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Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
July 29, 2022
Part of
Public Record

July 29, 2022

**Re: Finance Docket No. 33388(Sub-No. 102), CSX Transportation, Inc.—Petition
for Declaratory and Cease and Desist Orders**

Expedited Handling Requested

Dear Ms. Brown:

Enclosed for electronic filing is an Amended Petition for Declaratory and Cease and Desist Orders concerning a dispute over the implementation of a transaction pursuant to a New York Dock implementing agreement with the International Association of Sheet Metal, Air, Rail, and Transportation Workers.

The filing is in two parts. The first part is the Amended Petition. The second part is the Exhibit Volume.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,

/s/Ronald M. Johnson

Ronald M. Johnson
Counsel for CSX Transportation, Inc.

Enclosure

Finance Docket No. 33388 (Sub-No. 102)

CSX TRANSPORTATION, INC.
AMENDED PETITION FOR DECLARATORY
AND CEASE AND DESIST ORDERS

VOLUME 1

AMENDED PETITION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 102)

CSX TRANSPORTATION, INC.
AMENDED PETITION FOR DECLARATORY
AND CEASE AND DESIST ORDERS

I. Introduction

CSX Transportation, Inc. (“CSXT”) is filing this Amended Petition pursuant to 49 C.F.R. § 1117.1 to update the Board and amend its Petition for Declaratory and Cease and Desist Orders, which was filed on June 15, 2021. As explained in CSXT’s Petition, it and the International Association of Sheet Metal, Air, Rail and Transportation Workers-Transportation Division (“SMART-TD” or “Organization”) dispute whether CSXT’s use of Consolidated Rail Corporation (“Conrail”) as its agent to transfer railcars between two rail yards within the Detroit Shared Assets Area (“Detroit SAA”) as part of the Conrail Transaction violated SMART-TD’s collective bargaining agreement with CSXT, the B&O Agreement. CSXT is no longer seeking declaratory relief, because, since it filed its Petition, the New York Dock Section 11 arbitration resulted in an arbitration award that completely resolved this dispute. CSXT is still seeking a cease and desist order because the Organization nonetheless continues to pursue arbitration of this same dispute before the National Railroad Adjustment Board (“NRAB”), an arbitration board established under Section 3 of the Railway Labor Act (“RLA”). The NRAB set September 14, 2022 as the hearing date for the Section 3 arbitration.

This dispute required the interpretation of several New York Dock implementing agreements for the Conrail Transaction and of the New York Dock conditions.¹ As required by Board precedent and Section 11(a) of those conditions, CSXT submitted this dispute to arbitration under Section 11. Arbitrator VanDagens, the neutral member of the Section 11 Committee, issued an arbitration decision for the Committee, which became effective June 27, 2022. A copy is attached as Exhibit No. 1. Arbitrator VanDagens found in CSXT's favor on all issues. The VanDagens Award found that "[t]he Arbitration Committee has jurisdiction to determine whether changes in operations are related to the implementation of a STB-approved transaction," CSXT's use of Conrail is authorized by the Detroit SAA New York Dock implementing agreement, and "[t]he STB-approved transaction overrides conflicting obligations under the parties' B&O Agreement. Thus, no violation occurred, and no remedy is required." Award at 8.

SMART-TD elected not to file a petition for review of the Award under 49 C.F.R. § 1115.8. The VanDagens Award is "final, binding and conclusive" on the parties by operation of Section 11(c). This dispute is over. Yet, SMART-TD is still pursuing arbitration of the exact same issues decided by the VanDagens Award before the NRAB. The VanDagens Award is a decision of this Board.² By pursuing RLA arbitration, SMART-TD is collaterally attacking a Board decision, violating the Board's mandatory and exclusive procedures for resolving disputes over the implementation of Board-approved railroad consolidations, attacking the New York

¹ *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. Co. v. United States*, 609 F.2d 83 (2d Cir. 1979).

² See, e.g., *Delaware & Hudson Ry. Co.—Lease and Trackage Rights Exemption—Springfield Terminal Ry. Co.*, 8 I.C.C.2d 839, 844 n. 7, 1992 WL 46807, * 4 n. 7 ("An arbitrator's decision is treated as a decision of the Commission.").

Dock implementing agreement for the Detroit SAA, and seeking to by-pass this Board's exclusive jurisdiction over railroad mergers. CSXT should not be at risk of inconsistent Board and NRAB decisions. This Board has authority under 49 U.S.C. § 11321(a) and for the reasons set out in *Delaware & Hudson Ry. Co.—Lease and Trackage Rights Exemption—Springfield Terminal Ry. Co.*, 8 I.C.C.2d 839, 1992 WL 46807 (hereinafter “*Delaware & Hudson*”), to order SMART-TD to withdraw its case at the NRAB and to cease arbitrating issues within the Board's exclusive jurisdiction using RLA dispute resolution procedures.

II. Background

The background for the dispute is set out in CSXT's Petition for Declaratory and Cease and Desist Orders. CSXT here summarizes and updates that Background. This Background is also described in the VanDagens Award and CSXT's and SMART-TD's submissions to the Section 11 Committee. Those submissions are provided with this Amended Petition as, respectively, Exhibit Nos. 2 and 3 without their exhibits.³ CSXT uses the abbreviations “CSXT Sec. 11 Sub.” and “SMART-TD Sec. 11 Sub.” to refer to these submissions and “SMART-TD NRAB Sub.” to refer to its submission to the NRAB (Exhibit No. 4).

³ The exhibits are voluminous and CSXT does not believe the Board needs them to decide whether SMART-TD is making the same arguments in the NRAB arbitration as those it made in the Section 11 arbitration. That can be determined by a comparison of SMART-TD's Section 11 and NRAB Submissions, which are provided with this Amended Petition as Exhibit Nos. 3 and 4. The exhibits are also unnecessary to review the VanDagens Award since the Organization choose not to appeal the Award. The Detroit SAA Operating Agreement, Conrail Transaction Master New York Dock Implementing Agreement, and Detroit SAA New York Dock Implementing Agreement were previously provided to the Board as Exhibit Nos. 1, 3, and 4 to CSXT's Petition. CSXT can provide other exhibits, however, if the Board so desires.

A. The Dispute

This dispute grows out of implementation of the Conrail Transaction, specifically implementation of Detroit Shared Assets Area operations. The Board approved the control and division of Conrail by CSXT and Norfolk Southern Railway in the *Conrail Decision*.⁴

CSXT had utilized a yard job, Y122, to move railcars between Rougemere and Livernois Yards within the Detroit SAA. CSXT Sec. 11 Sub. at 10. A detailed map showing the Detroit SAA and Rougemere Yard's location within it is attached as Exhibit No. 5 and was Exhibit No. 1 to CSXT's Section 11 Submission. In 2017, exercising rights under Section 3(d)(i) of the Detroit SAA Operating Agreement, CSXT decided to have Conrail perform this transfer service and abolished Y122. There were operational inefficiencies with Y122, which were leading to congestion in Rougemere and Livernois Yards and less efficient operations within the Detroit SAA. These inefficiencies were eliminated by use of the Conrail Yard Job. CSXT Sec. 11 Sub. at 10-11.

After CSXT abolished Y122, the Organization objected that allowing Conrail to perform the transfer work formerly done by Y122 violated the B&O Agreement, "in particular but not limited to the Scope Rules/Articles, Rule 59, Article 3, and Rule 106." The Organization contended that this work "belong[s] to CSX employees and was illegally being 'farmed out' to Conrail SA [Shared Assets]." CSXT Sec. 11 Sub. at 11.

SMART-TD relied on two New York Dock implementing agreements for its argument that the B&O Agreement applied to any work performed by or on CSXT's behalf in the Detroit SAA. SMART-TD argued that the CSXT Western District NYD Agreement applied because

⁴ *CSX Corp. et al.—Control—Conrail, Inc. et al.*, Decision No. 89, STB Finance Docket No. 33388 (served July 23, 1998), 3 S.T.B. 196 (1998).

Detroit was in the Western District and that Agreement made the B&O Agreement the governing agreement. The later Northern Mid-Atlantic District (“NOMAD”) NYD Agreement reaffirmed that the B&O Agreement applied in the territory within the Western District. SMART-TD Sec. 11 Sub. at 14-16. SMART-TD also argued that Rougemere Yard was not within the Detroit SAA. SMART-TD Sec. 11 Sub. at 18.

CSXT’s position is that the Detroit SAA Operating Agreement, Section 3(d)(i), expressly authorized CSXT to use Conrail as its agent to perform Switching and Yard Service within the Detroit SAA. The transfer of railcars between these yards was “Switching and Yard Service” within the meaning of the Detroit SAA Operating Agreement. CSXT further argued that the Detroit SAA New York Dock Implementing Agreement, which implemented operations under the Detroit SAA Operating Agreement, made SMART-TD’s agreement with Conrail applicable to operations performed by Conrail as CSXT’s agent. In addition, the NYD Agreements relied upon by SMART-TD expressly excepted the Detroit SAA from their coverage. CSXT Sec. 11 Sub. at 37-39. Therefore, the B&O Agreement was not applicable to the transfer work performed by Conrail as CSXT’s agent, and CSXT’s utilization of Conrail to perform transfer work formerly performed by a CSXT job did not violate the B&O Agreement. CSXT Sec. 11 Sub. at 25-28, 34-37.

B. Section 11 Proceedings

Section 11(a) of the New York Dock conditions provides that “any dispute or controversy with respect to the interpretation, application or enforcement of this appendix . . . may be referred by either party to an arbitration committee.” 360 I.C.C. at 87.⁵ Board precedent is clear

⁵ “Appendix” refers to Appendix III of the ICC’s *New York Dock* decision, which contains the conditions.

that Section 11 applies to disputes over New York Dock implementing agreements as well as disputes over the conditions themselves.⁶ Board precedent is also clear that disputes relating to the New York Dock conditions and New York Dock implementing agreements must first be submitted to Section 11 arbitration with possible review by the Board.⁷

The Rougemere-Livernois Yard transfer dispute clearly involved such disputes since CSXT and SMART-TD relied on their differing interpretations of New York Dock implementing agreements. CSXT invoked arbitration under Section 11 of the New York Dock conditions in a April 6, 2021 letter to SMART-TD. CSXT Sec. 11 Sub. at 16. SMART-TD responded that Section 11 was not appropriate for the parties' dispute. SMART-TD Sec. 11 Sub. at 3-4.

Section 11(a) provides that each party will appoint a member of the Section 11 Committee. They are then to select an arbitrator to be the neutral chairperson of the Committee. CSXT designated its member in its April 6 letter. After SMART-TD refused to appoint its member, SMART-TD General Chairperson Lee was so designated by default by operation of Section 11(a). Because SMART-TD refused to discuss selection of the neutral member, CSXT on May 24, 2021 requested the NMB to appoint the neutral pursuant to Section 11. SMART-TD's efforts to stymie the appointment of the neutral were ended by the NMB when it appointed Arbitrator VanDagens as the neutral chairperson of the Section 11 Committee by letter dated

⁶ See, e.g., *Union Pac. Corp., Union Pac. R.R. Co. and Missouri Pac. R.R. Co.—Control and Merger—Southern Pac. Rail Corp., et al.*, Finance Docket No. 32760 (Sub-No. 45) (served Dec. 14, 2010), 2010 STB LEXIS, * 15 (“Arbitrators routinely rule on disputes that concern the interpretation and application of rail merger implementing agreements, and their decisions have been reviewed by the Board and our predecessor, the Interstate Commerce Commission (ICC))” (footnote omitted).

⁷ See, e.g., *Duluth, Winnipeg and Pac. Ry. Co.—Amended Trackage Rights Exemption—Duluth, Misssabe & Iron Range Ry. Co., et al.*, 2009 STB LEXIS 478, * 13 (“In any event, the Board does not consider implementing agreement disputes in the first instance.”).

September 22, 2021. CSXT Sec. 11 Sub. at 16.⁸ The parties provided their submissions to Arbitrator VanDagens on January 21, 2022, and a hearing was held on February 18, 2022.

C. VanDagens Section 11 Award

Arbitrator VanDagens issued her proposed award on June 1, 2022. After an executive session requested by the Organization, the Arbitrator did not make any changes to the proposed Award, which became final on June 27, 2022 when signed by the Arbitrator and the CSXT member of the Section 11 Committee. Exhibit No. 1. The VanDagens Award found in CSXT's favor on all issues, rejecting all of SMART-TD's arguments.

Arbitrator VanDagens rejected SMART-TD's argument that CSXT's invocation of Section 11 arbitration was untimely, explaining:

The period cited by the Organization does not preclude the invocation after more than 20 days. Instead, it provides a minimum period that must be observed before arbitration may be sought. Clearly, the Carrier waited more than 20 days to invoke arbitration giving the parties more than ample time to resolve their differences voluntarily. Unfortunately, no such resolution could be reached. Section 11 of the NYD conditions do not contain a fixed period for referring a matter to arbitration. The Carrier's referral to an arbitration committee pursuant to Article I, § 11 was not untimely.

Van Dagens Award at 4 (citing other awards that also found there was no such fixed period).

Based on the record in the Section 11 proceedings, Arbitrator VanDagens found that Rougemere Yard was part of the Detroit SAA, stating:

The outer limits of the Detroit SAA are defined in the Conrail Transaction Application and the Detroit SAA NYD Agreement. Rougemere and Livernois Yards are within the geographic limits of the Detroit SAA.

VanDagens Award at 2.

⁸ SMART-TD's efforts to block the appointment of the neutral member of the Section 11 Committee are described in the correspondence collected in Exhibit No. 22 to CSXT's Petition and CSXT's Reply to SMART-TD's Response. CSXT Reply at 9-11 (filed July 19, 2021).

Arbitrator VanDagens agreed with CSXT that the Detroit SAA NYD Agreement, not the CSXT Western District or NOMAD NYD Agreements as argued by SMART-TD, is the applicable NYD Agreement, explaining as follows: “The Carrier’s point is well taken that if a NYD Operating Agreement is to govern in the Detroit Shared Assets Area, it is the Detroit SAA Agreement, and not a NYD Agreement negotiated for another area.” Award at 7.

Arbitrator VanDagens found that CSXT’s use of Conrail did not violate the B&O Agreement, explaining as follows:

The Carrier’s replacement of Y122 with a Conrail Yard Job was an operational change allowed by the Conrail Transaction. The NYD Implementing Agreement permitted the Carrier to use Conrail as its agent to transfer cars between Rougemere and Livernois Yards. The STB-approved transaction overrides conflicting obligations under the parties’ B&O agreement. Thus, no violation occurred, and no remedy is required.

Award at 8.

Arbitrator VanDagens agreed that CSXT and Conrail are not foreign carriers vis-à-vis each other and do not interchange traffic, explaining:

Thus, Conrail is not a foreign line in this instance and there is no transfer of work as contemplated by Rule 106. The right that the Organization is asserting here would undermine or frustrate the rights held by the Carrier under the Detroit NYD Implementing Agreement. Additionally, the Organization has not established that the work in question is “interchange” work. The Carrier was not obligated to make an equitable arrangement for sharing of the transfer work under these circumstances.

Award at 8. Therefore, Rule 106 of the B&O Agreement was not violated.

