Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11358
SECOND DIVISION Docket No. 11308
2-BN-F&O-'87

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen & Oilers
(
(Burlington Northern Railroad Company

Dispute: Claim of Employes:

1. That in violation of the current Agreement, Ms. S. S. Kehm, Laurel, Montana, was discriminated against due to actions by the Burlington Northern Railroad Company.

2. That, accordingly, the Burlington Northern Railroad Company be ordered to compensate Ms. Kehm for all lost wages as a result of this discrimination.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On May 31, 1985 a Claim was filed by the General Chairman of the Organization on behalf of the Claimant on the grounds that the Carrier had been in violation of the anti-discrimination provision of the Agreement as outlined in its Preamble. The Claim was denied by the Carrier. After appeal by the Organization on property up to and including the highest Carrier Officer designated to hear such this case is now before the Second Division of the NRAB.

Before ruling on the merits of the case a procedural point must be settled by the Board. It is the contention of the Carrier that this case is improperly before the Board since it involves alleged discrimination which should more properly be considered in a different forum. In its request for dismissal of the Claim the Carrier quotes Third Division Award 24061 which states, in pertinent part, that the Board is "...governed by the (Railway Labor) Act and the parameters of the Agreement." The Agreement in question

however, clearly references the "...pledge (of the parties) to comply with Federal and State laws dealing with nondiscrimination towards any employee." It is the opinion of the Board that when the parties negotiated such language they did not do so to place a limitation on any employe covered by the Agreement whereby that employe must resort only to the administrative agencies of the laws in question for relief, but rather the parties added to the avenues of relief by including arbitral procedures as they are normally practiced under the Railway Labor Act in this industry. In view of this the procedural objection raised by the Carrier is found wanting. Further, a number of prior Awards which were presented for review by the Board, which deal with the issue of discrimination, have been studied (see Second Division Award 9405; Third Division Awards 19790, 22318, 22707). Absent Agreement reference to the issue of discrimination in those Awards they are not on point and hold no precedent value for the instant case.

On merits the Claimant alleges that Carrier's supervision discriminated against her because the Assistant General Foremen "...did not want women in the Roundhouse," because a temporary hostler helper vacancy was abolished and then later re-bulletined as a hostler-laborer position, and because of the coincidence of an injury she received while on the job and the abolishment of a position she had held. Lastly, she claims that the Carrier discriminated against her because a vacancy on property was not filled.

As moving party in this case the burden of proof rests with the Claimant to prove, by means of substantial evidence, the allegations she puts forth. Substantial evidence has been defined as such "...relevant evidence as a reasonable mind might accept as adequate to support a conclusion (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). The Board has closely studied the record before it, including the details of a ten page letter, with attached exhibits, which the Claimant sent to her Local Chairman on April 22, 1985, prior to the date when the Claim was first filed with the Carrier on her behalf.

The Board can find no contractual bar to the Carrier's right to abolish, rebulletin and/or to exercise its prerogatives by not filling a vacancy. These arguments by the Claimant must, therefore, be dismissed for lack of Agreement support. The Claimant's allegations of being discriminated against by the Assistant General Foreman are not supported in the record by substantial evidence. The Claimant appears to imply that the abolishing, rebulletining and filling of vacancy positions during the years of 1984 and 1985, the Carrier's attitude and reaction to an on-the-job injury she had received, and a continuing bias against her on the part of the Assistant General Foreman are all intertwined and related. After studying the record the Board must conclude that such is based on conjecture and inference, and not on evidence. An alleged discriminatory attitude by the Assistant General Foreman against the Claimant appears to be a central issue in the mind of the Claimant. The record shows, however, with respect to this Foreman's dealings with female employes that there are a number of supporting statements by fellow female employes who attest that they have found this Supervisor to be "...reasonable...fair...considerate..." and so on. Such disclaimers of the Claimant's allegations against this Supervisor hold considerable weight in a case such as this.

The Claimant has failed to meet the burden of proof and the Claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of October 1987.

CONCURRENCE AND DISSENT
OF THE CARRIER MEMBERS
TO
AWARD 11358 (DOCKET 11308)
REFEREE SUNTRUP

On the merits of the dispute submitted to this Board, we concur with the conclusion that no contractual bar was established and that such proof, being the requirement of the petitioner, was not substantiated on the record submitted to this Board.

However, at Page 2 of the Award, we find the following:

> "It is the opinion of the Board that when the parties negotiated such language they did not do so to place a limitation on any employe covered by the Agreement whereby that employe must resort only to the administrative agencies of the laws in question for relief, but rather the parties added to the avenues of relief by including arbitral procedures as they are normally practiced under the Railway Labor Act in this industry."

