

**BEFORE  
PUBLIC BOARD No. 7097**

**Award No. 5  
Case No. 5**

<b>BROTHERHOOD OF MAINTENANCE OF WAY )</b>		
<b>EMPLOYES )</b>	)	
	)	
<b>vs. )</b>	)	<b>PARTIES TO DISPUTE</b>
	)	
<b>UNION PACIFIC RAILROAD COMPANY )</b>	)	

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign T. Baehr to a flagging foreman vacancy during regular Flagging Foreman D. Hulke’s absence on May 27, 28, 29, 30, June 11, 12, and 16, 2003, and instead assigned junior employee L. Sprinkle (System File 7WJ-7377T/1367435 CNW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Baehr. shall now ‘. . .be compensated for the difference between the wages he earned as a welder on the dates under claim and the earnings paid to Mr. Sprinkle, the junior employee for filling the vacancy in the flagging foreman position in Mr. Hulke’s absence.’”

**OPINION OF THE BOARD:**

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

Claimant holds seniority in various classifications in the Maintenance of Way and Structures Department. On the days in question here, he was assigned as a District 7 Welder. Claimant also holds seniority within the foreman classification. The Organization asserts that pursuant to Rule 16(d), Claimant had filed a written request to fill any temporary flagging

foreman vacancy that might occur on various subdivisions within his seniority territory.

On two occasions during May and June 2003, Flagging Foreman Hulke was absent. The responsible Manager had a Rule 16 (b) request from Employee Sprinkle to fill the position, and he assigned the work to Sprinkle. Claimant had greater seniority than Sprinkle, but the Manager denies having any written request from Claimant for the work.

The Organization contends that the Carrier violated the Agreement by assigning the Flagging Foreman work to Sprinkle rather than Claimant. The Carrier contends that because Claimant never made a written request, the Carrier had no obligation to assign him the work.

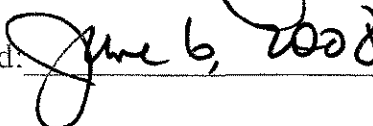
The primary issue is one of fact - whether Claimant had made a written request for the work. While the Organization contends that there is no evidence to refute Claimant's assertion that he filed a written request, the Board finds that the Carrier's evidence contradicts this: The Manager states that the claim "is not correct" because he had a written request from Sprinkle, and the Manager is reported to have stated more specifically that he never received a written request from Claimant. This evidence is sufficient to create a clear dispute of fact. Where there is an irreconcilable dispute of fact on a determinative point, the moving party, in this case the Organization, must be deemed to have failed to prove its position. See, e.g., Third Division Award No. 30591, Third Division Award No. 30635. We deny the claim on that basis.

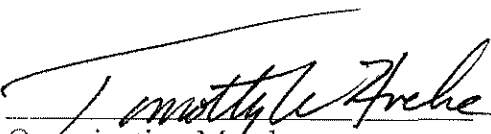
AWARD

Claim denied.

  
Lisa Salkovitz Kohn  
Neutral Member

  
Carrier Member

Dated:  June 6, 2008

  
Organization Member