The Organization’s member of the Section 11 Committee, General Chairperson Lee, subsequently submitted a written Dissent on July 14, 2022. *See* Exhibit No. 1. The Dissent is not part of the Section 11 decision. The Dissent is simply a repeat of the same arguments rejected by the Arbitrator. Significantly, for all its complaining, the Organization did not appeal the Award to the Board. So, notwithstanding its mischaracterizations of the Award, Section

11(c) makes the Award “final, binding, and conclusive” on the Organization for all findings contained in the Award.

CSXT does feel compelled to comment on the Dissent’s unwarranted attack on the Arbitrator’s qualifications. The Organization contends that the NMB’s guidelines for the appointment of neutrals for New York Dock cases “clearly stipulates that the neutrals provided on such matters would be qualified on New York Dock cases” and the “NMB failed to follow their own assignment guidelines and this award serves of no value and is very misplaced,” because Arbitrator VanDagens lacked sufficient experience with New York Dock disputes. Dissent at 1. The Organization laments that it would have prevailed only if there had been “a Neutral qualified on NYD.” *Id.* On the contrary, the Organization lost because its arguments had no merit. Nor does its criticism of the Arbitrator’s qualifications have any merit. The Organization misrepresents the NMB’s guidelines for appointment of neutrals in New York Dock cases. They state that the NMB “will furnish the parties to the dispute with a list of approximately thirty (30) qualified neutrals.” See Exhibit No. 6 (emphasis added). To be “qualified,” an arbitrator must be listed on the NMB’s Roster of Arbitrators. The NMB publishes its Uniform Procedures for Placement and Retention on the National Mediation Board Roster of Arbitrators on its website. <https://www.nmb.gov>. To be “qualified” for placement on this roster, an individual must either possess a certain level of labor arbitration or labor-management relations experience described in the guidelines or be “a member in good standing of the National Academy of Arbitrators.” The National Academy of Arbitrators is the preeminent organization of labor and employment arbitrators in the United States and Canada and has its own more stringent experience requirements for membership. Membership Guidelines, <https://naarb.org>. Arbitrator VanDagens is a lawyer, a member of the National

Academy, has more than 25 years experience as a labor arbitrator, including in the railroad industry, and is listed on the NMB's Roster of Arbitrators. Thus, she is "qualified" within the meaning of the NMB's guidelines. Contrary to the Organization's erroneous assertion, those guidelines do not require that an arbitrator have any particular level of experience with New York Dock cases to be qualified for appointment to a Section 11 Committee. Moreover, the New York Dock conditions specify that labor arbitrators will serve as neutrals because of their expertise in the railroad industry and railroad labor agreements. *See, e.g., CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review)*, 3 S.T.B. 701, 1998 WL 661418, * 10 n. 16 ("The ICC adopted arbitration procedures to ensure that 'those most familiar with the complexities of labor law and particular problems associated with railroad employees would determine disputes arising out of such conditions.'") (citations omitted). There is no question that Arbitrator VanDagens possesses that expertise. CSXT also notes that the Organization did not question the Arbitrator's qualifications when she was appointed by the NMB to this Section 11 Committee on September 22, 2021. The Organization only questioned the Arbitrator's qualifications after the Arbitrator ruled against it.

D. NRAB Proceedings

After CSXT invoked the Section 11 process, the Organization invoked arbitration under Section 3 of the RLA by filing a Notice of Intent with the NRAB First Division on April 29, 2021 submitting its Claim that CSXT's use of Conrail violated the B&O Agreement.⁹ CSXT Sec. 11 Sub. at 17. The NRAB consists of an equal number of carrier and union members and an arbitrator appointed by the NMB, who is chairperson. The NRAB First Division docketed the Organization's Claim as Case No. NRAB-00001-210254 on April 30, 2021. The parties

⁹ The First Division of the NRAB hears disputes involving the train and engine crafts.

provided their submissions on August 7, 2021. As explained, Arbitrator Jacobs recently scheduled a hearing for September 14, 2022.

CSXT has raised jurisdictional arguments to the NRAB that SMART-TD's case should be dismissed, because it involves the interpretation or application of the New York Dock conditions and New York Dock implementing agreements. The Divisions of the NRAB have long held that it lacks jurisdiction over claims that require such interpretation, because such claims must be submitted to arbitration under Article I, Section 11 of the New York Dock conditions. CSXT is hopeful that, if SMART-TD's case were to proceed to a NRAB award, the NRAB will follow its precedents and dismiss its case for lack of jurisdiction. However, CSXT should not be at risk of results inconsistent with those of Arbitrator VanDagens, sitting as an extension of this Board, and a decision of an RLA arbitrator. Moreover, as the Board's predecessor forcefully stated in *Delaware & Hudson*, "[t]he RLA has no role to play in the arbitration of implementing agreements under the authority of the Commission's labor protective conditions." 8 I.C.C.2d at 846. This is why CSXT filed its original Petition and is continuing to pursue its Amended Petition.

E. CSXT's Petition for Declaratory and Cease and Desist Orders

Because SMART-TD was refusing to participate in the Section 11 proceedings and denied their applicability when it initiated the NRAB arbitration proceedings, CSXT filed its Petition for Declaratory and Cease and Desist Orders with the Board on June 15, 2021. SMART-TD filed a Response on July 13, 2021. CSXT filed a Reply and request for leave to file its Reply on July 19, 2021. The Board has not yet ruled, possibly waiting for completion of the Section 11 proceedings and if a party sought review of the resulting VanDagens Award. As explained, no party appealed the VanDagens Award.

CSXT there asked the Board to declare that the issues CSXT submitted to Section 11 arbitration are within the Board's jurisdiction and appropriate for resolution in the first instance by a Section 11 Committee. CSXT also asked that the Board order the Organization to cease pursuing arbitration of issues in arbitration under the RLA, which are within the Board's jurisdiction. While SMART-TD was subsequently able to significantly delay the Section 11 proceedings, it participated in the Section 11 arbitration once the NMB appointed Arbitrator VanDagens as the neutral member of the Section 11 Committee. In light of the VanDagens Award, CSXT is no longer requesting the declaratory relief in its Petition that a Section 11 Committee has jurisdiction over the issues that CSXT submitted to it and SMART-TD be directed to participate in the Section 11 arbitration. However, given that SMART-TD is still pursuing arbitration by the NRAB of the very same issues decided by the VanDagens Award, CSXT continues to request an order from this Board directing SMART-TD to cease and desist that arbitration.

III. Argument

A. SMART-TD Is Asking the NRAB to Decide the Same Issues Decided By the VanDagens Award

A comparison of SMART-TD's submission to the NRAB (Exhibit No. 4) with its submission in the Section 11 arbitration (Exhibit No. 3) shows that SMART-TD is asking the NRAB to decide the very same issues already decided against SMART-TD by the VanDagens Award. Indeed, large portions of SMART-TD's NRAB Submission read verbatim to its Section 11 Submission.

1. Time Limits for Initiating Section 11 Arbitration

SMART-TD argued as a "Procedural Issue" in the Section 11 arbitration that Section 11 of the New York Dock conditions requires that arbitration be invoked within 20 days of when a

dispute first arises. Therefore, CSXT's invocation of Section 11 was untimely. As explained, Arbitrator VanDagens rejected this interpretation of Section 11 requirements, as have other arbitrators. Award at 4. Yet, SMART-TD makes this same Section 11 timeliness argument to the NRAB in its NRAB submission at page 7 again under "Procedural Issue":

In fact, had the Carrier truly believed that the proper direction for the dispute was to proceed with a Section 11 Board, they must have done so within twenty (20) days of the dispute, which they failed to do. . . . As noted in the Organization's reply to the NMB requesting comments on dispute falling under a NYD issue (Exhibit R), Section 11 of Appendix III, clearly outlines the requirements to establish a Section 11 Board which the Carrier did not follow and continues to ignore.

SMART-TD then quoted language from Section 11(a) that, if the carrier and union cannot settle any dispute "within 20 days after the dispute arises, it may be referred by either party to an arbitration committee." *Id.*

2. Whether Rougemere Yard Is Within the Detroit SAA

SMART-TD contended in the Section 11 proceedings that "the facts clearly proves that CSX Rougemere Yard is not a part of the Detroit SAA, but merely falls within close proximity to the SAA." SMART-TD Sec. 11 Sub. at 18. If Rougemere Yard were not in the Detroit SAA, then the Detroit SAA Operating Agreement and Detroit SAA NYD Agreement upon which CSXT relies would not be applicable to this case. Arbitrator VanDagens found that, based on the language of the Detroit SAA NYD Agreement and the record, Rougemere Yard is in fact within the Detroit SAA and the Detroit SAA Operating Agreement was applicable. Award at 2. Nonetheless, SMART-TD continues to pursue this same argument in virtually identical language in its NRAB Submission stating that "the facts clearly proves that CSX Rougemere Yard is not a part of the Detroit SAA, but merely falls within close proximity to the SAA." SMART-TD NRAB Sub. at 12.

3. Applicable NYD Implementing Agreement

A key determinant whether the B&O Agreement is violated by CSXT's use of Conrail for the Rougemere-Livernois Yard transfer is which NYD implementing agreement is applicable to train operations in the Detroit SAA. CSXT argued that the Detroit SAA NYD Agreement is the applicable agreement and made the Conrail collective bargaining agreement applicable to operations performed by Conrail as CSXT's agent. SMART-TD argued that the CSXT Western District NYD Agreement was the applicable New York Dock agreement, and it made the B&O Agreement the controlling labor agreement, because the Detroit SAA is within the Western District as defined by that NYD agreement. SMART-TD also relied on the subsequent NOMAD NYD Agreement, which reaffirmed the CSXT Western District Agreement. For example, SMART-TD argued as follows in its Section 11 submission:

Soon thereafter, CSXT and this Labor Organization finalized negotiating the district implementing agreements to include the CSXT Western District Agreement on August 28, 1998, which presides over the instant dispute. . . . Contained in the CSXT Western District Agreement is the designation of the B&O Agreement (as modified therein) as controlling for the Western Lines

SMART-TD Sec. 11 Sub at 14-15.

Nevertheless, the Carrier now takes an awkward position over twenty (20) years later that the B&O Agreement is not applicable with FD 33388 and further that the Division [NRAB] lacks authority over the dispute but the proper authority lies within the jurisdiction of the STB. The Employees disagree. As well, their *new* position is very misguided and in conflict with the Master Implementing Agreement and the CSXT Western District Agreement.

SMART-TD Sec. 11 Sub. at 16. Arbitrator VanDagens rejected these arguments and agreed that the Detroit SAA NYD Agreement is the applicable agreement, because it expressly applied to the Detroit SAA and the New York Dock agreements relied upon by SMART-TD expressly excepted the Detroit SAA from their coverage. Award at 7. This has not stopped SMART-TD from continuing the same argument in its NRAB arbitration that the Master NYD Agreement,

CSXT Western District NYD Agreement, and NOMAD NYD Agreement make the B&O Agreement the controlling agreement using similar language to that quoted above. Compare SMART-TD Sec. 11 Sub. at 16 with SMART-TD NRAB Sub. at 8-10.

4. Whether CSXT's Use of Conrail Was Permitted

The Organization argued that CSXT's use of Conrail to perform the transfer service formerly performed by CSXT Job Y122 violated the B&O Agreement. Arbitrator VanDagens found the B&O Agreement was not violated, because the Detroit SAA NYD Agreement made the Organization's agreement with Conrail, not the B&O Agreement, applicable to work that Conrail performs as agent for CSXT under the Detroit SAA Operating Agreement, and overrode any impediments in the B&O Agreement, stating as follows:

The Carrier's replacement of Y122 with a Conrail Yard Job was an operational change allowed by the Conrail Transaction. The NYD Implementing Agreement permitted the Carrier to use Conrail as its agent to transfer cars between Rougemere and Livernois Yards. The STB-approved transaction overrides conflicting obligations under the parties' B&O agreement. Thus, no violation occurred, and no remedy is required.

Award at 8. Contrary to the VanDagens Award, SMART-TD continues to argue in its NRAB Submission that CSXT's use of a Conrail yard job violates the B&O Agreement, specifically the Scope Rule, Rule 106, and Article 3, and seeks a monetary and other remedies. *See, e.g.*, SMART-TD NRAB Sub. at 20 ("Consequently, considering that this dispute is properly before the Division the Employees have proved by a preponderance of the evidence that the B&O Agreement was violated by the Carriers actions. Therefore, the proper remedy is to resolve the dispute is to render a favorable award in the claimant's behalf as it has been demonstrated that this is a willful violation of contract.").

5. Whether CSXT Interchanges Traffic With Conrail

SMART-TD argued in its Section 11 submission that the work of transferring railcars between CSXT and Conrail is interchange. Therefore Rule 106 of the B&O Agreement required that CSXT reach agreement with SMART-TD “to afford equitable portions of the interchange work with foreign line carriers,” SMART-TD Sec. 11 Sub. at 18. In other words, the transfer work must be shared by CSXT and Conrail trainmen. Arbitrator VanDagens agreed with CSXT that under the SAA concept, Conrail is not a “foreign line” carrier and does not interchange with CSXT. And Arbitrator VanDagens therefore concluded that Rule 106 was also inapplicable and was not violated. Otherwise CSXT’s rights under the Detroit SAA to use Conrail as its agent would be undermined. Award at 7-8.

SMART-TD makes this exact same argument in its NRAB Submission using similar language. See SMART-TD NRAB Sub. at 12 (“Whereas, the Carrier is required under Rule 106 of B&O Agreement, *vida infra*, to afford equitable portions of the interchange work with foreign line carriers.”).

B. SMART-TD Is Collaterally Attacking the VanDagens Award and the Board’s Jurisdiction

By pursuing arbitration under the RLA of the same issues decided by the VanDagens Award, as described above, SMART-TD is collaterally attacking a decision of this Board and bypassing the Board’s exclusive jurisdiction.

It is well settled under Board and judicial precedent that unions cannot use RLA dispute procedures to resolve labor disputes over the implementation of Board-approved railroad consolidations, because they are within the exclusive jurisdiction of this Board. For example, in *Railway Labor Executives Ass’n v. Southern Pacific Transportation Co.*, 7 F.3d 902 (9th Cir. 1993), the involved rail carriers invoked the procedures in Article I, Section 4 of the New York

Dock conditions to reach required implementing agreements. Rail unions argued instead that agreements to implement the approved rail merger had to be obtained under the RLA major dispute bargaining procedures. Rail labor sought a declaratory judgment in court to enforce the RLA bargaining procedures. The district court dismissed their complaint finding that the Board's predecessor had exclusive jurisdiction over labor aspects of rail mergers. The Ninth Circuit agreed, relying upon the reasoning of *Norfolk & Western Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117 (1991). The Supreme Court there held that the Board's exclusive jurisdiction over railroad mergers superseded RLA requirements because of the "immunities" language in 49 U.S.C. § 11321(a) (then § 11341(a)). The Ninth Circuit held that this same reasoning supported "the ability of the ICC to exempt parties from RLA procedures and impose an alternative set of procedures in connection with a merger is integral to meeting that objective" of Section 11321(a) to promote efficiency from railroad mergers. 7 F.3d at 906.