Thus, the Award has concluded that the Carrier and the Organization have negotiated a mutual contractual obligation to comply with all federal and state laws governing non-discrimination toward employees. As will be demonstrated, that conclusion is erroneous and would require this Board to render decisions on matters that it is neither qualified nor equipped to resolve.

The sole Agreement support for the contractual claim asserted here is the following language from the preamble to the parties' contract:

> "The parties to this Agreement pledge to comply with Federal and State Laws dealing with nondiscrimination toward any employee."

That statement is clearly nothing more than an acknowledgement by the parties of their legal obligations and an expression of their shared

commitment to good faith compliance with those responsibilities. But this Award has erroneously converted that precatory language into full-blown contractual commitments that are strictly enforceable by the Board. There are several flaws in such reasoning.

First of all, the purported agreement between the parties to comply with federal and state nondiscrimination laws would fail because it is not supported by adequate consideration. It is elementary contract law that a promise to perform a pre-existing legal duty is not valid consideration to support the other party's contractual undertaking where that duty is owed, as is the case here, to the public at large. E.g., Salmeron v. United States, 724 F.2d 1357, 1362 (9th Cir. 1983); In Re Lloyd, Carr and Co., 617 F.2d 882, 890 (1st Cir. 1980).

If the parties had truly intended to establish contractual prohibitions on nondiscrimination, one would expect the Agreement to contain substantive terms dealing specifically with this subject. See Alexander v. Gardner-Denver Company, 415 U.S. 36, 39 (1974) (consideration of contract containing substantive provision expressly barring discrimination by employer against any employee). But the substantive terms of the Agreement are completely silent on this matter. And the absence of such provisions is persuasive evidence that the parties neither intended nor construed the preamble language in question to create contractual obligations with respect to nondiscrimination.

Moreover, there are compelling reasons for the Board to require clear and convincing evidence that the parties knowingly intended to create a con-

tractual obligation not to violate federal and state nondiscrimination laws, and that it was their intent to have this Board be accorded the jurisdiction to so act. Even though the parties do not have such a right under the statute, there is no evidence of such a desire for the following reasons.

1. This Board is simply not an effective forum for the resolution of such claims. The Board's expertise relates primarily to the law and practices of the railroad industry, not the law of the land. Its accumulated knowledge and background would be of little, if any, benefit in ruling on discrimination claims founded on federal and state discrimination laws. Indeed, such claims often turn on the resolution of statutory or constitutional issues and the development and evaluation of complex factual records. This Board, by statute, is limited to a review of a record that has been made by the parties; it has no investigative or prosecuturial arm to develop necessary facts and evidence.

2. The Railway Labor Act (RLA) and its arbitral procedures are ill suited to resolve employment discrimination claims, particularly in comparison to specific anti-discrimination statutes (such as Title VII of the Civil Rights Act of 1964) that are ultimately enforced by the courts. In Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969) the court explained the significant differences between the RLA and Title VII:

> "The Railway Labor Act is not basically a fair employment practice act nor has it been utilized as such. Its basic purpose is to foster and promote collective bargaining between employees and employers . . . . On the other hand Title VII of the Civil Rights Act specifically prohibits racial and other discrimination in employment and employment opportunities.

> "We, therefore, do not think the plaintiffs are confined to their administrative remedies, which appear without further examination to be inadequate, under the Railway Labor Act. The enactment of Title VII provides a more extensive and broader ground for relief, specifically oriented towards the elimination of discriminatory employment practices based upon race, color, religion, sex or national origin.

Id. at 82-83. See also McDonald v. West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981).

3. There is no guarantee that the decision rendered would provide a claimant with the full breadth of the rights afforded by the nondiscriminations statutes; and yet an adverse arbitration award might cause some employees to forego further attempts to secure relief or, in some situations, even serve to block relief in other forums. See Alexander v. Gardner-Denver Company, supra, 415 U.S. at 60n.21; Criswell v. Western Airlines, Inc., 709 F.2d 544, 549 (9th Cir. 1983); Corbin v. Pan Am. World Airways, Inc., 432 F. Supp. 939, 945 (N.D. Cal. 1977). Indeed, Claimant has already exercised her statutory rights by initiating this claim while contemporaneously pursuing complaints against Carrier, based on the same allegations, with the state and federal agencies charged with administration of the laws allegedly violated by Carrier; and Claimant does ultimately have access to the courts, the bodies designated by law to exercise final responsibility with respect to the enforcement of such statutes, if she is dissatisfied with the outcome of those administrative proceedings.

The published commitment by the Carrier and the Organization to observe all federal and state laws dealing with employment discrimination is a laudable policy, but was never intended to rise to the level of a contractual

undertaking; and even if such interpretation is arguably permissible on the face of the Agreement, the Board cannot entertain such an undertaking absent a specific grant of jurisdiction to issue binding interpretations of State and Federal statutes concurrent with the withdrawal of authority from such Agencies. Such a grant, this Board does not have.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost