In The Matter of the Arbitration before a Special Arbitration Committee pursuant to Agreement dated January 10, 1962 and Memorandum of Understanding attached thereto.

SBA 829

PARTIES TO DISPUTE:

NORFOLK AND WESTERN RAILWAY COMPANY
AND
BROTHERHOOD OF RAILROAD SIGNALMEN

QUESTION AT ISSUE:

(a) Did the establishment of minimum hourly rates for certain hourly rated Norfolk and Western Railway Company signal employees, granted by Article 1, Section 3(a) of the November 16, 1971 Mediation Agreement, constitute "subsequent general wage increases" as contemplated in Sections 2(a) and/or 2(b) of the Implementing Agreement dated September 8, 1966?

(b) If the answer to the above-stated question is in the affirmative, what additional compensation, if any, are Messrs. D.R. Monk and A.D. Bohon entitled to for the months of June, July and August, 1972, and May and June, 1972, respectively.

(c) Do the five (5) above-mentioned matters represent circumstances which will permit them to be considered continuing claims?

FINDINGS: Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act as amended, and that this Board is duly Constituted by agreement and has jurisdiction of the parties and of the subject matter.

This is a claim to increase the base period computation for compensation as provided in the Implementing Agreement of September 8, 1966, following the Merger Protection Agreement effective January 10, 1962, by 3¢ per hour. The claim arose from a provision of the Mediation Agreement made November 16, 1971 which established minimum hourly rates for certain designated positions. Claimants are employes who occupy the positions in question.

In order to reduce the issues and contentions argued by the parties to the crux of this situation for meaningful discussion, we shall first dispose of the procedural questions.

Claims were filed by A.D. Bohon which were declined at the first level. When appealed to the next higher officer of the Carrier, the Carrier's officer declined the claims without prejudice to other reasons for rejection, on the ground that the Organization

failed to timely reject the denial of the claim. The Organization asserted that a letter of rejection had been mailed at the same time as the appeal. It has been stated in many prior awards that assertions do not constitute proof. The burden is on the Petitioner to prove receipt of the written rejection. No proof of the sending or of the receipt appears in the Record. The necessity to prove receipt of a writing required in handling a claim on the property in the usual manner is so well settled that we must dismiss the claim of A.D. Bohon for improper handling. This is so despite the argument made by the Organization that Rule 901 Section 3 of the Virginian Agreement fully protects all rights of the claimant. Section 3, refers to a continuing claim which may be filed at any time that a continuing violation is found to exist. This section also protects the Carrier from a money claim for more than 60 days preceding the filing of the claim. The protection argued is obviously confined to the time limits for filing claims and does not overcome a procedural defect.

The Carrier has also raised as procedural questions that the claims are vague, contradictory and in violation of the controlling agreement; also that the continuing nature of the claim was not raised on the property until the appeal to the highest officer. The record before us shows that the Carrier had sufficient information to take a position relative to the claim as presented initially. The issue of a continuing violation was presented in the handling on the

property although belatedly. The time limitation for presenting claims would not bar the claim of a continuing violation which may be made at any time. However, it was not made in the manner provided for the handling of claims prior to reaching the highest officer. For that reason it would be improper to consider it at this time.

The primary question is whether or not the increase in dispute should be included in the base pay computation. We are of the opinion that it should not be included.

We believe that the purpose of the Merger Protection Agreement of 1962 and the Implementing Agreement of 1966 as to compensation was to protect the employes by keeping the base pay computation current. This could be accomplished by including "general increases" when they become effective. Other than general increase are also granted from time to time to individual employes and to groups of employes. The protection Agreements omitted provision for such isolated situations. The Mediation Agreement of 1971, as it applies to this case is an example of an isolated situation, namely, to establish minimum hourly rates. The reason for this as argued by the Carrier was to eliminate inequities. That it affected all the members of the Local in this case as argued by the Organization, does not change the character of the increase as one isolated from the general increases.

We distinguish the wording of the Implementing

Agreement of 1966. In paragraph 2(a), the proposition is first stated that with 1961 as the base period, the computation will be, "(adjusted to include subsequent wage increases)". This is followed by an explanation of the specific procedure for handling claims so that the employe will be protected, which states that the base pay will be adjusted, "(---to include subsequent general wage increases),". In other words, from a general statement of base computation, the parties proceeded to the specific method by which claims would be judged. We are bound by the language applicable to an actual claim such as in this case. The use of the term, "(adjusted to include general wage increases)" repeated in paragraph 2(b), lends support to the conclusion that the parties intended that "general increases" would be included in handling claims. Additionally, we cannot ignore the phrase used in the second sentence of paragraph 2(a), to wit: "The base period for such employes---will be used as hereinafter set forth to determine whether---such employe has been placed in a worse position---." The phrase, "as hereinafter set forth", is followed by the procedure for handling claims, which specifies "subsequent general wage increases".

# A W A R D

Claims of A.D. Bohon are dismissed.

Question (a) The answer is "NO".

Question (b) and (c) are disposed of as indicated in the Findings.

Dated: January 27 1975

Irving T. Bergman, Neutral Member

Melvin B. Bryce
Organization Member
Dissenting

Carrier Member