A few years later, the Board had occasion to address this same issue in *Union Railroad Co. and Bessemer & Lake Erie Railroad Co.—Arbitration Review—United Steel Workers of Am.*, 1998 STB LEXIS 950 (served Dec. 17, 1998), *aff'd sub nom. Union Railroad Co. v. United Steelworkers*, 242 F.3d 458 (3d Cir. 2001). In that case, as in *Railway Labor Executives Ass'n v. Southern Pacific Transportation Co.*, a union argued that the RLA major dispute bargaining procedures rather than the New York Dock Section 4 procedures applied to changes in collective bargaining agreements necessary to implement a Board approved merger. The Board held that its exclusive jurisdiction over railroad consolidations under 49 U.S.C. § 11321(a) [formerly § 11341(a)] superseded requirements of the RLA for modifying collective bargaining agreements.

In *Delaware & Hudson*, which CSXT relied upon for its Petition for Declaratory and Cease and Desist Orders, the Board's predecessor addressed similar jurisdictional issues

involving the primacy of its Section 11 procedures to resolve disputes growing out of the interpretation or application of its employee protective conditions and implementing agreements reached thereunder. The ICC there explained that the logic of *Norfolk & Western* similarly required the conclusion that unions could not use the RLA Section 3 minor dispute arbitration procedures to resolve disputes over application or interpretation of an implementing agreement, stating that “[a]lthough Norfolk & Western addressed the disruptive effect of allowing the parties to pursue the ‘major dispute’ mechanisms of the RLA, no distinction can logically be made that the RLA ‘minor dispute’ processes should be allowed to supplant the Commission’s own independent dispute resolution procedures.” 8 I.C.C.2d at 846. While that case involved the Mendocino Coast conditions, the issues are the same in a case involving the New York Dock conditions.

In *Delaware & Hudson* the implementing agreement had been imposed through arbitration under Article I, Section 4 of the conditions, the “Harris Implementing Agreement” (from Arbitrator Harris). Disagreements later arose between the carrier and the union over the proper application of the Harris Implementing Agreement. As in the instant case, SMART-TD’s predecessor tried to put these disagreements before an arbitration board established under Section 3 of the RLA. The carrier argued that they had to be submitted to arbitration under Article I, Section 11 of the Mendocino Coast conditions, which is identical to Section 11 of the New York Dock conditions.

The ICC held that “the Commission’s labor protective conditions contain the exclusive dispute resolution mechanism for labor disputes arising out of implementation of the lease and trackage rights transactions approved by the Commission or exempted from the approval

process.” *Id.* at 845. The Commission further found that “the integrity of the implementing agreement process is directly at stake here” explaining as follows:

If one party can frustrate the orderly execution of the terms of an implementing agreement through resort to the RLA, they are in effect collaterally attacking the agreement. Thus, RLEA’s argument is a collateral attack on this ICC order . . . ,” [i.e., the Harris Award] . . . The National Mediation Board arbitrator could not fashion a meaningful arbitration award without impinging on the ICC’s implementing agreement, upon which the transactions were permitted to go forward. . . . Thus, rail labor must not be permitted to assert RLA jurisdiction over matters directly relating to implementing a transaction approved by the Commission under § 11341 and, thereby, avoid the jurisdictional bar of § 11341(a).

Id. at 845.

As in *Delaware & Hudson*, this dispute clearly involves disagreements over the proper interpretation and application of implementing agreements reached under the Board’s employee protective conditions, here the New York Dock conditions. CSXT argued that the Detroit SAA NYD Agreement is the applicable NYD agreement, while SMART-TD argued that the CSXT Western District and NOMAD NYD Agreements are the applicable NYD agreements. In addition, SMART-TD’s argument that Rougemere Yard was not within the Detroit SAA required interpretation of Article III of the Detroit SAA NYD Agreement, which defines the geographic scope of the Detroit SAA. There was also disagreement over the timeliness of CSXT’s invocation of Section 11 arbitration, which required interpretation of the conditions themselves. There is no question that these disputes are within the Board’s exclusive jurisdiction, and it has repeatedly directed that such disputes first be resolved through the Section 11 dispute procedures and then by a permissible appeal to the Board pursuant to 49 C.F.R. § 1115.8. See, e.g., *Union Pac. Corp., Union Pac. R.R. Co. and Missouri Pac. R.R. Co.—Control and Merger—Southern Pac. Rail Corp., et al.*, Finance Docket No. 32760 (Sub-No. 45) (served Dec. 14, 2010), 2010 STB LEXIS, ** 15-16.

Finally, as in *Delaware & Hudson*, the relief that SMART-TD is seeking here from the NRAB in the Section 3 arbitration would “imping[e]” on the Detroit SAA NYD Agreement as interpreted by Arbitrator VanDagens. The VanDagens Award found that CSXT’s use of Conrail does not violate the B&O Agreement because the Detroit SAA NYD Agreement makes it inapplicable in the circumstances of this case. SMART-TD is asking the NRAB to find just the opposite--that the Detroit SAA NYD Agreement does not apply and CSXT’s actions therefore violated the B&O Agreement. As Arbitrator VanDagens found, the relief requested by SMART-TD would frustrate or limit CSXT’s right under the Detroit SAA Operating Agreement, and as part of a Board-approved transaction, to use Conrail as its agent in the Detroit SAA. Award at 8.

C. The Board Should Order SMART-TD to Cease and Desist Pursuing RLA
Arbitration

The decisions discussed above conclusively show that the Board has authority under 49 U.S.C. § 11321(a) to enforce its Section 11 procedures for resolving labor disputes growing from implementation of Board approved transactions, even if the Board’s procedures supplant dispute resolution procedures in the RLA. The relief requested by CSXT’s Amended Petition is necessary to protect the integrity of the Board’s dispute resolution procedures and implementing agreements, here the Detroit SAA NYD Agreement, and avoid inconsistent results. Allowing the NRAB arbitration to continue is also a waste of time and resources because, as explained, the VanDagens Award addressed every issue raised by the Organization before the NRAB. The Organization’s intemperate Dissent makes clear that it views the VanDagens Award as a nullity, variously stating that the Award “serves of no value and is very misplaced” and “this decision should not be considered as sound precedent by any entity.” Dissent at 1, 5. By “any entity,” the Organization means the NRAB. The Organization is very clear that it is hoping for a different result from the NRAB asserting that “jurisdiction of this matter still lies before the NRAB under

Section 3 of the RLA.” Dissent at 1. The VanDagens Award is a decision of the Board. SMART-TD should not be allowed to collaterally attack a Board decision and a NYD implementing agreement in a RLA arbitration proceeding. Failure to grant the relief sought by CSXT will encourage collateral attacks on the Board’s jurisdiction, dispute procedures, and implementing agreements. In addition, should the NRAB exercise jurisdiction and reach a decision contrary to the VanDagens Award, there will be a waste of Board and judicial resources to undo the inconsistent results.

D. The Organization’s Response to CSXT’s Petition for Declaratory and Cease and Desist Orders Does Not Provide Any Basis for Denying the Relief Sought by This Amended Petition

As discussed, the Organization filed a Response to CSXT’s Petition on July 13, 2021. As explained in CSXT’s Reply (filed July 19, 2021), the Organization’s arguments therein do not provide any basis for denying Board jurisdiction and CSXT’s continued request for a cease and desist order. More importantly, they are now foreclosed by the findings of the VanDagens Award and SMART-TD did not appeal those finding.

The Organization’s Response argued that “CSXT’s actions constitute a waiver of any claim raised now that the STB has jurisdiction” Response at 2. The Organization’s waiver by “inaction” argument consisted of two parts. First, CSXT waited too long to invoke Section 11 arbitration, citing in part the supposed 20-day limit in Section 11(a). Second, CSXT should have filed a new notice under Section 4 of the New York Dock conditions to make the operational change of replacing the CSXT Y122 job with a Conrail yard job and it was too late to do so. The Organization’s waiver by four years of inaction argument is a laches argument without labelling it as such. The VanDagens Award rejected the Organization’s laches argument in the Section 11 proceedings as well as the 20-day limit argument. Award at 4-5. Arbitrator VanDagens found

that “[a]ny delay appears to have been caused by the parties’ attempts to resolve this matter informally.” Therefore, the Arbitrator found that CSXT’s invocation of the Board’s jurisdiction was timely and the Board has jurisdiction over the dispute. Award at 4, 8. The VanDagens Award’s finding that “[t]he NYD Implementing Agreement permitted the carrier to use Conrail as its agent to transfer cars between Rougemere and Livernois Yards” forecloses the Organization’s argument that CSXT should have served a new New York Dock notice to make this operational change. Award at 8. No new notice was required because, as Arbitrator VanDagens found, the existing Detroit SAA NYD Agreement permitted replacement of Y122 with the Conrail yard job.

Conclusion

For the reasons set forth in this Amended Petition, the Board should order SMART-TD to withdraw its case from the NRAB and cease trying to re-litigate issues in RLA arbitration conclusively decided by the VanDagens Award.

Respectfully submitted,

/s/ Ronald M. Johnson

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Dated: July 29, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2022, a copy of the forgoing Amended Petition for Declaratory and Cease and Desist Orders was served by e-mail on the following persons:

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Finance Docket No. 33388 (Sub-No. 102)

CSX TRANSPORTATION, INC.
AMENDED PETITION FOR DECLARATORY
AND CEASE AND DESIST ORDERS

VOLUME 2

EXHIBITS

EXHIBIT 1

VANDAGENS SECTION 11 AWARD

**ARBITRATION UNDER ARTICLE I, SECTION 11 OF THE
NEW YORK DOCK CONDITIONS**

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.—CONTROL AND
OPERATING LEASES—CONRAIL, INC. AND CONSOLIDATED RAIL CORP.,
FINANCE DOCKET NO. 33388

CSX TRANSPORTATION, INC.

AND

INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND
TRANSPORTATION WORKERS –TRANSPORTATION DIVISION

Background

In 1997, CSX Transportation, Inc. (“CSXT” or the “Carrier”) and Norfolk Southern Railway Company (“NSR”) and their parent corporations applied to the Surface Transportation Board (“STB”) for authorization pursuant to 49 U.S.C. §§ 11323-324 to control the Consolidated Rail Corporation (“Conrail” or the “CRC”) and divide most of its assets between them. The STB approved their control and division of Conrail in *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co.—Control and Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corp.*, STB Finance Docket No. 33388 (July 23, 1998) (the “Conrail Decision”).

Article I, Section 4 of the Master New York Dock (“NYD”) Implementing Agreement requires that the parties reach implementing agreements through negotiation or arbitration. The Applicants reached voluntary NYD implementing agreements with the Organization’s predecessor for the craft of trainmen. Most of Conrail’s rail lines, equipment, facilities, and employees were allocated to either CSXT or NSR and integrated into their rail systems.

In Detroit, Philadelphia/South Jersey, and North Jersey, the so-called Shared Assets Areas (“SAA”), Conrail continued to exist as a wholly owned subsidiary of CSXT and NSR. Each SAA is governed by a separate Operating Agreement, to which CSXT, NSR, and Conrail are parties. Shippers in the SAA located on Conrail lines are served by both CSXT and NSR.

Implementing agreements were entered into by CSXT, NSR, Conrail, and the International Association of Sheet Metal, Air, Rail and Transportation Workers - Transportation Division (“SMART-TD” or the “Organization”). The Implementing Agreement for the Detroit SAA is Attachment 1 to the Master NYD Implementing Agreement. The Detroit SAA Operating Agreement § 1 (yy) defines “Shared Assets Area” as follows:

“Shared Assets Area” means the geographic area comprising the Shared Assets and Operator Facilities and Jointly-Operated Facilities directly (without intermediate

connection to another railroad) attached to the trackage included within the Shared Assets, which is defined as the “Detroit” Shared Assets Area.

The outer limits of the Detroit SAA are defined in the Conrail Transaction Application and the Detroit SAA NYD Agreement. Rougemere and Livernois Yards are within the geographic limits of the Detroit SAA.

Events giving rise to this dispute

Prior to 2017, CSXT transferred railcars between CSXT’s Rougemere Yard and Conrail’s Livernois Yard in the Detroit SAA seven days a week using CSXT Yard Job Y122. Y122’s transfer operations originated in Rougemere Yard, traveled over CSXT track to a connection at Delray Tower, and then traveled over Conrail track to reach Livernois Yard. Y122 then picked up cars at Livernois Yard and returned to Rougemere Yard.

CSXT and Conrail met to evaluate how to improve the fluidity and efficiency of train operations, in particular the transfer of railcars between Rougemere and Livernois Yards in the Detroit SAA. They determined that performing the transfer via a nighttime Conrail job originating in Livernois Yard rather than the daytime CSXT job (Y122) originating in Rougemere Yard would improve operations. Effective November 18, 2017, CSXT abolished assignment Y122 at Rougemere Yard and began utilizing Conrail to perform this move, citing operational inefficiencies.

The Organization filed multiple penalty claims on behalf of its member asserting that the Carrier had violated Rule 1 (Scope) and Rule 106 (Interchange) and Article 3 of the parties’ collective bargaining agreement (“B&O Agreement”) by abolishment of work in the Rougemere Yard and by the use of Conrail to transfer railcars.¹ The Carrier denied the claims and the Organization appealed on July 23, 2018. No further action was taken until April 6, 2021, when the Carrier asserted that the matter was governed by the NYD Operating Agreement for the Detroit Shared Assets. The Carrier took the position that the *Conrail* decision supersedes the parties’ collective bargaining agreement with respect to work performed by Conrail as CSXT’s agent in the Detroit SAA, and thus no contractual violation had occurred. In the meanwhile, the affected conductor exercised his seniority to move to another assignment.

Procedural Issues

The Carrier then invoked arbitration pursuant to Article I, Section 11 of the New York Dock conditions imposed in the *Conrail* decision and appointed Jennifer E. Manz, Director, Labor Relations, as CSXT’s member of the Section 11 Committee. General Chairperson Richard Lee was

¹ The claim filed with the NMB reads, “Allow the a [ster] basic eight (8) hour day penalty due to CSX’s willful violation of the CBA, in particular but not limited to the Scope Rules/Articles, Rule 59, Article 3, and Rule 106, BLE 1971 Interchange agreement. The violation of the CBA has eliminated a prior right employees ability to work an assignment of his choosing belong to CSX employees and was illegally ‘farmed out’ to Conrail SA to which they are not entitled to, in an attempt to eliminate assignment to reduced costs for the stockholders. Consider this claim as notice that this is a continuous claim starting on November 19, 2017 and will be continued until resolved under the RLA. If CSX chooses to deny and not resolve the issue they do so at their own peril and should pay all claims in the full amount.”

appointed as the Organization's member and the neutral chairperson was appointed by the National Mediation Board by letter dated September 22, 2021.

The Organization contends that its claims properly belong before the First Division of the National Railroad Adjustment Board ("NRAB") under the Railway Labor Act ("RLA"), as amended. The Organization contends that the Carrier's actions deprived CSXT employees of work that they are entitled to under the clear and unambiguous terms of the B&O Agreement. The Organization asserts that it has not progressed any grievance on behalf of anyone claiming to be a displaced or dismissed employee as defined under NYD Protections related to the *Conrail* decision. The Organization contends that if the Carrier had notified CSXT employees of their potential right to NYD Protections from the effective date of the operating change, they could have filed claims under the Implementing Agreement.

