CARRIER FILE NO. 9502811
ORGANIZATION FILE NO. C96-0389

PUBLIC LAW BOARD NO. 5912

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION)
)
VS) NMB CASE NO. 128
) AWARD NO. 128
UNION PACIFIC RAILROAD CO.)

STATEMENT OF CLAIM:

Claim of North Platte Yardman D. L. Barkmeier for an additional basic day account required to drive a Company vehicle on May 27, 1995.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

This dispute covers a claim for an additional day's pay when claimant was required to drive a company-owned vehicle on May 27, 1995.

The Organization has argued before this Board that the provisions of the existing agreement do not provide that employees covered thereby can be instructed, without penalty, to drive company-owned vehicles in the performance of their duties.

Carrier has argued that the employees have been driving company-owned vehicles since 1974, that there was no protest to this practice until there was a strike called by the Organization on March 1, 1994, that the Court ruled this was a minor dispute to be handled under the dispute handling procedures of the Railway Labor Act; i.e., handling the issue as a dispute to the National Railroad Adjustment Board, and further, despite the May 10, 1994 court decision, the instant claim was not filed until May 27, 1995.

Carrier asks this Board to apply the doctrine of latches inasmuch as the practice of utilizing company-owned vehicles had been effect for 20 years before the Organization called the strike in 1994 and even after the decision of the Court was rendered on May 10, 1994, another year went by before the instant claim was filed.Award No. 128 -2-

The Organization takes the position that while employees may have used company vehicles, such usage was solely on a voluntary basis, not a company requirement nor a requirement of any existing rule in the governing contract. The Organization also argued that the instant claim was merely the vehicle to get the dispute before this Public Law Board--it does not necessarily follow that other claims were not submitted prior to May 27, 1995. (NOTE: No evidence was produced to verify the existence of additional claims filed prior to May 27, 1995.)

The Board should here note that in its Memorandum Opinion and Order the United States District Court for the District of Nebraska on May 10, 1994, clearly held:

> "Therefore, the parties collective bargaining agreements, viewed in light of past and protracted practice, including those in UP's eastern district, provide an arguably justified basis for UP's interpretation of the collective bargaining agreements to the end that UP's employees who are members of UTU may be required to drive company-owned vehicles in performance of their duties. That interpretation, under the circumstances, is neither frivolous nor obviously insubstantial."

The Court then went on to find that the use of trainmen to operate off-track company

- owned vehicles was a minor dispute within the meaning of the Railway Labor Act, such minor dispute to be progressed to the National Railroad Adjustment Board. The parties here have agreed the dispute should be decided by this Public Law Board which was established pursuant to Section 3, Second, of the Railway Labor Act, as amended by Public Law 89-456.

While this Board could adopt Carrier's argument with respect to application of the doctrine of latches, given the lengthy past history of utilization of company-owned vehicles, to do so at this point in time would deprive the Organization of its right to have the dispute resolved, as decided by the Court, by handling the matter as a minor dispute under the procedures of the Railway Labor Act. The Board does not deem the passage of one year from the date of the court decision to the presentation of this particular claim to be sufficient to hold that the Organization slept on its rights.

When the Board looks at the merits of this dispute, it is noted the Organization contends the claim is supported by Rule 31, a scope rule which defines the general duties of yardmen on the Eastern District. For this record, Rule 31 states:

> "Except as provided in Rule 32, the following shall be considered yard work at terminals where the yardmen's schedule is in effect, and shall be handled by yardmen and be paid for at not less than yard rates.
>
> " (a) The switching or transfer of all freight and passenger equipment operating exclusively within the yard and/or switching limits.
>
> " (b) The assembling and breaking -up of all trains or transfers within the switching limits."

The Board notes that this rule does not prohibit the use of a company - owned vehicle for assistance in the performance of the prescribed yard work at terminals where the yardmen's schedule is in effect. The rule likewise does not specifically authorize the use of company - owned vehicles in the performance of the established functions. A determination of what is permitted under the rule can best be deemed by referring to the practice existing by tacit understanding of the parties. There is no dispute between the parties that the practice of yardmen utilizing company - owned vehicles had been in effect for over 20 years at the time the instant claim arose. While the Organization has stated such usage was only on a "voluntary" basis, the bald fact remains that company - owned vehicles have been used with the knowledge of the employees and Organization for a considerable length of time and such usage must be considered as an accepted practice under the rule.

In referring to prior Court holdings, the US District Court for the District of Nebraska in its May 10, 1994 opinion noted that:

> "Past practices rise to the level of an implied agreement when they have 'ripened into an established and recognized custom between the parties.' (Citations omitted) . The practice must be with the knowledge and acquiescence of employees. ***.

Based on the entire record before this Board the Board finds that the past practice of some 20 plus years, with the knowledge and acquiescence of the employees, has made the use of Company -owned vehicles a part of the duties which can be required of yardmen under the provisions of Rule 31.

In view of our finding as set forth above, the Board must rule that the use of a company - owned vehicle does not constitute a violation of the existing agreement, and the claim here involved is without support.

AWARD

Claim denied.

Award date

F. T. Lynch, Neutral Chairman

Catherine J. Sosso, Carrier Member

A. Martin, Employee Member