

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0071012325:

SANDY JOHNS,)	Case No. 608-2008
)	
Charging Party,)	
)	
vs.)	HEARING OFFICER'S DECISION
)	
MONTANA RAIL LINK,)	
)	
Respondent.)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Sandy Johns filed a complaint with the Department of Labor and Industry on March 2, 2007, alleging that Montana Rail Link, her former employer, discriminated against her in employment because of her age. On October 12, 2007, the department issued notice the complaint would be heard by Hearing Officer Terry Spear.

After continuances obtained by the parties for good cause shown, the contested case hearing took place on September 23-24, 2008, in Missoula, Montana. Johns attended with her counsel Philip A. Hohenlohe, Hohenlohe, Jones, PLLP. MRL attended through its designated representative, Pam Schneider, with its counsel, Darla J. Keck and Matthew A. Baldassin, Datsopoulos MacDonald & Lind PC.

Dr. Christine White, Sandy Johns, Mel Holtz, Kathy Jones, Susan Emrick, Pam Schneider, Marie Welch, Lauren Johns, Mike Lemm, Craig Bassett, Nate Lemieux, Char Boldt, Angie Binns, Lori Foust, Thomas Hower, Tom Walsh, Dennis Meyer, and Teresa Finnell testified under oath. Exhibits 1-11, 13-31,¹ 101-110, 112, 114-116, 118-121, 124-127, 129-136, 137(c) and (d), 138, 140-141, and 145-146 were admitted into evidence. The parties extended the post hearing filings to include a motion to strike (and the briefing for and against the motion). The Hearings Bureau received the last post hearing filing on November 17, 2008.

The Hearings Bureau file docket accompanies this decision.

The motion to strike is denied, for the reasons stated in the discussion herein.

II. ISSUES

The key issue in this case is whether MRL discriminated against Johns by subjecting her to age discrimination in both her treatment as a probationary employee and in evaluation of her training performance. A full statement of the issues appears in the final prehearing order.

¹ Exhibit 29, originally refused, was subsequently admitted for specific limited purposes.

III. FINDINGS OF FACT

1. In railroad parlance, “extra boards” are for employees qualified to work particular jobs who do not have a job assignment and are available to fill in as needed when positions become vacant for whatever reason. This case involves respondent Montana Rail Link (MRL) and an age discrimination charge by a former trainee extra board clerk, charging party Sandy Johns.

2. Extra boards are a normal part of the railroad work environment, governed by applicable collective bargaining agreements (CBAs). Each CBA is between the particular railroad and the union representing the employees the CBA covers. Each CBA provides the terms and conditions of most employment matters, typically including hiring, benefits and scheduling of covered employees.

3. Because of the CBAs, union work assignments are not typically within the control of management. Instead, employee seniority governs work assignments among qualified employees. In broad terms, work assignments are “bid” and held by seniority. MRL extra board clerks are covered by such a CBA.

4. At MRL, extra board clerk is an entry level position that does not require a college degree or any prior experience in the railroad industry. Extra board clerks provide temporary coverage for clerks in each of 10 different departments: Customer Service, Yard Office, Crew Calling Office, Car Shop, Car Distribution, Engineering, Training Rules and Safety, Mail Room, Reception, and Engineering.

5. The Yard Office and Crew Calling Office operate around the clock, 7 days each week, and are 2 of the 3 heavy users of extra board clerks. Although Customer Service no longer operates around the clock, having eliminated its night shift, it is the third heavy user of extra board clerks. Clerks in the other 7 departments work from 8:00 a.m. to 5:00 p.m., Monday through Friday, and their numbers are relatively few.

6. MRL “declines” the application of a provisionally hired trainee extra board clerk who fails during training to qualify in at least 1 of the 3 key departments (Yard Office, Crew Calling Officer and Customer Service) that utilize the most extra board clerks. “Declining the application” means terminating that trainee’s employment.

7. If a trainee does qualify in at least 1 of the 3 key departments, but fails to qualify in another department during probation, the trainee can complete probation, become an extra board clerk, and train again later in the department in which he or she failed to qualify during probation. Typically, a trainee who becomes an extra board clerk will not be qualified in all 10 departments that use clerks, and will train later, as necessary, to qualify in the other departments. Lack of qualifications in some departments reduces the number of clerk positions the particular extra board clerk can bid.

8. To qualify in any of the 10 departments using clerks, a trainee extra board clerk or extra board clerk training for additional clerk positions must demonstrate to his or her trainers the capacity to learn critical, fundamental concepts. As a result of CBAs, existing MRL union employees and not management or management selected professionals provide training to extra board clerks, during their probationary period and thereafter. An individual who has successfully completed the training receives a written certificate of qualification to work as a clerk in the particular department involved.

9. The trainers give management their evaluations and recommendations regarding the individual. At the times pertinent to this case, Customer Service Manager Rick Zimmer made the ultimate determination on whether an employee would qualify or not. Zimmer was responsible for all the clerks in the Missoula office. Throughout Zimmer's career at MRL, prior to the present case, there was never a complaint of discrimination against Zimmer nor an allegation that Zimmer attempted to prevent individuals over the age of 40 from succeeding as clerks.

10. Because the trainers were the supervisor's "eyes and ears," Zimmer considered comments from all of a trainee's various trainer to decide whether the trainee qualified. An individual trainer's comments to the trainee did not by themselves constitute a determination of that employee's qualification binding on MRL.

11. Under the terms of the CBA, MRL has 90 calendar days or 60 working days to decline an application for employment. Working days are defined as shifts actually worked by the prospective employee.

12. Pursuant to the applicable MRL CBA, there are three general categories of clerks within MRL—regularly assigned shift clerks, guaranteed rotating extra board clerks (GREB clerks) and extra board clerks.

13. Clerks with regularly assigned shifts work their assigned shifts, which can be day shifts, afternoon shifts or evening/night (graveyard) shifts, depending upon the department and the shift assigned. In addition there are regularly assigned "relief" shifts covering the days off of the clerks with the assigned shifts. A relief clerk typically works consistently staggered day, evening and night shifts that the holders of those regular shifts have off work, such as 2 consecutive day shifts, followed by 2 consecutive evening shifts, followed by a night shift, on the same days each week.

14. GREB extra board clerks are paid for 40 hours of work per week, even if they are not assigned work. GREB extra board clerks bid for openings as they occur. Unlike employees who have regularly assigned shifts, their assignments vary as needed. MRL assigns clerk openings to GREB extra board clerks ahead of extra board clerks for obvious reasons—seniority and the expense of paying GREB extra board clerks for 40 hours of work a week, whether the work is available or not.

15. Extra board clerks are not guaranteed 40 hours of work per week. Depending upon the openings in the various clerk positions, and the seniority of the particular extra board clerk, extra board clerks work 40 hours a week or less. The days and shifts of work will fluctuate as well.

16. It is in MRL's best interests to have enough extra board clerks to cover vacancies, but not so many that extra board clerks leave due to lack of work. Because the days and shifts of work vary, extra board clerks often leave for other more stable employment, despite the higher wages and benefits often available in railroad work and the prospects of obtaining more consistent work as their longevity translates into more seniority.²

17. According to the applicable CBA, a clerk with an earlier hire date has more seniority than clerks with later hire dates. For clerks who have successfully completed their probations and who have the same hire date, their birth dates determine seniority, with earlier birth dates senior to later birth dates.

18. Under the CBA, extra board clerks bid on available positions. MRL must assign the senior qualified bidding extra board clerk to work the position. Each day, the extra board clerk with the most seniority has the first choice to bid on available clerk positions for which he or she is qualified.

19. On June 13, 2006, Johns applied for an open MRL extra board clerk position. She believed her skills, background, employment history and qualifications suited her for the position. She was excited about the opportunity to earn good wages and health benefits.

20. On July 13, 2006, Johns was interviewed for the position by Zimmer and Pam Schneider, the Director of Human Resources. At the time, MRL had 2 positions open for extra board clerk trainees. Johns was not MRL's first or second choice to fill those 2 positions. MRL intended initially to decline her application. Instead, MRL decided to create a third extra board position.

21. MRL hired Mel Holtz (age 27), Kathy Jones (age 33) and Johns (age 44), to fill the three extra board trainee positions, on a probationary basis, without knowing any of their ages.

22. Susan Twiford called Johns about two weeks later to tell her that her application had been accepted. After being offered the job, Johns was required to provide MRL a copy of her birth certificate.

23. On August 1, 2006, Zimmer asked Twiford for the birth dates of Holtz, Jones and Johns. Pursuant to the CBA, employee age was a tiebreaker for seniority of employees with the

² For example, Jones and Holtz, the 2 extra board clerk trainees provisionally hired with Johns, successfully completed their probations, but had both left MRL for more stable employment by the time of this hearing.

same hire date, so, on August 2, 2006, Twiford provided this information to him. If and when the 3 new trainees became permanent employees, Johns would be senior, followed by Jones and then Holtz, based upon their ages.

24. The average age of MRL employees is about 45. Aging workforces is an industry concern for railroads, including MRL. It creates a potential long-term labor force dilemma, when large numbers of employees approach retirement age and need to be replaced.

25. During orientation, Zimmer explained to Johns, Jones and Holtz that each of them would be dispatched (assigned) to train in 1 of the 3 departments making heaviest use of extra board clerks (Yard Office, Crew Call Office and Customer Service). He told them that it typically took about six weeks for a new employee to complete training and become “qualified” in a department, but that they would have additional time if necessary. He told them that after qualifying in 1 of the 3 key departments, they would spend the rest of the probationary period training in other departments.

26. Zimmer was responsible for establishing the training schedules for Johns, Jones, and Holtz during their probationary periods. After their 2 days of orientation on August 7 and 8, 2006, Zimmer sent Johns to the Yard Office, Jones to the Crew Calling Office and Holtz to Customer Service.

27. Johns, Jones and Holtz were each training for their own respective positions. They were not in competition with each other.

28. MRL cannot direct an employee to work a particular shift if that employee elects to bid to another job for which he or she is qualified and has the seniority to hold. Thus, MRL cannot assign a trainee to train with a particular individual, but can only assign the trainee to train on a particular shift. If the individual holding that shift exercises the right to bid into another position at that time, another employee will bid into the now vacant shift and be responsible for any training during that shift. Thus, in assigning Johns, Jones and Holtz to particular shifts in particular departments, Zimmer could at most have anticipated that the employees holding those particular shifts would probably be training the three provisional hire extra board clerks.

29. Of the 3 key departments, the most difficult for trainees to qualify is the Crew Call Office and the easiest to qualify in is the Yard Office. Of the shifts in the Yard Office, the easiest shift to train and to learn the required skills for an extra board clerk is the graveyard shift.

30. The Crew Call Office is difficult to train in because it is very busy and the trainee must become well-versed in the relative seniority of MRL employees and the applicable provisions of the Collective Bargaining Agreement (CBA) between the operational employees and MRL.

31. Compared to Crew Call, the Yard Office is simpler and much slower paced. The clerks in the Yard Office must essentially know how to “verify” trains and drive and pick up crews to and from their trains. Computer tasks in the Yard Office are repetitive from shift to shift.

32. Accurate train verification is mandated by federal regulation. Improper verification can subject MRL to federal fines and create serious risks for train crews and the general public in the event of a derailment, because many trains carry hazardous materials, and accurate verification of the nature, amount, and proximity of such materials to other materials on a train is critical. Verification of trains, while of critical importance to the company and to the public, is a fairly simple task involving three steps: printing out a list of cars and their contents, watching the train as it passes, and checking off cars on the list as they pass. For a qualifying trainee, it can take as little as one day to master this skill. The Federal Railroad Administration conducts regular, unscheduled inspections to confirm that verification is being properly conducted. Because the ability accurately to verify trains is such a fundamental element of the position of extra board clerk, it is listed as an essential job function for a successful applicant for the position.

33. Weighing cars is also a simple, but critical, task required of extra board clerks in the Yard Office. A trainee clerk could reasonably master the skill within one day (provided, of course, that the trainee took and kept notes in an understandable and accessible form).

34. Customer Service is a critical department within MRL because the clerks in that department deal with the customers of MRL. There are significant demands on the clerks in Customer Service. They must be able to use the computer system effectively, expeditiously and accurately to complete a number of reports, and must efficiently troubleshoot and resolve a wide variety of customer problems. If an extra board clerk improperly fills out a report, it can result in significant financial costs to the railroad and potential loss of business.

35. The attitude of a prospective MRL employee is one of the primary considerations for hiring. Extra board clerks must constantly interact effectively with customers and co-workers. MRL sells service. An applicant’s attitude and enthusiasm for the position are emphasized during hiring. An extra board clerk in Customer Service is constantly being confronted with new situations. Years into their performance, he or she must have thorough, detailed notes (taken initially during training for each position) in order to problem solve complex issues. The ability to problem solve is fundamental to the operation of Customer Service and problem solving depends upon taking and constantly referring to detailed notes.

36. Taking good, detailed notes is generally vital to success as an extra board clerk. There can be extended times between shifts in one particular department, and thorough notes are important to refresh the clerk’s recollection on how properly to complete critical job tasks. Extra board clerks must take a significant number of notes and continue to add and refer to those notes many years into employment. The critical importance of a trainee’s notes is

emphasized throughout training. Without such detailed notes, an extra board clerk who makes it through probation still cannot fulfill the responsibilities of the various clerk positions.

37. A prerequisite for permanent employment as an MRL extra board clerk is the demonstrated ability effectively to multi-task—to work on and to complete numerous tasks at once. An extra board clerk distracted while receiving and transmitting a call while in Customer Service, for example, could result in the deaths of employees working on the track, for an extreme example.

38. It is common for trainees to receive training from extra board and relief clerks. Johns trained with one relief clerk in the Yard Office.³ It was not until her fifteenth shift that Johns trained with anyone other than a clerk working his regularly assigned shift.

39. Johns' first trainer was Craig Bassett, on the graveyard shift in the Yard Office. Bassett was a relief clerk, working consistently staggered shifts on days, afternoons, and nights. Bassett had more than 19 years experience training probationary extra board clerk trainees and had trained between 45 to 50 employees prior to training Johns. He had never, before training Johns, trained a "brand-new" hire with no prior training.

40. Between 25 and 30 of Bassett's trainees began first by observing Bassett, then doing more hands-on work as their training progressed. Bassett's training of Johns was consistent with the training he gave to other "new"⁴ trainees. Johns initially observed Bassett perform the job for the first several days of training. During that initial phase, Bassett introduced Johns to other employees and to concepts and terms unique to the railroad industry.

41. This period of "shadowing" the trainer for the first few shifts in a new department was common in every department and with every trainer. It was considered an effective way to teach and learn a new position.

42. Bassett told Johns of the importance of taking notes while training, and constantly commented to Johns on her notes, as did other trainers. Johns thought the introductory observation period with Bassett was helpful.

43. During her first few days with Bassett, Johns told him she had finished high school in 1980. He was surprised, saying he heard she was younger.

44. Initially, Johns performed adequately in her training with Bassett. Bassett thought that the first shift of training Johns went "very, very well" and there were no problems. Johns

³ Jones, during her initial probationary assignment to train in the Crew Calling department, trained with 3 relief clerks.

⁴ "New," in this context, refers to probationary trainees as opposed to permanent employees training or retraining in the Yard Office.

had a good attitude and seemed to have the aptitude to learn the job. Her initial performance was good without exception. She took notes, and there were no problems with her notes. There were no problems with Johns' footwear. Johns asked appropriate job-related questions.

45. Bassett testified at hearing that there was a dramatic change in Johns' demeanor during her fifth training shift with him. Her hostile tone of voice and facial expressions in response to his instruction made him uncomfortable. He had never encountered such behavior from any trainee in his nearly two decades as a trainer. Bassett did not believe that what he thought was a personality problem between him and Johns was something that should disqualify Johns in the Yard Office. However, he did report an inability to train Johns beginning with the change in her demeanor and worsening until, on the final day he trained her, any actual training had effectively ceased. Bassett concluded that Johns had not demonstrated an ability to master the fundamental concepts and skills required of an extra board clerk. He reported his conclusion to Zimmer.

46. Zimmer asked Johns, after the completion of her training with Bassett, how her training was proceeding. She told him that Bassett had treated her poorly (providing no details) but that her training with her next trainer, Nate Lemieux, was much more effective and was going in a better direction. She felt that Zimmer appeared pleased that the training was going better. Johns did not report any problems with Bassett until after completing her training with him, and then only as a result of Zimmer's inquiry.

47. Lemieux, was a permanent, qualified clerk in the Yard Office, again on the graveyard shift. Johns felt her training with Lemieux went well. Because she had already trained in the Yard Office for 2 weeks with Bassett, Lemieux had Johns work on all tasks, and had no criticism regarding Johns' performance. Lemieux has trained probationary employees both older and younger than Johns, providing them all with the same training. Lemieux felt he got along well with Johns. Johns was able to do what he asked of her, there were no problems with her performance and she was progressing well. Johns' attitude was not a problem, nor was her note-taking. Lemieux believed that Johns was on track to qualify in the Yard Office.

48. After training Johns for 6 shifts, Lemieux marked up to another shift, in accord with the terms of the CBA. Zimmer had assigned Johns to train on Lemieux's shift for 5 additional shifts, but had no control over Lemieux's decision to exercise his seniority and mark up to another job.

49. Following Lemieux's exercise of his seniority under the CBA, Johns next trained with Angie Binns for 2 shifts. Binns was a qualified GREB clerk. Zimmer had no control over her right to fill that position.

50. Johns had been training in the Yard Office for nearly a month when she began training with Binns. Binns expected Johns to be able to perform much of the work herself and allowed Johns to take a lead role in the work to be done.

51. Binns recognized immediately that Johns was not as far along as she should have been. Binns provided Johns with a copy of her notes, and began to assist her in learning the fundamental tasks required of a Yard Office clerk. Johns was resistant to instruction, and informed Binns that she already knew the information she was being taught. However, Binns had to walk Johns through every single step of tasks she had been observing and performing for weeks, and which she said she already knew.

52. As Binns continued to train Johns, Johns became “snippy,” “irritated” and “frustrated.” Binns became uncomfortable training her. Binns attempted different methods of training, but Johns became more irritated as the training continued. Binns wanted Johns to succeed in her training (so that Binns would have additional opportunities for vacation), but was unable to assist Johns who appeared unwilling or unable to understand, retain, and apply the information she was being taught. Binns made no comments which could be considered discriminatory and has never heard of such conduct at MRL.

53. Despite having trained in the Yard Office for a month, Johns was unable to demonstrate the ability to verify a train to Binns. Binns had printed out a list of cars, and had driven Johns to the location for verification, but Johns yelled at Binns that she wasn’t able to complete the task with the train list. Verification from the train list is a matter of checking off car numbers as they roll past. A trainee unable to verify a train is not ready to do the job. Binns, surprised that Johns was unable to complete such a basic and critical task, ended up verifying the train herself.

54. Johns was very snippy and reiterated forcefully to Binns that she could not complete the required tasks as she’d been instructed. At some point during the second evening of their training, Johns became so irritable and resistant to training that Binns asked a supervisor if Johns could be sent home early. Binns never spoke to Zimmer about Johns’ performance.

55. Johns next trained with Char Boldt for two nights. Boldt is qualified to train probationary extra board clerks in eight of the ten clerical positions. Other probationary trainees described Boldt as an effective, active trainer. A GREB clerk who worked various shifts in various departments, Boldt’s position and experience were very similar to the extra board clerk position for which the probationary employees were training. The training received from GREB or extra board clerks was, in some ways, superior to that of employees with permanent shifts because those trainers had a perspective similar to that of the trainees.

56. The first thing Boldt noticed when Johns reported for work on the first night of training was that Johns was wearing improper footwear. MRL has strict safety rules for the Yard Office requiring employees to wear shoes which go up over an employee’s ankles and Johns was wearing a low, slide-on shoe without a back. Boldt brought it to the attention of Zimmer and another supervisor, because she was unsure what Johns had been told about the footwear requirement.

57. Boldt asked Johns where she was in her training, how she felt about her mastery of the job, and the status of her notes. Johns responded that she knew and could do the job, and that her notes were fine. Because of that assertion, Boldt allowed Johns to begin working, and observed her, telling Johns that she would answer any questions Johns had or intervene if she saw Johns making an error.

58. During their first night of training the nightly gas train came in, and Boldt asked Johns if she knew how to verify it. Johns replied that she did, but did not know how to print a list of the cars on the train. This surprised Boldt, because the gas train comes in every evening, and Johns had already worked 16 shifts in the Yard Office. Under Boldt's direction Johns printed the train list. When they left the Yard Office, Johns did not know which direction to drive to verify the train, although the location for verification of that train never changes.

59. Johns was unable to demonstrate the ability to verify the train. Boldt eventually verified the train that night and attempted to explain the process as she completed it, offering Johns copies of her notes associated with that process. Johns refused. Johns was then unable to demonstrate fundamental data entry for departing and arriving trains. Trains arrive and depart throughout every Yard Office shift.

60. On the second night of training with Boldt, Johns reported for work about 20 minutes late, with her shoes untied, and told Boldt it was Boldt's fault she was late because she had to have proper footwear. Johns was visibly unhappy with Boldt.

61. After that interaction, Johns again could not show Boldt where to go to verify the gas train, despite being reminded of the location and the process the previous evening.

62. Johns was also unable to demonstrate to Boldt an understanding of the fundamental task of weighing cars, Johns told Boldt she knew how to get an accurate weight of cars. Boldt then attempted to explain the proper, accurate method of calculating the weight, but Johns resisted instruction. Boldt described Johns' attitude or receptiveness toward training as very poor. She informed Zimmer that she had encountered personality issues with Johns.

63. Johns trained for over a month in the Yard Office, and then was moved to train at MRL's Reception, or front desk. She worked at the front desk for 4 days, training with Susan Emrick for 3 of those days and with extra board clerk Kyle Harsh for the fourth shift. The requirements at the front desk were easier than those in the Yard Office. Prior to beginning her training at the Front Desk, Johns had extensive experience with the duties required of that position. The tasks required were relatively simple, and were not unique to the railroad industry. Emrick recommended that Johns qualify at Reception.

64. On September 11, 2006, Johns was transferred to the Mail Room, where she was trained by Lori Foust for five shifts. The Mail Room involved relatively simple tasks such as running mail through the postage machine, distributing mail, making copies of deposits, and

inventorying supplies. Foust reported to Zimmer, after the end of Johns' scheduled mail room training, that, while Johns probably *could* do the work, she would *not* do it, having refused to perform requested tasks and generally resisted training in the tasks and in appropriate note taking.

65. Foust never observed anything in Zimmer's words or conduct which indicated he would consider or would discriminate based on an applicant's age. Foust herself was then 45 years old.

66. Following her training in the mail room, Johns began training with Tom Hower in Customer Service on September 20, 2006. Hower had worked for MRL for 15½ years, was considered by some to be the best trainer at MRL, and took pride in his training of others. He had trained between 40 and 50 trainees while at MRL, and developed a training system to facilitate extra board clerks' note taking in the Customer Service department. Johns thought that Hower took his job seriously, was very knowledgeable, and was willing to convey that knowledge to his trainees. She thought that he was a fine trainer.

67. Other female trainees had also found Hower to be an effective trainer. He was never irritable or overly critical, never shouted, was approachable with questions, and never said anything disrespectful or discriminatory toward women.

68. On September 23, 2006, Hower was away from work. Rather than having Johns train with the extra board clerk who filled in that day, Zimmer had her train with Dave Chelonian, who had been the clerks' union representative for many years. Chelonian was extremely knowledgeable about his position, and took his Union responsibilities very seriously. There is no record of Johns ever mentioning to Chelonian, her Union Representative, any unfair or discriminatory treatment by MRL. Chelonian never observed such conduct directed toward Johns.