The Carrier contends that an arbitration board established under the RLA would not have jurisdiction over the Organization's claim because pursuant to Article I, § 11 of the NYD conditions, an arbitration committee must interpret the NYD conditions and implementing agreements imposed in the *Conrail* decision. *See, Union Pac. Corp., Union Pac. R.R. Co. and Missouri Pac. R.R. Co.—Control and Merger—Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and the Denver & Rio Grande Western R.R. Co., Finance Docket No. 32760 (Sub-No. 45) (served Dec. 14, 2010), 2010 WL 5125512, * 5.* The Carrier further contends that STB approval of a transaction under 49 U.S.C. § § 11323-324 supersedes or overrides collective bargaining agreement terms that would frustrate an STB-approved transaction.²

The Carrier further contends that the right to invoke Section 11 arbitration is not limited to claimants seeking NYD protections. The Carrier contends that arbitral precedent makes clear that NYD arbitrators have jurisdiction to determine whether operational changes are related to the implementation of an STB-approved transaction, citing *Canadian National Ry. Co., et al.—Control—Wisconsin Central Transportation Corp., et al.*, 2008 STB LEXIS 321 at * 8 ("It is well established that disputes over whether employment changes are being taken to implement a transaction subject to New York Dock are to be resolved through arbitration, subject to appeal to the Board."). According to the Carrier, because the instant dispute requires the Section 11 Committee to decide whether CSXT's replacement of Y122 with a Conrail Yard Job was an operational change allowed by the Conrail Transaction, this Committee also has jurisdiction over the Organization's related arguments that CSXT cannot rely on the STB's approval of the Conrail Transaction to justify its use of Conrail.

The authority of a Section 11 arbitration committee to address any dispute or controversy with respect to the interpretation, application, or enforcement of the NYD conditions cannot seriously be disputed. This dispute arose out of operational changes made by the Carrier, which it asserts is permitted by the Conrail Transaction. Since the Carrier points to the STB approval of the terms of the Conrail Transaction to justify its use of Conrail to perform switching in the Detroit SAA, this is a dispute with respect to the interpretation or application of the NYD conditions.

² The Carrier argues that the override of RLA requirements and agreements is based in 49 U.S.C. § 11321(a), and the imposition of labor protection under 49 U.S.C. § 11326. Section 11321(a) provides that a transaction approved under Sections 11323 and 11324 is "exempt from . . . all other law . . . as necessary to let . . ." the transaction be carried out. The Supreme Court has held that "all other law" includes collective bargaining agreements reached under the RLA. *Norfolk & Western Ry Co. v. Am. Train Dispatchers Ass'n*, 499 US 117 (1991) (interpreting Section 11321(a), then 11341(a)).

Timeliness of Invocation of Section 11 Board

The Organization contends that even if a NYD Section 11 Board could have jurisdiction over this matter, the Carrier failed to timely request that this Board be established. The Organization contends that the triggering action occurred on November 18, 2017, but the Carrier did not assert that the claim was “a NYD matter” until April 6, 2021. The Organization contends that the Carrier was required to assert that the dispute should proceed under the jurisdiction of a Section 11 Board within 20 days of the dispute, and thus, is untimely.

The Conrail Master NYD Implementing Agreement reads, at Appendix III, § 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 Section 4 and 12 of this Article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee...

The Organization contends that the Carrier had twenty days after the dispute arose to refer it to an arbitration committee. The Organization contends that the Carrier’s invocation of NYD arbitration, four years after the triggering of the dispute, and twenty years after FD 33388 was approved by the STB and the Master Implementing Agreement became effective, is therefore, untimely. The Organization contends that the jurisdiction of the STB over transactions is not “timeless and limitless,” and CSXT’s actions constitute a waiver of any claim raised now that the STB has jurisdiction with respect to a transaction that was completed over two decades ago.

The Carrier contends that the Organization’s argument is neither supported by the plain language of Section 11 nor by precedent interpreting it. The Carrier contends that the only possible interpretation of this section is that the parties must engage in settlement discussion for a minimum of 20 days before invoking arbitration. *E.g., Missouri Pac. Railroad Co. and Am. Train Dispatchers Ass’n*, NYD Sec. 11 Arbitration, ICC Finance Docket No. 27773 at 7 (1981) (“[I]t seems clear that the 20 days was meant to provide a minimum period in which the parties were to attempt to reconcile their differences, and only after the expiration of that period could either party invoke arbitration.”)

The period cited by the Organization does not preclude the invocation of arbitration after more than 20 days. Instead, it provides a minimum period that must be observed before arbitration may be sought. Clearly, the Carrier waited more than 20 days to invoke arbitration, giving the parties more than ample time to resolve their differences voluntarily. Unfortunately, no such resolution could be reached. Section 11 of the NYD conditions do not contain a fixed period for referring a matter to arbitration. The Carrier’s referral to an arbitration committee pursuant to Article I, § 11 was not untimely.

The Organization is also seeking to invoke the doctrine of laches against the Carrier, citing decisions which found that the NYD conditions “do not contain an express time limitation for filing claims for displacement and dismissal” but an employee’s “unreasonable delay in progressing a claim for protective benefits which operates to prejudice the Carrier, is barred under the doctrine of laches.” *TCU and UP*, NYD § 11 Arb. (LaRocco, 1990), *citing CR v. IBEW*, NYD § 11 Arb. (Seltzer,

12/16/85); RED and C&WI, Appdx C-1 Arb. (Dolnick, 1/25/73). The Carrier here is not invoking NYD protections but has raised a defense to a claim filed by the Organization. The issue before this committee is unrelated to a claim for compensation by an affected employee.

To prove laches, the Organization must show 1) undue delay, 2) no or inadequate justification for the delay, and 3) prejudice to another who justifiably relied on another party to assert the claim. The Organization's summary of correspondence following the claim recognizes that the Carrier first raised the applicability of the *Conrail* decision in the on-property handling of the initial claim. In so doing, the Carrier challenged the jurisdiction of the First Division to decide this matter, asserting that a NYD committee has exclusive jurisdiction to decide questions regarding the implementation of an STB-approved transaction.

The Organization asserts that because the Carrier waited four years to assert that the matter was covered by NYD conditions, the affected employees were deprived of the opportunity to be accorded protective status under NYD. The Organization asserts that claimants were prejudiced as they cannot retroactively act to protest a displacement guarantee, nor did the Carrier take the snapshot of test period earnings required under NYD protections. The Organization further argued that the Carrier's assertion of this committee's exclusive authority deprives its members of pursuing a claim at the NRAB.

The Organization has not shown that the doctrine of laches should apply here. Any delay appears to have been caused by the parties' attempts to resolve this matter informally. Furthermore, the Carrier is not asserting rights, but challenging the Organization's choice of forum. Lack of jurisdiction cannot be waived by inaction. As for a showing of prejudice, the RLA claim is still active before the NRAB; the Carrier's assertion has not changed that. The Organization or the claimant could have sought applicable displacement allowance at any time; the Carrier's position does not change what entitlement he might have had. The Organization has failed to show how claimants were prejudiced by the Carrier's assertion of a defense. Even if the doctrine of laches could prevent a party from raising a jurisdictional challenge to a claim asserted by another, it will not do so here.

Applicable Agreements

Rougemere Yard lies in the geographical area covered by the CSXT Western District Agreement.³ Therefore, the Organization contends that by the terms of the CSXT Western District NYD Agreement and the 2010 Northern Mid-Atlantic ("NOMAD") New York Dock Implementing Agreement, this matter must be governed by the B&O Agreement, which was negotiated after the *Conrail* decision was approved by the STB. The Organization argues that the CSXT Western NYD Agreement designates the B&O Agreement as controlling for the Western Lines.

The Detroit SAA NYD Implementing Agreement was negotiated specifically for the Detroit SAA. Both the NOMAD NYD Implementing Agreement and the Western District NYD Agreement expressly exclude the Detroit SAA from their coverage. For instance, the Western District Agreement reads, in part:

³ In 2010, the NOMAD NYD Agreement combined the CSXT Western, Eastern, and Northern Districts into a larger consolidated district, the Northern Mid-Atlantic District, and made the B&O Agreement applicable to trainmen working in the larger NOMAD district, which included Rougemere Yard.

ARTICLE I - SENIORITY

- A. Train operations and the associated work forces of the former B&O, B&OCT, C&O (PMHV), C&O (Proper), C&EI, TTRR, L&N and Conrail, will be merged into the new operating and seniority district hereinafter described:

Eastern Limits:	Cleveland, OH (exclusive) Willard, OH (inclusive)
Southern Limits:	Cincinnati, OH (inclusive) Louisville, KY (exclusive) Evansville, IN (exclusive)
Western Limits:	St. Louis, MO (inclusive) Chicago, IL (inclusive)
Northern Limits:	Manistee, MI (inclusive) Midland, MI (inclusive) Port Huron, MI (inclusive)

The above includes all mainlines, branch lines, yard tracks, industrial leads, stations between points identified, and all terminals that lie at the end of a line segment **except: Detroit (SAA)**. All branches and industrial tracks intersecting the above lines and all preexisting territorial rights of the involved districts not in conflict with the intent of this agreement are included in the merged district.

- B. All road territory and terminals within the districts will have one common work force operating under one labor agreement. The former B&O labor agreement, as modified herein, will apply in the Western District, except the B&OCT labor agreement will remain applicable in the B&OCT territory. (emphasis added.)

The Organization contends that the exception of the Detroit SAA applies only to the employees working at Conrail in the Shared Assets Area and that the B&O Agreement is otherwise controlling. It asserts that the B&O Agreement makes clear that the Carrier does not have the right to allow Conrail crews to perform work belonging to CSXT employees in CSXT's Rougemere Yard.

The Carrier does not assert that the B&O contract has been nullified. It does not deny that the contract is controlling when CSXT employees do work for CSXT. But, the Carrier contends, where a conflict arises between the B&O contract and the NYD Agreement, the NYD Agreement takes precedence.

According to the Carrier, the Detroit SAA Operating Agreement provides CSXT the express right to utilize Conrail as its agent to perform "Switching and Yard Services" that CSXT otherwise would perform in the Detroit SAA. The Agreement reads, at Section 3(d)(i):

(d) Switching and Yard Services.

- (i) At the request of and as agent for each Operator⁴, CRC shall perform Switching and Yard Services required by such Operator within the Shared

⁴ "Operator" is defined in the Agreement as CSXT or NSR.

Assets Area, including without limitation any such services which such Operator may be responsible for performing or having performed for a shipper or other Person.

The Carrier contends that there is no question that the work done by Conrail here meets the definition of "Switching and Yard Service," defined as the "movement of loaded or empty Railcars between yards..." The Conrail Job moves railcars between Rougemere and Livernois Yards at CSXT's request.

As to whose crews will perform the work, the Carrier contends that the Detroit SAA Operating Agreement provides that when CSXT, NSR, or Conrail are operating in the SAA, they will use their own crews, irrespective of whose tracks they are operating over. Section 3(c)(i) states,

- (i) CSXT hereby grants to CRC and NSR overhead operating rights to operate CRC trains and NSR trains, respectively, with their own crews, over such CSXT line segments access to and use of which by CRC and NSR are necessary to effectuate the train operations and services contemplated by this Agreement.

The Carrier also asserts that in furtherance of this provision, the NYD Implementing Agreement for the Detroit Shared Assets provides, at Article II, "For CRC employees working within Shared Asset Areas (SSA's) the CRC collective bargaining agreement will be the effective agreement for SAA employees."

The Carrier further contends that if the B&O Agreement were interpreted as suggested by the Organization, its right to use Conrail as its agent would be blocked or limited. The Carrier argues that if the B&O provision is applied in the Shared Assets Area, the entire concept spelled out in the Implementing Agreement will be frustrated.

The Carrier's point is well-taken that if a NYD Operating Agreement is to govern in the Detroit Shared Assets Area, it is the Detroit SAA Agreement, and not a NYD Agreement negotiated for another area. The Organization has not pointed to any provision in either the NOMAD NYD Implementing Agreement or the Western District NYD Agreement which suggests that the parties intended for the Agreement to control the Detroit SAA. In fact, they both expressly exclude it. Thus, the governing Agreement must be the Detroit SAA Operating Agreement, which expressly gives the Carrier the right to use Conrail to perform Switching and Yard Services required by the Carrier within the Shared Assets Area. As a result, the Organization's position must be rejected, as enforcement as the Organization suggests would frustrate the STB-approved transaction.

Interchange Work

The Organization argued that Rule 106, Interchange, of the parties' Agreement must be complied with because the work performed by the Y122 and now the Conrail Yard Job is "interchange work." When the Carrier notified the Organization of the intended change on October 27, 2017, the Director of Labor Relations wrote, "In accordance with Rule 68 of the Agreement between the parties, this is to notify you of Conrail's intent to institute interchange service at CSX's Rougemere Yard in Detroit, MI...Notice of the designated interchange tracks will also be immediately placed in the

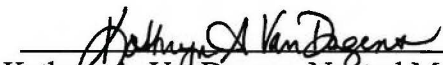
Conrail Detroit SAA Operating Bulletin. This interchange service is scheduled to begin on November 11, 2017.” The Organization contends that the affected employee(s) were entitled to an equitable percentage of the interchange work between CSXT and Conrail, pursuant to the B&O agreement.

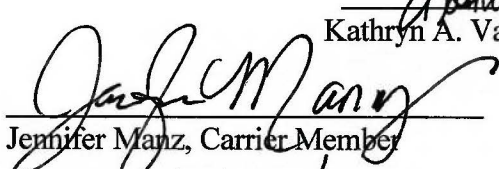
The Carrier responded that despite this statement to the contrary, this was not interchange work because any cars handled by Conrail stayed in CSXT’s account, as Conrail only acted as an agent for CSXT. An interchange occurs only when cars are transferred from the account of one carrier to another. *See, e.g., Union Pacific R. Co. and United Transp. Union*, Pub. Law Board No. 1048, Award No. 111 at 1 (1986) (Moore, Arb.) Thus, there was no “interchange.” And because Rule 106 only governs matters relating to the interchange of railcars between CSXT and connecting carriers, it was inapplicable here.

The terms of the Detroit SAA NYD Implementing Agreement, applicable in the Detroit SAA, make clear that Conrail acts as an agent for the Carrier and not as its own carrier. Thus, Conrail is not a foreign line in this instance and there is no transfer of work as contemplated by Rule 106. The right that the Organization is asserting here would undermine or frustrate the rights held by the Carrier under the Detroit SAA NYD Implementing Agreement. Additionally, the Organization has not established that the work in question is “interchange” work. The Carrier was not obligated to make an equitable arrangement for sharing of the transfer work under these circumstances.

FINDINGS and AWARD

1. The Arbitration Committee was properly established by the National Mediation Board pursuant to Article I § 11 of the New York Dock protective conditions.
2. The Arbitration Committee has jurisdiction to determine whether changes in operation are related to the implementation of an STB-approved transaction.
3. The Carrier’s invocation of arbitration under Article I, § 11 was timely.
4. The Carrier’s replacement of Y122 with a Conrail Yard Job was an operational change allowed by the Conrail Transaction. The NYD Implementing Agreement permitted the Carrier to use Conrail as its agent to transfer cars between Rougemere and Livernois Yards. The STB-approved transaction overrides conflicting obligations under the parties’ B&O agreement. Thus, no violation occurred, and no remedy is required.


