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72 F.4th 839
United States Court of Appeals, Eighth Circuit.

Nancy AVINA, Plaintiff-Appellant
v.
UNION PACIFIC RAILROAD CO.
Defendant-Appellee

No. 22-2376
|
Submitted: January 12, 2023
|
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Counsel who presented argument on behalf of the appellant and appeared on the brief was Martin Mark Meyers, of Kansas City, MO. The following attorney(s) also appeared on the appellant brief; Dennis E. Egan, of Kansas City, MO, Cooper Scott Mach, of Kansas City, MO.

Counsel who presented argument on behalf of the appellee and appeared on the brief was Andrew J. Rolfes, of Philadelphia, PA. The following attorney(s) also appeared on the appellee brief; Robert Lee Ortbals, Jr., of Creve Coeur, MO, Kimberly F. Seten, of Kansas City, MO, Robert S. Hawkins, of Philadelphia, PA.

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

Opinion

STRAS, Circuit Judge.

After Nancy Avina twice lost out on a promotion, she sued Union Pacific for discrimination. The question

is whether a dispute over the interpretation of a collective-bargaining agreement required dismissal. The district court[1] concluded that the answer was yes, and we affirm.

I.

Avina, a Hispanic woman in her forties, has worked in Union Pacific's Kansas City warehouse for over a decade. Like many of her co-workers, she is a member of a union that has a collective-bargaining agreement with the railroad. One provision lays out the application process for filling open positions. When a hiring manager posts an opening on a bulletin board, interested employees can submit an "application[], in duplicate," to the person listed.

Since the collective-bargaining agreement took effect in 2006, the process has changed. Union Pacific now uses an online tool called iTrakForce to collect applications. As one employee put it, iTrakForce is used "any time anyone puts a bid in for any type of job." Only the applicants who use it receive consideration.

When Avina decided to apply for a supervisor position, she faxed her resume rather than using iTrakForce. Unfortunately, her name never made it onto the official list of candidates, and someone else received the job. A year later, the same sequence of

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[1] The Honorable Roseann A. Ketchmark, United States District Judge for the Western District of Missouri.

events unfolded, and once again, the position went to someone else.

According to Avina, Union Pacific's discriminatory hiring practices were to blame. She sued for age and race discrimination after learning that the applicants who received the positions were either younger, white, or both. *See* 29 U.S.C. § 623; 42 U.S.C. § 1981.

The application process itself soon became a focal point of the case. At trial, Avina's attorney specifically questioned Union Pacific employees about what the collective-bargaining agreement requires of applicants. This line of questioning prompted Union Pacific to seek dismissal under the Railway Labor Act, *see* 45 U.S.C. § 151, *et seq.*, which requires disputes over the interpretation of a collective-bargaining agreement to go to arbitration. The district court granted the motion to dismiss.

II.

We must decide whether, as Avina argues, the case belongs in federal court. Our review is de novo. *See Bloemer v. Nw. Airlines, Inc.*, 401 F.3d 935, 937 (8th Cir. 2005).

A.

Employment-discrimination lawsuits regularly end up in federal court. *See* 28 U.S.C. § 1331. But not always. When a dispute over the meaning of a collective-bargaining agreement crops up in a case involving

a railroad or an airline, federal courts cannot hear it. *See*, *e.g.*, *Martin v. Am. Airlines, Inc.*, 390 F.3d 601, 607-08 (8th Cir. 2004) (explaining that collective-bargaining disputes between airlines and their employees must go to mandatory arbitration). Here, the district court concluded that Avina had to litigate her claims before a special arbitral forum called the National Railroad Adjustment Board. *See* 45 U.S.C. § 153(i).

Labor disputes involving railroads fall into one of two categories. The first, "major disputes," involves "the formation of collective[-]bargaining agreements or efforts to secure them." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) (brackets and citation omitted). They must be resolved through "a lengthy process of bargaining and mediation." *Sturge v. Nw. Airlines, Inc.*, 658 F.3d 832, 836 (8th Cir. 2011) (quoting *Consol. Rail Corp. v. Ry. Lab. Execs.' Ass'n*, 491 U.S. 299, 302, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989)).

The other, "minor disputes," covers "controversies over the meaning of an existing collective[-]bargaining agreement in a particular fact situation." *Hawaiian Airlines*, 512 U.S. at 253, 114 S.Ct. 2239 (citation omitted). The way to address those is different. The initial step is to use "the [railroad's] internal dispute-resolution processes." *Id.* (citation omitted). And then, if the dispute ends up in formal litigation, the Railway Labor Act strips federal courts of subject-matter jurisdiction and places it in the National Railroad Adjustment

Board.[2] *See Richardson v. BNSF Ry. Co.*, 2 F.4th 1063, 1070 (8th Cir. 2021); *see also Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431, 439 (8th Cir. 1998).

Some railroad-employee disputes do not fit into either category. For those that involve "purely factual questions about an employee's . . . [or] employer's conduct and motives," the destination is the same as for any other employment-discrimination case: federal court. *Hawaiian Airlines*, 512 U.S. at 261, 114 S.Ct. 2239 (quotation marks omitted); *see Sturge*, 658 F.3d at 836-37. But if there is any doubt about whether the dispute "require[s] . . . interpret[ing] any term of a collective-bargaining agreement," *Hawaiian Airlines*, 512 U.S. at 261, 114 S.Ct. 2239 (citation omitted), dismissal is the only option, *see Sheet Metal Workers' Int'l Ass'n v. Burlington N. R.R. Co.*, 893 F.2d 199, 203 (8th Cir. 1990).

B.

We must now apply those general principles here. The parties agree that this case does not involve an attempt to "form[]" or "secure" a collective-bargaining

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[2] At times, the district court mentioned "preemption." We clarify that "preemption is not the applicable doctrine" because "whether one federal law takes precedence over another does not implicate the Supremacy Clause." *Hastings v. Wilson*, 516 F.3d 1055, 1058 n.2 (8th Cir. 2008) (brackets and citation omitted). Even if the analysis looks similar, *see Sturge*, 658 F.3d at 836 n.4, the court "no doubt meant [to say] that the [Railway Labor Act] applied in this case and divested [it] of subject[-]matter jurisdiction," *Hastings*, 516 F.3d at 1058 n.2.

agreement, so it does not fall into the major-dispute category. *Hawaiian Airlines*, 512 U.S. at 252, 114 S.Ct. 2239 (citation omitted). All the focus is instead on whether the dispute is a minor one: in Railway Labor Act terms, does it "require[]" the interpretation of "some specific provision of the collective-bargaining agreement"? *Boldt v. N. States Power Co.*, 904 F.3d 586, 591 (8th Cir. 2018) (quotation marks omitted).[3] If so, Avina's case cannot remain in federal court.

1.

"The proper starting point" is "an examination of [her] . . . claim[s]." *Id.* at 590 (citation omitted). In the absence of direct evidence of discrimination, the three-step *McDonnell Douglas* framework applies. *See Tusing v. Des Moines Indep. Cmty. Sch. Dist.*, 639 F.3d 507, 515 (8th Cir. 2011) (applying it to a 29 U.S.C. § 623 claim); *Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 873 (8th Cir. 2010) (same for a 42 U.S.C. § 1981 claim).

The steps by now are familiar. Avina must "first make out a prima[-]facie case of discrimination." *Boldt*, 904 F.3d at 591 (citation omitted). If she can, then Union Pacific must produce admissible evidence of a "legitimate, nondiscriminatory reason" for hiring someone else. *Gentry v. Georgia-Pacific Corp.*, 250 F.3d 646, 650 (8th Cir. 2001) (citation omitted). And finally,

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[3] Although *Boldt* is a Labor Management Relations Act case, *see* 904 F.3d at 593, the analysis is "virtually identical" under the Railway Labor Act, *Hawaiian Airlines*, 512 U.S. at 260, 114 S.Ct. 2239.

if the case gets to the third step, Avina must show that Union Pacific's reason was "just a pretext for discrimination." *Boldt*, 904 F.3d at 591 (quotation marks omitted).

All the action here is at the first step. In a failure-to-promote case like this one, Avina must establish that (1) she "was a member of a protected group; (2) she was qualified *and applied for* a promotion to a position for which the employer was seeking applicants; (3) she was not promoted; and (4) similarly situated employees, not part of the protected group, were promoted instead." *Austin v. Minn. Mining and Mfg. Co.*, 193 F.3d 992, 995 (8th Cir. 1999) (emphasis added). The sticking point is whether she actually applied for either promotion: she says she did, but Union Pacific disagrees. To resolve the dispute, we need to know what it means to apply.

2.

The collective-bargaining agreement appears to provide an answer. A provision called Rule 11, entitled "Bulletining Positions," says that interested employees "must have their applications, in duplicate, on file in the office of the official whose name is signed to the bulletin, or in the office of the supervisor as may be specified on the bulletin, not later than noon of the tenth (10th) day from [the] date of [the] bulletin." Avina, for her part, faxed her resume within the deadline to the official listed in the bulletin. So, from her perspective, she followed Rule 11 to the letter.

Union Pacific has a different view. It claims that the use of iTrakForce is an "implied" term that arises from "established and recognized custom[s]," even if the collective-bargaining agreement makes no mention of it. *Bhd. Ry. Carmen v. Mo. Pac. R.R. Co.*, 944 F.2d 1422, 1429 (8th Cir. 1991) (citation omitted). After all, Union Pacific has a "past practice" of using it to fill open positions, *id.*, and the collective-bargaining agreement recognizes that the parties can "amend[]" the job-application process.

Here is the point. Whether Avina "applied for [either] promotion," *Austin*, 193 F.3d at 995, is "inextricably bound up" with the interpretation of Rule 11, *Johnson v. Humphreys*, 949 F.3d 413, 417 (8th Cir. 2020). Whether faxed resumes count as applications under the collective-bargaining agreement is something she will have to prove to establish her prima-facie case. Perhaps the best evidence of its importance was the prominent role it played at trial, especially in the questioning by Avina's attorney. In these circumstances, the issue is one for the National Railroad Adjustment Board to decide.[4] *See Richardson*, 2 F.4th at 1070; *see also Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987).

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[4] Having concluded that the district court lacked subject-matter jurisdiction, we cannot consider Union Pacific's argument that it was otherwise entitled to judgment as a matter of law. *Cf. Steel Co. v. Citizens for a Better Env't*, 532 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("Without jurisdiction the court cannot proceed at all in any cause.").

3.

Avina wants us to dig deeper. In her view, whether Union Pacific amended the collective-bargaining agreement is itself a "purely factual" question that should go to a jury. It can decide whether Union Pacific "*in fact* adopted such a process or whether it was a pretextual after-the-fact excuse" for discrimination. At most, Rule 11 is a sideshow.

Once again, however, her attorney approached the issue differently. He emphasized its importance during opening statements by discussing "the promotional process that [Union Pacific] is supposed to . . . carry out" in posting a position. In fact, at one point, he even said that "the entirety of [Union Pacific's] interaction with a union employee [like Avina] is governed by th[e] [collective-bargaining agreement]." Then, the specifics of Rule 11 repeatedly came up during questioning.

It is no wonder that the district court later noted that the trial was "*replete* with questioning, testimony, and evidence revealing the necessity of interpreting . . . the [collective-bargaining agreement]." (Emphasis added). In short, it became a "defining source" for her claims. *Gore v. Trans World Airlines*, 210 F.3d 944, 950 (8th Cir. 2000) (giving weight to the fact that a party "indicated that [its] actions were required according to [its] interpretation of specific provisions in the collective[-]bargaining agreement").

C.

Avina has one last-ditch argument: maybe she did not need to apply at all because Union Pacific was aware of her interest. One obvious problem with this argument, as we explain above, is that Avina's counsel argued the exact opposite to the jury.

But even beyond that problem, no one at Union Pacific ever "deterred" her from applying. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 368, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The best she can do is point to a single statement from a supervisor who told her "not to even bother with applying because she had already made her selection." But this statement hardly qualifies as the kind of "gross and pervasive discrimination" that would excuse her alleged failure to apply in the customary way. *EEOC v. Audrain Health Care, Inc.*, 756 F.3d 1083, 1087 (8th Cir. 2014) (quoting *Teamsters*, 431 U.S. at 367-68, 97 S.Ct. 1843) (rejecting the argument that a single statement by a hiring supervisor about preferring female nurses met this standard); *see Winbush v. State of Iowa By Glenwood State Hosp.*, 66 F.3d 1471, 1481 (8th Cir. 1995) (requiring futility).

