BEFORE AN ARBITRATION BOARD
ESTABLISHED PURSUANT TO
ARTICLE I, SECTION 11, OF THE
NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS
AND IMPLEMENTING AGREEMENT ENTERED PURSUANT
TO STB FINANCE DOCKETS 34000 AND 34424

PETER R. MEYERS, CHAIRMAN AND NEUTRAL MEMBER
360 East Randolph Street, Suite 3104
Chicago, Illinois 60601-7338
312-616-1500

PARTIES	)	**BROTHERHOOD OF MAINTENANCE OF WAY**
	)	**EMPLOYEES DIVISION**
TO	)	**and**
	)	**DULUTH, MISSABE AND IRON RANGE RAILWAY**
DISPUTE	)	**COMPANY**
	)	**CANADIAN NATIONAL RAILWAY COMPANY**
	)	**GRAND TRUNK CORPORATION**

OPINION AND AWARD
Dated: August 29, 2011

Appearances on behalf of the Organization

Richard S. Edelman--Attorney

Appearances on behalf of the Carrier

Cathy K. Cortez—Senior Manager, Labor Relations

This matter came to be heard before Neutral Member Peter R. Meyers on the 27th day of July 2011 at the offices of the Brotherhood of Maintenance of Way Employees Division, 150 South Wacker Drive, Suite 300, Chicago, Illinois.

Introduction

On April 9, 2004, under Board Finance Docket No. 34424, the Surface Transportation Board (hereinafter referred to as "the Board") approved the acquisition of the Duluth, Missabe and Iron Range Railway Co. (hereinafter referred to as "the DMIR") by Canadian National Railway Company and Grand Trunk Corporation (hereinafter referred to, collectively, as "the Carrier"). In approving this transaction, the Board imposed the employee protective conditions of the *New York Dock Labor Protective Conditions.*

Pursuant to Article I, Section 4 of the *New York Dock Labor Protective Conditions*, a Notice was served on the Brotherhood of Maintenance of Way Employes Division (hereinafter referred to as "the Organization" and/or "BMWE") on July 30, 2004, to begin negotiations on an Implementing Agreement addressing the consolidation of maintenance of way work on four railroads: the DMIR; the Duluth, Winnipeg & Pacific Railway (hereinafter referred to as "the DWP"), the Minnesota & Manitoba Railway Company (hereinafter referred to as "the M&M"), and the Wisconsin Central Transportation Corporation (hereinafter referred to as "the WC"). The parties successfully developed and agreed upon an Implementing Agreement, which had an effective date of January 1, 2005.

On December 20, 2010, the Organization submitted a claim on Article III, Section J, of the Implementing Agreement, alleging that the Carrier had violated the Implementing Agreement and the *New York Dock Labor Protective Conditions* by stopping the accrual of continuous service credits toward retirement benefits for former

DMIR employees as of January 1, 2011. The Carrier denied the claim, stating that the DMIR/BMWE agreement no longer was in effect and that the protective benefits under *New York Dock* expired on January 1, 2011.

The parties being unable to resolve their dispute, this matter was submitted for arbitration under the *New York Dock Conditions*. This matter came to be heard, pursuant to Article I, Section 11, of the *New York Dock Conditions*, before the Section 11 Arbitration Committee, with Peter R. Meyers as the Neutral Chair, on July 27, 2011, in Chicago, Illinois.

Question at Issue

Whether the Carrier violated the Implementing Agreement and/or the *New York Dock Labor Protective Conditions* when it froze future accruals of continuous service credit by former DMIR employees toward pension benefits under the DMIR Pension Plan effective January 1, 2011? If so, what shall the appropriate remedy be?

Relevant Governing and Contractual Provisions

NEW YORK DOCK CONDITIONS

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* (formerly sections 5(2) and 5(3) of the Interstate Commerce Act), except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions. - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" mean an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a

result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee who position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

. . .

11. Arbitration of disputes. – (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article 1, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

. . .

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

IMPLEMENTING AGREEMENT

Effective January 1, 2005

II: WAGES, RULES AND WORKING CONDITIONS

A. On the effective date of this agreement, all agreements covering wages, rules and working conditions in effect between the BMWE and DMIR, BMWE and M&M, and BMWE and DWP are dissolved.

B. On the effective date of this agreement, all employees working under agreements covering wages, rules and working conditions in effect between the BMWE and DMIR, BMWE and M&M, and BMWE and DWP will be subject to the agreement in effect between BMWE and WC covering wages, rules and working conditions, subject to the modifications contained herein.

SIDE LETTER NO. 3

This will confirm our understanding, reached during negotiations leading to the Implementing Agreement of this date, regarding continued application of pension benefits to former DMIR employees represented by the Brotherhood.

We agreed that, on the effective date of the agreement, the CN would continue to provide former DMIR employees with all pension rights and benefits provided under the terms of the BMWE/DMIR collective bargaining agreement. We further agreed that the former DMIR employees would continue to accrue additional benefits under the terms of that agreement based upon service and compensation.