Kathryn A. VanDagens, Neutral Member


Jennifer Manz, Carrier Member

Date: 6/27/22


Richard Lee, Organization Member

Dissent attached

**Organization Member's Dissent to the Findings and Award of
Arbitration Under Article I, Section 11 of the New York Dock Conditions
Chairperson Kathryn A. VanDagens**

**CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.—CONTROL AND
OPERATING LEASES—CONRAIL, INC. AND CONSOLIDATED RAIL CORP.,
FINANCE DOCKET NO. 33388**

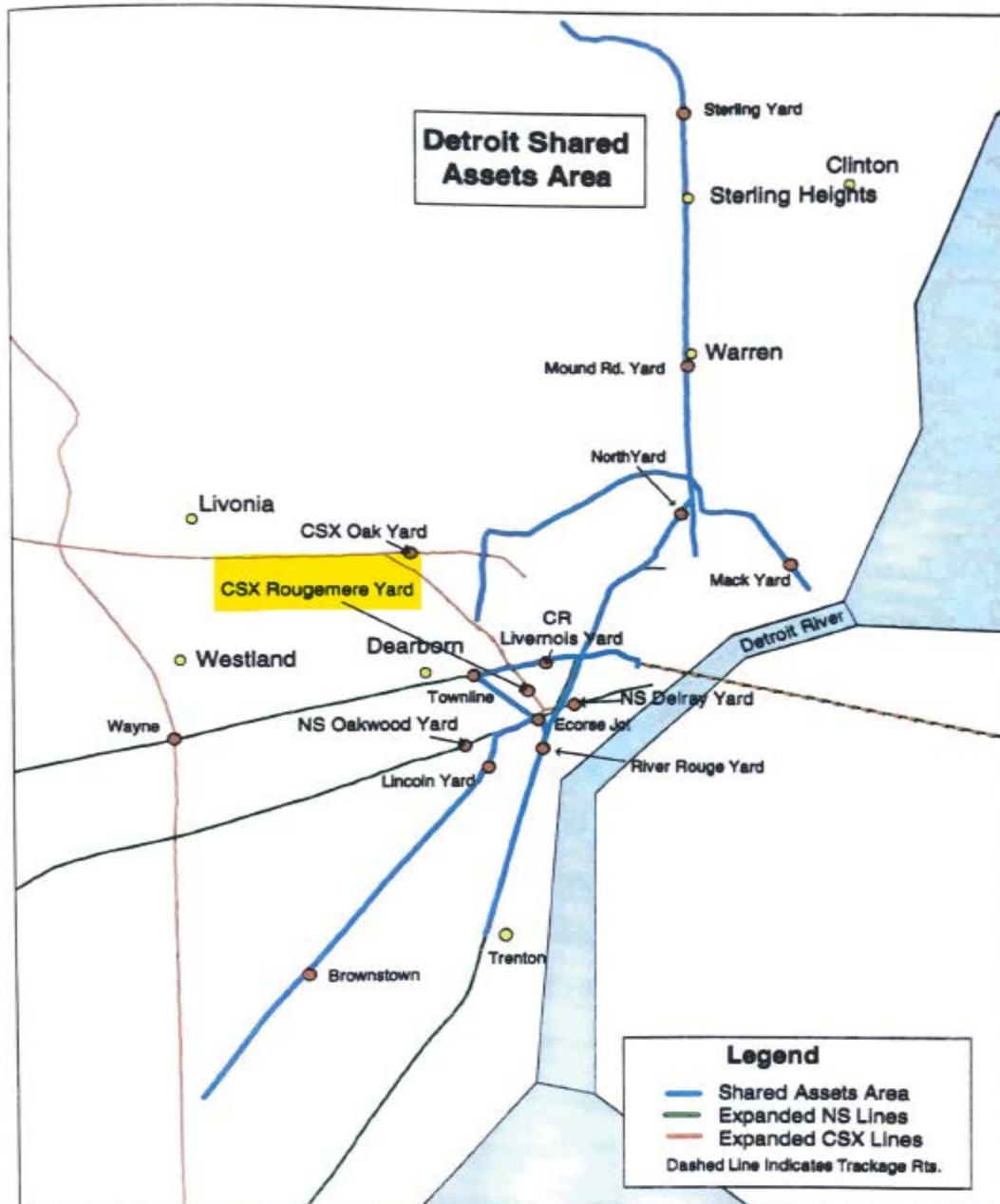
The Organization is compelled to dissent the Award of NMB assigned Neutral, Kathryn A. VanDagens, for the reason set out below.

Foremost, the Organization maintains its position that the case was not properly before the New York Dock Section 11 Committee and that the applicable and cited Agreement rules were indeed violated and jurisdiction of this matter still lies before the NRAB under Section 3 of the RLA.

On that point, the Organization stresses that this Section 11 Committee was not properly established due to, *inter alia*, the prescribed timeline proviso within New York Dock (“NYD”). Furthermore, the NYD Arbitration – Neutral Selection – letter (dated April 28, 2000) which the NMB supplied as an attachment to their May 26, 2021, letter to the parties clearly stipulates that the neutrals provided on such matters would be qualified on New York Dock cases. This prerequisite was established by the NMB over twenty years ago due to the unique characteristics and complexities surrounding New York Dock disputes. However, the NMB appointed Neutral VanDagens even though she had no previous experience handling NYD disputes. Therefore, in our opinion, we must conclude that the NMB failed to follow their own assignment guidelines and this award serves of no value and is very misplaced. Whereas, a Neutral familiar with New York Dock Arbitration would not have been convinced that a “billing agreement” between the railroads would supersede or somehow negate the governing collective bargaining agreements when they were not, in any way shape or form, an impediment to acquisition. Moreover, a Neutral qualified on NYD would have recognized that the CSX Rougemere yard, although in the proximity to, was not actually part of the Conrail Shared Assets Area (“SAA”). This so “Operating Agreement”, as we expounded in detail, was merely an arrangement between the recognized rail carriers on how they would track their billing and thus cannot become the wedge between the affected employees’ rights to a portion of the work provided under their applicable collective bargaining agreement(s). Rather, it is clear that premise of the

decision ignored some of the most simple, yet most important, information, such as; the color-coded map of the area outlining the boundaries. As evinced, this exhibit from the Finance Docket and included by both parties, segregated CSX's wholly owned Rougemere yard from the Detroit SAA in regards to the "Operating Agreement" between Conrail and CSXT. Below is the map detailing out what the Shared Assets Area is (*SAA is colored blue*):

Figure 13.4-3



As noted above, CSX Rougemere yard is not color-coded blue, but is brown and shows as a CSX section. This is very important because this proves that the B&O Agreement was in place at Rougemere and those employees (and their assignments) do fall under governance of the single agreement (B&O Agreement) applied to Rougemere terminal. In fact, as included in our submission, Article I, A, of the 1998 Western District Implementation agreement supports our arguments in Paragraph B, stating:

B. All road territory and terminals within the districts will have one common work force operating under one labor agreement. The former B&O labor agreement, as modified herein, will apply in the Western District, except the B&OCT labor agreement will remain applicable in the B&OCT territory.
(Emphasis added)

Consequently, the Neutral in this case obviously ignored this crucial section of the Implementing Agreement and thus erred when rendering the conclusion that B&O Rule 106 did not apply based solely on the carrier's "Operating Agreement", *supra*. It is, therefore, also clear that the Neutral simply keyed in solely on the exception carved out in paragraph A ("*except: Detroit SAA*"), which she quoted and drew emphasis to about the SAA not being inclusive, which was because CSX claimed that the Conrail agreement would apply in these areas (*i.e.*, the blue areas on the map). Moreover, Paragraph "A" quoted by the Neutral was actually dealing with the integration of seniority, not outlining the collective bargaining agreement to apply to the districts and terminals prescribed in Paragraph "B", above. The purpose of CSXT's reliance to the referred sections of Volume 8C, Exhibit I ("the Operating Agreement"), was intended to mislead the Neutral as "an agreement", but the reality remains that this was an operating arrangement between the three involved railroads; CSXT, NS, and Conrail (the jointly owned and operated entity). The control of owner operating facilities, haulage, capital contributions, tax allocation etc., and has no bearing on the applicable Collective Bargaining Agreement to govern the CSX employees affected by the NYD Implementing Agreements. Volume 8, C, was merely for billing purposes between the railroads and details that Conrail will act as an agent/operator for CSXT and explains why the cars handled by Conrail are considered as staying in CSXT's account. The word "account" is specifically used and referenced just as it was intended to mean – *a financial billing account*. The assertion by CSXT, and ruling by the Neutral here, that the agreed upon billing methods between the railroads would now somehow override the Collecting Bargaining Agreement is not one of sound judgment. To give any weight to the findings to the Neutral

in this case would infer to a reader that CSX Rougemere yard is a location where no Collective Bargaining Agreement is in place to govern the rules and working conditions for this group CSX employees; regardless of the agreement rule in question. Clearly, this concept cannot logically occur and the Neutral missed the mark and applied CSXT's flawed assertion that the B&O Agreement is not applicable to the CSXT employees working in Detroit-Rougemere, but rather should be governed by *their* [the Carrier's] Detroit CRC Shared Assets Operating Agreement, as she stated in her Award that:

“The Carrier’s point is well-taken that if a NYD Operating Agreement is to govern in the Detroit Shared Assets Area, it is the Detroit SAA Agreement, and not a NYD Agreement negotiated for another area. The Organization has not pointed to any provision in either the NOMAD NYD Implementing Agreement or the Western District NYD Agreement which suggests that the parties intended for the Agreement to control the Detroit SAA Operating Agreement”. (Underscore added)

Nevertheless, although the record was rich with rebuttal on this assertion by CSXT, the Neutral in this case ignored these crucial facts and inappropriately ruled in favor of the Carrier based on their “smoke and mirrors” arguments and plethora of misconstrued exhibits from the Finance Docket. Nevertheless, the affected employees still working for CSXT at Rougemere yard today are, as they always have been, governed by the B&O Agreement. To further that point, the Neutral in this decision implies that B&O Rule 106 (interchange rule) is the only rule that would not apply at Rougemere, but it is impossible to draw that conclusion rationally. Evidence was submitted into the record detailing that CSX abolished the Y122 (CSX Rougemere job) due to “Conrail interchange”, and likewise the Conrail Labor Relations department issued notice to the Conrail SMART-TD Local Chairperson under UTU/Conrail Agreement Rule 68, due to...“*implementing interchange service at CSX’s Rougemere Yard*”. All the employees ever progressed were our rights to an equitable portion of the interchange work, not NYD Protective condition claims, and this is why it is a Section 3 matter rightfully standing at the NRAB First Division, and was never an issue that was properly in front of a venue under Article I, Section 11 of NYD. What is more, if CSXT had believed their own position to be true they would have attempted long before this dispute arose, but sat silent to the fact since implementation of the Conrail acquisition on June 1, 1999.

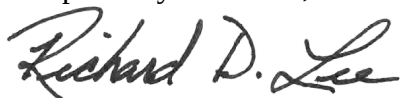
Finally, contrary to the logic laid out in this decision by the Neutral, the approved “Conrail transaction” in 1998 did not address any CBA impediments, because simply none existed. The Neutral stated, in the decision, that the STB-approved transaction overrides conflicting obligations

under the parties' agreement; however, the agreement did not conflict, rather complimented the transaction in place since the service being performed was not wholly contained within the shared assets area. The Neutral was provided agreement language on both interchange and on transfer work between yards of the same Carrier (Rule 106 and Article 3 of the B&O Agreement). Both of these rules entitle the CSX employees at Rougemere a percentage of the work and neither the operating agreement nor the implementing agreement conflict with these rules and the latter was never contemplated in the ruling. The STB does not easily override a provision in a collective bargaining as supported by an abundant of case law and arbitral precedent. Rather, this unique authority by the STB is reserved for only when an agreement is an impediment to the acquisition and this case did not pass that test, especially considering this is nearly two decades after the acquisition.

In simple terms, the issue in this case boils down to whether the B&O Agreement was in place at Rougemere yard, which it clearly was. Specifically, that all B&O Schedule Rules (i.e., scope, job advertisements, pay rates, seniority moves, etc.) govern the CSXT employees at Rougemere and thus Rule 106 was applicable as well. It was never a question of carving out rules at a location, nor does a Section 11 arbitration have authority to make exceptions, especially when the applicable CBA rules were not touched, amended or addressed in the Implementing Agreement whatsoever. Accordingly, this Section 11 Board did not have jurisdiction to "override" the existing rules of the B&O Agreement and the pending claims for the right to the transfer and interchange work sit properly at the NRAB under Section 3 of the RLA.

For these reasons, this Award is unsound and illogical in finding that the Carrier's replacement of the CSX Y122 with a Conrail yard assignment for transfer or interchange work was permissible and not in violation of the governing agreement rules. Consequently, this decision should not be considered as sound precedent by any entity. Thus, we maintain that the B&O Agreement was applicable at CSX Rougemere Yard and we must dissent.

Respectfully submitted,

A handwritten signature in black ink, reading "Richard D. Lee". The signature is written in a cursive, flowing style with a large initial "R".

Richard D. Lee
General Chairperson

EXHIBIT 2

CSXT SECTION 11 SUBMISSION

ARBITRATION UNDER ARTICLE I, SECTION 11 OF THE
NEW YORK DOCK CONDITIONS

CSX CORPORATION AND CSX TRANSPORTATION, INC., ET AL.—CONTROL AND
OPERATING LEASES—CONRAIL, INC. AND CONSOLIDATED RAIL CORP., FINANCE
DOCKET NO. 33388

CSX TRANSPORTATION, INC.

AND

INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND
TRANSPORTATION WORKERS –TRANSPORTATION DIVISION

SUBMISSION OF CSX TRANSPORTATION, INC.

Dated: January 21, 2022

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ARBITRATION UNDER ARTICLE I, SECTION 11 OF THE
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INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND
TRANSPORTATION WORKERS –TRANSPORTATION DIVISION

SUBMISSION OF CSX TRANSPORTATION, INC.

I. Introduction

Prior to 2017, CSX Transportation, Inc. (“CSXT”) used a CSXT yard job, Y122, to transfer railcars between CSXT’s Rougemere Yard and the Livernois Yard of the Consolidated Rail Corporation (“Conrail”) in the Detroit Shared Assets Area (“SAA”). To improve operations, CSXT began utilizing Conrail to perform this transfer move. Section 3(d)(i) of the Operating Agreement for the Detroit SAA provides CSXT the express right utilize Conrail as its agent to perform “Switching and Yard Services” that CSXT otherwise would perform. Conrail similarly performs this yard transfer service for Norfolk Southern Railway Company (“NSR”) in the Detroit SAA and for CSXT in the Philadelphia/South Jersey SAA, where CSXT also replaced CSXT jobs with Conrail.