* * *

There is little doubt here: this case involves a "minor dispute" over the meaning of a collective-bargaining agreement. *Hawaiian Airlines*, 512 U.S. at 253, 114 S.Ct. 2239. The trial itself made that much clear. If Avina wants to pursue this case further, she will have to do so elsewhere. *See Jenisio v. Ozark Airlines, Inc.*, 187 F.3d 970, 973 (8th Cir. 1999).

III.

We accordingly affirm the judgment of the district court.

2021 WL 2903245
United States District Court, W.D. Missouri,
Western Division.

Nancy AVINA, Plaintiff,
v.
UNION PACIFIC RAILROAD COMPANY,
Defendant.

Case No. 4:19-00480-CV-RK
|
Signed 07/09/2021

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ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ROSEANN A. KETCHMARK,
UNITED STATES DISTRICT COURT JUDGE

Before the Court is Defendant Union Pacific Railroad Company's motion for summary judgment. (Doc. 56.) The motion is fully briefed. (Docs. 57, 69, 70, 76, 77.) After careful consideration, the motion is **GRANTED in part and DENIED in part**.

Background[1]

Plaintiff Avina is a 46-year-old, Hispanic female. Defendant hired Plaintiff in September 2005. Avina's first position with Defendant was on the Extra Board, which meant Avina did not have a normal shift, but was on call 24 hours a day, seven days a week. Avina would receive two hours' notice before having to report for work. Between 2006 and 2011, Avina obtained several positions with Defendant as a Material Handler, GEB General Clerk, and Utility Clerk. In 2011, Avina moved into the Supply Department as a Material Handler and remained there until her position was abolished in December 2019. After the abolishment of her Material Handler position in December 2019, Avina bid back into a Utility Clerk position. Currently, Avina's position is a Relief Utility Clerk, where Avina drives three times a week and then relieves the Yard Office Coordinator/Chief Clerk two times a week.

In 2014, Avina was subpoenaed to be a witness for Shelby Monaco in a sexual harassment case against Defendant that was tried in Jackson County, Missouri, from November 17-21, 2014. Avina appeared at trial and testified against Defendant. The Monaco trial resulted in a verdict for Shelby Monaco, in the amount of

[1] The following facts are taken from the parties' statements of uncontroverted material facts. The Court recognizes that many of the following facts are in fact controverted. However, for the purposes of summary judgment, the Court finds sufficient evidence to support these facts. Such facts are not necessarily established for purposes of trial.

$20,000. The total judgment entered against Defendant was $229,643.06 plus interest.

Within the first four years of Avina's employment, Avina attempted to be qualified for the Chief Clerk and Assistant Chief Clerk position but was not allowed to exercise her seniority rights approximately four separate times. There were four white co-workers, with less seniority, who leapfrogged over Avina – one of whom was Cindi Wood. Kantrell Robinson (African American) testified that Wood was installed as Assistant Chief Clerk within four to six months. When Robinson asked why Wood got the opportunity and Robinson did not, despite Robinson having more seniority, Union Pacific officials told Robinson, "Manager discretion. They do what they want."

Avina applied for the material supervisor 1E position in approximately 2008. Kim Peterson (white) was also interviewed for the position, and Avina and Peterson prepared for the interviews together. Avina interviewed only with Craig Mitchell. Peterson was awarded the position, and Peterson later told Avina that Mitchell did not want Avina to have the position, and Mitchell had suggested to Peterson that she enroll for college courses so Peterson would have an advantage over Avina.[2]

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[2] Defendant objects on the ground of inadmissible hearsay. While the parties have not briefed the issue of hearsay extensively, the Court has only included statements it believes could be admissible under an exclusion or exception to the hearsay rule. However, the Court reserves final ruling on such issues until trial.

Avina sought a transfer and applied for a position in the diesel shop between 2009-2010 but was never given the opportunity to interview. Gayla Krouse (white) applied for the same position and was given the position without having to interview for the position. Avina testified the hiring manager, Mr. Slattery (white), did not like her. Avina stated Slattery's demeanor with the way he looked at her and the way he spoke to her was different. She indicated he would "just talk to . . . Caucasian people." Around the same time, Avina sought a transfer to train services, and again was denied an opportunity to interview for that position.

Avina testified she applied again for the material supervisor 1E position when it became available in June 2017, though Defendant contests whether she actually applied or followed the correct procedure to apply. Avina testified she was threatened not to apply by Samantha Miller, because Miller told Avina that Miller was only going to consider one individual in Supply, and she was already going to take that position. Avina questioned Miller why the position was bulletined if everyone was not getting the opportunity to qualify or apply for it, and Miller told Avina it was "none of your business." Miller denies having memory of Avina speaking with Miller about the 1E position specifically and denies knowing who the bid would be awarded to. Avina testified she still applied by submitting her resume to Miller, exactly as the bulletin requested. Robinson testified she saw Avina, in passing, in the clerical break room, as Avina was faxing her resume in

application for the position. Robinson also submitted her resume via email, and via facsimile, in applying for the material supervisor 1E position. Neither Avina nor Robinson were afforded an interview. Melanie King, a younger, white female, was selected for the position.

Avina raised concerns to Cindi Wood as Union President when King was selected as supervisor. Avina testified Wood even said, "You have a point because I can't believe they picked Melanie over me." Avina believes she mentioned "age discrimination" to Wood because King had not been in the Supply Department long enough to have the knowledge and experience required for the position. Michelle Collins (African American) also felt the selection of King was age discrimination and race discrimination.

After King was awarded the supervisor position, King did not know how to do the work, so Miller and King would try to give the work to Avina, in addition to Avina's regular duties. If Avina would not do King's work as instructed by Miller, Miller would retaliate against Avina.

Avina applied for an administrative aide position in June 2018. Avina was sent an email thanking her for applying, but that she was not being considered for the position. Avina went to Jennifer Perkins, seeking feedback as to why Avina was not being given another opportunity, and Perkins told Avina they already had an employee from the Supply Department in mind for the position. Avina questioned why the position is even posted for bid if there is not going to be a fair

opportunity given to all and Perkins stated, "It has to look formal because it's the process." After Avina had already seen the bulletin awarding the administrative aide position to Melanie King, she received a phone call from Superintendent, Kelli Dunn, and two other individuals to be interviewed on the spot for the position.

The material supervisor 1E position became available once again due to King being awarded the administrative aid position. Avina asserts she applied for the position, not only by bidding through the system but by submitting her resume as requested. Perkins testified Avina did not apply, because "[s]he did not send in her resume." Avina was not afforded an interview for this position, and Cindi Wood was selected for the position. Wood initially was deemed to not be qualified for the supervisor position just one year earlier in 2017. Robinson testified that Wood had to receive training from Avina, that Avina did most of the work in those departments, and that Avina had "way more knowledge" than both Wood and Perkins.

Samantha Miller came to Kansas City in March 2017 as the Manager of Supply Operations. Immediately after Miller assumed the position of Manager of Supply Operations, Miller introduced herself to Michelle Collins as the person that was going to "make everyone's lives miserable." Avina described how Miller would get into Avina's face and scream at her or harass Avina by recording Avina on Miller's phone. Miller would scream and slam doors. Miller would also fabricate events. For example, Miller called Avina and falsely said Melanie King accused Avina of being

insubordinate. On another occasion, Miller wrote up Avina for being late or being a nocall, no-show when Avina was actually on vacation. Avina additionally described that Miller would raise her voice and scream at the minorities, direct the minorities in a bad demeanor, slam doors on the minorities, and just caused a hostile work environment for the minorities most of the time.

Avina testified she and Collins always had excessive work, and Miller gave them double the amount of work versus other employees. Avina testified everyone but her and Collins had only one job to do and that no other employee was required to work both the Material Handler and Material Clerk positions in any given day. Collins agreed the workload was not equally distributed between employees. Avina testified Miller would haphazardly change Avina's work location from Kansas to Missouri and vice versa without informing Avina. Miller would do it unpredictably over the course of six months – two to three times a week – and Miller was the first manager to do that. For instance, Miller would instruct Avina to report to Missouri, and then Miller would report Avina as a no-call, no-show in Kansas. In June 2017, Avina made a safety complaint regarding an eye wash station. On July 10, 2017, Avina was coached under the MAPS Policy due to violating Rule 1.15 – Not leaving an assignment without relief. Miller left Defendant's employment on June 2, 2018.

Jennifer Perkins (white) assumed the Manager of Supply Operations position on July 1, 2018. On October 3, 2018, Perkins held a breakfast for the

department. Avina testified of the event: "[A]s soon as I got there, Cindi Wood . . . was telling Perkins and the group . . . 'Well, have you guys heard Kantrell Robinson is coming over here? We need to hurry up and qualify Michael because we don't want her here.'" Neither Perkins nor Wood mentioned Robinson's race or gender at the breakfast.

Robinson was disqualified from the Material Handler position on February 26, 2019. On March 5, 2019, a formal hearing was held and Avina testified on behalf of Robinson during such hearing. After Avina testified on behalf of Robinson, Perkins purposely would avoid Avina if Avina sought instruction in order to complete her job. Perkins would not answer Avina's telephone calls or Avina's emails. During the morning meetings or any other group discussion, Perkins displayed poor body language towards Avina and would ignore Avina.

In 2019, the position held by Avina was abolished. Avina testified only the Missouri positions were being abolished and asked why her position in Kansas was also being abolished. During this time, the shops in both Kansas and Missouri were being closed and winding down, though the parties dispute the timing of such events. Wood stayed on in Kansas to help wind down.

Avina was recently qualified as a Relief Chief Clerk and was threatened to be written up and disqualified by her supervisor, Jeremy Schultz, for not making a phone call. Avina did attempt to call Schultz when the train crew was running late, but Schultz did not answer his phone. Avina was not afforded the full

four-week training period as allowed by the collective bargaining agreement ("CBA"). Collins was not afforded the appropriate training period either. Robinson was disqualified for not making a phone call. Collins was written up and drug tested for not making a phone call. Jerry Kirkpatrick, Union Representative and Yard Office Coordinator, testified in his deposition that in his 41-year career, he had observed other employees not follow the rule of alerting the run-through manager when an employee is running late, and none of those other individuals had been disqualified from their position.

Plaintiff and Collins assert that Caucasian women are doing similar things and are not being reprimanded for it. For example, Plaintiff testified that Cheryl Harris was a Chief Clerk who was unprofessional, did not do her job right, and was able to perform her job for five years without getting disqualified. Further, Robinson testified "over a period of time there's things and events that happened, and our white [coworkers] do some of the same things. They're not disciplined. They're not wrote up (sic)." Jolenta Goode (African American) who works at Union Pacific, stated she has witnessed and personally experienced unfairness between races at Union Pacific. Goode has witnessed minorities not being given the same forgiveness for mistakes and are disciplined differently than white employees. Throughout Collins's 41-year career at Union Pacific, she has witnessed (and experienced) that management likes to pick on minorities more than their white counterparts.

Regarding age, Robinson specifically detailed she had heard manager Aaron Keith say, "They're old. Their memory, they can't remember stuff," as well as, "All these old people." Robinson pointed out that Manager Jeremy Schultz also made comments related to age similar to, "I wish some of these women would retire," as well as, "I wish some of these old people would just retire."

Legal Standard

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court views the evidence "in the light most favorable to the nonmoving party and giv[es] the nonmoving party the benefit of all reasonable inferences." *Fed. Ins. Co. v. Great Am. Ins. Co.*, 893 F.3d 1098, 1102 (8th Cir. 2018) (citations and quotation marks omitted).

