Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33438
Docket No. MW-32394
99-3-95-3-250

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Harrisburg Division (Allegheny A) forces to replace 1200 feet of welded rail on No. 3 Track between Mile Posts 248.1 and 248.2 on the Pittsburgh Line on September 2, 1993, instead of assigning inter-regional rail gang employes (System Docket MW-3330).

(2) As a consequence of the violation referred to in Part (1) above, Messrs. K. C. Burns, R. E. Dunkelberger, R. C. Forshey, R. W. Hunt, R. A. Cyran and R. F. James shall each be allowed . . . eight hours each at their respective straight time rates of pay. Additionally, all lost wages and/or credits normally due . . . ."

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.

In this case, the Organization alleges a violation of the Scope Rule rights of Claimants, the members of regional Production Gang 143, when Carrier utilized Harrisburg Division forces to replace some 1200 feet of track on No. 3 Track between Mile Posts 248.1 and 248.2 on the Pittsburgh Line on September 2, 1993. The Organization argues that, as recognized by Appendix D, Inter-regional gangs have long performed the majority of rail renewals and were traditionally used by Carrier on jobs of this magnitude. On that basis it invokes the Scope Rule, contending that it requires work to accrue to those who have historically performed it on the basis of past practice. In denying the claim, Carrier argues that Claimants do not have a contractual right to perform the work in issue, and that the Scope Rule does not prohibit Subdivision Forces working within their Seniority Districts from performing rail replacement work, citing Third Division Award 29582; Special Board of Adjustment No. 1016, Award 22; Public Law Board No. 3781, Award 22. Carrier also contends that since Claimants were "fully employed" elsewhere on the claim date when the work needed to be performed, they were unavailable to do the work in issue, and have suffered no monetary loss.

In deciding a case presenting virtually identical facts, contract provisions, issues and arguments, this Board denied the claim of an inter-regional gang to 7800 feet of rail replacement work performed by a Division gang. In rejecting the Organization's theory that length of track was dispositive as to work jurisdiction, the Board in Third Division Award 32326, involving the same parties, held, in pertinent part, as follows:

> "A review of the record convinces us that the Organization has failed to sustain its burden of proving that any of the cited Rules gives a fully-employed Inter-regional gang any more of a right to lay the rail in issue than the same classification of employees within the Subdivision . . . . We find nothing in the provisions of this Agreement delineating the assignment of work by the specific size of the project or limiting Divisional forces to the replacement of a designated number of feet of rail. Further, the Union failed to sustain its burden of proving in this case that there has been an established past practice of Carrier to assign Inter-regional gangs only to rail renewals of the size involved herein".

This Board frequently has reaffirmed the notion that even though not bound technically to follow an earlier decision, proper regard for the arbitration process and

for stability in collective bargaining militate in favor of accepting an interpretation in a prior arbitration based in the same agreement as binding, if it is on point and not plainly wrong. It is not necessary that the subsequent Referee endorse all of the reasoning expressed in the earlier opinion so long as identity of issue and parties is established and the earlier award is final, definitive and sets forth a holding which is not palpably erroneous. In such circumstances, it would be a disservice to the parties to subject them to the unsettling effects of conflicting and inconsistent interpretations of the same contract language in the same set of circumstances.

Nothing in the present record causes us to deviate from that holding which we consider authoritative if not stare decisis. In that connection, one well recognized commentator on the arbitration process make the following important distinction:

> "Giving authoritative force to prior awards when the same issue subsequently arises (stare decisis) is to be distinguished from refusing to permit the merits of the same event or incident to be relitigated (res judicata). Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award."

See Elkouri & Elkouri, How Arbitration Works, 421-22, 4th ed., 1985).

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 23rd day of August 1999.