The International Association of Sheet Metal, Air, Rail and Transportation Workers—Transportation Division (“SMART-TD” or “Organization”) is claiming that CSXT’s use of Conrail violated the parties’ collective bargaining agreement, the B&O Agreement, by “sub-

contracting” or “farming out” to Conrail work that allegedly belongs to CSXT trainmen. The Surface Transportation Board (“STB”), however, approved the Detroit SAA Operating Agreement as part of the Conrail Transaction. *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co.—Control and Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corp.*, STB Finance Docket No. 33388 (served July 23, 1998) (hereinafter “*Conrail Decision*”). In the Conrail Transaction, the STB approved the control and division of Conrail between CSXT and NSR. In so doing, the STB approved Conrail’s role as “subcontractor or agent” to CSXT and NSR to perform switching services on their behalf in the Detroit SAA. The STB’s approvals supersede or override the B&O Agreement for two related reasons. First, well established STB precedent provides that its approval of the Detroit SAA Operating Agreement, and CSXT’s right thereunder to use Conrail as its “agent” overrides any requirements of the B&O Agreement that frustrate CSXT’s right to do so. Second, the New York Dock implementing agreement for the Detroit SAA, which was required by the STB approval, recognized that the Detroit SAA Operating Agreement superseded the B&O Agreement to implement operations in the Detroit SAA. That agreement, the Detroit SAA New York Dock Implementing Agreement (“Detroit SAA NYD Agreement”), recognized that the scope and other provisions in the B&O Agreement are superseded by the Operating Agreement by providing that, when Conrail performs services for CSXT as its agent in the Detroit SAA, the Organization’s collective bargaining agreement with Conrail applies to such services, not the B&O Agreement. While the Organization tries to rely on other New York Dock implementing agreements to argue that the B&O Agreement still applies to the transfer work at issue in this case, those agreements expressly excepted from their coverage the Detroit SAA.

CSXT disagrees with the Organization's interpretation of the B&O Agreement, but there is no need for this Committee to consider those disagreements, because the STB-approved Detroit SAA Operating Agreement preempts application of the B&O Agreement to work performed by Conrail as CSXT's agent in the Detroit SAA as recognized by the Detroit SAA NYD Agreement.

CSXT respectfully asks the Committee to make the following findings:

- The Detroit SAA Operating Agreement, Section 3(d)(i), allows CSXT to utilize Conrail as its agent for the transfer of railcars between Rougemere and Livernois Yards
- The terms of the B&O Agreement are superseded or overridden by the STB's approval of the Conrail Transaction and the Detroit SAA Operating Agreement to the extent those terms limit CSXT's ability to use Conrail as its agent or subcontractor in the Detroit SAA for Switching and Yard Services
- The Detroit SAA NYD Agreement, specifically Article II and Article VI.A, is the applicable NYD agreement and provides that work performed by Conrail pursuant to the Detroit SAA Operating Agreement is done by Conrail employees subject to the Organization's collective bargaining agreement with Conrail
- Consequently, the B&O Agreement is also overridden and inapplicable to work that CSXT requests Conrail to perform by virtue of Articles II and VI.A of the Detroit SAA NYD Agreement

CSXT's Submission is organized into three main parts: Part II--Background, Part III--Procedural Arguments, and Part IV—Merits Arguments.

II. Background

A. Conrail Transaction

The STB has exclusive jurisdiction over railroad mergers and consolidations. CSXT and NSR and their parent corporations applied to the STB in 1997 for authorization pursuant to 49 U.S.C. §§ 11323-324 to control Conrail and divide most of its assets between them. *Conrail Decision* at 47-48. The STB approved their control and division of Conrail in the *Conrail*

Decision. Excerpts of the *Conrail Decision* are in Exhibit No. 2. Most of Conrail's rail lines, equipment, facilities and employees were allocated to either CSXT or NSR and integrated into their rail systems. *See Conrail Decision* at 24-25.

B. Shared Assets Areas

As explained in the *Conrail Decision*, while most Conrail assets and employees were allocated to CSXT or NSR and integrated into their systems, Conrail continued to exist as a wholly owned subsidiary of CSXT and NSR in three areas called the "Shared Assets Areas". The Shared Assets Areas ("SAAs") are in three commercially important areas: Detroit, Philadelphia/South Jersey, and North Jersey. *Conrail Decision* at 29, 31; 33-34. The Shared Asset Areas are a unique aspect of the Conrail Transaction, which make it different from any rail merger before or since.

In the Shared Assets Areas, shippers located on Conrail lines are served both by CSXT and NSR. Previous to the Conrail Transaction, they were generally only served by Conrail, which was the dominant carrier in Detroit. The SAA concept gives these shippers equal access to two strong rail competitors, CSXT and NSR, with comprehensive rail systems in the eastern United States. Shippers in the SAAs have single line service over CSXT or NSR to any location on their respective systems.

Each SAA is governed by an Operating Agreement to which CSXT, NSR, and Conrail are party. A SAA is a geographic area consisting of the facilities owned by Conrail, the "Shared Assets" in that area and facilities of CSXT and NSR that connect to the Shared Assets in the particular SAA. The terms "Shared Assets" and "Shared Assets Area" are defined in the Operating Agreements. "Shared Assets" are defined as the tracks, yards and other facilities that Conrail continues to own and operate. *See* Detroit SAA Operating Agreement § 1 (ss) (Exhibit

No. 3). “Shared Assets Area” is defined to include the Shared Assets, i.e., Conrail facilities, and facilities of CSXT and NSR that connect with the Shared Assets in a particular SAA. The Detroit SAA Operating Agreement, § 1 (tt) defines the Detroit SAA as follows:

“Shared Assets Area” means the geographic area comprising the Shared Assets and Operator Facilities and Jointly-Operated Facilities directly (without intermediate connection to another railroad) attached to the trackage included within the Shared Assets, which is defined as the “Detroit” Shared Assets Area.

The term “Operator” refers to CSXT or NSR. *See* Detroit SAA Operating Agreement § 1 (ee). The outer limits of the Detroit Shared Assets Area are defined in the Conrail Transaction Application and the Detroit SAA NYD Agreement. Exhibit No. 4, p. 2, 3 (Application Vol. 3B, § 4.1.3); Exhibit No. 7, p. 1 (Detroit SAA NYD Agreement, Art. III). The Detroit SAA is illustrated in maps included with the Application. Exhibit No. 4, p. 4, 15-16. A more detailed map of the Detroit SAA is Exhibit No. 1. Rougemere and Livernois Yards are in the Detroit SAA.

The Operating Agreements also define the unique role of Conrail in the SAAs. As explained, Conrail is no longer an independent carrier. Conrail exists solely to act as the agent of CSXT or NSR in performing rail operations on their behalf in the SAA. Section 3(d)(i) of the Detroit SAA Operating Agreement specifies the “Switching and Yard Services” that CSXT or NSR can request that Conrail perform on their behalf in the Detroit SAA.

At the request of and as agent for each Operator, CRC shall perform Switching and Yard Services required by such Operator within the Shared Assets Area, including without limitation any such services which Operator may be responsible for performing or having performed for a shipper or other Person.

Switching and Yard Services are defined in Section 1 (aaa):

“Switching and Yard Services” means the service of classifying and assembling trains for the account of an Operator in Jointly-Operated Facilities, movement of loaded or empty Railcars between yards and local industries, and switching trains and Railcars at yards, terminals and local industries.”

That Conrail has no shippers and only acts as agent for CSXT or NSR is further made clear by Section 3(f):

Freight traffic To Remain in Account of Each Operator. Switching and Yard Services and other services performed by CRC for either Operator under this Agreement shall be performed as agent for, and for the account of, such Operator. All freight traffic and Railcars handled within the Shared Assets Area, including traffic and Railcars handled by CSXT or NSR pursuant to *Sections 3(a) and 3(c)*, and traffic and Railcars handled by CRC pursuant to *Sections 3(c) and 3(d)*, shall at all times remain in the waybill, car hire and revenue accounts of either CSXT or NSR.

Many shippers were located only on the rail lines of Conrail. If these lines had been divided and allocated to either CSXT or NSR, the shipper would still only be served by one rail carrier. By making Conrail the agent or subcontractor for CSXT and NSR, these shippers have access to both CSXT and NSR. Conrail has no train operations of its own.¹

C. STB Approval of Shared Assets Areas

The STB approved the Conrail Transaction in its 1998 *Conrail Decision*. Applicants specifically sought and obtained STB approval of the SAAs and their Operating Agreements pursuant to 49 U.S.C. §§ 11323-324. *See Conrail Decision* at 37. The purpose and operation of the SAAs are described in the *Conrail Decision*. *Id.* at 31. The STB recognized that an important “procompetitive” feature of the SAAs was that all former Conrail shippers in a SAA are served by both CSXT and NSR. *Conrail Decision* at 54, 58. The STB also recognized the unique role of Conrail in the SAAs as “agent or subcontractor” to CSXT and NSR, stating as follows:

It is intended that, following the Division: CRC [Conrail] will not hold itself out to the public as performing transportation services directly and for its own account; CRC will not enter into any contract (other than with CSXT or NSR) for the performance of transportation services; and all transportation

¹ This is equally true in the other SAAs.

services performed by CRC will be performed as agent or subcontractor of CSXT or NSR.

Conrail Decision at 34 (emphasis added) (note that the STB uses the abbreviation “CRC” for Conrail). The STB found that the Conrail Transaction was in the public interest and approved the control and division of Conrail by CSXT and NSR. *Conrail Decision* at 166-68. The STB specifically approved the SAA Operating Agreements, stating as follows:

The foregoing findings specifically extend to the following elements of the transaction authorized in STB Finance Docket No. 33388: ... (c) ... the entry by CSXT, NSR, and CRC into the Shared Assets Areas Operating Agreements and the operation by CSXT, NSR, and CRC thereunder of the assets held by CRC, with CSXT and NSR respectively acquiring the right to operate and use the Allocated Assets Operating Agreements, the Shared Assets Area Operating Agreements....

Conrail Decision at 167 (emphasis added).

The STB was required by 49 U.S.C. § 11326(a) to impose the New York Dock and other employee protective conditions upon its approval of the Conrail Transaction to address its effects on employees of CSXT, NSR, and Conrail. *Conrail Decision* at 183.² Article I, Section 4 of the New York Dock conditions required that the parties reach implementing agreements through negotiation or arbitration. *See Conrail Decision* at 125-26.

The STB noted in the *Conrail Decision* that the Organization’s predecessor, the UTU, had entered into a settlement agreement with the Applicants in which it agreed to support the Transaction and enter into NYD implementing agreements “implementing the Operating Plans and the related Appendices . . . ,” which included the Operating Plan for the Detroit SAA. *Id.* at

² The New York Dock conditions are found in Appendix III of the decision of the Interstate Commerce Commission, predecessor to the STB. *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 ICC 60 (1979) (Exhibit No. 5).

350-51. The Organization never objected to the Detroit SAA Operating Plan or Conrail's role as agent or subcontractor to CSXT or NSR in the Shared Assets Areas.

D. Conrail Transaction New York Dock Implementing Agreements

In accordance with the settlement agreement discussed above, the Applicants reached voluntary New York Dock implementing agreements with the Organization's predecessor for the craft of trainmen. While, as discussed *infra*, the parties sometimes referred to the "Conrail New York Dock Implementing Agreement" in their on-property correspondence for the instant dispute, there were actually seven contemporaneous agreements. These are the Master New York Dock Implementing Agreement (the "Master NYD Agreement") (Exhibit No. 6), which includes as Attachments 1 and 2 implementing agreements for the Detroit SAA (hereinafter "Detroit SAA NYD Agreement") (Exhibit No. 7) and the New Jersey and Philadelphia SAAs (hereinafter "North/South Jersey SAA NYD Agreement") (Exhibit No. 8).³ The parties to these three New York Dock agreements are CSXT, NSR, Conrail, and the Organization. The Master NYD Agreement addressed how the Conrail workforce would be divided between CSXT or NSR or who remained with Conrail. The Detroit and North/South Jersey SAA NYD Agreements addressed labor aspects of train operations by CSXT, NSR and Conrail within the SAAs.

There was also a New York Dock implementing agreement between CSXT, Conrail and the Organization consisting of three attachments. The three CSXT attachments addressed the combination of CSXT operations and employees with Conrail operations and employees allocated to CSXT into three consolidated seniority districts on CSXT. There were attachments for a new Western, Eastern and Northern District. These are hereinafter referred to as the

³ For ease of reference, CSXT has included the Detroit SAA NYD Agreement and North/South Jersey SAA NYD Agreement as, respectively, Exhibit Nos. 7 and 8, as well as in Exhibit No. 6, the Master NYD Agreement (Attachments 1 and 2).

“CSXT Western District NYD Agreement,” “CSXT Eastern District NYD Agreement,” and “CSXT Northern District NYD Agreement.” Excerpts from the CSXT Western District NYD Agreement and CSXT Eastern District NYD Agreement are Exhibit Nos. 9 and 10. Finally, NSR, Conrail and the Organization were party to a New York Dock implementing agreement, which addressed the labor impacts of combining NSR territory and operations with Conrail territory and employees allocated to NSR.

As part of the settlement between UTU and the Applicants, the Applicants agreed to valuable benefits for employees beyond those which a New York Dock arbitrator would have had authority to impose had the Conrail Transaction implementing agreements been reached through Section 4 arbitration.⁴ These additional benefits are listed in the *Conrail Decision* and included, among others, automatic certification of employees adversely affected by the Transaction, supplying the Organization the names and test period averages for such employees, and preserving certain flowback rights that Conrail employees had to move between freight service and passenger service for Amtrak and commuter rail providers. *Conrail Decision* at 350-51. In return, the Organization agreed to implementing agreement terms, which implemented the Conrail Transaction, including Conrail’s role as “agent or subcontractor” to CSXT and NSR in the Shared Assets Areas. CSXT discusses these New York Dock implementing agreements in more detail *infra* in Part IV.C when explaining that the Detroit SAA NYD Agreement rather than

⁴ Arbitrators do not have authority under Section 4 to impose requirements or benefits beyond what the New York Dock conditions require. *See, e.g., Canadian National Ry. Co., et al.—Control—Illinois Central Corp., et al.*, 2011 STB LEXIS 464, * 21-23 (Exhibit No. 35). For example, New York Dock does not require automatic certification, which means that the employee does not have to show that adverse effect was caused by the transaction, or that the carrier automatically provide test period averages for calculation of displacement or dismissal allowances.

the CSXT Western District NYD Agreement, as argued by the Organization, is the controlling NYD implementing agreement in the instant dispute.

E. Transfer Operations Between Rougemere and Livernois Yards

CSXT had utilized a yard job, the Y122, seven days a week to move railcars between Rougemere and Livernois Yards. The two yards are connected by CSXT and Conrail track, as shown in the detailed map of the Detroit SAA that is Exhibit No. 1 and explained in the Verified Statement of Tony Ferrera (Exhibit No. 11). Y122 originated at Rougemere Yard and traveled about one mile south on CSXT track to a connection with Conrail track at Delray Tower. The assignment then traveled northeast over about two miles of Conrail track to reach Livernois Yard. It dropped off railcars in CSXT's account destined for CSXT shippers located on Conrail lines in the Detroit SAA. It then returned to Rougemere Yard with cars picked up at Livernois Yard.