Discussion

Plaintiff brings claims for race discrimination and retaliation under 42 U.S.C. § 1981 and age discrimination under 29 U.S.C. § 623 (ADEA).[3] In discrimination

[3] Though the discrimination claims and retaliation claims are contained in two respective counts (under § 1981 and ADEA), the Court, as well as the parties, analyze the claims as four independent claims: race discrimination under § 1981, retaliation under § 1981, age discrimination under ADEA, and retaliation under ADEA.

cases, a plaintiff can establish a claim by presenting direct evidence of discrimination or through circumstantial evidence. *Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 873 (8th Cir. 2010); *Carraher v. Target Corp.*, 503 F.3d 714, 716 (8th Cir. 2007). Plaintiff presents no direct evidence of discrimination. Where no direct evidence of discrimination exists, the Court applies the *McDonnell Douglas* burden shifting framework. *Id.* *Lake* summarizes the framework well:

> Under *McDonnell Douglas*, the plaintiff initially has the burden to establish a prima facie case of discrimination. A prima facie case creates a rebuttable presumption of discrimination. The burden then shifts to the defendant to provide a legitimate, nondiscriminatory reason for its decision. If the defendant provides such a reason, the presumption disappears, and the burden shifts back to the plaintiff to show that the proffered reason was pretext for discrimination.

Lake, 596 F.3d at 873-74 (internal citations and quotations omitted). Defendants make several arguments why summary judgment should be granted. The Court will address each.

I. Facial Discrimination and Retaliation

A. Claims that are Time-Barred

Avina's claims under § 1981 are governed by a four-year statute of limitations. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). Avina filed the

instant lawsuit on June 20, 2019. Thus, any conduct occurring before June 20, 2015, is time-barred and Avina cannot maintain an independent claim for any such conduct. Further, Avina alleges discrete acts of discrimination, and as such the continuing violation theory does not apply. *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 851 (8th Cir. 2012); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111-14 (2002). However, conduct occurring before June 20, 2015, may be relevant evidence of discrimination after June 20, 2015. *Nat'l R.R. Passenger Corp.*, 536 U.S. at 113 (a plaintiff is not barred "from using the prior acts as background evidence in support of a timely claim.").

B. Prima Facia Case (as to claims after 2015)

To establish a prima facie case of race discrimination pursuant to § 1981, Avina must show: (1) she is a member of a protected class; (2) she met Union Pacific's legitimate expectations; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination. *Lake, Inc.*, 596 F.3d at 874. Defendant argues Avina cannot make a prima facia case because she cannot show circumstances which give rise to an inference of discrimination. Defendant's argument is without merit.

Here, the first three elements are not contested.[4] Plaintiff provides sufficient evidence to give rise to an

[4] The Court notes Defendant may contest the elements to specific actions or claims, but as a whole, Defendant concedes, for

inference of discrimination. In addition to testifying about Miller's abusive behavior, Avina specifically testified Miller treated her differently. Avina testified Miller would fabricate events or wrongly write Avina up, give her excessive work compared to other employees, and change her work location without informing her. Unlike a Plaintiff's subjective belief about discrimination, the testimony of Avina provides specific examples of potential discrimination sufficient to create an inference of discrimination. This is in addition to evidence that minorities are treated differently, disciplined differently, and passed over for interviews even though they may be more qualified than their white counterparts. As, such, Plaintiff has presented a prima facia case of discrimination.

Avina also alleges racial discrimination for failure to promote. To establish a failure to promote claim Avina must show that she is: (1) a member of a protected class; (2) qualified and applied for the promotion; (3) was rejected; and (4) another employee who was not a member of a protected group was promoted instead. *Cunningham v. Kansas City Star Co.*, 995 F. Supp. 1010, 1022 (W.D. Mo. 1998) (citing *Marzec v. Marsh*, 990 F.2d 393, 395-96 (8th Cir. 1993)). Defendant argues Avina never applied for certain positions, but genuine issues of fact exist. For instance, as to the 2017 material supervisor position, Avina testified she applied to the job, was not provided an interview, and Melanie King, a younger, white employee, was selected

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the purposes of summary judgment only, the first three elements are satisfied.

for the position. There is also evidence that King was less experienced than Avina or others who applied for the position. Regarding the 2018 material supervisor position, Avina again testified she applied for the position, but was not afforded an interview. Cindi Wood was given the position. There is additional testimony that Wood was less qualified than Avina and had to receive training from Avina once awarded the position. Moreover, there is testimony to the effect that when interviews were given, despite already selecting a candidate, it was done to make the process look formal. From these facts, an inference of discrimination can be made because a reasonable trier of fact could determine that when a company hires a less-qualified, white employee instead of a more qualified, Hispanic employee, the decision was racially discriminatory. As to the 2018 administrative aide position, Defendant concedes Plaintiff makes a prima facia case.

Defendant argues Avina never applied for the material supervior positions and there were specific reasons why King was hired. However, Avina's testimony is competent and admissible evidence to contradict Defendant's assertions. *See also Jackson v. United Parcel Serv., Inc.*, 643 F.3d 1081, 1086 (8th Cir. 2011) (Even if plaintiff did not apply, "[f]ailure to formally apply for a position does not bar a plaintiff from establishing a prima facie case, as long as the plaintiff made every reasonable attempt to convey [her] interest in the job to the employer.") (citation and internal quotation omitted). A trier of fact is entitled to believe Avina's testimony and disbelieve the assertions of Defendant

as to whether Avina applied, the correct process to apply, and consideration of applicants. Thus, genuine issues of fact exist as to the relevant positions Avina may have applied for, and Plaintiff has made a prima facia case for failure to promote.

C. Defendant's Legitimate, Nondiscriminatory Reason

Next, the Court considers if Defendant has any legitimate, nondiscriminatory reason for its actions. "This burden is exceedingly light;" Defendant must merely proffer a non-race, non-age based, or non-retaliatory reason." *Ottman v. City of Indep.*, Mo., 341 F.3d 751, 758 (8th Cir. 2003). Here, Defendant offers evidence that Miller was abrasive and harsh with most employees, not just the minority or older ones. Further, Defendant asserts it treated Avina consistent with its policies at all times. Regarding the failure to promote claims, Defendant offers evidence Avina failed to correctly apply for some jobs, and they hired the most qualified candidate for each position. Therefore, Defendant has sufficiently offered legitimate, nondiscriminatory reasons for its actions.

D. Pretext

Finally, the Court turns to whether Plaintiff has offered sufficient evidence of pretext to survive summary judgment. To rebut the legitimate, nondiscriminatory reasons of Defendant, Avina must "point to enough admissible evidence to raise genuine doubt as

to the legitimacy of the defendant's motive, even if that evidence does not directly contradict or disprove the defendant's articulated reasons for its actions." *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 995 (8th Cir. 2011) (cleaned up). "Plaintiff must . . . establish the existence of facts which if proven at trial would permit a jury to conclude that the defendant's proffered reason is pretextual and that intentional discrimination was the true reason for the defendant's actions." *Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 958 (8th Cir. 1995).

Here, there is sufficient evidence of pretext. Avina has presented evidence of several positions for which she applied but was not selected. Avina has presented evidence that other white and younger employees were given the positions instead. Further, Avina has presented evidence that the hiring process was predetermined, or at a minimum, Avina may have received less consideration than others. For instance, in 2008, Avina allegedly applied for the material supervisor position. Kim Peterson was awarded the position. Kim Peterson also allegedly told Avina that Craig Mitchell, who interviewed Avina, told Peterson he did not want Avina to have the position and suggested Peterson take classes to have an advantage over Avina. While this occurred before 2015, these facts are relevant in establishing genuine issues of fact as to pretext. Avina provides similar testimony and evidence regarding positions she allegedly applied for throughout her employment with Defendant, including positions in 2009, 2017, 2018, and 2020. From these facts, a reasonable trier of fact could disbelieve Defendant's stated

reasons and find intentional discrimination based on race or age.

Avina has also presented other evidence which could create an inference of pretext. Avina provided testimony that Samantha Miller treated her and other minorities differently. Specifically, Avina testified she was given excess work compared to other employees and had her location changed without notice. Avina also testified to a conversation in which Jennifer Perkins stated another employee should be qualified soon so as to prevent Kantrell Robinson from getting a position. Perkins allegedly stated, "We need to hurry up and qualify Michael because we don't want her [(Robinson)] here."

Finally, there is evidence minorities were treated differently and suffered greater disciplinary actions than their white counterparts for the same or similar conduct.

Defendant's arguments here are without merit at the summary judgment stage. Defendant argues any actions attributed to Miller fail because Avina admitted Miller's actions were in response to a safety report. However, Avina's testimony regarding the treatment of minorities sufficiently controverts this and may allow for an inference of pretext. Further, Defendant argues Miller disqualified Peterson, an under-40, Caucasian woman from the 1E material supervisor position, which led to the June 2017 opening. While this is clearly a relevant argument, it does not preclude a

trier of fact from finding pretext based on the other practices of Defendant in this case.

Next, Defendant argues Avina never applied for the 1E material supervisor positions. Avina's testimony creates a genuine issue of fact on this issue. Defendant cites to *Anuforo v. Comm'r*, 614 F.3d 799, 807 (8th Cir. 2010), for the proposition that Avina's testimony is insufficient here. However, in *Anuforo*, the self-serving allegation was a general denial of liability by Plaintiff. *Id.* In contrast, contrary testimony, given under oath, is sufficient to survive summary judgment if it raises a genuine issue of material fact. *See Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289 (8th Cir.1988) ("any party could head off a summary judgment motion by supplanting previous depositions . . . ", indicating deposition testimony is competent evidence at the summary judgment stage). From the facts presented, a reasonable trier of fact could believe Avina and disbelieve Defendant.

Defendant then argues it hired the most qualified candidate for the 2018 administrative aide position. "To support a finding of pretext, the applicant must show that the [Defendant] hired a less qualified applicant." *Torgerson v. City of Rochester*, 643 F.3d 1031, 1049 (8th Cir. 2011) (cleaned up). However, if Plaintiff can present probative evidence the interview process was a sham, a genuine issue exists as to whether the stated nondiscriminatory reason was pretextual. *See McKay v. U.S. Dep't of Transp.*, 340 F.3d 695, 700 (8th Cir. 2003) ("Lacking probative evidence that the interview process was a sham or that Thomson was the real

decisionmaker, McKay failed to introduce evidence creating a genuine issue whether this nondiscriminatory reason was pretextual."). Defendant's argument fails here as Avina has presented evidence the hiring process may have been applied differently to different individuals. Avina was sent an email thanking her for applying but stating she was not being considered for the position. Avina sought feedback as to why Avina was not being given another opportunity and was told Defendant already had an employee from the Supply Department in mind for the position. Avina questioned why the position is even posted for bid if there is not going to be a fair opportunity given to all, and Perkins stated, "It has to look formal because it's the process." Avina had already seen the bulletin awarding the administrative aide position to Melanie King, and she and two other individuals received a phone call from Superintendent Kelli Dunn to be interviewed on the spot for the position. An interview after the position has already been filled creates a reasonable inference the hiring or interview process may have been a sham. Additionally, Avina has presented evidence she was more qualified. Although Defendant has explanations and facts to support a contrary inference, the evidence presented by Plaintiff, even if primarily through her own sworn testimony, establishes a genuine issue of fact. Therefore, from these facts taken as a whole, a reasonable trier of fact could disbelieve Defendant's stated reasons for its actions and find intentional discrimination.

E. Retaliation

To establish a prima facie case of retaliation pursuant to § 1981, Avina must show: (1) she engaged in protected activity; (2) she suffered a material adverse employment action; and, (3) there was a causal connection between the protected activity and the adverse action. *Young v. Builders Steel Co.*, 754 F.3d 573, 579 (8th Cir. 2014). There is sufficient evidence Plaintiff has engaged in protected activity and suffered adverse employment actions. The only issue is whether a causal connection exists between them.

The Court applies the same analysis "to § 1981 retaliation claims and to retaliation claims under Title VII of the Civil Rights Act of 1964." *Sayger v. Riceland Foods, Inc.*, 735 F.3d 1025, 1030 (8th Cir. 2013). "Although the wording of § 1981 differs from that of Title VII, the underlying retaliation analysis is the same and [the Court] may look to Title VII precedent to inform [its] analysis of the elements under § 1981." *Id.* "Protected activity under Title VII includes, (1) opposition to employment practices prohibited under Title VII, and (2) filing a charge, testifying, assisting or participating in any manner in an investigation, proceeding, or hearing under Title VII." *Comstock v. Consumers Markets, Inc.*, 953 F. Supp. 1096, 1103 (W.D. Mo. 1996). "A materially adverse action must be more disruptive than a mere inconvenience or an alteration of job responsibilities. There must be a material change in employment status – a reduction in title, salary, or benefits." *Box v. Principi*, 442 F.3d 692, 696 (8th Cir. 2006) (cleaned up). "In addition, an employer's denial

of an employee's request for training is not, without more, an adverse employment action." *Id.* at 697 (cleaned up).

