

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35422
Docket No. MW-32875
01-3-96-3-215**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to assign Mr. R. T. Hollen to perform overtime service on November 13, 1994 and instead assigned Supervisor B. Little to perform foreman's duties of directing a gang in the replacement of insulated joints, (System Docket MW-3710).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. T. Hollen shall be allowed ten (10) hours' pay at the foreman's time and one-half rate and he shall receive proper credits and benefits therefor."**

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.

Although several facets of the instant claim are in controversy, an essential element of the instant dispute is whether the B&B Plumber, Mr. Pugh, actually operated the backhoe as alleged on the dates in question. The earliest stages of the handling of this claim on the property give the distinct impression that Mr. Pugh did. However, the response of the highest designated officer very clearly countered that impression. According to the response, an examination of records revealed that Mr. Pugh had not performed the disputed backhoe work. Thereafter, neither party provided any actual evidence to resolve the question one way or the other.

This leads to the question of which party had the burden of proof regarding the missing fact. Generally speaking, when the existence or non-existence **of an** essential fact is in issue, as it is here, the burden of proof must be shouldered by the party asserting the **affirmative** aspect of the fact (e.g., that Mr. Pugh did perform the work) rather than the party asserting the negative aspect (e.g., that Mr. Pugh did not perform the work). The instant record provides no proper basis for departing from that evidentiary doctrine.

Given the lack of evidence to determine the essential element, we must conclude that the Organization has failed to satisfy its burden of proof.

AWARD

Claim denied.

ORDER

This Board, after consideration **of the** dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of April, 2001.