In 2017, exercising rights under Section 3(d)(i) of the Detroit SAA Operating Agreement, CSXT agreed to have Conrail perform this transfer service and abolished the Y122. As explained in the Ferrera Verified Statement and Verified Statement of Kory Johnson (Exhibit No. 12), there were operational inefficiencies with the Y122, which were leading to congestion in Rougemere and Livernois Yards and less efficient operations within the Detroit SAA. The Y122 went on duty at 10:00 AM at Rougemere Yard and arrived at Livernois Yard around noon. Often it did not return to Rougemere Yard until the evening. Although a normal yard job shift is eight hours, Y122 frequently took up to the maximum twelve hours of service allowed by the federal Hours of Service regulations. Sometimes the Y122 did not complete the transfer run before reaching the twelve hour limit. The Conrail Yard Job, conversely, goes on duty at midnight. It originates and terminates at the Livernois Yard and has consistently completed the

transfer run in eight hours or less. Like the Y122, the crew of the Conrail Yard Job consists of an engineer and a conductor. Johnson Verified Statement, page 2. The conductor position is subject to Conrail's collective bargaining agreement with the Organization.⁵ CSXT notes that NSR similarly utilizes Conrail to transfer railcars between Conrail's Livernois Yard and NSR's Oakwood Yard in the Detroit SAA. Johnson Verified Statement, p. 2-3.

F. The Organization Objects to CSXT's Use of Conrail Yard Job

After CSXT abolished the Y122 job, the Organization began filing claims on behalf of Patrick M. Gay, a CSXT conductor who had worked on Y122 at the time it was abolished, even though Mr. Gay was able to exercise seniority to another position and suffered no loss in earnings (hereinafter the "Claim"). The initial Claim and CSXT's denial are Exhibit No. 13. After CSXT denied the Claim, the Organization appealed the Claim denial on July 3, 2018. Exhibit No. 14. The Organization argued that allowing Conrail to perform the transfer work formerly done by the Y122 violated the B&O Agreement, "in particular but not limited to the Scope Rules/Articles, Rule 59, Article 3, and Rule 106." The Organization contended that this work "belong[s] to CSX employees and was illegally being 'farmed out' to Conrail SA [Shared Assets]."

There followed conferences in which the Claim was discussed. The parties' positions were summarized in an e-mail dated January 20, 2021, from SMART-TD Vice General Chairperson Belew to Jennifer Manz, Director, Labor Relations, CSXT. Exhibit No. 16. The Organization characterized the work performed by the Y122 and now the Conrail Yard Job as "interchange work." The Organization repeated its argument that the B&O Agreement applied

⁵ Locomotive engineers on CSXT, Conrail and NSR are represented by the Brotherhood of Locomotive Engineers and Trainmen. BLET has never raised any objection to CSXT's replacement of Y122 with a Conrail yard job.

to this work and that CSXT violated the scope rule, Rule 106, and Article 3 of that Agreement by using a Conrail job to perform the work formerly done by Y122.

Rule 1, entitled “Scope,” provided that the B&O Agreement “covers all road and yard service employees: ‘Conductors’, ‘Trainmen’ and ‘Yardmen’, found in their respective classes, represented by the United Transportation Union (C&T) under the Railway Labor Act, as amended.” Exhibit No. 15 (excerpts of B&O Agreement). Rule 106, entitled “Interchange,” addressed matters relating to the interchange of railcars between CSXT and “connecting carriers.” The Organization contended that CSXT violated Subpart 3 of Rule 106 by not notifying the Organization which tracks in Rougemere Yard were designated for interchange of cars with Conrail, that is, which tracks would be used by the Conrail crew to pick up and drop off railcars. The Organization did not explain its reliance on Article 3.

In addition to the claimed violations of the B&O Agreement, the Organization also contended that CSXT’s use of a Conrail Yard Job was in violation of “The Conrail Implementing Agreement” and “STB requirements to operate in such a fashion.” Exhibit No. 16, p.1. The Organization attached excerpts from the Application in Finance Docket No. 33388, including the Detroit SAA Operating Agreement, to support its arguments.

CSXT responded in its April 6, 2021 letter (Exhibit No. 17) that the Organization was fundamentally in error as to the STB’s authorizations in the *Conrail Decision*, Conrail’s role in the SAAs, and the service performed by the Y122 and the Conrail Yard Job. CSXT also explained that the Organization’s argument that the STB’s approval of the Detroit SAA Operating Agreement did not make the B&O Agreement inapplicable to work assigned to Conrail as agent or subcontractor to CSXT was in error.

First, SMART-TD was wrong that the *Conrail Decision* did not authorize CSXT to “farm out” work to Conrail. As discussed, CSXT, NSR, and Conrail sought and were granted STB authority for Conrail to function as “agent or subcontractor” for CSXT and NSR.

Second, the Organization was wrong that the STB’s authorizations in the *Conrail Decision* did not approve a grant of trackage rights to Conrail to operate over CSXT track between Rougemere and Livernois Yards. Section 3(c)(i) of the Detroit SAA Operating Agreement granted Conrail operating rights over CSXT track in order to perform Switching and Yard Services within the Detroit SAA.

Third, CSXT also relied on the Conrail New York Dock Implementing Agreements negotiated with UTU for its position that the B&O Agreement did not apply to jobs for which the Detroit SAA Operating Agreement allowed CSXT to utilize Conrail as its agent. As explained, the Detroit SAA NYD Agreement specifies that work performed by Conrail anywhere in the Detroit SAA pursuant to the Detroit SAA Operating Agreement is covered by Conrail’s collective bargaining agreement with the Organization, not its collective bargaining agreement with CSXT.

Fourth, the Organization was wrong that the Detroit SAA Operating Agreement and Conrail New York Dock Implementing Agreements could not supersede conflicting requirements in collective bargaining agreements negotiated under the Railway Labor Act (“RLA”).

Fifth, the Organization was wrong that the function performed by the Y122 or the Conrail Yard Job was the “interchange” of cars between CSXT and Conrail. Citing Section 3(e) of the Detroit SAA Operating Agreement, CSXT explained there can be no interchange between CSXT and Conrail. The cars handled by Conrail as agent for CSXT are never in Conrail’s account.

They remain in the account of CSXT, as recognized by the STB. In the railroad industry, a defining characteristic of interchange is that the cars are transferred from the account of one carrier to the other and become the latter's legal responsibility. *See, e.g., Union Pacific R. Co. and United Transp. Union*, Pub. Law Board No. 1048, Award No. 111 at 1 (1986) (Moore, Arb.) (Exhibit No. 18) ("However, the set out did not constitute interchange. The evidence establishes that the cars set out were never placed into the account of another carrier.").

CSXT further explained in its April 6 letter that an arbitration board established under the RLA would not have jurisdiction over the Organization's Claim, because it required interpretation of the New York Dock conditions and implementing agreements, matters committed to arbitration pursuant to Article I, Section 11 of the New York Dock conditions imposed in the *Conrail Decision*. In its April 6 letter, CSXT invoked such arbitration, appointed Jennifer E. Manz, Director, Labor Relations, as CSXT's member of the Section 11 Committee, and asked the Organization to designate its member.

The Organization responded in a letter dated April 8, 2021. Exhibit No. 19. The Organization repeated that its position was based on alleged violations of Rule 1 (Scope), Rule 106 (Interchange), and Article 3 of the B&O Agreement. The Organization also contended that its position was supported, not only by the "1999 UTU/CSXT Conrail Implementing Agreement," but also by another New York Dock implementing agreement, "the Northern Mid-Atlantic Agreement." Exhibit No. 9, p. 1. The Organization's April 8 letter explained its argument that Article 3 of the B&O Agreement required CSXT to make an agreement with the Organization for the equitable sharing of the transfer work between CSXT and Conrail trainmen.

The Organization also attached two documents, which it claimed supported its position that the Conrail Yard Job that replaced Y122 was engaged in interchange service. The

documents were an October 27, 2017 notice issued by Conrail Labor Relations to the Organization pursuant to the Conrail-SMART-TD collective bargaining agreement notifying Conrail crews which tracks at Rougemere Yard to pick up and drop off railcars and a CSXT Crew Management Notice No. 146 noting the Y122 had been abolished, both of which refer to “interchange.”

Finally, the Organization disagreed that its Claim had to be submitted to a Section 11 Committee. Rather, it argued the dispute should be submitted to the NRAB and refused to designate its member of the Section 11 Committee despite its own reliance on New York Dock implementing agreements.

CSXT responded to the Organization’s April 8, 2021 letter in a letter dated April 20, 2021. Exhibit No. 20. CSXT explained, again, that Rule 106 and Article 3 did not apply because the B&O Agreement did not apply to work performed by Conrail as agent for CSXT pursuant to the Detroit SAA Operating Agreement.

CSXT again also explained that Rule 106’s interchange requirements did not apply in any event because CSXT does not interchange traffic with Conrail. The two documents attached to the Organization’s April 8 letter did not alter this fact. Their authors mistakenly used the term interchange when they meant transfer.

CSXT explained that Article 3(e) by its terms was inapplicable because there was no “transfer work between foreign lines and The Baltimore and Ohio Railroad” within the meaning of Article 3. Conrail is not a “foreign line.” As discussed, it is a joint affiliate of CSXT and NSR and acts as their agent. For similar reasons, the Organization was wrong that the disputed transfer work was “transfer and interchange work to and from the SAA.” The movement of railcars between Rougemere and Livernois Yards all occurs within the Detroit SAA on CSXT’s

account. Moreover, Article 3 is not even an absolute requirement (“effort will be made”). In that regard, CSXT further explained that it was not required to make an equitable arrangement for sharing transfer work between CSXT and Conrail trainmen because such an arrangement was contrary to CSXT’s rights under the Detroit SAA Operating Agreement to use Conrail as its agent “without limitation.” It was also contrary to the Detroit SAA NYD Implementing Agreement. Finally, the April 20 letter advised that General Chairperson Lee was appointed the Organization member by operation of Section 11(a) after the Organization failed to appoint a member.

G. Establishment of Section 11 Committee

While the Organization tried to frustrate the establishment of this Committee, it was eventually established with the appointment of the Carrier member by CSXT’s April 6, 2021 letter, the automatic appointment of General Chairperson Lee as the Organization’s member and the appointment of the neutral chairperson by the NMB’s letter dated September 22, 2021. Exhibit No. 21.⁶

In the midst of the Organization’s efforts to frustrate this Section 11 Committee, the Organization on April 29, 2021 filed a Notice of Intent with the NRAB First Division submitting its Claim that CSXT’s subcontracting with Conrail violated the B&O Agreement. Exhibit No. 23 . CSXT subsequently filed a Petition for Declaratory and Cease and Desist Orders with the STB on June 15, 2021. CSXT asked the STB to declare that the issues CSXT submitted to Section 11 arbitration are within the STB’s jurisdiction and order the Organization to cease pursuing these issues in arbitration under the RLA. The STB has not ruled on CSXT’s Petition.

⁶ Hopefully, we are past any issue as to the legitimacy of this Committee. For a complete record, CSXT attaches in Exhibit No. 22 the correspondence regarding the Committee’s establishment.

The NRAB docketed the Organization's Claim as Case No. NRAB-00001-210254 on April 30, 2021. Exhibit No. 24. The NRAB has not yet scheduled a hearing on the Organization's Claim. CSXT has raised jurisdictional arguments to the NRAB that the Organization's Claim should be dismissed because it involves the interpretation or application of the New York Dock conditions and New York Dock implementing agreements, matters which NRAB precedent recognizes are within the jurisdiction of a Section 11 Committee such as this one. The outcome of the NRAB proceedings have no effect on the jurisdiction or decisions of this Committee.

III. Procedural Arguments

The Organization to date has avoided the merits, arguing instead that CSXT's issues should not be heard by a Section 11 Committee for various procedural reasons. CSXT hopes the Organization abandons these arguments, all of which have been shown to lack merit.

A. CSXT's Invocation of Section 11 Arbitration Was Timely

The Organization argued in its July 13, 2021 Response to CSXT's Petition for Declaratory and Cease and Desist Orders that CSXT's initiation of arbitration proceedings under Section 11 was untimely, because they were initiated more than 20 days after the dispute arose, contrary to the supposed requirements of Section 11(a). Excerpts from the Response are Exhibit No. 25. The Organization's argument is refuted by the text and purpose of Section 11 and lacks any support in precedent.

Section 11(a) states that if the parties "cannot settle any dispute or controversy with respect to the interpretation, application or enforcement [of New York Dock] within 20 days after the dispute arises, it may be referred by either party to an arbitration committee." 360 I.C.C. 60, 87 (Exhibit No. 5). The 20-day reference appears in the first part of the sentence

dealing with settlement discussions. The plain language and sentence structure show the intention that the parties must engage in such discussions for at least 20 days before either invokes arbitration. That is the only limitation on invoking arbitration. The Organization cites no authority that Section 11 has ever been interpreted to mean that a party must invoke arbitration within 20 days of when a disagreement first materializes or a claim is filed. Indeed, Section 11 arbitral authority has actually rejected this argument. *See, e.g., Missouri Pac. Railroad Co. and Am. Train Dispatchers Ass'n*, NYD Sec. 11 Arbitration, ICC Finance Docket No. 27773 at 7 (1981) (“it seems clear that the 20 days was meant to provide a minimum period in which the parties were to attempt to reconcile their differences, and only after the expiration of that period could either party invoke arbitration.”) (Exhibit No. 26). *See also Denver Union Terminal and Bhd. Ry., Airline and Steamship Clerks*, Opinion and Award (1973) (rejecting 20-day limit argument under similar language in Amtrak C-1 conditions) (Exhibit No. 40, p. 6-7).

There is no merit to the Organization’s 20-day limit argument. Frankly, it is surprising that the Organization would advocate a 20-day limit, because such limit is much more likely to bar arbitration of claims brought by employees and unions for labor protective benefits under the STB’s labor protective conditions than affect carriers.

B. CSXT “Inaction” Did Not Waive Right to Invoke STB Jurisdiction

The Organization also argued in its Response to CSXT’s Petition for Declaratory and Cease and Desist Orders that CSXT waived “by inaction” its ability to invoke Section 11 arbitration. There are two parts to its waiver argument. First, the Organization claims that CSXT waived its right to invoke Section 11 by waiting “until more than three years after the Organization began filing claims ... [to] even mention the application of *New York Dock* protective conditions.” Response at 9. Second, the Organization alleges CSXT should have

served a new notice under Article I, Section 4 of the New York Dock conditions before contracting the Rougemere-Livernois transfer work to Conrail. Response at 8. Now, the Organization claims, 20 years after the Conrail Transaction, it is too late for CSXT to do so. Neither argument has merit.

1. CSXT Did Not Waive “By Inaction” its Right to Invoke Section 11

There is no such doctrine as “waiver by inaction” in STB precedent. There is the doctrine of laches, but the Organization has never asserted laches and there is no basis to do so.⁷

More specifically, the Organization’s contention that CSXT did not raise the STB’s approvals in the Conrail Transaction as a defense until its April 6, 2021 letter is false. Indeed, it is disproved by the Organization’s own statements in the on-property handling. For example, the January 20, 2021 e-mail from SMART-TD Vice Chairperson Belew to Jennifer Manz, Director, Labor Relations, CSXT, explained that it was “a brief synopsis of the [sic] what we are referring to as the Rougemere Yard claims discussed in multiple conferences as a result of the Detroit terminal yard assignment Y122 being abolished so that CSX could begin utilizing the subsidiary of CSX, Shared Assets to perform what is our work. . . . Being that CSX relied solely on FD 33388 to base this position there was not any additional filings with the STB to legally allow this interchange.” Exhibit No. 16 (emphasis added). Thus, the Organization understood early on in claims handling that CSXT relied upon STB approval of the Conrail Transaction and the Detroit SAA Operating Agreement for its defense. CSXT’s April 6, 2021 letter was in response to the Organization’s historical summary of the parties’ positions.