We further agreed that these pension benefits shall be continued to the extent provided in Article I, Section 2 of the *New York Dock* conditions.

Fact Summary

The record in this matter reveals that on April 4, 2004, the Surface Transportation Board approved a transaction that involved the Carrier's acquisition of the DMIR by Canadian National Railway Company and Grand Trunk Corporation. In approving this transaction, the Board also imposed the *New York Dock* employee protective conditions. The Implementing Agreement negotiated and agreed upon by the parties took effect on January 1, 2005. Among its other provisions, the Implementing Agreement specified that the collective bargaining agreement between the Organization and the DMIR was dissolved as of the effective date of the Implementing Agreement.

The collective bargaining agreement that had been in place between the Organization and the DMIR prior to the effective date of the Implementing Agreement provided for a defined-benefit pension plan for covered employees, known as the Bessemer Non-Contributory Pension Plan (hereinafter referred to as "the DMIR Pension Plan"). The DMIR Pension Plan offers retirement benefits that supplement the benefits provided to railroad employees under the Railroad Retirement Act. Under the DMIR Pension Plan, employees received service credit toward retirement benefits throughout the course of their employment with DMIR. Under the terms of the DMIR Pension Plan, an employee accrues continuous service credits for each year of employment, with the employee's pension payments increasing with the accrued credits. An employee with fifteen years of service credits is able to collect a higher level of pension benefits than if

the employee had less than fifteen years of service credits. An employee with thirty years of accrued service credits is entitled to full pension benefits, regardless of age. The record indicates that through different changes in the ownership and control of DMIR, its maintenance of way employees continued to be covered by the DMIR Pension Plan.

In Side Letter No. 3 to the Implementing Agreement, the parties specifically addressed the issue of the continuation of the DMIR Pension Plan. During the parties' negotiations over this Side Letter, the Carrier proposed that the Carrier would continue the DMIR employees' pension accrual rights for six years, but the Organization refused this proposal, taking the position that Article I, Section 2, of the *New York Dock* Conditions preserved these rights unconditionally, unless and until the parties changed those rights in subsequent collective bargaining. The Carrier subsequently drafted Side Letter No. 3, which ultimately was agreed upon by the parties and incorporated as an attachment to their Implementing Agreement.

Side Letter No. 3 provides that the Carrier "would continue to provide former DMIR employees with all pension rights and benefits currently provided under the terms of the BMWE/DMIR collective bargaining agreement." Side Letter No. 3 expressly stated that the former DMIR employees would continue to accrue additional benefits under the DMIR Pension Plan based upon service and compensation. Moreover, Side Letter No. 3 specified that "these pension benefits shall be continued to the extent provided in Article I, Section 2 of the *New York Dock* conditions."

On November 2, 2010, the Carrier advised the Organization that as of January 1, 2011, and pursuant to the Implementing Agreement, former DMIR employees no longer

would earn continuous service credit for the purpose of calculating pension benefits under the DMIR Pension Plan. The Organization disputed the Carrier's assertion of an agreement that would allow the Carrier to stop the accrual of continuous service credits by former DMIR employees. The instant claim followed.

The Organization's Position

The Organization initially contends that Article I, Section 2, of the *New York Dock* Conditions expressly preserves rules, working conditions, and "other rights, privileges and benefits (including continuation of pension rights and benefits)" unless and until such time as they are "changed by future collective bargaining agreements or applicable statutes." The Organization asserts that the rights of former DMIR employees to continue to accrue service credits toward pension benefits under the DMIR Pension Plan as they would have if the STB-approved transactions had not occurred falls within the scope of the "continuation of pension rights and benefits" as set forth in Article I, Section 2, of the *New York Dock* Conditions. Moreover, the Carrier expressly agreed, in Side Letter No. 3, that the pension benefits rights of former DMIR employees "shall be continued to the extent provided in Article 1, Section 2, of the *New York Dock* conditions."

The Organization argues that STB and judicial decisions also have emphasized that the "rights, privileges, and benefits" portion of this provision includes vested and accrued ancillary benefits, as opposed to the more central aspects of pay and working conditions. These decisions make clear that the right of former DMIR employees to accrue continuous service credits toward their retirement benefits is a right, privilege, or

benefit that must be preserved as required by Article I, Section 2, of the *New York Dock* Conditions and under the parties' Implementing Agreement.

The Organization maintains that the pension benefit rights of the former DMIR employees must be preserved until changed through collective bargaining, not just for the six-year duration of the dismissal and displacement protection. The Organization submits that the language of Side Letter No. 3 is clear and direct that the former DMIR employees' pension rights must be preserved as required by Article I, Section 2, not merely for six years as the Carrier asserts. The Organization emphasizes that Article I, Section 2, states that rights, privileges, and benefits "shall be preserved unless changed by future collective bargaining agreements or applicable statutes." The Organization insists that no provision of any agreement between the Carrier and the Organization has terminated, modified, or set an expiration date for the obligations accepted by the Carrier as a condition of its consummation of the transactions approved by the STB.

