

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 37475  
Docket No. CL-37000  
05-3-01-3-632**

**The Third Division consisted of the regular members and in addition Referee Joshua M. Javits when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Transportation Communications International Union**  
**(Springfield Terminal Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Organization (GL-12778)  
that:**

**Claim No. 1 - Claim of the System Committee of the TCU (ST-00-06)  
on behalf of A. W. Ferland:**

- (1) Claim for 8 hours at time and one half rate at the TSR rate of \$18.15 per hour for Saturday August 12, 2000. Claimant should have been called for this assignment under rule 18A. 2 supra.**
- (2) Claim for 8 hours at time and one half rate at the TSR rate \$18.15 per hour for Sunday, August 13, 2000. Claimant should have been called for this assignment under rule 18A.2 supra.**

**Claim No. 2 - Claim of the system Committee of the TCU (ST-00-08)  
on behalf of A. W. Ferland.**

- (1) Claim for 8 hours at time and one half rate at the TSR rate of \$18.15 per hour for Saturday, August 26 and Sunday, August 27, 2000. Claimant should have been called for the assignments under rule 18A.2, supra.”**

**FINDINGS:**

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The present dispute relates to the manner in which the Carrier acted in covering positions within the Waterville facility whenever the incumbent employee was not available for assignment.

At the time of the dispute, Claimant A. W. Ferland worked as a Store Clerk in the Waterville Stores Department. Additionally, the Carrier employed four other Clerks, in a separate facility at the same location in the Transportation Department that work as Transportation Service Representatives (TSRs).

On August 12, 2000, when TSR Deans was absent from work, the Carrier filled the position for that day with TSR Barstow. On August 13, 2000, when TSR Barstow was not available to work, the Carrier had TSR Deans fill the position.

The Claimant maintains that the Carrier incorrectly assigned these positions, and claims that he should have been chosen by the Carrier to work on the dates in question. The Claimant contends that the Carrier improperly assigned the vacancies under Rule 18A.1 of the parties' Agreement when it should have applied the provisions of Rule 18A.2 in filling such assignments.

The relevant provisions provide:

**“Rule 18A.1**

**In the event that the service described in Rule 34 of this Agreement cannot be covered by other than regularly assigned Employees, and that service is required on a rest day of a regular assignment not part of the regular relief assignment, and the work is basically the same work and during the same relative hours, the incumbent of the five (5) day position will be offered the work first.**

**Rule 18A.2**

**In the event that the service described in Rule 34 of this Agreement cannot be covered by other than regularly assigned Employees, and the service is not part of any assignment, or the incumbent referred to in paragraph 18A.1 is unavailable, the work will be offered to the Employees within the applicable Declared Home Station territory, in seniority order.”**

**According to the Carrier, filling the vacancies for the dates in question was proper under Rule 18A.1 of the Agreement. The Carrier contends that it had the authority under Rule 18A.1 to have one TSR fill the vacancy of another while the latter was absent. The Carrier asserts that because all TSRs perform the same duties and work the same relative hours, all of them are considered to be incumbents in accordance with Rule 18A.1. Consequently, the Carrier was in full compliance with Rule 18A.1 with respect to the actions it took.**

**The Organization disputes the definition of incumbent advanced by the Carrier. Although all four TSR positions perform the same work, the Claimant contends that the definition of incumbent in Rule 18A.1 is limited to the specific bulletined position of each TSR employee. Thus, whenever a TSR vacancy arises, the Carrier may not consider another TSR employee the incumbent unless both individuals occupy the same specific bulletined position. When that is not the case, as in the present dispute, the Carrier is obligated to fill the vacancy on the basis of seniority as outlined in Rule 18A.2 of the Agreement.**

**Furthermore, the Organization contends that because he was the most senior employee at the time the vacancy existed, the Carrier was mandated under Rule**

18A.2 to offer Claimant the option of filling the vacancy. On this basis, the Claimant maintains that he is entitled to overtime payments for those dates.