69. Johns trained with Hower for 9 shifts in Customer Service. Hower had just started a system of using flash drives instead of bulky manuals. When Johns began training with him, she was excited and willing to learn. Hower believed that he was getting along well with Johns on a personal level. Hower told Johns on numerous occasions to take notes, refer to her notes, and problem solve by using them.

70. Hower prepared two written evaluations of Johns' performance, one for her first week and one for her second. For each task, Hower gave Johns a rating from zero to five, with five being the best. With a new trainee, Hower would expect to see mostly 0's and 1's on the first week's evaluation. On her first week Johns received 12 0's, 30 1's, 5 2's and a 3. In his comments, Hower wrote that the flash drive "seems to work great," and that Johns "has a great attitude towards learning her job." For the second week, Hower would expect to see 2's and 3's with some 0's and 1's. On her second week, Johns received 11 0's, 31 1's, 13 2's and a 3. All of the 0's on both of Johns' evaluations involved tasks upon which Hower did not train her.

71. Hower gave Johns constant verbal feedback, and also gave her written feedback at the end of each week. Hower gave all trainees their own report to fill out, and asked that they put any critique of their trainers in them to improve training quality. Johns made no such indications. Johns never reported to anyone any conduct she considered inappropriate or discriminatory by Hower.

72. Hower trained Johns, Jones and Holtz during their probationary periods. He testified that he had found problems with all three trainees' performances. The numerical scores he gave Jones and Holtz for their first 2 weeks of their respective trainings were not significantly different from the scores Hower gave Johns.

73. Hower testified that he told Johns on numerous occasions to take notes, refer to her notes, and problem solve by using them. He emphasized her need to rely on those notes in the future and that, if she were to become qualified, she would rely upon them when she was on her own. He also mentioned to her that her probationary period was only so long, and that was the only time she had to qualify.

74. Hower testified that in Customer Service, there is approximately a 98% success rate in getting people qualified in that department—that it was very rare for someone to train in Customer Service and not get qualified. Hower was interested in seeing Johns qualify because he was proud of his training and because the extra board clerks served as his relief, allowing him to take time off and to attend personal events.

75. Hower told his supervisors, Zimmer and Dennis Meyer (Manager of Car Distribution), that Johns wasn't performing adequately and needed additional training. As a result of Hower's expressed concerns, Meyer approached Johns and discussed those concerns and Johns' relatively short window in which to demonstrate her ability to learn the position. He intended to encourage Johns to pay attention, and take good notes in an effort to stimulate her training. Johns told Meyer she would try harder and appeared to understand the importance of taking an active role in her training. Meyer had never seen Zimmer, Hower, Teresa Finnell (who would next train Johns), or any other MRL employee give inferior training to a trainee based on his or her age. Meyer has never had an employee complain about training they received or were assigned by Zimmer.

76. After her conversation with Meyer, Hower found that Johns refused to train. She would not respond to questions and would stare blankly at the computer screen. Hower had never witnessed a trainee "shut down like that before," but as a result, he was unable to train her. He attempted various ways to reach Johns, but could not get her to respond. Hower felt Johns was actually regressing.

77. Hower felt a new trainer would serve as a fresh start for Johns. On his day off, Hower contacted Zimmer at home. He told Zimmer that he was still willing to train Johns, but that if she continued to perform at current levels he wouldn't be able to recommend that she

qualify. Hower recommended to Zimmer that Johns be moved to an additional trainer because she wasn't progressing. He felt an additional trainer might overcome the obstacles she apparently faced, whatever they might be. Hower did not recommend to Zimmer that Johns not be qualified in Customer Service.

78. Hower told Johns of his concerns, and that he'd spoken to Zimmer about moving her to another trainer. Johns became very angry. Hower tried to explain that this was a new beginning for her.

79. Hower never considered Johns' age, and has trained many clerks older than Johns who are still with MRL.

80. After Hower recommended that Johns receive additional training, Zimmer assigned her to train on Teresa Finnell's shift in Customer Service, beginning October 2, 2006. Finnell had been employed at MRL for over 18 years, spending 16 ½ years in Customer Service. Johns trained with Finnell for eight day shifts. The training included completing a number of reports, answering phones, and troubleshooting problems for customers and MRL employees.

81. Finnell is a patient, effective trainer, receptive to questions of trainees, who emphasizes the importance of thorough notes to all trainees. Finnell, as a matter of customary practice, offers to assist her trainees with their notes, even offering to make copies of her own notes to assist them. Finnell is very knowledgeable. Johns felt that Finnell effectively instructed her on completion of necessary reports.

82. Finnell testified that she repeatedly had to instruct Johns to refer to her notes in order to complete tasks upon which Johns had been previously instructed. Despite already having worked with Hower for two weeks, Johns was unable to complete very fundamental reports, and refused to refer to her notes to problem solve. While training with Finnell, Johns did not demonstrate enthusiasm or even willingness to learn the position. In contrast, other trainees took notes home to study in order to facilitate their training.

83. After the third day training Johns, Finnell approached Zimmer with her concerns about Johns' inability or unwillingness to learn essential skills. Finnell had expressed concerns about trainees to Zimmer in the past, but she reported that Johns was unable or unwilling to complete very simple tasks at a relatively early stage in training. Johns' inability to grasp the fundamentals concerned Finnell because this rendered Johns unable to multitask, a critical skill in Customer Service. Finnell also expressed to Zimmer her concern at Johns' unwillingness to do anything more than the bare minimum. She suggested to Zimmer that Johns be given yet another opportunity. Zimmer did not end Johns' training at that time—she trained for 5 more days with Finnell.

84. Finnell gave Johns consistent feedback about her need to grasp the fundamentals and advance to new reports and concepts, but Johns continued to refuse to try and complete tasks on her own.