The Organization goes on to contend that the history of the parties' negotiations over the Implementing Agreement demonstrates that the parties agreed that the Carrier's obligation to provide the benefits established under the DMIR Pension Plan would continue in accordance with Article I, Section 2, of the *New York Dock* Conditions. Accordingly, the right to accrue continuous service credits would continue until changed through collective bargaining.

The Organization points out that the Carrier proposed protecting the DMIR employees' pension accrual rights for six years, as the Carrier now argues was the agreement, but the Organization rejected that proposal, stating that it would not agree to

put a time limit on the protection of pension rights because Article I, Section 2, preserved those rights unless they were changed through collective bargaining. The Carrier then proposed and drafted, and the Organization accepted, the language that now appears in Side Letter No. 3, continuing the pension benefit rights "to the extent provided in Article I, Section 2 of the *New York Dock* Conditions."

The Organization then addresses the Carrier's position that there is no agreement requiring the continuation of the DMIR Pension Plan because the DMIR agreement was terminated by the Implementing Agreement, the employees were placed under the WC agreement, and the WC agreement does not provide for pension benefits. The Organization submits that in making this argument, the Carrier has ignored Side Letter No. 3 of the Implementing Agreement. The Organization emphasizes that in the same agreement that terminated the DMIR agreement, the parties expressly continued and preserved employee pension rights until they are changed through collective bargaining. The Organization suggests that given the language of Article I, Section 2, the DMIR Pension Plan necessarily was preserved unless changed or terminated by a subsequent collective bargaining agreement. The Implementing Agreement did not modify or terminate the rights and benefits of the former DMIR employees under the DMIR Pension Plan, and Side Letter No. 3 expressly preserves the DMIR Pension Plan pursuant to *New York Dock* Article I, Section 2. The Organization maintains that not only was there no agreement terminating any rights and/or benefits under the DMIR Pension Plan, but the Implementing Agreement expressly continued the DMIR Pension Plan in accordance with and subject to Article I, Section 2.

The Organization argues that Side Letter No. 3 created a new contractual term within the Implementing Agreement that incorporated the terms of the pension rights held by the former DMIR employees under their former agreement. The Organization insists that the only limitations on the extent of those rights are that they were coterminous with the limits provided by Article I, Section 2.

The Organization asserts that by operation of the *New York Dock* Conditions, and by virtue of the Implementing Agreement, the Carrier is obligated to maintain the employee benefits and rights under the DMIR Pension Plan until such obligation has changed through the collective bargaining process, which has not yet occurred.

The Organization then submits that decisions from the ICC, the STB, and the courts, including the *Carmen* series of decisions, negate any argument that pension benefit rights may be unilaterally changed after six years have passed. The Organization argues that these decisions have addressed the interaction between Sections 2 and 4 of Article I, concluding that certain established employee rights under collective bargaining agreements may be modified, but only upon a showing that modification is necessary for the realization of the public transportation benefits of an approved transaction. The Organization points out that these decisions have established that other rights, including the continuation of pension rights, fall within the "rights, privileges and benefits" language of Article I, Section 2 that must be preserved, are immutable, and are protected absolutely. These rights may be changed only by agreement or by statute.

The Organization insists that rights that are immutable, inviolate, protected absolutely, and preserved absolutely, as found in the agency and judicial decisions, are

rights that may not be unilaterally altered, without regard for the passage of some period of time. As established by the whole line of cases defining the meaning and scope of Article I, Section 2's mandate, some rights may be changed upon a showing of necessity to a public transportation purpose, while others, particularly pension benefits and rights, may be changed only by agreement or statute.

The Organization goes on to contend that there is no support in the Implementing Agreement for the Carrier's argument that the scope of its obligations under the DMIR Pension Plan is determined by Article I, Section 1(d) of the *New York Dock* Conditions. The Implementing Agreement refers to Article I, Section 2, in connection with the duration of the Carrier's duty to maintain the DMIR Pension Plan and continue employee benefits under the DMIR Pension Plan. The Organization points out that Article I, Section 1(d), addresses the obligation to pay displacement and dismissal allowances, which are not at issue here. The Organization submits that there is nothing in Article I, Section 1(d), that supports the Carrier's argument. The Organization emphasizes that Side Letter No. 3 expressly refers to Article I, Section 2, as determining the duration of the Carrier's duty to maintain the DMIR Pension Plan and to provide the former DMIR employees with benefits under the DMIR Pension Plan. The Organization asserts that the Carrier was obligated to preserve and continue the rights of former DMIR employees under the DMIR Pension Plan, specifically the continued accrual of continuous service credits, until such time as the parties agreed through collective bargaining to modify or terminate that obligation.

The Organization asserts that the Carrier violated the Implementing Agreement

and the *New York Dock* Conditions when it unilaterally declared that former DMIR employees would not accrue continuous service credits after January 1, 2011. The Organization points out that as a result of the Carrier's unilateral action, former DMIR employees generally will receive less in retirement benefits. The Carrier's unilateral action will be particularly significant for those employees who will be denied the opportunity to reach the benchmarks of fifteen and thirty years of continuous service credit in that certain rights and eligibility qualifications that substantially affect benefits kick in at these milestones. The Organization emphasizes that five former DMIR employees who retired after January 1, 2011, had their pensions incorrectly calculated because the Carrier refused to credit them for time worked after December 31, 2010. In addition, all former DMIR employees with twenty-nine or fewer years of continuous service credit on December 31, 2010, will not reach thirty years of credit under the DMIR Pension Plan, and eight of these former DMIR employees will never teach fifteen years of credit.

The Organization therefore argues that the Carrier's violation of the Implementing Agreement and the *New York Dock* Conditions already has caused substantial harm to certain former DMIR employees, and many more former DMIR employees will be substantially harmed if the violation continues.

The Organization ultimately contends that the Board should find that the Carrier violated the Implementing Agreement and Article I, Section 2, of the *New York Dock* Conditions, should direct the Carrier to cease and desist from so violating the Agreement and the Conditions, should direct the Carrier to rescind all actions and directives that

violate the Agreement and the Conditions, and should require that all former DMIR employees who have been adversely affected by the Carrier's actions be made whole for their losses.

The Carrier's Position

The Carrier initially contends that the Organization bears the burden of proof in this matter. The Organization must prove, through appropriate agreement citation, that the Carrier improperly froze continuous service relating to the DMIR Pension Plan. The Carrier asserts that the Organization has failed to offer anything of probative value. The Carrier argues that the Organization simply has repeated its faulty conclusion that the Carrier must continue the DMIR Pension Plan in perpetuity, exactly as it was under the long-dissolved DMIR/BMWE agreement, regardless of what the language in Side Letter No. 3 and *New York Dock* provide.

The Carrier maintains that although the Organization relies exclusively on Side Letter No. 3, this document actually is fatal to the Organization's claim. The Carrier submits that the Organization has not offered the proof necessary to show a violation of the Agreement and the instant claim should be denied based on the factual inadequacy of the Organization's claim.

The Carrier asserts that there is no dispute that the DMIR agreement was dissolved in its entirety effective January 1, 2005. The Carrier insists that absent the special labor protections of *New York Dock*, when a collective bargaining agreement disappears, so does an employer's obligation to make pension contributions under that agreement. The Carrier points out that the DMIR collective bargaining agreement was the sole source of

any obligation to maintain a defined-benefit pension plan, except to the extent that the *New York Dock* Conditions required otherwise.

The Carrier argues that in Side Letter No. 3, the parties agreed that rather than immediately ceasing to accrue continuous service credits under the DMIR Pension Plan by operation of the parties' agreement to dissolve the DMIR/BMWE agreement, the parties agreed to allow employees to continue to accrue continuous service credits. The Carrier emphasizes that the parties explicitly agreed that these benefits would continue only "to the extent provided in Article I, Section 2 of the *New York Dock* Conditions." The Carrier emphasizes that without Side Letter No. 3, there is no contractual obligation to continue the DMIR Pension Plan at all. The Carrier asserts that Side Letter No. 3 confirms that the Carrier is agreeable to allowing the DMIR Pension Plan to continue to the extent that *New York Dock* provides.

Pointing to Article 1, Section 1(d), the Carrier maintains that *New York Dock* offers up to six years of wages and benefits to employees adversely affected by certain STB-approved transactions. The Carrier submits that a full reading of *New York Dock*, including the definition of "protective period," clearly negates the conclusion drawn by the Organization. The Carrier asserts that this, coupled with the acceptance of moving to the National Health & Welfare Plan, is a clear indication of the meaning of Article I, Section 2, of *New York Dock*. Emphasizing that the Organization has not protested the changing of health and welfare benefits, the Carrier argues that the Organization cannot pick and choose which benefits are protected by the *New York Dock* protective period.

The Carrier contends that to give proper meaning to Article I, Section 2, it is

necessary to consider the purpose of the *New York Dock* Conditions. These protective conditions provide employees with earnings and benefit protection from potential adverse effects due to a transaction. The Carrier insists that the protective period under *New York Dock* is not to exceed six years. The Carrier points out that the six-year period of protection of Article I, Section 2, as adopted by the parties in Side Letter No. 3, expired on January 1, 2011. The Carrier submits that it properly is applying Side Letter No. 3 by ceasing to allow employees to accrue continuous service credits under the DMIR Pension Plan as of January 1, 2011.

The Carrier points out that in taking the position that the former DMIR employees' rights under the DMIR Pension Plan may be changed only through collective bargaining, the Organization fails to recognize that the negotiated Implementing Agreement is precisely the agreement that allowed the Carrier to cease the accrual of continuous service credits under the DMIR Pension Plan. The Implementing Agreement dissolved the DMIR/BMWE agreement that was the sole basis for the DMIR Pension Plan.

The Carrier submits that Side Letter No. 3 does not allow for the continued accrual of continuous service credits in perpetuity, as the Organization contends, but it instead establishes a defined limit on employees' rights under the DMIR Pension Plan. The Carrier suggests that if Article I, Section 2, of *New York Dock* alone would have continued the employees' pension rights in perpetuity, then Side Letter No. 3 would have been completely unnecessary. The Carrier insists that Side Letter No. 3 represents an admission by the Organization, fatal to its current claim, that its agreement to dissolve the

DMIR/BMWE agreement also dissolved employees' rights under the DMIR Pension Plan. Without an existing collective bargaining agreement to serve as the source of any obligation to maintain a defined-benefit pension plan, there is no agreement for the parties to change or terminate.

The Carrier emphasizes that the collective bargaining agreement now covering the former DMIR employees is the WC/BMWE agreement. The Carrier maintains that this agreement does not contain any language or provisions for the DMIR Pension Plan, nor has the Organization served a Section 6 notice seeking to add a pension plan to the WC/BMWE agreement. The DMIR/BMWE agreement has been dissolved, and the Carrier has no need to change or terminate an agreement that has been dissolved.

The Carrier ultimately contends that the instant claim is totally without merit and should be denied in its entirety.

Decision

This Section 11 Arbitration Committee has carefully reviewed all of the testimony and evidence in the record, as well as the parties' arguments in support of their opposing positions in this matter. In this dispute over whether the Carrier violated the Implementing Agreement and/or the *New York Dock* Labor Protective Conditions when it ceased the accrual of continuous service credits by former employees of the DMIR as of January 1, 2011, the Organization carries the burden of proof. To prevail in this matter, the Organization must establish that under the parties' various agreements and in accordance with the *New York Dock* Conditions, the former DMIR employees maintain the right to accrue continuous service credits toward benefits under the DMIR Pension

Plan. The overall purpose of the *New York Dock* Conditions is to protect employees from a worsening of their employment positions due to an STB-approved railroad transaction, and this principle must guide the analysis and resolution of the instant dispute.

The record in this matter establishes that prior to the STB-approved transaction underlying this dispute, the maintenance-of-way employees working for the DMIR were covered by a collective bargaining agreement that included provisions for a defined-benefit pension plan to supplement the retirement benefits provided these employees under the Railroad Retirement Act. The DMIR Pension Plan contained designated benchmarks at fifteen and thirty years of service that allowed for increased benefits to those employees who reached these service benchmarks. DMIR employees earned continuous service credit toward the DMIR defined-benefit pension with each year of service to their employer. The record also suggests that this Pension Plan survived several changes in ownership and control of the DMIR over the years.

The record further establishes that in connection with the Carrier's acquisition of DMIR, the Organization and the Carrier negotiated and ultimately agreed upon an Implementing Agreement that addressed the issues relating to that STB-approved acquisition. The portions of the Implementing Agreement that are particularly relevant here are Sections II.A. and II.B., and Side Letter No. 3.

The first two of these parts of the Implementing Agreement set forth the parties' agreement that the DMIR/BMWE collective bargaining agreement that had been in place at the time of the acquisition at issue was dissolved as of January 1, 2005, the effective date of the Implement Agreement, and that the former DMIR maintenance-of-way

employees thereafter would be subject to the collective bargaining agreement between BMWE and the WC, which covers wages, rules, and working conditions.

Side Letter No. 3 directly addresses the matter of the DMIR Pension Plan. The record indicates that during their negotiations over the Implementing Agreement, the parties discussed the continuation of the DMIR Pension Plan, but did not reach any agreement as to how long that Plan would continue. There is no dispute that during these negotiations, the Carrier proposed that the DMIR Pension Plan covering the former DMIR employees would continue for a period of six years, but the Organization rejected that proposal. The Carrier subsequently drafted Side Letter No. 3, which was attached to and incorporated in the Implementing Agreement. Side Letter No. 3 does not mention any specific time limit, six years or otherwise, for the continued accrual by the former DMIR employees of continuous service credits under the DMIR Pension Plan.

To the extent that the parties were able to reach any agreement on the issue of the continuation of the DMIR Pension Plan, Side Letter No. 3 memorializes that agreement. Side Letter No. 3 does expressly state that as of the effective date of the Implementing Agreement, the Carrier would continue to provide the former DMIR pension benefits. Side Letter No. 3 further provides that these pension benefits "shall be continued to the extent provided in Article I, Section 2, of the *New York Dock* Conditions."

Pursuant to the Implementing Agreement, January 1, 2005, therefore was the date upon which the Carrier's acquisition of the DMIR was implemented, the date upon which the former collective bargaining agreement covering the DMIR maintenance-of-way employees was dissolved, the date upon which the former DMIR maintenance-of-way

employees were made subject to the BMWE/WC collective bargaining agreement, and the date upon which the Carrier took over the continued provision of pension rights and benefits to the former DMIR employees under the DMIR Pension Plan. By structuring the implementation of the Carrier's acquisition of DMIR in this manner, the parties essentially provided for the unbroken application of the DMIR Pension Plan for some period of time on and after the effective date of the Implementation Agreement. The DMIR Pension Plan therefore survived the dissolution of the BMWE/DMIR collective bargaining agreement.

The critical determination here is to resolve for how long the Carrier is to continue these benefits and the former DMIR employees are entitled to accrue continuous service credits toward the pension benefits under the DMIR Pension Plan. The Organization has argued that under Article I, Section 2, of the *New York Dock* Conditions, and in accordance with the language of Side Letter No. 3, the former DMIR employees have the right to continue to accrue these service credits until such time as the parties expressly agree otherwise through collective bargaining negotiations. The Carrier has asserted that under Article I, Section 1(d), of the *New York Dock* Conditions, it was obligated to continue these pension benefits for only six years from the effective date of the Implementing Agreement, or until January 1, 2011. The Carrier further argues that Side Letter No. 3 supports its position that the six-year protective period in Article I, Section 1(d), of the *New York Dock* Conditions applies to the pension benefits at issue here.

Starting with the provisions of the *New York Dock* Conditions, it is necessary to review the sections cited by both parties, to determine which of these apply to the instant

situation, and then to determine how to properly apply the governing provision(s) to this dispute. Article I, Section 1, of the *New York Dock* Conditions expressly addresses the protection of "displaced" and "dismissed" employees, meaning those employees who, as a result of a railroad transaction, either are placed in a worse position with respect to compensation and working conditions or are deprived of employment with the railroad. Sub-paragraph 1(d) of Article I does establish a protective period of six years, but a reading of this entire Article leaves no reasonable doubt that Section 1(d)'s six-year protective period refers only to the protection afforded displaced or dismissed employees in response to such displacement or dismissal. In the instant case, there are no claims or disputes relating to the protection of any displaced or dismissed employees who may have been affected by the Carrier's acquisition of the DMIR, so Article I, Section 1, of the *New York Dock* Conditions does not directly apply to this matter.

It also is important to emphasize that the *New York Dock* Conditions do not contain any language indicating that the six-year protective period described in Section 1(d) of Article I is meant to be applied to any situation other than the protection of a displaced or dismissed employee affected by a railroad transaction. Because that is not at issue in this matter, this Section 11 Arbitration Committee finds that the *New York Dock* Conditions impose a six-year limit on protections afforded to displaced and/or dismissed employees affected by a railroad transaction as described in Article I, Section 1, but this six-year limit does not necessarily apply to other situations addressed by the *New York Dock* Conditions.

Article I, Section 2, of the *New York Dock* Conditions addresses a completely

different set of issues than is addressed in Article I, Section 1. Section 2 deals with the continuation and preservation of various collective bargaining rights, privileges, and benefits during and after the implementation of a railroad transaction. The language of this section does, in fact, describe the precise situation presented in this dispute over the extent of the continuation of the DMIR Pension Plan, and it even expressly refers to "the continuation of pension rights and benefits" as one of the rights, privileges and benefits that "shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

It is significant that Section 2, as opposed to Section 1, does not contain any mention of a specific time period during which these rights, privileges and benefits shall be preserved. The Carrier, in fact, has suggested that in taking its position in reliance on Section 2, the Organization essentially is arguing that the DMIR Pension Plan should continue in perpetuity. This is not the case, nor would such an argument be supported by the clear and unambiguous language of Section 2. Instead, the Organization is contending that the DMIR Pension Plan should continue until such time as it is changed as a result of an agreement between the parties reached through collective bargaining.

This particular contention is fully supported by the language of Section 2. The directly relevant language of Section 2 mandates that the continuation of pension rights and benefits shall be preserved unless changed by future collective bargaining agreements or applicable statutes. There is no specific time limit for the continuation of pension rights and benefits, nor is there any mandate that such rights and benefits must be continued in perpetuity. It is up to the parties, through collective bargaining, to reach an

agreement as to how long these rights and benefits will continue.