Before addressing the substantive issue in this dispute, it should be noted that the Carrier contends that the Organization did not prove its case on the property in this matter. The Carrier contends that the Organization failed to explain in its claim that both the work duties and the hours of the employee must be the same in order for that individual to be considered an incumbent. Consequently, the Carrier maintains that the argument presented by the Organization is inadmissible. However, the Board rejects that argument. Examination of the record indicates that the Organization in its letter of July 9, 2001, outlined its position that Rule 18 A.1 narrowly defines the term of incumbent (listing five criteria) and because those employees who were called did not fit that definition the Claimant was entitled to have been called in accordance with Rule 18A.2. The Carrier did not see fit to refute the Organization's position when the burden of proof shifted to it. It took no exception that the same "relative" hours equates to meaning that the hours of the employee must be the same in order for an employee to be considered the incumbent of a position. The Board has repeatedly stated that failure to refute a parties position contentions leave them to be material fact (See for example Third Division Awards 14385, 15503, 16431, 20083, 21277, 22775 and 24758). It is clear to the Board that the Carrier did not refute the Organization's position. Therefore, the Board rejects the Carrier's procedural argument on this matter.

With respect to the substantive issue in this case, the dispute between the parties essentially relates to the interpretation of the term "incumbent" incorporated within Rule 18A.1 of the Agreement. The Carrier maintains that the terms should be interpreted in a broad manner in order to include each of the four employees who work as TSRs. Under this application, the actions of the Carrier would have been authorized by Rule 18A.1.

On the other hand, the Organization maintains without refutation that the definition of "incumbent" is much more restrictive. In order to be considered an incumbent, the employee must perform both the same duties and also perform the same hours of work as the absent TSR. Additionally, the employee must have the same specific bulletined position as the absent employee. Applying the Rule in this manner allows junior employees the opportunity to pick up overtime work that they would not ordinarily receive. However, to benefit from Rule 18A.1, the employee's position must exactly mirror that of the absent TSR. Where there is no incumbent,

because the other TSRs have different hours than the absent employee, the Carrier should not apply the provisions of Rule 18A.1. Instead, the Carrier is required to apply Rule 18A.2 of the Agreement, which is not restricted to incumbents filling the vacancies. According to this interpretation, the Claimant would have been entitled to the available work under Rule 18A.2 because he was the most senior employee at the time.

After reviewing the evidence and arguments presented, the Board agrees with the Organization's interpretation of the term "incumbent" as provided under Rule 18A.1 of the Agreement. Given that the Carrier offers no evidence to the contrary, the Board accepts the Organization's position that the contractual language of Rule 18A.1 requires that a number of criteria must be met in order to be classified as an incumbent. First, the vacancy must arise on what is usually a rest day of the particular employee who is to fill the vacancy in question. Second, the work to be performed during the vacancy must be basically the same work as that performed by the employee. And third, the employee must work during the same relative hours as the vacancy. These conditions explain that the term incumbent was intended to be narrowly construed in favor of those employees whose job exactly mirrored that of the absent employee, i.e., the term incumbent is position specific.

Thus, although the individuals used by the Carrier to fill the vacancies in question performed the same duties as the absentee employee, they did not work the same relative hours of work. Further, if "relative hours" was traditionally applied in a less restrictive fashion on this Carrier, there is no evidence of record to support this line of argument. Therefore, the Board concludes that on both August 12 and 13, 2000 neither vacancy was filled by an incumbent, because neither employee who filled the vacancy worked the same hours as the absent TSR. That being the case, the vacancies in question should have been filled by the Claimant. The Board therefore concludes that the relief requested by the Claimant is appropriate in Claim No. 1 of the Statement of Claim.

With respect to Claim No. 2 of the Statement of Claim the Board concludes that the issue should be dismissed without addressing the merits, as neither party presented conclusive evidence in the matter.

**AWARD**

**Claim sustained in accordance with the Findings.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

**Dated at Chicago, Illinois, this 19th day of April 2005.**