85. Ultimately, Finnell told Zimmer that Johns had not demonstrated the ability or willingness to perform in Customer Service. She told Zimmer that she had attempted to train Johns in a variety of ways, hoping she would catch on, but that Johns could not and would not do the work. Finnell never considered Johns' age.

86. The only department (Reception) in which Johns' trainers recommended her qualification (Reception) had one position, filled by a permanent employee.

87. On October 12, 2006, Johns was told that MRL had declined her application. Zimmer was responsible for deciding to decline Johns' application. On the day of her termination, Johns arrived bringing salmon and crackers for Finnell's birthday party. Meyer took her aside and told her that Zimmer had decided to decline her application. He did not give her a reason for the decision. Johns did not immediately complain to Meyer about her treatment at MRL. During her subsequent discussion with Meyer of her final paycheck, Johns told him she intended to write a letter to MRL management about the treatment she'd received. She did not send the letter.

88. Following orientation, Jones trained in the Crew Calling Office for approximately 40 consecutive shifts from August 9, 2006 through October 5, 2006, until she qualified in the Crew Calling Office. She worked only eight shifts with extra board clerks and seven shifts with relief clerks. During her probationary period, Jones found all of her trainers helpful and patient.

89. Following orientation, Holtz trained in Customer Service for approximately 30 consecutive shifts from August 9 through September 24, 2006, until he qualified. During this period, he was not trained by extra board clerks. From September 25, 2006 through October 15, 2006, Holtz worked various shifts in other departments. None of his trainers during this time were extra board clerks or relief clerks. During the probationary period, Holtz received effective training and was treated well by his trainers.

90. Both Jones and Holtz successfully completed their probationary periods, and ultimately received no negative reviews from any trainer. Each qualified in one of the three primary departments during their probationary period.

91. MRL does not require written evaluations of probationary employees and aside from Hower, no trainer provided written evaluations of Johns' Jones' and Holtz' probationary performances. MRL employees are not given any instruction on how to train other employees. MRL employees are considered qualified to train other employees as soon as they are considered qualified to do a certain position. Aside from a general anti-discrimination policy, MRL has no safeguards or procedures to prevent or to require reporting of discrimination during the

probationary and training processes. MRL has no formal process for evaluating the effectiveness of its trainers.

92. From January 1, 2003, to February 4, 2008, MRL hired 18 extra board clerks, 6 of whom were 40 years of age or older at the time of hire. Of the 6, 4 either had their applications declined or resigned within 7 months of hire. Of the 12 extra board clerk hires under 40, 1 had her application declined. MRL does not maintain the applications of unsuccessful applicants for extra board clerk positions, so there is no record of what percentage of applicants were over the age of 40.⁵

93. Johns testified at hearing that Bassett was frustrated that she was asking questions about the computer system and began refusing to answer her questions, and that he, not she, had become aggressive and hostile. She asserted that Bassett subjected her to frequent discriminatory comments about her age. She also testified that he told her that he did not think she could take adequate notes because it had been so long since she had been in high school, and made age-related critical comments about other employees. Johns testified that Bassett's barrage of hostile age related comments made her feel uncomfortable and frustrated, and impaired her ability to learn the job.

94. In his 19 years with MRL, Bassett has never been disciplined for abusive or discriminatory conduct. His supervisors, co-workers, and trainees describe him as professional, pleasant, and as an effective trainer. All witnesses with experience training with Bassett (except Johns), of various ages, sex, and experience levels, testified that Bassett was an effective trainer who was appreciative of trainees asking questions. Some noted that his experience working all three shifts was beneficial to his trainees. None of the trainees who trained with Bassett, again except for Johns, regardless of their age, sex, or experience, reported hearing Bassett saying anything sexist or in any way discriminatory about anyone.

95. Johns received negative reviews from Bassett, Binns, Boldt, Foust, Hower, and Finnell in the Yard Office, the Mail Room, and Customer Service. Not all of Johns' trainers gave her negative reviews, but none of her trainers in the 2 key departments in which she trained considered her ready to qualify.

96. Despite MRL's ability to terminate a probationary employee at any time, Zimmer gave Johns repeated opportunities to demonstrate that she had the capacity and desire to learn skills critical to an extra board clerk. Finally, after receiving negative reviews from six of his trainers, Zimmer decided to decline Johns' application for employment.

⁵ Despite this statistical evidence, the substantial and credible evidence of record does not establish that it is more likely than not that MRL has a policy or practice of preferring younger applicants and/or treating older applicants unfavorably or unfairly.

97. Zimmer, the person responsible for establishing Johns' training schedule and deciding to decline her application, did not testify. MRL's Vice President of Operations Mike Lemm testified that Zimmer had undergone heart surgery that had not gone well. Lemm testified that Zimmer is in pain and has difficulty remembering things. The record does not reflect whether either party attempted to obtain Zimmer's testimony, by bringing him to hearing or by perpetuating his testimony through a deposition.

98. Schneider, MRL's Human Resources Director, is nearly 60 years old, a woman, and Native American. She is, personally and professionally, sensitive to discrimination at MRL. She has never heard any complaint of discrimination on the basis of age at MRL. MRL has an internal policy forbidding discrimination in hiring based on age. Any employee can report unfair or discriminatory treatment at any time to any MRL supervisor. If anyone had reported a suspicion that Zimmer was discriminating against employees, Schneider would have investigated. After Johns' application had been declined, Schneider interviewed Johns about her experience. Johns expressed no concern that she been treated unfairly or discriminated against during her probationary period with MRL.

99. Taking the evidence in its entirety, Johns' accounts of the hostility she encountered and of the level of performance she nonetheless achieved were not credible.

IV. DISCUSSION⁶

A. Johns Was Not as Credible as MRL's Witnesses

Johns' entire case rests primarily upon her credibility with regard to two vital points: her testimony about both (1) the overt age-related hostility that she experienced from many of her trainers and some other MRL employees and (2) her satisfactory and trainer-approved performance of the training tasks assigned to her. A witness is presumed to tell the truth. Mont. Code Ann. § 26-1-302. The direct testimony of a single witness, including a party, is sufficient if the fact finder believes the witness' testimony regarding the fact at issue. Mont. Code Ann. § 26-1-301; *O'Langan v. First State Bank of Hilger* (1921), 59 Mont. 190, 196 Pac. 149. On the other hand, Johns' testimony can be rebutted by other evidence contradicting it. Mont. Code Ann. § 26-1-302(9).