Here, the only claims of adverse employment actions within the relevant time period are the denial of a promotion to the 1E material supervisor position in 2017 and 2018; the actions of Miller; the denial of a promotion to the administrative aide position in 2018; and the elimination of Plaintiff's position in 2019 or 2020.[5]

As to the alleged adverse employment actions, no causal connection exists. In each instance, Avina alleges no specific protected activity engaged in prior to the adverse actions. For instance, as to the 1E material supervisor position in 2017, the only alleged protected activity prior to that time was Avina's testimony in the Monaco trial. However, such testimony was given in 2014 and is too remote to infer a causal connection. *See Kipp v. Missouri Highway and Transp. Com'n.*, 280 F.3d 893, 897 (8th Cir. 2002) (holding, in a Title VII retaliation case, that two months was too long to permit a causation inference). As to the actions of Miller, while Avina testifies Miller treated minorities differently, she fails to testify to any facts tying those specific actions to any protected activity. Thus, while her testimony is sufficient for a claim of racial discrimination, it is insufficient to support a claim of retaliation. As to the positions in 2018, while Avina did complain of

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[5] It is disputed whether Plaintiff's position at the Kansas location was abolished in 2019 or 2020.

harassment, such complaints were made nearly six months prior to her applications. Thus, the protected activity is too remote to infer retaliation. *Id.* Finally, regarding the abolishment of Avina's position, at the earliest, it was abolished in October 2019. Avina's most recent protected activity prior to that was the filing of the instant lawsuit in June 2019. Avina fails to present enough factual support to find a causal connection between her protected activity and any adverse employment action.

On a final note, the Court addresses Plaintiff's argument of systematic retaliation. While Avina is correct that the Eight Circuit, in *Kim v. Nash finch Co.*, declined to decide if each act constituted an adverse employment action, the plaintiff in that case had alleged systematic retaliation. 123 F. 3d 1059, 1060. Here, Plaintiff does not allege systematic retaliation, and other Courts have found when the plaintiff fails to plead systematic retaliation, each alleged retaliatory act should be considered a separate adverse employment action. *See e.g.*, *Fercello v. Cty. Of Ramsey*, 612 F.3d 1069, 1084 (8th Cir. 2010); *Muldrow v. City of St. Louis*, No. 4:18-CV-02150-AGF, 2020 WL 5505113, at *14 (E.D. Mo. Sept. 11, 2020). Therefore, Avina fails to present a genuine issue of fact as to her retaliation claims, and the Court will grant Defendant's motion on this point.

II. Age Discrimination and Retaliation

"The ADEA protects individuals aged 40 and over by prohibiting employers from discharging or otherwise discriminating against such individuals with respect to their compensation, terms, conditions, or privileges of employment on the basis of their age." *Haigh v. Gelita USA, Inc.*, 632 F.3d 464, 468 (8th Cir. 2011) (citing 29 U.S.C. § 623(a)). Without direct evidence, ADEA claims follow the same *McDonnell Douglas* burden-shifting framework outlined above. *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1119 (8th Cir. 1997).

A. Claims that are Time-Barred

The ADEA requires the filing of a Charge of Discrimination with the EEOC within 300 days of the alleged act of discrimination. 29 U.S.C. § 626(d)(2). Avina filed her Charge on February 26, 2019. Applying the respective statute of limitations, Avina's claims of discriminatory acts prior to May 2, 2018, are time barred. *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 825 (8th Cir. 2003). Thus, any claim Avina might make regarding the June 2017 1E material supervisor position is time-barred as it occurred almost 630 days before she filed her Charge. *Id.*

B. Prima Facia Case

To establish a prima facie case of age discrimination, Avina must show: (1) she was at least 40 years old; (2) she met the applicable job qualifications, (3) she suffered an adverse employment action; and, (4) there

is some evidence that age was a factor in Union Pacific's decision. *Rahlf v. Mo-Tech Corp.*, 642 F.3d 633, 637 (8th Cir. 2011). In regard to any alleged failure to hire/promote Avina must demonstrate: (1) she is over 40 years old; (2) she was otherwise qualified for the position; (3) she suffered an adverse employment action; and, (4) a younger person was hired to fill the position. *Chambers v. Metro. Prop. & Cas. Ins. Co.*, 351 F.3d 848, 856 (8th Cir. 2003). At all times, Avina retains the burden of persuasion to prove her age was the "but for" cause of any alleged adverse employment action. *Gross v. FBL Financial Services*, 557 U.S. 167, 176 (2009); *Rahlf*, 642 F.3d at 637.

Here, as to the 2018 1E material supervisor position, Defendant's only argument is Avina never applied for this position. As noted above, the Court finds a genuine issue of fact exists here. Additionally, Defendant concedes a prima facia case has been established as to the 2018 administrative aide position. In each instance, a younger employee who was arguably less qualified was given the position over Avina. Defendant argues Avina's reference to seniority defeats her claim because seniority is different than age. This argument fails because the facts suggest younger employees were hired in each instance as it relates to the 2018 positions. Further, while not always correlated, seniority at Defendant's company may also closely relate to the age of the individual. Therefore, a prima facia case has been made for age discrimination as it relates to the 2018 positions.

C. Defendant's Legitimate, Nondiscriminatory Reason

As discussed above, Defendant has offered legitimate, nondiscriminatory reasons for its actions.

D. Pretext

For many of the same reasons above, the Court finds there is sufficient evidence of pretext. There is evidence the hiring process was applied differently to younger individuals and younger individuals were afforded greater consideration than older ones. There is evidence the interviews given to Avina were merely a formality to make the process look legitimate and not predetermined. Finally, Robinson testified managers in her department made comments to the effect of, "They're old. Their memory, they can't remember stuff," as well as, "All these old people." Robinson pointed out Manager Jeremy Schultz also made comments related to age similar to, "I wish some of these women would retire," as well as, "I wish some of these old people would just retire." Jeremy Schultz is one of Avina's supervisors. Therefore, at this stage, the Court finds a genuine issue of material fact exists as to Plaintiff's age discrimination claim and summary judgment will be denied.

E. Retaliation

Plaintiff abandons her retaliation claim under ADEA. Therefore, the Court will grant summary judgment on this claim.

Conclusion

After careful consideration, the motion is **GRANTED** in part and **DENIED** in part. Specifically, Defendant's motion as to Plaintiff's Race and Age discrimination claims is **DENIED**. Defendant's motion as to Plaintiff's retaliation claims is **GRANTED** and those claims are dismissed.

IT IS SO ORDERED.

United States District Court,
W.D. Missouri, Western Division.

Nancy AVINA, Plaintiff,
v.
UNION PACIFIC RAILROAD COMPANY,
Defendant.

Case No. 4:19-00480-CV-RK

Trial Transcript, February 9, 2022
(V. 7, pp. 1233-41)

[1233] THE COURT: I'm looking at the case law. Plaintiff is correct that discrimination claims arising under federal law generally are not preempted by the RLA notwithstanding any corporate policies also prohibiting discrimination. So, simply said, not every dispute concerning employment or tangentially involving a provision of a CBA is preempted. And plaintiff is also correct that a defendant can't interject a CBA in a discrimination case just to take the matter outside of the jurisdiction of the district court.

But looking at the plaintiff's complaint and looking at what is the fact issue for the jury and articulating it most favorably for plaintiff in this preemption situation is asking the jury was plaintiff a viable candidate? And there's nothing in the CBA that requires candidates to apply through iTrack. Or you could articulate it plaintiff was not properly considered for the supervisory, at least the 1E position, pursuant to the CBA rules 1E.

So it seems that you can't get around the question – the application and whether plaintiff applied, it

turns on the rules and requirements of the bulletining. And in plaintiff's argument this morning asking the Court to just look at Exhibit 91 and 97, which are the noticing – the bulletins of – 91 is of the 1E 2018 position, 97 is of the 2017 position, it is so intertwined with the rules of bulletining and the rules and requirements of rule 11 and rule 1E that [1234] preemption seems appropriate in this case.

That's a very hard call for a district court judge to make when you're – I don't know – seven, eight days into trial. You all have exerted so much energy and resources. And I totally understand why preemption hasn't ripened until now because of the posture of the case and how it has morphed into the claims we have here before the jury.

Another issue is whether the defense injected the CBA. And last night I was looking at the opening. And the opening – the theory of the plaintiff's case is that, as they articulated in opening, the rules of the road for employment cases are laid out in Union Pacific's own policies. This way, management employees understand what the law requires of employers. Rule 3 that we're going to talk about in the workplace is that the company has to ensure that all job opportunities are offered in an equal manner.

I'm just going to highlight a few comments from opening. Mr. Mitchell is actually sitting right here as the designated corporate representative for Union Pacific, and that means the testimony he's giving is essentially the same as if we were able to put the

company up on the stand and ask questions of Union Pacific.

That's why I asked the questions of how should the Court evaluate a corporate representative in the plaintiff's [1235] case in chief. The opening said that he will testify. He will tell us the promotional process that is supposed to be carried out at Union Pacific.

And referred to in opening the testimony of Jennifer Perkins. She was responsible for the hiring process. And the Union Pacific has policies in place that they claim enforce the facilitation of equal employment opportunities for all its employees and promotion and treatment.

And I don't know how the plaintiff would be able to outline the evidence for the jury in opening without getting into the CBA. They can't when they talk about bulletining and is it – you know, what are the duties and the requirements. And – and I find Ms. Casey's point persuasive in that when Mr. Mitchell testified very early on, one of the first exhibits was Exhibit 79, which was the CBA. And this was the question asked:

You're aware that part of the claims in this case are that Ms. Avina was not properly considered for the supervisory lE position in the supply department. Right?

And that's –

And Mr. Mitchell said: Yes.

And that's when plaintiff had given him Exhibit 79, the CBA. The question started asking about the application of [1236] rule El and whether the selection is up to the right of the head of the department. And the question was asked:

And its selection is up to the right of the head of the department? Is that right?

And his answer was: That's what it states here, referring to the CBA. It's really – the practice has been a panel that looks at applicants.

And then the question: Okay. So what actually is done in practice is not what's written in the CBA?

And I can go on and on about how they then introduced – plaintiff introduced specifically rule 11 and asking:

Nowhere in there does it say you've got to put on your application on iTrack, does it?

And the answer was: Doesn't specifically say that. That is our process though.

And they – plaintiff again asked: And it doesn't say that in the CBA though, does it? And the answer was: It does not say that. It's just our process.

And I don't go through any more of Mr. Mitchell's testimony. But it seems as though you can't get around the issue that the jury must decide is was plaintiff a viable candidate. And there's nothing to the contrary in any policy, CBA requirement. [1237] There was a question by Ms. Casey about the pattern and practice.

I think that is important to integrate in this case. And there's a – the Supreme Court case Conrail – which, really, that case – the focus on that case is resolving – or differentiation between minor and major disputes. That's really the most important value of that case. But it gives us instructive value in other areas. In that case, Conrail, they were changing the practice of medical examinations to include drug testing. And the Supreme Court emphasized that, quote, Furthermore, it is well established that the party's practice, usage, and custom is of significance in interpreting their agreement. And in the Conrail case, the plaintiff's claims rested upon implied contractual terms as interpreted in light of past practice.

And I also think it's instructive in closely reviewing Conrail and the issues with the changing practice of the medical examinations that the procedures had been modified to reflect changes in medical science and technology. So I think that's enlightening that when you speak of practices and changes in practices as technology in our world evolves that computers, technology, digital technology does come into play. And that's a valid legitimate nondiscriminatory concept.

When you look at the Norris case, the emphasis is on where the resolution of a state law claim depends on the interpretation of the CBA, the claim is preempted. So in our [1238] case, how does the jury resolve the race discrimination claim? And this is where I mentioned you look at an employer's conduct. And in Norris, it says it's observed. However, that purely factual questions about an employee's conduct or an

employer's conduct and motives do not require a court to interpret any term of a CBA.