A full reading of Sections 1 and 2 of Article I of the *New York Dock* Conditions conclusively establishes that Section 2, not Section 1, applies to the instant matter. Moreover, it is evident that each of these provisions is intended to address a different type of issue for employees affected by a railroad transaction. The different types of employment conditions and benefits that these two sections work to protect underline why there is a six-year limit to protection under Section 1, while there is no specific time limit on the protection offered under Section 2. Section 1 addresses such matters as a loss of employment or being placed in a worse position with respect to compensation and rules governing working conditions. These are the types of issues that it is possible to resolve over the course of time, such as through obtaining new employment, exercising seniority to move to a different (and possibly higher paying) position, and other such means. Although it also references rates of pay, rules, and working conditions, Section 2 expressly deals with other rights, privileges, and benefits – such as pension rights and benefits – that potentially impact an individual employee's long-term financial security. This type of benefit must be preserved and protected over a much longer time period than a period of a few years in order to ensure that employees are not permanently harmed and that they receive the benefits and security that they have relied on over the course of their employment.

This distinction between the different types of employment conditions and benefits that are subject to the *New York Dock* Conditions has been recognized in a number of judicial and administrative decisions. The federal D.C. Circuit, for example, has stated

that "certain contractual provisions are immutable," *American Train Dispatchers Association v. Interstate Commerce Commission*, 26 F.3d 1157, 1163 (D.C. Cir. 1994), and that a modification to a collective bargaining agreement in connection with a rail transaction must be "necessary in order to secure to the public some transportation benefit flowing from the underlying transaction." *Railway Labor Executives' Association v. United States*, 987 F.2d 806, 815 (D.C. Cir. 1993). The STB and the ICC both have referenced the scope of "rights, privileges and benefits that must be preserved" as including incidents of employment or fringe benefits such as pension benefits, hospitalization, and medical care. *E.g., Union Pacific Corp. et al. – Control and Merger – Southern Pacific Transportation Co.* (Arbitration Review) STB Finance Docket No. 32760, 1997 W.L. 351468 at 6-7 (S.T.B. 1997) and cases cited therein.

These and other decisions establish that certain provisions of a collective bargaining agreement may be modified or overturned if such action is necessary to obtain a transportation benefit for the public from a railroad transaction, while other rights, privileges and benefits that include certain incidents of employment and fringe benefits are immutable and must be preserved.

This analysis now turns to the parties' Implementing Agreement, including Side Letter No. 3. As the Carrier has emphasized, Article II, Section A, of the Implementing Agreement between the Carrier and the Organization does dissolve the collective bargaining agreement that existed between the Organization and the DMIR, and this dissolution was effective on January 1, 2005. Pursuant to the Implementing Agreement, former DMIR employees became subject to the collective bargaining agreement between

the Organization and the WC on that same date, which also was the effective date of the Implementing Agreement. The WC/BMWE collective bargaining agreement does not contain any provision for a supplementary pension benefit plan similar to the DMIR Pension Plan.

Of all of the various provisions cited by the parties in connection with this matter, it is Side Letter No. 3 to the Implementing Agreement that has the most direct impact upon the resolution of the instant dispute. Side Letter No. 3 sets forth the substance of the agreement that the parties were able to reach on the matter of the continuation of the DMIR Pension Plan. There is no dispute between the parties that the issue of the continuation of the DMIR Pension Plan did come up during their negotiations over the Implementing Agreement, and that the Carrier proposed a six-year limit on the continuation of this Plan. There also is no dispute that the Organization rejected this proposal, and that the parties did not reach any agreement about a specific duration for the continuation of the DMIR Pension Plan.

The fact that the Carrier made this proposal at all serves to clarify the parties' understanding of the impact of the *New York Dock* Conditions on the issues between them as they engaged in their negotiations over the Implementation Agreement and the continuation of the DMIR Pension Plan. It must be noted that if the Carrier believed that the six-year protective period set forth in Article I, Section 1(d), of the *New York Dock* Conditions applied to the continuation of the DMIR Pension Plan, then there would be no reason for the Carrier to specifically propose applying a six-year limit on the continuation of this defined-benefit plan. If the parties understood the *New York Dock* Conditions to

already impose a six-year limit on the continuation of the DMIR Pension Plan, then there would not have been such a proposal from the Carrier, there would not have been any negotiation over how long this Plan should be continued, and there would have been no Side Letter No. 3.

There is a Side Letter No. 3, however, and it must be properly understood and applied to the instant dispute in order for there to be an appropriate resolution to the instant dispute. In analyzing this document, it must be remembered that it was drafted by the Carrier. Accordingly, any ambiguity in the language of Side Letter No. 3 must be resolved against the Carrier, as the drafter of that language. A careful reading of Side Letter No. 3, however, reveals that there is no ambiguity in its language.

The clear and unambiguous language of Side Letter No. 3 expressly provides that on the effective date of the Implementing Agreement, "the CN would continue to provide former DMIR employees with all pension rights and benefits provided under the terms of the BMWE/DMIR collective bargaining agreement." Side Letter No. 3 specifies that "the former DMIR employees would continue to accrue additional benefits under the terms of that agreement based upon service and compensation." This mutual agreement therefore provides for the continuation, on and after the effective date of the Implementing Agreement, of pension rights and benefits under the terms of the former BMWE/DMIR collective bargaining agreement, the very agreement that otherwise was dissolved by Article II, Section A, of the Implementing Agreement. Side Letter No. 3 therefore specifically preserves the DMIR Pension Plan on and after the effective date of the Implementing Agreement and after the dissolution of the DMIR/BMWE collective

bargaining agreement.