In this case, Johns' testimony was contradicted on both points by testimony from a parade of witnesses called by MRL. The majority of MRL's witnesses were union employees rather than MRL's management. Despite prodigious efforts by her counsel, Johns did not prove that MRL's concern with its aging work force resulted in the effective creation of a culture of youth so coercive that union employees would side with management and enforce its alleged

⁶ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Hoffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

hostility toward older “new hires,” either in their conduct toward Johns or in their subsequent testimony under oath.

Evidence is not necessarily entitled to more weight because more witnesses agree upon it. Simply put, the Hearing Officer found MRL’s union and management employees credible in their testimony, because of their demeanor as well as the substance of their testimony. These witnesses were more credible than Johns regarding alleged age-based hostility toward Johns and regarding the performance and behavioral deficiencies which ultimately led MRL to decline her application.

MRL presented (over Johns’ strenuous objections) evidence regarding “extraneous” matters that it argued established Johns’ lack of credibility. Properly admissible regarding Johns’ credibility, *Cooper v. Rosston* (1988), 232 Mont. 186, 756 P.2d 1125, 1128, the evidence ultimately was not terribly helpful. Perhaps the closest thing to useful information contained in this “credibility” evidence regarding Johns’ statements in a variety of outside contexts was evidence that Johns had claimed a degree that she (as far as the evidence established) did not actually possess, either because she had not completed all of the degree requirements or (more likely) had not completely paid her bill to the school. Even though that was “the closest thing to useful evidence” in MRL’s “extraneous matters” evidence, it, like the rest of such evidence, was ultimately useless to the Hearing Officer in determining Johns’ credibility, for which reason there are no findings about her disputed degree or any of the other alleged misrepresentations in applications and in outside disputes.

Johns asserted that the failure of MRL to present the testimony of Zimmer should be construed in favor of her claims that Zimmer engineered her failure as a probationary extra board clerk. Zimmer’s absence was satisfactorily explained by MRL, and despite counsel’s able arguments on behalf of Johns, there was insufficient evidence to call that explanation into question or to require MRL to present medical records verifying the reasons for Zimmer’s absence.

Johns testified that several of her trainers told her either that no probationary employee over 40 had successfully completed probation under Zimmer’s supervision or that Zimmer had not allowed anyone over 40 to pass probation. Johns testimony in this respect was not credible. Lemieux admitted that he “may have” talked with Johns about older MRL employees, that it was possible that he told Johns that no one her age had made it past probation in over five years and that no one her age knew anything about music, movies, or computers. Lemieux was not one of the trainers who gave Johns a negative review. His possible stray remarks simply were insufficient to corroborate Johns’ testimony that she was repeatedly belittled and attacked for her age, to the point that the environment was hostile to her and to her attempts to train for her job. Had Johns’ trainers actually told her that Zimmer was preventing older applicants and provisional hires from succeeding, such a comment would be a conclusory opinion amounting to little, if anything, more than sheer speculation, but she failed to persuade the Hearing Officer that such statements were made.

Johns also testified that Foust told her, on her first day in the Mail Room, that she did not think that Johns should be training in the mail room because the Mail Room had been temporarily relocated due to remodeling and she would not be able to learn where everything was located. Johns testified that Foust went on to say that she had expressed these concerns to Zimmer, but he had told her to train Johns anyway and that “it wouldn’t matter.” Johns also testified that she had performed adequately in the mail room and was informed by Foust and Zimmer that she had qualified. Johns denied that she ever refused to perform any task requested of her by Foust. Johns was not as credible as Foust.

Johns also testified that when she was assigned to the Front Desk without qualifying in the Yard Office she asked Zimmer why she had been transferred and he responded that she had not had effective training in the Yard Office because certain clerks, Suzanne Bonner and Char Morton, had not been available to train her. She further testified that Zimmer told her that she would work at the front desk and the mail room until Bonner returned, and then he would move her back to the Yard Office. Bonner was on vacation until September 22, 2006, and thereafter Johns continued the training set forth in these findings, without a return to the Yard Office. Zimmer assigned Holtz to the Yard Office on October 2, 2006, where he started training with Bonner. The Hearing Officer did not credit Johns’ account of what Zimmer had said to her.

Johns further testified that after she told Hower (while training with him in Customer Service) when she had attended high school, he told her that Zimmer did not qualify older employees. According to Johns, Hower explained to her that Pam Schneider would hire older employees, but then Zimmer would ensure that they did not make it through probation. She reported that Hower said to her that he thought that “all single women your age liked to party all night—that’s what they do in the crew office. They’re all your age, and they party all night and call in sick every day.” Johns also testified during her second week with Hower, two days before he told her that her training was not going well and she would be reassigned, Hower had told her that she was doing well and that he thought he could qualify her in another week. The Hearing Officer did not credit this testimony about what Hower allegedly said to Johns.

Testifying at hearing in detail about Johns’ performance problems, Hower indicated that during Johns’ first week of training she was yawning a lot and did not appear to be absorbing the information he was teaching. Hower expects a trainee to take, at most, two or three days to master such tasks and that a trainee should be able to refer to his or her notes to complete them. He testified that at the end of a full week of training in Customer Service, Johns was unable to complete the simplest of tasks such as basic computer command entry despite her training in the Yard Office and presumed familiarity with basic terms and concepts. He said she would return after a shift and would retain nothing from the previous day’s training. His testimony was thus more negative than his written report of her conduct during both her weeks of training with him. However, it was too much of a stretch to go from this inconsistency, which seemed more a matter of emphasis resulting from skillful questions from counsel, to a finding that Hower made the hostile comments Johns testified that he did. The importance Hower gave to his training

duties and the pains he took to perform those duties make it very unlikely indeed that he would engage in the unprofessional conduct of which Johns accused him.