So I can totally see how fact scenarios involving promotions and applications could not be preempted such as what we talked about, if there was gross and pervasive pattern of discrimination that made it futile for minorities to apply. Or if UP only gave heads up of openings to white younger employees. You don't need the CBA to resolve that discrimination case. The Supreme Court in Norris says, In other words, as long as a state law claim can be resolved without interpreting the agreement itself, the claim is dependent of the agreement for preemption purposes.

And the problem in our situation is plaintiff applied – which is an element that the plaintiff must prove – pursuant to the bulletin's directives. But the bulletins – the bulletin and the bulletining procedures and requirements are set forth in the CBA. And UP has a pattern and practice that requires the use of digital applications, the iTrack procedure.

And in Norris, what is distinguishing from the facts that were before the Supreme Court, that was an issue of a [1239] discharge. And that could be evaluated independently of the CBA. It was just purely a factual question as you analyze the facts in Norris as compared to our facts. So I find that the bulletining requirements are inextricably intertwined with the CBA. The jury must determine if the plaintiff applied and must look at the application requirements.

And I've – we've talked about a district court in Minnesota's findings in the Hogan case. So I won't go into that. So although it's difficult, I am finding that the 1E positions and the issues are preempted in the 2017 1E position and the 2018 1E position. I would like to make a quick record, though, of – even if they weren't preempted, I would find – or I would grant defendant's motion for judgment as a matter of law. And I do take some direction from the Eighth Circuit regarding the sufficiency of the plaintiff's proof of their elements in the case of Jackson v. United Parcel Service. It was a case that I used in the summary judgment order but for a different purpose. But the Jackson case talks about viable candidates. And in that case, they were described as ready now candidates. And that case – it was even more difficult in that the facts of that case, the plaintiff applied but – for the position, but it was not even Jackson that failed to do something. It was, in that case, her direct manager, Jackson's direct manager needed to complete and submit a promotion packet. But the manager elected to not complete and submit the [1240] promotion packet. And the Eighth Circuit said that that deemed her to be not a viable candidate. And the decision that Jackson was not a, quote, ready now candidate was -kept her from being – from applying. She wasn't considered a viable applicant.

But I think it's the Jackson case. Let me look. Maybe the Jackson case. I can't find it very quickly. But they talk about similarly situated standard of the prima facie showing the element that similarly

situated employees not part of the protected group were promoted instead. And, usually, it is articulated the focus on folks in the protected group. But there was language that the similarly situated employees can be in our case those that were similarly situated to Avina and didn't utilize the electronic system but, instead, used the hand delivery of a resume that were then hired. So we don't have any evidence that anyone's similarly situated by applying through handing a resume was hired.

And the 2017 position, there was an exhibit – I don't recall the exhibit – where it lists the nine employees that were in the supply division, the demographics. And five of those nine applied to the 2017 position. And the demographics were that Nancy Avina and five others of that nine were older than Ms. Avina. This is when in 2017 Melanie King was hired. And there were five folks in the supply that applied and made the list of ten viable applicants. Four of [1241] those applicants in the supply demographics that we know of were older than Ms. Avina. But age is not really an issue with the 2017. But there were minorities in that supply department that electronically applied and made the iTrack list that was African American. And I see Jolenta Goode as being identified as being older than Ms. Avina and a black female.

And this is similar to the 2018 demographics of the folks in the supply department in 2018. I think it's Exhibit 74 has nine employees listed. And I think plaintiff just said that with the 1E in 2018, age doesn't come into play. Is it just with – now age only comes into play

with the AA position where Melanie King got it. I won't address the age in the 2018 1E.

So with that ruling – and I will do a more organized order with the help of my stellar staff as soon as possible. But for purposes of today, the two 1E position claims are preempted. And the Court would have – if the Court had jurisdiction, I would have granted the motion – defendant's motion for JMOL.

2022 WL 2353078
Only the Westlaw citation is currently available.
United States District Court, W.D. Missouri,
Western Division.

Nancy AVINA, Plaintiff,
v.
UNION PACIFIC RAILROAD COMPANY,
Defendant.

Case No. 4:19-cv-00480-RK
|
Signed 05/11/2022

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ORDER

ROSEANN A. KETCHMARK, JUDGE

Before the Court are what the Court interprets as Defendant's partial motion to dismiss for lack of subject matter jurisdiction (Doc. 131) and Defendant's motion for judgment as a matter of law (Doc. 135). The Court ruled on these motions on the record. After

conclusion of the trial, which resulted in a hung jury, Plaintiff filed a motion for relief from an interlocutory order under Federal Rule of Civil Procedure 54(b). (Doc. 144.) For the reasons set forth below and for other reasons stated on the record, the Court **ORDERS**:

(1) Defendant's partial motion to dismiss (Doc. 131) is **GRANTED**:

a. Plaintiff's § 1981 race discrimination claim for failure-to-promote into the 2017 lE Material Supervisor position is preempted by the Railway Labor Act ("RLA"), and is **DISMISSED** for lack of subject matter jurisdiction;

b. Plaintiff's § 1981 race discrimination claim for failure-to-promote into the 2018 lE Material Supervisor position is preempted by the RLA, and is **DISMISSED** for lack of subject matter jurisdiction; and

c. Plaintiff's ADEA age discrimination claim for failure-to-promote into the 2018 lE Material Supervisor position is preempted by the RLA, and is **DISMISSED** for lack of subject matter jurisdiction.

(2) The Court would otherwise find Defendant is entitled to judgment as a matter of law as to the claims dismissed above, and grant Defendant's motion for judgment as a matter of law.

(3) Plaintiff's motion for relief from interlocutory order (Doc. 144) is **DENIED** after careful review of the record, arguments, and authority cited therein.

I. Background

Plaintiff filed her amended complaint alleging race and age discrimination and retaliation in violation of 42 U.S.C. § 1981 and age discrimination under 29 U.S.C. § 623 ("ADEA") on March 16, 2020. (Doc. 28.) On July 9, 2021, the Court granted in part Defendant's motion for summary judgment as to Plaintiff's retaliation claims and denied the motion in part as to Plaintiff's race and age discrimination claims. (Doc. 78.) The remaining allegations were (1) that Defendant failed to promote Plaintiff due to her race to a lE Material Supervisor position in 2017 and 2018 and to an Administrative Aide position in 2018, and (2) that Defendant failed to promote her due to her age to the lE Material Supervisor position in 2018 and the Administrative Aide position in 2018.[1]

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[1] The ADEA requires the filing of a Charge of Discrimination with the EEOC within 300 days of the alleged act of discrimination. 29 U.S.C. § 626(d)(2). Plaintiff filed her Charge on February 26, 2019. Applying the respective statute of limitations, Plaintiff's claims of discriminatory acts based on age alleged to have occurred prior to May 2, 2018, were found to be time barred. *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 825 (8th Cir. 2003). Thus, any age discrimination claim Plaintiff may have had regarding the June 2017 1E material supervisor position was found to be time-barred as it occurred almost 630 days before she filed her Charge. *Id.*

The case proceeded to a jury trial held over eight days from January 31, 2022, through February 10, 2022, ending in a declaration of mistrial when the jury was unable to reach a unanimous verdict. During trial, on February 6, Defendant filed a trial brief the Court interprets as a partial motion to dismiss regarding preemption. (Doc. 131.) On February 8, after the close of Plaintiff's evidence, Defendant filed a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). (Doc. 135.) In these filings, Defendant argues (1) Plaintiff's claims of discrimination regarding the 1E Material Supervisor positions are preempted by the RLA, and (2) Plaintiff failed to present a legally sufficient basis for a reasonable jury to find in her favor on her race and age discrimination claims. The Court orally **GRANTED** the motions concerning the preempted claims and ruled in the alternative that the Defendant was entitled to judgment as a matter of law as to the 1E Material Supervisor positions. (Doc. 155 at 60.)

II. Legal Standards

Under Federal Rule of Civil Procedure 12(h)(3), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." "Lack of subject matter jurisdiction, unlike many other objections to the jurisdiction of a particular court, cannot be waived. It may be raised at any time by a party to an action, or by the court *sua sponte.*" *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993).

Under Federal Rule of Civil Procedure 50(a)(1), "[i]f a party has been fully heard on an issue" the court may "resolve the issue against the party" when "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *See Tatum v. City of Berkeley*, 408 F.3d 543, 549 (8th Cir. 2005) (under this rule, judgment may be entered against a party on a claim "that the party cannot maintain under the controlling law, so long as the party has been fully heard on the issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on the issue") (citation omitted). A motion for judgment as a matter of law "may be made at any time before the case is submitted to the jury." Rule 50(a)(2). In ruling on a motion for judgment as a matter of law, the court views the facts in the light most favorable to the non-movant and "does not weigh evidence or make credibility determinations." *Harrison v. United Auto Grp.*, 492 F.3d 972, 974 (8th Cir. 2007) (citation omitted).

III. Defendant's Partial Motion to Dismiss (Doc. 131)

Defendant contends that three of Plaintiff's claims must be dismissed for lack of subject matter jurisdiction as preempted by the RLA. More specifically, Defendant contends the Court does not have jurisdiction "to determine any issue regarding the use of iTrakForce as a proper mechanism for bidding under the applicable collective bargaining agreement ('CBA') or to determine whether [Plaintiff] sufficiently applied

for positions by faxing or e-mailing her resume." (Doc. 131 at 1.) Thus, Defendant asks the Court to dismiss the following claims for lack of subject matter jurisdiction: (1) § 1981 race discrimination claim for failing to promote Plaintiff into the 2017 1E Material Supervisor position; (2) § 1981 race discrimination claim for failing to promote Plaintiff into the 2018 1E Material Supervisor position; and (3) ADEA age discrimination claim for failing to promote Plaintiff into the 2018 1E Material Supervisor position.

The RLA establishes a mandatory arbitral mechanism for disputes "growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151a. Such disputes of this nature are preempted by the RLA. Thus, a threshold question of preemption is whether the dispute in question is a "major" dispute or a "minor" dispute. Major disputes are not preempted and minor disputes are.

"Major disputes relate to the formation of collective [bargaining] agreements." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994).

> These disputes relate to contract formation and arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 302 (1989) (citation omitted). Thus, "major disputes seek to create contractual rights." *Id.*

In contrast, "minor disputes" seek to "enforce [contractual rights]." *Id.* They arise "out of the interpretation or application of" existing collective bargaining agreements. *Id.* at 303 (quotation omitted). Such disputes contemplate

> the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. *The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.* In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

Id. (emphasis added) (citation omitted).

Put another way, a dispute is minor, and therefore preempted, if it involves "the meaning of an existing [CBA] in a particular fact situation." *Hawaiian Airlines*, 512 U.S. at 253. In opposing preemption, Plaintiff stresses, "purely factual questions" about an employee's conduct or an employer's conduct and motives do not "require[] a court to interpret any terms of a

collective-bargaining agreement." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988). In asserting preemption, Defendant urges, under the RLA, a CBA can give rise to implied terms arising from "practice, usage and custom." *Hawaiian Airlines*, 512 U.S. at 264 n.10.

Additionally, relevant to this case, the Supreme Court held:

> [I]f an employer asserts a claim that the parties' agreement gives the employer the discretion to make a particular change in working conditions without prior negotiation, and if that claim is arguably justified by the terms of the parties' agreement (i.e., the claim is neither obviously insubstantial or frivolous, nor made in bad faith), the employer may make the change and the courts must defer to the arbitral jurisdiction of the Board.

Consol. Rail, 491 U.S. at 310.

Finally, the Court notes that as a matter of statutory preference, it is not for the courts "to interpret or construe the language of the collectively-bargained for agreement between the parties; rather, our function is to determine whether this case implicates a question of contract interpretation." *Int'l Ass'n of Machinists v. Soo Line R.R.*, 850 F.2d 368, 376 (8th Cir.1988). "[W]hen in doubt, the courts construe disputes as minor," and are therefore preempted. *Sheet Metal Workers' Int'l Ass'n v. Burlington N. R.R. Co.*, 893 F.2d 199, 203 (8th Cir. 1990) (also noting courts construe disputes as minor "when the surrounding circumstances

are ambiguous") (citations omitted). In light of this presumption, the Eighth Circuit Court of Appeals has reiterated that the party asserting that the dispute in question is "minor" "shoulders a 'relatively light burden' in establishing exclusive arbitral jurisdiction under the RLA." *Jenisio v. Ozark Airlines, Inc.*, 187 F.3d 970, 973 (8th Cir. 1999) (quoting *Schiltz v. Burlington N.R.R.*, 115 F.3d 1407, 1414 (8th Cir. 1997)).