What Side Letter No. 3 does not do is establish a specific time period within which the DMIR Pension Plan will continue. It must be noted that a six-year protective period would be completely insufficient to provide the necessary protection to the former DMIR employees. If the accrual of continuous service credits under the DMIR Pension Plan is allowed to be ended as of January 1, 2011, most of the former DMIR employees would be irreparably and permanently harmed by such action. Every former DMIR employee who was in the active service of the Carrier as of January 1, 2011, would see their pension benefits frozen at the level they had reached as of that date. None of these employees would be able to increase their benefits as a result of continued service to the Carrier. This would be particularly harmful to those employees closing in on the fifteen- and thirty-year service benchmarks that otherwise would have qualified them for additional rights and benefits under the Plan.

Side Letter No. 3 does not reference Article I, Section 1(d), of the *New York Dock* Conditions and its six-year protective period, so Side Letter No. 3 does not provide any basis for finding that this limited protective period should apply to the continuation of the DMIR Pension Plan. The only reference to the *New York Dock* Conditions in Side Letter No. 3 is the affirmation that the DMIR Pension Plan benefits "shall be continued to the extent provided in Article I, Section 2 of the *New York Dock* conditions." As previously discussed, Article I, Section 2, does not contain any specific time limit that is to be applied to the preservation of the "rights, privileges and benefits (including continuation of pension rights and benefits)" referenced in this particular provision. Instead, as this

Committee already has emphasized, pension rights and benefits continue under this part of the *New York Dock* Conditions either until such time as the parties agree, through collective bargaining, to end those rights and benefits, or until such time as they are ended by statute.

Because pension rights and benefits are so critical to employees, any mutual agreement between a carrier and an organization to end such rights and benefits must be clearly stated and absolutely unequivocal. In all of the parties' various agreements, there is no clear and unequivocal expression of a mutual intent to end the continuation of the DMIR Pension Plan at any particular point in time. The evidence in the record relating to the parties' negotiations over the Implementing Agreement leaves no doubt that they discussed the continuation of the DMIR Pension Plan, as well as for how long this Plan should continue, but there is no evidence that the parties reached any agreement that established an endpoint for the Plan's continuation or, more particularly, for the accrual of continuous service credits under the Plan.

The simple fact that the WC/BMWE collective bargaining agreement, which now covers the former DMIR employees, does not contain any provision for a supplemental pension plan like the DMIR Pension Plan is not enough to establish that the DMIR Pension Plan no longer continues. Because Side Letter No. 3 specifies that the DMIR Pension Plan continues as of the effective date of the Implementing Agreement, this Plan has survived the dissolution of the BMWE/DMIR collective bargaining agreement and continues as one of the benefits of employment for former DMIR employees that "shall be preserved unless changed by future collective bargaining agreements." Essentially,

Side Letter No. 3 works to modify the BMWE/WC collective bargaining agreement that now covers the former DMIR employees by expressly providing for the continuation of their pension rights and benefits under the terms of the DMIR Pension Plan. In accordance with Article I, Section 2, of the *New York Dock* Conditions, this continuation may be ended only upon a negotiated agreement between the parties or by statute.

In light of all of these considerations, and in accordance with the governing language in the parties' agreements and in the *New York Dock* Conditions, this Section 11 Arbitration Committee therefore finds that the Organization has satisfied its burden of proof in this matter. The competent and credible evidence in the record conclusively demonstrates that under Side Letter No. 3 to the parties' Implementing Agreement, the DMIR Pension Plan is to be preserved and former DMIR employees are to continue to accrue continuous service credits until such time as the parties affirmatively and unambiguously agree, through the collective bargaining process, to discontinue this Plan, or until the Plan is ended by statute. Because neither of these events have occurred, the former DMIR employees were and are entitled to continue to accrue continuous service credits on an after January 1, 2011.

Award

The Question at Issue therefore is answered in the affirmative. This Section 11 Arbitration Committee finds that the Carrier did violate the parties' Implementing Agreement and the *New York Dock* Conditions when it froze accruals of continuous service credits by former DMIR employees as of January 1, 2011. The former DMIR employees working for the Carrier as of January 1, 2011, shall be credited with

continuous service credits under the DMIR Pension Plan for all time worked on and after January 1, 2011, and continuing until such time as the parties mutually agree, through collective bargaining, to end the accrual of continuous service credits under the DMIR Pension Plan.

PETER R. MEYERS
Chairman ~~and Neutral~~ Member

CATHY K. CORTEZ
On behalf of the Carrier
Dated: Sept 27, 2011

RICHARD S. EDELMAN
On behalf of the Organization
Dated: 9/27/11