The desks of Hower, Zimmer, Chelonian, Teresa Finnell, Julie Cowan, Meyer, and Pam Schneider were all in close proximity to each other. They were divided by short cubicles whose walls did not extend to the ceiling. All these MRL employees could hear the conversations of all other employees within the Customer Service area, even those enclosed offices with doors. No witness ever heard Finnell or Hower yell, condescend, or belittle any other employee or trainee, including Johns. Likewise, none of the persons in proximity to where Johns was training in Customer Service (including the union representative, Chelonian) corroborated Johns' testimony that Finnell and Cowan were extremely hostile and abusive to Johns every day all day.

Cowan did make sarcastic comments about Johns' inability to master the required skills of an extra board clerk and Finnell did not effectively intervene on Johns' behalf. That was inappropriate. However, this impropriety, apparently borne out of frustration with the progress of Johns' training, did not suffice to corroborate Johns' testimony about the frequency and severity of the treatment she perceived from many of her trainers.

B. Johns Failed to Carry Her Evidentiary Burden

Johns asserted that she presented direct evidence of discrimination. Direct evidence is proof which "speaks directly to the issue, requiring no support by other evidence," and proves a fact without resort to inference or presumption. *See*, BLACK'S LAW DICTIONARY, p. 413 (5th Ed. 1979). For example, direct evidence is "evidence of statements made by a decision-maker and related to the decisional process being challenged which reflected an unlawful discriminatory attitude." *Laudert v. Richland County Sheriff's Office*, ¶ 29, 218 MT 2000, 301 Mont. 114, 7 P.3d 386.

Johns' presented much more attenuated evidence. She testified that some of her MRL trainers said to her that Zimmer, MRL's decision-maker, had prevented anyone over 40 from successfully completing probation. The people making these purported statements were union employees rather than MRL management. One of these union employees, Lemieux (who was not critical of Johns' performance as a trainee), acknowledged that he might have told Johns that no one her age had made it past probation in more than five years. Most of the union employees who allegedly made such remarks or remarks displaying an age bias against Johns, credibly denied making any such remarks. Coupling one or even several such stray remarks⁷ with the only statistics of record, which indicate that a larger portion of older as opposed to

⁷ "Age related comments by non-decision makers are not material in showing that an employer's actions are based on age discrimination. *Snoey v. Advanced Forming Technology, Inc.* (D. Colo. 1994), 844 F. Supp. 1394." *Mysse v. Martens* (1996), 279 Mont. 253, 926 P.2d 765, 772.

younger probationary employees either did not successfully complete probation or resigned soon thereafter, did not establish a direct evidence case.

The provisions of the Montana Human Rights Act that prohibit discrimination mirror the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. Where there is no direct evidence of discrimination, Montana has adopted the three-tier standard of proof articulated in *McDonnell Douglas*.⁸ *See, e.g., Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628; *Crockett v. City of Billings* (188), 234 Mont. 87; 761 P.2d 813.

Under *McDonald Douglas* test, Johns had the burden of proving four elements:

(I) that [s]he belongs to a [protected class] . . . ; (ii) that [s]he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [s]he was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. *at* 802.

The Court noted in *McDonnell Douglas* that this standard of proof is flexible. Thus, in this particular case Johns needed to prove that her performance as a trainee was substantially similar to that of the younger probationary hires, Jones and Holtz, but for the discriminatory animus that interfered with her training and performance. *Cf., Martinez v. Yellowstone County Welfare Department* (1981), 192 Mont. 42, 626 P.2d 242, 246, *citing Crawford v. Western Electric Co., Inc.* (5th Cir. 1980), 614 F.2d 1300 (fitting the four elements of the first tier of *McDonnell Douglas* to the allegations and proof of the particular case).

If Johns had established her *prima facie* case under *McDonnell Douglas*, she would have been entitled to an inference of discrimination. The burden would then have shifted to MRL to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. *at* 802. MRL actually met this burden to show, through competent evidence, a legitimate nondiscriminatory reason for declining her application. *Crockett*, 761 P.2d *at* 817. This burden only arises in the second tier of *McDonnell Douglas*, after the charging party establishes a *prima facie* case, for two reasons:

[It] meet[s] the plaintiff's *prima facie* case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

⁸ *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792.

Texas Dept. of Comm. Affairs v. Burdine (1981), 450 U.S. 248, 255-56. Once MRL produced its legitimate reasons for its adverse employment action, Johns then would have had the burden to prove that MRL's legitimate reasons were pretextual. *McDonnell Douglas at 802; Martinez*, 626 P.2d at 246. To meet this third tier burden, Johns could present either direct or indirect proof of the pretext in the company's proffered reasons, *Burdine at 256*:

She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Johns always bore the burden of persuasion that MRL did illegally discriminate against her. *Crockett*, 761 P.2d at 818; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 213. She did not meet that burden, failing to establish her *prima facie* case. She did not prove that her performance as a trainee was substantially similar to that of the younger probationary hires, Jones and Holtz, but for the discriminatory animus that interfered with her training and performance. She failed even to prove the alleged discriminatory animus.

Had Johns' evidence been sufficient, on full consideration, to establish her *prima facie* case, as the Hearing Officer now concludes it was not, she nonetheless failed to establish that MRL's substantial and credible evidence of her performance and behavioral deficiencies was pretextual. Therefore, she cannot prevail on her complaint of discrimination.⁹

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case, pursuant to Mont. Code Ann. § 49-2-512(1) (2007).

2. Montana Rail Link did not discriminate in employment against Sandy Johns because of her age. Mont. Code Ann. § 49-2-303(1)(a).

VI. ORDER

1. Judgment issues in favor of Montana Rail Link and against Sandy Johns on her charges that MRL subjected her to illegal discrimination in employment because of age.

2. The complaint of Sandy Johns against Montana Rail Link is dismissed.

Dated: December 18, 2008

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Montana Department of Labor and Industry

⁹ Because Johns failed to carry her burden of proof, her motion to strike MRL's arguments relative to her legal theories is moot and is therefore denied.

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