With that framework in mind, the Court notes Plaintiff is correct that discrimination claims arising under federal law *generally* are not preempted by the RLA. *See Pittari v. Am. Eagle Airlines*, 468 F.3d 1056, 1060-61 (8th Cir. 2006); *Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431, 439 (8th Cir. 1998). That is because "not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is preempted." *Hawaiian Airlines*, 512 U.S. at 260.

Here, in her case-in-chief, Plaintiff examined Craig Mitchell, Defendant's Director of Strategic Sourcing, concerning the following provisions of the CBA, in an effort to establish Plaintiff had complied with the CBA's application requirements, i.e., by faxing or emailing her resume because iTrakForce is not mentioned in the CBA. Portions of the CBA include:

> (e-1) Partially excepted positions are excepted from the promotion, assignment, and displacement rules of this Agreement. Employees holding these positions shall be subject to the Union Shop Agreement (Appendix

No. C), notwithstanding the exceptions set forth in Sections 2 and 3 thereof.

. . .

(e-3) Partially excepted positions covered by Sections (e-1) and (e-2) shall be bulletined in the department or office affected in accordance with Rule 11, but selection of the incumbent shall be a matter for the determination of the head of the department, subject only to the condition that preference shall be given to employees in service.

Employees working in the Zone in which the partially excepted position is located shall be given preference, and if in the judgment of the head of the department none of the applicants from such Zone are qualified, selection shall be made from the qualified employees in other Zones.

. . .

RULE 11 – BULLETINING POSITIONS

. . .

(b) The positions advertised under Section (a) shall be dated on the 1st and 16th of the month and issued for posting on those dates or the first succeeding business day. Employees desiring bulletined positions must have their applications, in duplicate, on file in the office of the bulletin, or in the office of the supervisor as may be specified on the bulletin, not later than noon of the tenth (10th) day from the date of bulletin. A copy of the

> application must be furnished Local/District Chairman direct by the employee [sic]. Applications for bulletined positions cannot be withdrawn subsequent to closing time and date specified in the vacancy notice [sic]. The official whose name is signed to the bulletin shall acknowledge receipt of employee application by returning one copy of the application with proper notice thereon, and the assignments shall be made as specified above. Shorter or longer time limits for bulletins and applications may be established by agreement.
>
> . . .
>
> (j) By agreement between the parties, the bulletining process may be amended for certain departments and/or locations. In addition, the parties may also agree to amend the bulletining process to allow the use of CRT machines.

Pl.'s Ex. 79.

Portions of Plaintiff's direct examination called for Mr. Mitchell to explain his interpretation of certain language in the CBA, as follows:

> Q. And what is Exhibit 79?
>
> A. This is the collective bargaining agreement. So this is for our – you know, I've heard the term union employees here today as well as agreement. We typically use the term agreement. But this is the agreement that really sets a lot of the rules for how we conduct

our work and covers the Transportation Communications Union, which is stated here on the cover.

Q. And if we had a physical copy sitting in front of you, you'd agree, it's a pretty hefty document. Right?

A. It's a very thick document. And, quite often, labor relations assists in a lot of the determinating [sic] how it applies to the work.

Q. ***And I'm just going to ask you some of your understanding about some of the policies involved here today***. If you don't know the answer –

A. Sure.

Q. – if you can tell me someone that I could talk to who would know the better answer, that would be great. Okay?

A. Okay.

Q. I've got my CliffsNotes version here. You'd agree that the entirety of the company's interaction with a union employee is governed by this CBA.

A. Correct.

Q. You'd agree that the entirety of the company's interaction with a union employee is governed by this CBA. Right?

A. Correct.

Q. Ms. Eaton,[2] ***could you flip to what's Bates stamped as 2235. And if you could zoom in on that section that's E-1.***[3] Mr. Mitchell, obviously, you're aware that part of the claims of this case are that Ms. Avina was not properly considered for the supervisor 1E position in the supply department. Right?

A. Yes.

Q. ***And you're also aware that the union essentially states that the majority of bids are determined on a seniority basis. Right***?

A. ***If they're not covered under the 1E, they are.***

Q. ***Exactly. So this is one of the few exceptions to the union where a position is what we've heard as right of selection. Right?***

A. ***That's correct.***

Q. Okay. And as we see here on this page, I believe that's what we're talking about. ***And if, actually, we can blow out E-3.***[4] ***Mr. Mitchell, E-3 says, Partially accepted positions covered by sections E1 and E2 shall be bulletined in the department or office affected in accordance with rule 11***

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[2] Ms. Eaton served as Plaintiff's paralegal.

[3] Although reproduced in the transcript as "EI," the reference was to "(e-1)," excerpted above.

[4] Although reproduced in the transcript as "E-3," the reference was to "(e-3)," excerpted above.

but selection of the incumbent shall be a matter for the determination of the head of the department. Right?

A. Yes.

Q. ***Subject only to the condition that preference shall be given to employees in service. So the 1E position is right of selection. But it's still needs to be bulletined. Right?***

A. Yes.

Q. ***And its selection is up to the right of the head of the department. Is that right?***

A. ***That's what it states here. It's – it's really – the practice has been a panel that looks at applicants***.

Q. ***Okay. So what's actually done in practice is not what's written in the CBA?***

A. ***It's how you determine what the head of the department is. But by operation, we've never had a grievance filed. But the local management with a panel of – a diverse panel would make that selection.***

Q. ***You'd agree with me, though, that the CBA says that it's the head of the panel – or the head of the department's decision. Right?***

A. ***I do see that.***

Q. ***Nothing else in that section that we've looked at tells the head of the***

department how to actually perform the process of placing the 1E. Right?

A. No.

Q. Ms. Eaton, could you please go to Bates 2244. All right. If you could blow out rule 11, section A, B, and C. Hopefully, we can read that. Mr. Mitchell, are you familiar with the bulletining process?

A. Yes.

Q. And tell me what the bulletining process is for open positions?

A. As it states here, there should be a period of 10 calendar days. And – well, let me just read it to you since it's right here in front of us.

Q. Sure.

A. All new positions and vacancies of 30 days or more duration, excluding vacations, shall be promptly bulletined on bulletin board accessible to all employees in the affected zone for a period of ten calendar days. The bulletin shall show wage grade, location, title, duties of position, rate of pay, hours of service, assigned meal period, rest days, and, if temporary, the probable and expected duration. Copies of bulletins shall be furnished to the general chairman and local district chairmen.

Q. So, essentially, a position has to be posted on this bulletin for 10 days. Right?

A. Right.

Q. And is that to alert the union or agreement workers that there is this potential opportunity in their zone?

A. Yep. Share opportunities with everyone.

Q. ***In subsection – or, I'm sorry, nothing on there mentions anything beyond that it's just got to be posted on the bulletin. Right?***

A. ***Doesn't say it specifically there. Doesn't talk about the means***.

Q. ***If you could blow out section B, please. The second sentence says, Employees desiring bulletined positions must have their applications in duplicate on file in the office of the official whose name is signed to the bulletin or in the office of the supervisor as may be specified on the bulletin not later than noon on the 10th day of the date. Right?***

A. Yes. I see that.

Q. ***So another section is they've got to have their apps to the supervisor or the named person on the bulletin. Right?***

A. ***The application. Correct.***

Q. ***Doesn't say anything about any other requirement. Does it?***

A. ***I mean, there's – there's other sentences here, but, no.***

Q. ***Sure. Nowhere in there does it say you've got to go put on your application on [iTrakForce]. Does it?***

A. ***Doesn't specifically say that. That is our process though.***

Q. And doesn't say that in the CBA though, does it?

A. ***It does not say that, just our process.***

Q. And didn't say anywhere in The How Matters?

A. Correct.

Q. Or any other policy we've looked at so far?

A. Correct.

Q. And as we saw previously in the E1 rule, rule 11 does apply even though this is an exempt right of selection position. Correct?

A. Correct.

Q. Real quickly, Ms. Eaton, if you could go to 2250. And rule 19, please. Mr. Mitchell, rule 19 applies to positions abolished and reinstated. Right?

A. That is correct.

Q. And just – I just want to make sure that we're understanding on A. If a position is abolished and reinstated by bulletin in the same or another zone, within 90 days, the last regularly assigned incumbent shall be returned

> to the position without regard to seniority if they do those three steps. Right?
>
> A. That is correct. Yes.
>
> Q. Okay. And that's if the same exact position is reinstated after an abolishment. Right?
>
> A. Yes. The incumbent.
>
> Q. If we could flip really quick to page 2272. Mr. Mitchell, we see again in this collective bargaining agreement that there's a policy about discrimination. Right?
>
> A. Yes, sir.
>
> . . .

(Doc. 130 at 21-27) (emphasis added).

Plaintiff conceded at oral argument that an interpretation of the CBA is warranted in some discrimination cases and directed the Court to *Johnson v. Humphreys*, 949 F.3d 413 (8th Cir. 2020). The *Johnson* plaintiff claimed he was terminated due to his race; the defendant claimed the plaintiff was terminated because he committed an offense of "extreme seriousness" as defined in the CBA. *Id.* at 415.

In *Johnson*, as here, the plaintiff argued that his claim involved "purely factual questions and that no CBA interpretation is required from the face of the complaint and his *prima facie* case." 949 F.3d at 416. Citing *Lingle* and *Hawaiian Airlines*, the *Johnson* plaintiff argued he could prevail by showing the retaliatory intent of his employer. *Id.* The Eighth Circuit

determined, however, that the plaintiff's *prima facie* case of discrimination required showing that he was following established rules and practices under the CBA and involved whether an offense at issue was one of "extreme seriousness," a term unique to the CBA. *Id.* The *Johnson* court thus held that the CBA was "inextricably bound up" in the *prima facie* case and found the matter was preempted. *Id.*

Defendant points to *Hogan v. Northwest Airlines, Inc.*, 880 F. Supp. 685 (D. Minn. 1995), where a district court addressed a question analogous to the one in the instant case: In a disability discrimination failure-to-hire claim under the Americans with Disabilities Act ("ADA"), did the issue of whether the plaintiff "applied" for the position in question involve the interpretation and application of the procedures for filling vacancies set forth in the CBA? *Id.* at 689. There, the plaintiff argued that his dispute did not involve the interpretation or application of any term of the CBA because he had not alleged that the employer violated the CBA by failing to hire him. *Id.* at 689-90. The plaintiff also asserted that the CBA did not apply to the positions at issue there because those positions became "company select" positions outside the scope of the CBA's vacancy procedures when it appeared that no "eligible bidders" had applied to fill them.

In finding preemption, the *Hogan* court rejected plaintiff's contentions, as follows:

> Northwest argues before this Court that Hogan did not apply for the Bulletin Number

> 92-360 position in accordance with the procedures set forth in Article 9 of the Blue Book. To determine whether Hogan has stated a prima facie case of discriminatory failure to hire under the ADA, the Court must necessarily determine whether Hogan's conduct constituted an "application" under the terms of the collective bargaining agreement. Such a determination requires the interpretation and application of the vacancy provisions of the Blue Book, a determination committed by Congress to the exclusive procedures of the RLA. Plaintiff's claim for disability discrimination cannot be decided "wholly apart" from the collective bargaining agreement; his claim does not present "purely factual issues" which do not require interpretation and application of the collective bargaining agreement.

Id. at 690-91.

