

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35543
Docket No. SG-35238
01-3-99-3-93

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(CSX Transportation, Inc. (former Chicago and
(Eastern Illinois Railroad Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation Co. (former Chicago and Eastern Illinois Railroad Company):

Claim on behalf of E. C. Mack for payment of 684 hours at the time and one-half rate, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule and Rules 10, 37, 38, 39, 40 and 41, and Letters of Understanding dated March 13, 1973, June 14, 1976 and June 18, 1981, when it used outside forces to remove trees from the signal pole line from November 10 to December 3, 1997, and deprived the Claimant of the opportunity to perform this work. Carrier's File No. 15(98-109). General Chairman's File No. 98-25-01. BRS File Case No. 10773-C&EI.”

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.

As Third Party in Interest, the Brotherhood of Maintenance of Way Employees was advised of the pendency of this dispute and chose to file a Submission with the Board.

The general principles governing resolution of the brush cutting disputes currently under consideration by the Board are set forth in detail in Third Division Award 35529. In sum, (1) the Organization filing the claim has the burden to demonstrate a violation of the Agreement; (2) brush cutting in general along the Carrier's right-of-way is BMW scope covered work; (3) the cutting of brush that interferes with signal or communications lines and related equipment is BRS scope covered work; (4) the cutting of brush under the pole line that does not interfere with signal or communications lines and related equipment falls under BMW Scope Rules; (5) where outside forces are used, the relevant contract provisions governing the use of such forces will be applied and assertions of the need to show exclusive performance of the work will not defeat an Organization's claim; (6) with respect to asserted emergencies, the Carrier has the burden to demonstrate the existence of an emergency, which requires it to show the existence of an unforeseen combination of circumstances that calls for immediate action, but where ordinary track maintenance could have prevented the situation, no emergency exists; (7) where Agreement violations have been demonstrated, adversely affected employees will be made whole at the appropriate contract rate on the basis of lost work opportunities and irrespective of whether the employees were working on the dates of the demonstrated violations; and (8) where violations have been demonstrated, the disputes will be remanded to the parties for determination of the number of hours attributable to the improperly assigned work taking into account the specific type of work involved, with the Board retaining jurisdiction to resolve disputes over remedies.

In this case, according to the Organization, the Carrier used a contractor to cut trees that were interfering with the signal wires under the pole line. According to the Carrier, the contractor was used to cut trees and undergrowth from the right-of-way.

The burden in this case is on BRS to demonstrate that the work performed by the contractor was the cutting of brush that interfered with signal or communications lines and related equipment. We cannot sufficiently determine from this record that the brush had grown into the signal or communications lines. At best, the record is in

conflict. A record in conflict on the material facts is insufficient to meet the Organization's burden.

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 24th day of July, 2001.