

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

PACIFIC ELECTRIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Carrier violates agreement rules when it fails and refuses to assign Stanley Gronek to the position of Assistant Elevator Starter, Job No. 31, as advertised in Bulletin No. 315 dated June 12, 1950.

(b) Mr. Gronek shall now be assigned to the position of Assistant Elevator Starter, Job No. 31.

(c) Mr. Gronek shall now be compensated for the differential between the rate of pay of Job No. 40, Elevator Operator, rate \$10.60 per day, and that of Job No. 31, Assistant Elevator Starter, rate \$10.83 per day, plus 50 minutes per day at rate of time and one-half for time worked outside of the regular assigned hours of Job No. 31, effective June 20, 1950 and for each work day thereafter that he has not been permitted to work that position.

EMPLOYEES' STATEMENT OF FACTS: On June 12, 1950, Bulletin No. 315 (Employees' Exhibit "A") was issued by the Manager of the Pacific Electric Building, Los Angeles, California, to advertise for seniority choice a vacancy in the position of Assistant Elevator Starter. Among the applicants for this position were:

1. Stanley Gronek, Seniority date November 9, 1928, Roster 16.
2. Hamilton Woodman, Seniority date May 6, 1946, Roster 16.

By Bulletin No. 315-A dated June 19, 1950 (Employees' Exhibit "B") this position was assigned to Hamilton Woodman effective June 20, 1950.

It will be noted from Bulletin No. 315 that the position of Assistant Elevator Starter, Job No. 31, has hours of assignment 9:00 A.M. to 6:00 P.M. (one hour lunch). The position of Elevator Operator, Job No. 40, to which Mr. Gronek is regularly assigned, has the assigned hours of 8:10 A.M. to 5:10 A.M., lunch period 12:30 P.M. to 1:30 P.M.

The assigned duties of Elevator Operator Job No. 40 are as follows:

claim. The Carrier submits that the request for 50 minutes at overtime rate is based upon an untenable theory.

Insofar as all calendar time involved in the present case is concerned, the incumbent has been assigned to Job No. 40, Elevator Operator, with hours from 8:10 A. M. to 5:10 P. M., with lunch period from 12:30 P. M. to 1:30 P. M.—a total of eight (8) hours.

Rule 9 of the collective agreement provides that:

"Except as otherwise provided in these rules, eight (8) consecutive hours or less exclusive of the meal period shall constitute a day's work for which eight (8) hours' pay will be allowed."

Rule 18 of the collective agreement provides:

"Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of the meal period, on any day will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

The Carrier is entirely at a loss to determine the basis upon which the Employees request 50 minutes at overtime rate. In analyzing the Employees' Statement of Claim, it appears evident that the claim involves simply a theory based upon the formula that had the Claimant been awarded position No. 31, Assistant Elevator Starter, he would have worked assigned hours 9:00 A. M. to 6:00 P. M., with one hour for lunch; but, in view of the fact that he was not awarded the position, he was required to work assigned hours from 8:10 A. M. to 5:10 P. M., with one hour for lunch. Apparently the 50 minutes involved must be upon some intangible thesis that the Claimant was withheld from his regular position.

In any event, the simple facts are that during the entire time involved in the present dispute the Claimant has worked Job No. 40, which job he bid in through seniority choice. He is the regular employee assigned thereto. Insofar as this case is concerned, he has not worked any time in excess of eight (8) hours in any one day and cannot thus qualify for 50 minutes or any other amount of time at overtime rate under the provisions of Rule 18 quoted above.

The collective agreement is entirely void of any rule to substantiate the request of the Employees for the overtime payment of 50 minutes each day in the manner requested.

SUMMARY OF POSITION: The position of the Carrier in the instant case is that its actions were in accord with the provisions of the effective agreement and as similar provisions have been interpreted by the many awards of the National Railroad Adjustment Board, and that the claim should be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: The Pacific Electric Building is probably the second largest private office building in the City of Los Angeles, California, with a tenancy representing the usual cross section found in any large office building of such character. Seven passenger elevators and one combination passenger and freight elevator require thirteen elevator operators in addition to an Elevator Starter and an Assistant Elevator Starter, the position here in question, for operation purposes and handle approximately 14,000 passengers daily.

On June 12, 1950, Claimant, Stanley Gronek, of the approximate age of 61, with a seniority date of November 9, 1928, and no established record of unsatisfactory conduct, had approximately 22 years of service with the Carrier as Elevator Operator. June 19, 1950, there was a vacancy in the position

of Assistant Elevator Starter at the office building and the Carrier bulletined the position. Gronek and Hamilton Woodman, who was about 50 years old and is conceded to be a junior employe with seniority dating from May 6, 1946, made application for the position which was ultimately accorded to the latter. It should perhaps be stated, although for reasons to be presently mentioned we regard it of little importance, that the record discloses Woodman had had approximately 14 continuous years of satisfactory employment in another large office building in Los Angeles as an elevator starter before entering the Carrier's service and was undoubtedly the best qualified of the two applicants.

The instant claim is based primarily upon the proposition that the Carrier's action in assigning Woodman, an employe junior in service to Gronek, resulted in a violation of Rule 26 of the current Agreement which, for all purposes pertinent to this dispute, reads:

"Promotions, assignments and displacements under these rules shall be based on seniority, fitness and ability, fitness and ability being sufficient, seniority shall prevail . . .".