As in *Hogan*, here, Plaintiff must demonstrate that she applied for the positions at issue. *Austin v. Minnesota Min. & Mfg. Co.*, 193 F.3d 992, 995 (8th Cir. 1999) (the elements for a failure-to-promote claim include showing that: (1) the employee was a member of a protected group; (2) she was qualified and *applied for* a promotion to a position for which the employer was seeking applicants; (3) she was not promoted; and (4) similarly situated employees, not part of the protected group, were promoted instead); *see also Green v. City of St. Louis*, 507 F.3d 662, 666 (8th Cir. 2007) ("To establish a prima facie claim for discriminatory failure to hire, a plaintiff must show that he applied and was

qualified for a job for which the employer was seeking applicants.") (quotation marks omitted).[5]

With that factual and legal background in mind, the Court finds that, as was the case in *Johnson* and *Hogan*, the issues in this case involve the interpretation of an existing CBA and implicate a question of contract interpretation, thus reflecting a "minor" dispute. *See also Boldt v. N. States Power Co.*, 904 F.3d 586 (8th Cir. 2018) (applying *McDonnell Douglas* framework[6]; affirming ruling that CBA included fitness-for-duty

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[5] The Court notes the Eighth Circuit has "held that formal application for a job opening will not be required to establish a *prima facie* case of discrimination if the job opening was not officially posted or advertised *and* either (1) the plaintiff had no knowledge of the job from other sources until it was filled, or (2) the employer was aware of the plaintiff's interest in the job notwithstanding the plaintiff's failure to make a formal application." *Gentry v. Georgia-Pac. Corp.*, 250 F.3d 646, 652 (8th Cir. 2001) (emphasis added) (cleaned up). Here, there is no meaningful question the job opening was sufficiently posted or advertised, thus taking the exception out of the purview of this case.

Even if there were a meaningful question, the relevant inquiry is whether Plaintiff properly applied given that she provided her resume to her supervisor but did not submit an application through iTrakForce. The question of whether Plaintiff applied simply is undetermined (and undeterminable for this Court): perhaps Plaintiff properly applied under the operative CBA by submitting her resume to her supervisor and she was not meaningfully considered for the position for invidious reasons; perhaps she did not properly apply because she did not use iTrakForce, an accepted practice permissible under a proper interpretation of the CBA. Regardless, it is *Plaintiff's* case-in-chief that indicates the answer to this question is inextricably tied to interpretation of the CBA.

[6] *See infra* pp. 13-14 regarding *McDonnell Douglas* framework.

policy which required interpretation to determine whether plaintiff had to prove he was "qualified" to continue working). The excerpt of the CBA adduced at trial and Mr. Mitchell's testimony make clear two provisions of the CBA must be interpreted in deciding whether Plaintiff properly applied for this position.[7]

First, Plaintiff maintains she applied for the positions in question by delivering her resume to her supervisor(s), and Plaintiff asks the factfinders to determine that such means of application was sufficient under the CBA. In other words, given that the CBA requires "[e]mployees desiring bulletined positions must have their applications, in duplicate, on file in the office of the bulletin, or in the office of the supervisor as may be specified on the bulletin," Plaintiff argues it is a question of fact whether the submission of her application to her supervisors other than through iTrakForce was sufficient. Fundamentally, however, Plaintiff asks this Court and/or the jury to determine the meaning of the CBA in the particular situation of Plaintiff's application/bid for the IE Material Supervisor position in 2017 and in 2018. Bulletining and bidding on (applying for) those positions falls squarely under the provisions of Rule 11 of the CBA. The relevant question here, though, is what does "must have their applications, in duplicate, on file in the office of

[7] While Defendant did not necessarily identify the language addressed here, the Court reiterates that "[l]ack of subject matter jurisdiction, unlike many other objections to the jurisdiction of a particular court, cannot be waived. It may be raised at any time by a party to an action, or by the court *sua sponte*." *Bueford*, 991 F.2d at 485.

the bulletin, or in the office of the supervisor" mean? Plaintiff's examination of Mr. Mitchell reflects significant questioning over the CBA's language pointing to the requirement that applicants "must have their applications, in duplicate, on file in the office of the bulletin" – with that language in the CBA, did Defendant require submission (or could Defendant require submission) of the application through iTrakForce?[8] The answer cannot be known on this record and requires interpretation of the CBA.

Second, Plaintiff asserts supervisors Samantha Miller and Jennifer Perkins, respectively, as "head of the department" made the discriminatory decisions not to hire Plaintiff. Evidence of these supervisors' alleged workplace behavior was adduced at trial to support Plaintiff's case. In contrast, as illustrated in Mr. Mitchell's testimony, Defendant asserts the "head of the department" making the decision was in fact a panel. Testimony adduced at trial then indicated the panel making the employment decision was comprised of multiple individuals, one of whom was from local management, and the rest of whom were typically from other locations (along with possibly a customer); interviews were conducted by telephone. (Doc. 150 at 165-

[8] In addition, Plaintiff presented Rule 11 and the posted bulletins for the positions to several witnesses at trial in an effort to establish she properly applied in accordance with the bulletins and was not required to use iTrakForce to bid on those positions. Similarly, Plaintiff showed witness Jeffrey Anderson Form 5 ("Application for Bulletined Position") in Appendix M of the CBA to demonstrate Plaintiff properly applied by submitting her resume only. *See* Pl.'s Ex. 79, p. 130.

66; Doc. 152 at 36). To be clear, the intertwined nature of the application process and the CBA was presented in Plaintiff's case-in-chief when Mr. Mitchell was asked whether "what's actually done in practice" (i.e. using a panel to consider applicants) was in accordance with "what's written in the CBA" (i.e., "selection of the incumbent shall be a matter for the determination of the head of the department"), Mr. Mitchell interpreted the CBA as follows: "It's how you determine what the head of the department is . . . [b]ut the local management with a panel of – a diverse panel would make that selection." Thus, the question of what or who constitutes the "head of the department" for purposes of selecting the incumbent cannot be a determination made in this Court.

The Court's conclusion that interpretation of the CBA is necessary is confirmed by additional reference to Mr. Mitchell's testimony when he was asked whether the CBA discusses iTrakForce. Mr. Mitchell responded that it does not, but he noted there are "other sentences" in the CBA and that using iTrakForce was the process used to apply for the 1E Material Supervisor jobs. In fact, the CBA allows: "[b]y agreement between the parties, the bulletining process may be amended for certain departments and/or locations. In addition, the parties may also agree to amend the bulletining process to allow the use of CRT[9] machines." Whether and to what extent the bulletining process was amended or whether and to what extent

[9] CRT is not defined in this provision of the CBA.

the CBA may otherwise be interpreted to allow Defendant to require an application through iTrakForce requires an interpretation of the CBA.[10]

The Court's conclusion the 1E Material Supervisor claims are preempted is further confirmed through juror confusion about the CBA and its relationship to iTrakForce. Testimony from Defendant's first witness, Jacob Langel, led a juror to submit the following question, which the Court read:

> THE COURT: Why is [iTrakForce] absent from the CBA and handbook?
>
> THE WITNESS: [iTrakForce] is just a system that we created to facilitate the bulletin and bidding of application – or of jobs for the nonops.

In a nutshell, the trial was replete with questioning, testimony, and evidence revealing the necessity of

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[10] In subsequent briefing, Plaintiff concedes the CBA allows Defendant to require iTrakForce be used to apply for these positions and argues there is a mere factual dispute as to whether Defendant in fact adopted a policy requiring submission of bids through iTrakForce as to 1E positions. (Doc. 144 at 8-9.) However, this nuanced argument was not evident to at least some portion of the jury, as noted *infra*, who asked a defense witness why the iTrakForce requirement was not included in the CBA. This is no wonder, as Plaintiff and Defendant both showed the CBA and questioned witnesses about the meaning of it, including how to properly apply for a given position. Even if Plaintiff's concession rendered Defendant's argument on this point moot, however, the interpretation of the requirement that applicants "must have their applications, in duplicate, on file in the office of the bulletin, or in the office of the supervisor" and "head of department" under the governing CBA nonetheless remain outstanding matters.

interpreting specific provisions of the CBA, and at least one factfinder sought guidance on the absence of a certain provision of the CBA.

In so ruling, the Court notes Plaintiff correctly argues a defendant cannot be the party to inject the CBA in a discrimination case so as to take the matter outside the jurisdiction of the district court. *Humphrey v. Sequenta*, 58 F.3d 1238 (8th Cir. 1995) ("We must find not just that a pre-emption defense is present, but that the claim is completely federal from the beginning") (cleaned up). Although at oral argument Plaintiff contended she introduced the CBA and related evidence in anticipation of confronting the defense theory that she did not apply for the position, it was clear since opening statements that Plaintiff, not Defendant, first injected the interpretation of the CBA into the case and, key to this ruling, that Plaintiff *needed* to introduce the CBA to the jury to prove she properly applied for the 1E Material Supervisor positions as part of her *prima facie* case.[11] In other words, the tone and tenor of Plaintiff's opening

[11] Plaintiff maintains whether she applied is a factual issue to be determined by the jury. But at base, accepting Plaintiff's testimony as true: Plaintiff submitted her resume to her supervisor in various ways, but she did not submit an application through iTrakForce. As noted throughout this order, the resolution of whether Plaintiff actually applied requires determining whether she acted in accordance with the CBA and/or whether Defendant properly (or invidiously) required her application to be submitted through iTrakForce.

statements[12] and direct examination soon thereafter of Mr. Mitchell roundly invoked reliance on and

[12] The Court acknowledges that "the bare fact that a collective bargaining agreement will be consulted" and that "mere reference to or consultation of the CBA" are not enough to trigger preemption. *Hawaiian Airlines*, 512 U.S. at 261 n.8; *Markham v. Wertin*, 861 F.3d 748, 755 (8th Cir. 2017). The Court nonetheless notes invocation of the CBA began in opening statements and continued through the testimony as it was necessary for Plaintiff to fully present or prove her case. Had mere reference to or consultation of the CBA been the extent of this issue, the Court would be inclined to rule for Plaintiff. The portions below from Plaintiff's opening statements, however, were only the preface:

> . . . The rules of the road for employment cases are actually laid out in Union Pacific's own policies. This way, management employees understand what the law requires of employers. And it's up to juries to enforce these laws. . . .
>
> During trial, you'll hear testimony from a man by the name of Craig Mitchell. Mr. Mitchell is actually sitting right here as the designated corporate representative for Union Pacific and that means the testimony he's giving is essentially the same as if we were able to put the company up on that stand and ask questions of Union Pacific. He was also the director of supply operations who oversaw the department in which Nancy Avina spent the majority of her time. The same department in which she continually applied for positions at issue before you today. He will tell us the promotional process that is supposed to be carried out at Union Pacific. . . .
>
> Throughout this week, we're going to be using a lot of legal and railroad terminology that some people might not be too familiar with. So I'd take a second to introduce you to some of these words and phrases, the first of which is the EEO policy. EEO stands for equal employment opportunity. **And Union Pacific has policies in place that they claim enforce the facilitation of equal employment opportunities for all its employees in hiring, promotion, and treatment. It**

interpretation of portions of the CBA from the outset, and that theme resounded throughout the trial. Testimony from additional witnesses through Plaintiff's case-in-chief continued to address the issue of whether Plaintiff needed to use iTrakForce (including the deposition testimony admitted into evidence at trial of Plaintiff's former supervisor, Samantha Miller).

The Court concludes that to determine whether Plaintiff can establish she applied for the 1E Material Supervisor positions requires analysis of whether Plaintiff properly applied under the terms of the CBA. This inquiry goes beyond "'purely factual questions' about an employee's conduct or an employer's conduct" and instead requires a determination of whether

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means exactly what it says when it's enforced. Every employee should have equal opportunity at all employment levels at every step of the process. The positions that are at issue in this case are what are called right of selection positions. Union Pacific contracts with unions in order to fill a lot of their employee positions. And many of these positions are done – or filled on what's called a seniority basis where somebody has the most seniority rights, they get the position. Three positions that we're going to talk about are right of selection positions, which means that they are, technically, union positions, but the strict union seniority rules do not apply. Union Pacific does get to select the most qualified person even if they don't have the earliest seniority date.

The supervisor 1E position that Nancy applied for in 2017 and 2018 is one of these right of selection positions. It is the second in command in the supply department at the warehouse level.