Promptly upon Woodman's being assigned to the position the Organization wrote the Carrier calling attention to Gronek's seniority status, advising it considered Woodman's assignment to the position to be in violation of the rule above quoted and requesting that Gronek be assigned thereto. The Carrier replied, through the Manager of the office building, to the effect that, although it fully recognized the rule, in its opinion Gronek was not qualified under fitness and ability to perform the duties of an Assistant Elevator Starter. Other correspondence ensued between the parties, all to the same effect. Failing to thus determine the controversy the Organization presented the instant claim which is quoted at length in the record and need not be repeated. On July 20, 1950, this claim was denied by the Carrier's Office Manager by a letter wherein, among other things not particularly important and hence not quoted, he said:

"In the case of Mr. Gronek, it is our contention that party cannot qualify for the duties of an Assistant Elevator Starter due to his inability to qualify under the fitness and ability provision.

Reports to reach this office regarding the performance of Mr. Gronek as an elevator operator, do not come up to the level of operating standards, established by other operators performing the same job under the same circumstances.

We have received several complaints from tenants, other elevator operators, Head Starter and Asst. Head Starter, regarding Mr. Gronek's operation on the elevators which we summarize:

1. Party resents very much in taking and following out orders.
2. Is quite moody and at frequent times, un-cooperative with other operators.
3. Has been warned repeatedly about passing up passengers, still repeats.
4. Airs private Company business to passengers on elevators.
5. Physical condition to perform required duty is very questionable.
6. Difficult to understand in conversation and does not have the politeness nor patience to perform the duties of an Assistant Elevator Starter, directing passengers.
7. Has been known to shut elevator down, leaving passengers on upper floors because relief failed to arrive on time.

In view of Mr. Gronek's performance record which we have attempted to outline on reports reaching this office, it is our opinion that party does not have the fitness nor ability to perform the job of Assistant Elevator Starter."

Following denial of the claim as aforesaid the Organization took an appeal to the Assistant to the President who subsequently denied it by letter which states in substance that under the conditions and circumstances set forth in the Office Manager's letter (heretofore quoted) Gronek lacked sufficient fitness and ability for the position sought and that the Carrier considered its action in respect to the matter in question was in full compliance with the requirements of Rule 26.

There can be no doubt under the confronting facts that the assigned duties of the Assistant Elevator Starter consist of operating the elevators approximately 70 per cent of the time, work that claimant had been doing, and work of the character required of an Assistant Elevator Starter the remaining 30 per cent.

Arguments advanced by the Organization would lead us to believe the responsibilities of the position are little, if any, greater than those of an elevator operator. These arguments in a sense are refuted by the fact it is a higher rated position. However, we need not labor the point. This Division of the Board in Award 4485 said: "While we recognize that the position of Assistant Starter of Elevators does not call for a great deal of supervision, it does require a standard of reliability and punctuality, plus a certain amount of intelligence, tact and affability not necessarily required of an operator." Supplementing this statement it can be said that such a position does require more supervisory work, more contact with the public and contemplates that its occupant will possess a higher degree of personality than that of the occupant of the position of operator.

Nor can it be disputed, particularly when consideration is given to the letters heretofore mentioned, that in taking the action in question the Carrier measured Gronek's qualifications and found him wanting in the personal attributes to which we have just referred.

We agree with the Organization in its position that from its inception the fundamental question involved in this case is whether, on the day he sought the position, Gronek had sufficient fitness and ability to fill it. We have so held many times in like cases and, in addition, as it points out, have recognized that fitness and ability as used in Rule 26, and others containing similar language, does not mean that the applicant is immediately qualified to step in and assume the duties of the position without guidance and assistance (Awards 2427, 3469, 4026 and 5265). However, we cannot agree with its contention that is the only issue involved now that the case has reached this tribunal for decision.

Repeated decisions of this Division of the Board have established the rule that once fitness and ability of an employe have been found by the Carrier to be lacking, the burden rests upon the claimant to overcome that decision by substantial and competent proof. See, e. g., Awards 1147, 2031, 2491, 3273, 3469, 4040 and 5147.

In the instant case we must start on the premise the Carrier made the finding which, under the rule requires the Organization to establish Gronek possessed sufficient ability and fitness to occupy the position. It supports that finding by the letter heretofore quoted and repeated assertions in its submissions on the part of those preparing them that the statements therein contained are true. The Organization vigorously insists all proof submitted by the Carrier is in the form of opinion and conclusion evidence. Assuming without deciding it is right in that contention the fact still remains the finding was made and that it must be overcome by the degree of proof required by the rule. The proof submitted by the Organization to accomplish that result is no better, if as good, as that submitted by the Carrier. It

consists of opinions and conclusions of the same type and character, supplemented by general denials on the part of those preparing the Organization's submissions that Gronek lacked the qualifications described by the Carrier and repeated assertions that he possessed them. In fact, the record in behalf of the claimant does not contain a single statement on the part of elevator employes or patrons of the building who must have had definite information regarding Gronek's qualifications and could have easily refuted the Carrier's findings with respect thereto if they had not been true.

In a situation such as has been heretofore outlined we cannot say the claimant has overcome the Carrier's decision Gronek lacked the fitness and ability necessary to permit him to exercise his seniority rights on the position of Assistant Elevator Starter by substantial and competent proof. The result is the claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That in the situation disclosed by the record the Carrier violated no rule of the Agreement and its action in refusing to assign the employe named in the claim to the position in question on the ground he lacked the necessary fitness and ability to fill it will not be disturbed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of July, 1951.