Plaintiff's applications were sufficient, under the CBA, to put her in meaningful consideration for the promotions. *See Hawaiian Airlines, Inc.*, 512 U.S. at 261 (quoting *Lingle*, 486 U.S. at 407). As in *Hogan*, Defendant argues that its means of accepting applications was allowed under the CBA and Plaintiff did not properly apply for the job.[13] Thus, to show that she applied for the position – an element of the *prima facie* case – Plaintiff must show her applications were in accordance with a proper interpretation of the CBA. Portions demanding interpretation include:

> (1) the meaning of the requirement that applicants "must have their applications, in duplicate, on file in the office of the bulletin, or in the office of the supervisor" given Plaintiff had to apply for the position, given Defendant maintains the only proper way was to apply through iTrakForce, and given none of Plaintiff's proffered means of applying necessarily complied with the language of the CBA; and
>
> (2) what constitutes "head of the department" particularly given that Plaintiff asked Mr. Mitchell whether "what's actually done in practice is not what's written in the CBA," his response "It's how you determine what the head of the department is . . . [b]ut the local management with a panel of – a diverse panel would make that selection."

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[13] To the extent Plaintiff meant to claim an exception applied (see supra n.5), such determination would also fall within the purview of the CBA.

The Court's conclusion that the matter is preempted is bolstered by the CBA's allowance for amendment of application procedures (*see supra* Rule 11(j)), by precedent (*Consol. Rail*, 491 U.S. at 310) allowing for the changes in the CBA, by Mr. Mitchell's testimony that the CBA excerpts he was questioned about on direct examination in Plaintiff's case-in-chief did not include the whole of the agreement ("I mean, there's – there's other sentences here"), and by juror questions indicating potential confusion over whether the CBA necessarily needed to include reference to iTrakforce as the means of application for the supervisory positions in question. The Court therefore finds that Plaintiff's *prima facie* showing for her discrimination claims against Defendant concerning the 1E Material Supervisor positions is substantially dependent upon an analysis of the CBA, and is therefore completely preempted and precluded by the RLA. *See Sheet Metal Workers'*, 893 F.2d at 203 (holding "when in doubt, the courts construe disputes as minor" and disputes are to be construed as minor "when the surrounding circumstances are ambiguous").

For these and other reasons set out on the record, the Court dismisses the following claims for lack of subject matter jurisdiction: (1) § 1981 race discrimination claim for failure-to-promote into the 2017 1E Material Supervisor position; (2) § 1981 race discrimination claim for failure-to-promote into the 2018 1E Material Supervisor position; and (3) ADEA age

discrimination claim for failure-to-promote into the 2018 1E Material Supervisor position.[14]

> There is no clear reason why the jurisdictional question resolved now was not raised earlier, and Plaintiff's frustration is well taken. An earlier resolution would have reduced the resources spent conducting extensive discovery and an eight-day trial and may have avoided any statute of limitations issue that may arise following this dismissal. The Court does not condone Defendant's decision to raise the issue so late in the proceedings. Nonetheless, the mistrial allowed for full briefing of the issue, and as the parties well know, subject-matter jurisdiction is not an issue that can be waived.

IV. Defendant's Motion for Judgment as a Matter of Law

Assuming the Court had not found the above-mentioned claims preempted by the RLA, the Court would otherwise grant Defendant's motion for judgment as a matter of law as to those claims. In its motion for judgment as a matter of law on each of Plaintiff's claims,

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[14] The Court is cognizant of Plaintiff's visceral frustration that Defendant "first raised the issue of preemption on Friday, February 4, 2022, the fourth day of an eight-day trial[,] more than two and a half years after Plaintiff filed her complaint and more than a year after Defendant sought summary judgment accompanied by suggestions that specifically point out the fact that the 1E position is governed by a collective bargaining agreement." (Doc. 144 at 3.)

Defendant argues (1) Plaintiff failed to present evidence of discrimination, (2) Defendant had legitimate non-discriminatory reasons for its actions, (3) Plaintiff failed to present sufficient evidence her age or race were the "but for" cause in Defendant's promotion or hiring decision, and (4) Plaintiff failed to present evidence she suffered damages, and failed to produce evidence that would permit a reasonable jury to award punitive damages. After careful consideration of the evidence presented, viewed in the light most favorable to Plaintiff, the Court finds Defendant would be entitled to judgment as a matter of law on Plaintiff's claims regarding the 2017 and 2018 1E Material Supervisor positions were they not preempted by the RLA.

Plaintiff's claims for race and age discrimination under 42 U.S.C. § 1981 and 29 U.S.C. § 623 (ADEA) are analyzed under the *McDonnell-Douglas* burden-shifting framework. *Lake v. Yellow Transp., Inc.*, 596 F.3d 871, 873 (8th Cir. 2010) (the *McDonnell-Douglas* framework applies when a discrimination case is based on circumstantial rather than direct evidence).[15]

> Under *McDonnell Douglas*, the plaintiff initially has the burden to establish a prima facie case of discrimination. A prima facie case creates a rebuttable presumption of discrimination. The burden then shifts to the defendant to provide a legitimate, nondiscriminatory reason for its decision. If the defendant

[15] Plaintiff has not argued or presented any direct evidence of race or age discrimination in the context of these particular positions.

> provides such a reason, the presumption disappears, and the burden shifts back to the plaintiff to show that the proffered reason was pretext for discrimination.

Id. at 873-74 (citations and quotation marks omitted). Whether judgment as a matter of law on a discrimination claim is appropriate depends on factors including "'the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case.'" *Tatum*, 408 F.3d at 549 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148-49 (2000)). Judgment as a matter of law may be granted when the plaintiff "fails to establish a legally sufficient evidentiary basis for the jury reasonably to find just one element of his . . . prima facie case." *Id.* at 449-50 (citation omitted).

To establish a *prima facie* case on her claims of discrimination based on Defendant's failure to promote her to the 1E Material Supervisor positions, Plaintiff must prove that: (1) she was a member of a protected group; (2) she was qualified and applied for a promotion to a position for which the employer was seeking applicants; (3) she was not promoted; and (4) similarly situated employees, not part of the protected group, were promoted instead. *Austin*, 193 F.3d at 995. In this context, "similarly situated" means Plaintiff must be "considered a viable candidate for the position." *Jackson v. United Parcel Serv., Inc.*, 643 F.3d 1081, 1086 (8th Cir. 2011) (citation omitted); *see Horton v. Shinseki*, No. 4:13-cv-00147 KGB, 2014 WL 7238145,

at *3 (E.D. Ark. Dec. 17, 2014) (plaintiff failed to show he was similarly situated where he failed to submit a complete application package and the other individuals considered for the promotion did submit complete application packages).

Here, Plaintiff testified and argued throughout trial that she applied for the 2017 and 2018 1E Material Supervisor positions by emailing or faxing her resume to the then-manager of supply operations (Samantha Miller and Jennifer Perkins, respectively).[16] Additionally, Plaintiff presented evidence Defendant acknowledged through an email Plaintiff's interest (though not her application) in at least the 2017 position; the email from a supervisor stated, "[t]hank you for your interest in the Supervisor 1E position. The bid has closed and it has been awarded. Thank you."[17] Further, Plaintiff testified that a supervisor told her not to bother applying for the 2017 position because she had already made her selection, and thus asserted an exception to the general rule that a plaintiff must show she applied as part of her prima facie showing as stated above. *Winbush v. Iowa By Glenwood State Hosp.*, 66 F.3d 1471, 1481 (8th Cir. 1995) ("[P]laintiffs need not prove they formally applied for a position if they allege facts which, if proven, would be sufficient to establish that application was

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[16] Plaintiff additionally testified she believes she handed Ms. Miller a copy of her resume for the 2017 position.

[17] Defendant presented evidence that this email responded to an employee's indication of interest and did not acknowledge an application had been submitted.

futile due to the defendants' discriminatory practices."). Plaintiff further points to Kantrell Robinson's testimony that Ms. Robinson was unable to apply for the job because there was no submit button so as to apply through iTrakForce. (Doc. 152 at 68.) Despite Ms. Robinson's testimony as to her own experience, Plaintiff, however, steadfastly maintains she properly applied for the positions by following instructions on the bulletin to fax her resume. (Doc. 153 at 175.)

While the Court acknowledges these arguments and this evidence, at base, the record is clear: Plaintiff never properly submitted her application for either position. Testimony established that since 2009, Defendant has utilized iTrakForce for collective-bargaining or union positions within the company. Union employees use iTrakForce to "bid" or apply for these jobs. It is undisputed that Plaintiff did not use iTrakForce in relation to either 1E Material Supervisor position and just emailed or faxed (and possibly handed in) her resume. It is also undisputed the employees Defendant did identify and interview for each opening had utilized iTrakForce and thus were identified as candidates through iTrakForce. Plaintiff presented no evidence that any applicant outside of the protected group only emailed or faxed or handed in a resume without using iTrakForce and was interviewed or otherwise considered for the 1E Material Supervisor position openings in 2017 and 2018. Thus, Plaintiff failed to show similarly situated employees not part of the protected group were promoted to the positions instead. *See*

Jackson, 643 F.3d at 1086; *Horton*, 2014 WL 7238145, at *3.

Additionally, the exception in *Winbush* and its progeny does not apply here. "[I]n order for an employee who conveys an interest in an open position to be exempted from the employer's formal application requirement, the position sought must, *inter alia*, not have been officially posted or advertised." *E.E.O.C. v. Midw. Div.-RMC, LLC*, No. 04-00883-CV-W-REL, 2006 WL 6508508, at *2 (W.D. Mo. Aug. 17, 2006) (citing *Chambers v. Wynne Sch. Dist.*, 909 F.2d 1214, 1217 (8th Cir. 1990)). Here, there is no dispute that the bulletin was posted. Further, although Ms. Robinson testified *she* could not apply through iTrakForce, *Plaintiff* did not testify that she could not apply through iTrakForce. She instead testified that she did not do so because the instructions on the bulletin said to fax the resume. (Doc. 153 at 175.) Put simply, Plaintiff was not within the pool of candidates considered for the 1E Material Supervisor positions based on the means of her application; she therefore was not similarly situated to those chosen instead of her.

Additionally, and separately, Plaintiff cannot demonstrate a *prima facie* case for age discrimination regarding the 2018 1E Material Supervisor position for the simple reason that the individual chosen for that position, Cindi Wood, was significantly older than Plaintiff. *See McGinnis v. Union Pac. R.R.*, 496 F.3d 868, 875-76 (8th Cir. 2007) (plaintiff failed to establish a *prima facie* case for age discrimination where the individual hired to replace plaintiff was older than

plaintiff); *Schiltz v. Burlington N. R.R.* 115 F.3d 1407 (8th Cir. 1997) (plaintiff failed to make a *prima facie* showing of age discrimination as to the positions where the individuals hired were older or the same age as plaintiff or no more than five years younger than plaintiff).

Because Plaintiff has failed to present a *prima facie* case for age or race discrimination regarding the 2017 and 2018 1E Material Supervisor positions, even if they were not dismissed due to preemption, the Court would otherwise find Defendant entitled to judgment as a matter of law as to these claims. *See Tatum*, 408 F.3d at 549-550, 553.

V. Conclusion

Accordingly, the Court **ORDERS** as follows:

(1) Defendant's partial motion to dismiss (Doc. 131) is **GRANTED**:

a. Plaintiff's § 1981 race discrimination claim for failure-to-promote into the 2017 1E Material Supervisor position is preempted by the RLA, and is **DISMISSED** for lack of subject matter jurisdiction;

b. Plaintiff's § 1981 race discrimination claim for failure-to-promote into the 2018 1E Material Supervisor position is preempted by the RLA, and is **DISMISSED** for lack of subject matter jurisdiction; and

c. Plaintiff's ADEA age discrimination claim for failure-to-promote into the 2018

1E Material Supervisor position is preempted by the RLA, and is **DISMISSED** for lack of subject matter jurisdiction.

(2) The Court would otherwise find Defendant is entitled to judgment as a matter of law as to the claims dismissed above and grant Plaintiff's motion for judgment as a matter of law.

(3) Plaintiff's motion for motion for relief from interlocutory order (Doc. 144) is **DENIED.**

IT IS SO ORDERED.

STATUTES INVOLVED

45 U.S.C. § 153 provides in pertinent part:

> National Railroad Adjustment Board
>
> First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review
>
> There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided –
>
> (a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.
>
> * * *
>
> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with

a full statement of the facts and all supporting data bearing upon the disputes.

* * *

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided

elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

* * *

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

Age Discrimination in Employment Act, 29 U.S.C. § 623, provides in pertinent part:

> (a) Employer practices
>
> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

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42 U.S.C. § 1981 provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.