⁷ See, e.g., *Burlington Northern and Santa Fe Ry. Co.—Pet. for Review of Arbitration Award*, 2002 WL 31117575 (S.T.B.) at * 4 (arbitrator can dismiss stale claim for laches) (Exhibit No. 27).

The Organization's waiver argument is also inconsistent with its own reliance on New York Dock implementing agreements for its Claim. As discussed in Part IV.C of this Submission, the Organization relies on the CSXT Western District NYD Agreement and NOMAD NYD Agreement to argue that the B&O Agreement is the controlling collective bargaining agreement.⁸ Finally, the Organization never made this waiver argument in the on-property handling of its Claim.

2. CSXT Was Not Required to Serve a New Section 4 Notice

The Organization's other waiver argument is of a completely different, and convoluted, nature and does not even involve Section 11 of New York Dock. This waiver argument is based on a false premise that CSXT was required to serve a new Section 4 notice before requesting Conrail to take over the Rougemere-Livernois Yard transfer, and is without merit.

The Organization argued as follows:

Importantly, at no point when CSXT abolished Y122 did it provide the notice required by the New York Dock protective conditions. It is well established that "a railroad contemplating an operational change that may result in dismissal, displacement, or rearrangement of employees, must provide ninety days written notice of its intent to interested employees and their representatives. . . . CSXT failed to do so here.

Response at 8. The Organization is referring to the requirements in Article I, Section 4 of the New York Dock conditions. In effect, the Organization is contending that CSXT violated Section 4 by not first serving a notice before making the operational change of replacing the

⁸ For these reasons, *CSX Transportation, Inc. v. Transportation Communications Int'l Union*, 480 F.3d 678 (4th Cir. 2007), does not support the Organization. In that case, CSXT did not assert that the STB had jurisdiction over the dispute until after the NRAB had already ruled in the union's favor in several cases. Here, CSXT raised its jurisdictional objections during the on-property claims handling process and invoked the Section 11 procedure before the union submitted its claim to the NRAB, let alone before the NRAB has issued any decision. Additionally, unlike that case, the union here also bases its position on New York Dock implementing agreements.

Y122 with a Conrail yard job. Because the STB’s jurisdiction over implementation of railroad consolidations is not “timeless and limitless” and this operational change came “20 years after the completion of the Conrail acquisition,” it would be, according to the Organization, too late now for CSXT to serve a Section 4 notice to make this change. Response at 11.

This argument fails because, as explained in Parts II.D and IV.B of this Submission, the Detroit SAA NYD Agreement, reached with the Organization’s predecessor in 1998, already addressed CSXT’s right to utilize Conrail as its agent in the Detroit SAA. This NYD implementing agreement was in satisfaction of Section 4 of the NYD conditions imposed on the Conrail Transaction. While some aspects of merger implementation may be transitory, the Detroit SAA Operating Agreement and Detroit SAA NYD Agreement are “timeless” in the sense that Conrail’s unique role as an “agent or subcontractor” to CSXT and NSR in the SAAs is a permanent feature of the STB-approved Conrail Transaction. Because the 1998 Detroit SAA NYD Agreement applies to any use by CSXT of Conrail as its agent pursuant to the Detroit SAA Operating Agreement, CSXT was not required to serve a new Section 4 notice to use Conrail for the work that had been done by Y122.

C. A Section 11 Committee Has Jurisdiction to Address CSXT’s Issues

The Organization has previously argued that the jurisdiction of a Section 11 Committee is limited to disputes arising from the New York Dock conditions and employee claims for protective benefits thereunder. Because the Claimant in this case was not claiming New York Dock benefits, according to the Organization, there is no dispute for the Section 11 Committee.⁹

⁹ In the on-property handling, “the Organization disagrees that this is a case involving a review or intervention by a NYD Section 11 Committee In other words, the Organization is not seeking New York Dock Protections” April 8, 2021 Letter from Gen. Chairperson Lee to Jennifer E. Manz, Dir., CSXT Labor Relations (Exhibit No. 19). *See also* June 9, 2021 letter

The Organization has mischaracterized the nature of this dispute and the scope of a Section 11 Committee's authority.

New York Dock arbitrators have jurisdiction to determine whether changes in operations are related to the implementation of a STB approved transaction. *See, e.g., Canadian National Ry. Co., et al.—Control—Wisconsin Central Transportation Corp., et al.*, 2008 STB LEXIS 321 at * 8 (“It is well established that disputes over whether employment changes are being taken to implement a transaction subject to New York Dock are to be resolved through arbitration, subject to appeal to the Board.”) (Exhibit No. 28); *Canadian Pacific Ltd., et al.—Purchase and Trackage Rights—Delaware & Hudson Ry. Co.*, 1998 WL 638433 (S.T.B.) at * 4 (arbitrator has authority to determine whether operational change is linked to an approved transaction) (Exhibit No. 29). The instant dispute requires the Section 11 Committee to decide whether CSXT's replacement of Y122 with a Conrail Yard Job was an operational change allowed by the Conrail Transaction. This Committee also has jurisdiction over the Organization's related arguments that CSXT cannot rely on the STB's approval of the Conrail Transaction to justify its use of Conrail.

As explained in Part IV.A of this Submission, it is CSXT's position that STB's authorization of CSXT's use of Conrail as its agent overrides requirements in the B&O Agreement that would restrict such use. Under STB precedent, a New York Dock arbitrator has authority to determine in the first instance whether it is necessary to override a RLA collective bargaining agreement to allow the effectuation of a STB approved transaction and the public transportation benefits that flow from that approval. The STB set out the criteria arbitrators are

from Gen. Chairperson Lee to the NMB opposing CSXT's request for appointment of a neutral. Exhibit No. 22, p.7.

to apply in making such findings in its “*Carmen III*” decision, discussed *infra* in Part IV. D of this Submission. *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Industries, Inc. (Arbitration Review)*, 1998 WL 661418 (Exhibit No. 32).

Furthermore, as discussed in Part IV.B of this Submission, the Detroit SAA NYD Agreement recognizes that CSXT’s right under the Detroit SAA Operating Agreement to use Conrail as its agent supersedes the B&O Agreement by making the Organization’s labor agreement with Conrail the applicable agreement. The Organization disagrees and contends that the CSXT Western District NYD Agreement and NOMAD NYD Agreement make the B&O Agreement applicable to the transfer work. The STB and, before it, the ICC have repeatedly held that disagreements involving the interpretation, application or enforcement of New York Dock implementing agreements are within the scope of Section 11 arbitration. *See, e.g., Union Pac. Corp., Union Pac. R.R. Co. and Missouri Pac. R.R. Co.—Control and Merger—Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and the Denver & Rio Grande Western R.R. Co.*, Finance Docket No. 32760 (Sub-No. 45) (served Dec. 14, 2010), 2010 WL 5125512, * 5 (“ Arbitrators routinely rule on disputes that concern the interpretation and application of rail merger implementing agreements, and their decisions have been reviewed by the Board and its predecessor, the Interstate Commerce Commission (ICC).”) (footnotes omitted) (Exhibit No. 30); *Delaware & Hudson Ry. Co.—Lease and Trackage Rights Exemption—Springfield Terminal Ry. Co.*, Finance Docket No. 30965 (Sub-Nos. 1 and 2) (served Dec. 13, 1991), 1991 WL 261567 (Organization’s predecessor required to submit implementing agreement dispute to Section 11 arbitration.) (Exhibit No. 31). Even though the Organization has tried to cast this dispute as one that solely requires interpretation of a RLA

agreement, the B&O Agreement, the dispute clearly requires the interpretation of New York Dock implementing agreements.

This Committee also has jurisdiction to address other issues ancillary to the interpretation of the New York Dock conditions and implementing agreements. The STB (and before it, the ICC) generally requires that labor disputes initially be heard by the Section 11 Committee with review of the arbitrator's decision by the STB.¹⁰ *See, e.g., Canadian National Ry. Co., et al.—Control—Wisconsin Central Transportation Corp., et al.*, 2008 STB LEXIS 321 at * (“And it has been the Board’s policy not to intervene in matters subject to arbitration before they have been considered by an arbitrator.”) (cites omitted) (Exhibit No. 28). *See also, e.g., Midsouth Corp.—Control Exemption—Midsouth Rail Corp. and MidLouisiana Rail Corp.*, 1990 WL 288390 (I.C.C.) at * 2 (“Recent practice has been to permit the arbitrator to decide all issues, including issues that might otherwise not be arbitrable, prior to Commission review.”) (Exhibit No. 33). In considering matters within the jurisdiction of a Section 11 Committee, a New York Dock arbitrator is required to follow STB precedents. *Id.* (“In initially permitting arbitrators to decide these matters, we assume that they will act within the limits of their jurisdiction and consistent with applicable precedent.”)

Finally, CSXT’s Petition for Declaratory and Cease and Desist Orders did not deprive this Committee of jurisdiction to consider the matters submitted by CSXT. CSXT’s Petition recognized the STB’s preference that such issues be decided in the first instance by a Section 11 arbitrator with review by the STB. The STB may be deferring action on CSXT’s Petition until

¹⁰ The STB reviews appeals from arbitration decisions using its “Lace Curtain” standard of review. *Chicago & North Western Transp. Co.—Abandonment*, 3 I.C.C.2d 729 (1987), *aff’d sub nom. Int’l Bhd. of Electrical Workers v. ICC*, 862 F.2d 330 (DC Cir. 1988) (Exhibit No. 34). *See also, e.g., Canadian National Ry. Co., et al.—Control—Illinois Central Corp., et al.*, 2011 STB LEXIS 464 (reversing and affirming NYD arbitrator) (Exhibit No. 35).

after this Committee has addressed the issues and if a party seeks review of the Committee's decision.

IV. Merits Arguments

Application of the B&O Agreement to frustrate CSXT's right under the Detroit SAA Operating Agreement to use Conrail as its agent to perform yard transfer work is preempted by (1) the STB's approval of that Agreement and (2) the parties' recognition in the Detroit SAA NYD Agreement that the Conrail labor agreement applies to work performed by Conrail as CSXT's agent.

A. STB Approval of CSXT's Right to Use Conrail Pursuant to the Detroit SAA Operating Agreement Supersedes the B&O Agreement

It is well settled that STB approval of a transaction under 49 U.S.C. §§ 11323-324 supersedes or overrides collective bargaining agreements that would frustrate a STB-approved transaction. The B&O Agreement as interpreted by the Organization would block or limit CSXT's right under Section 3(d)(i) of the Detroit SAA Operating Agreement to use Conrail as its agent and therefore must give way to the STB's approval of that Agreement.

1. CSXT Has the Right Under the Detroit SAA Operating Agreement to Use Conrail As Its Agent for Rougemere-Livernois Yard Transfer Work

As explained, CSXT's right to use Conrail as its agent in the Detroit SAA is an integral part of the Conrail Transaction. This right is expressly spelled out in Section 3(d)(i) of the Detroit SAA Operating Agreement. Section 3(d)(i) allows CSXT or NSR to request Conrail to "perform Switching and Yard Services required by such Operator within the Shared Assets Area, including without limitation any such services which such Operator may be responsible for performing or having performed for a shipper or other Person." The term "Operator" is defined as CSXT or NSR.

While the Organization in the on-property handling offered vague arguments that CSXT's use of Conrail was not allowed by the STB's approval of the Conrail Transaction and was in violation of STB requirements, the Organization never presented any explanation why.¹¹ CSXT's use of Conrail is clearly authorized as part of the Conrail Transaction.

Rougemere Yard is within the Detroit SAA as defined by the Detroit SAA Operating Agreement (§ 1(tt)) because it connects with Conrail Shared Assets track, as shown in the map in Exhibit No. 1, and is within the outer limits of the Detroit SAA as defined in the Conrail Application and Detroit SAA NYD Agreement (Art. III). *See also* Ferrera Verified Statement, p.4 and Johnson Verified Statements, p. 1.

The work of transferring railcars between Rougemere and Livernois Yards clearly falls within the definition of "Switching and Yard Service," and the Organization has never contended otherwise. The Detroit SAA Operating Agreement defines Switching and Yard Services to include the "movement of loaded or empty Railcars between yards" The Conrail Job moves railcars between Rougemere and Livernois Yards.

The Detroit SAA Operating Agreement granted Conrail operating rights over the CSXT track segment between Rougemere Yard and the connection with Conrail track at Delray Tower to access Rougemere Yard for purposes of providing Switching and Yard Services to CSXT. *See* Detroit SAA Operating Agreement § 3(c)(i) ("CSXT hereby grants to CRC and NSR overhead operating rights to operate CRC trains and NSR trains, respectively, with their own crews . . . over such CSXT line segments").

¹¹ For example, in Vice General Chairperson Belew's January 20, 2021 e-mail, the Organization asserted that "It is this offices position that CSX is in violation of Rule 106, Article 3, The Conrail Implementing Agreement, and that the FD 33388 does not grant this authority to CSX and as a result are in violation of the STB requirements to operate in such a fashion." Exhibit No. 16, p. 1 (emphasis added).

The Detroit SAA Operating Agreement also provides that whenever CSXT, NSR or Conrail are operating in the SAA, they will use their own crews regardless of whose tracks they are operating over. For example, Section 3(a) provides that when CSXT or NSR operate over Conrail Shared Assets, they do so “with its own crews.” Section 3(c)(i) provides that when Conrail or NSR operate over CSXT track, they do so “with their own crews.” Section 3(c)(ii) provides that when Conrail or CSXT operate over NSR track, they again do so “with their own crews.”

The fact that since the Conrail Transaction CSXT had performed the transfer move with a CSXT yard job did not take away or diminish CSXT’s right under Section 3(d)(i) subsequently to agree to have Conrail to perform the transfer run based on new operational considerations. CSXT’s right to utilize Conrail as its agent is stated in very broad language quoted above. CSXT can use Conrail to perform “without limitation” “any” Switching and Yard Services which CSXT had been performing. As this language shows, there is no time limit in Section 3(d)(i) for when CSXT can request Conrail to perform a service for it within the SAA. And, Section 3(d)(i) expressly allows CSXT to request Conrail to take over a job that CSXT had been performing.

Moreover, the Detroit SAA Operating Agreement recognizes that CSXT, NSR and Conrail will continually evaluate ways to improve operations within the SAA. They will meet “from time to time” “for the purpose of assuring timely train operations, fluid movement of railcars . . . minimization in the number of empty cars in the Shared Assets Area, and overall operating efficiency in the Shared Assets Area.” *See* § 3(e) Operating Protocols. That is what happened here as explained in the Ferrera and Johnson Verified Statements (Exhibit Nos. 11 and 12). CSXT and Conrail met to evaluate how to improve the fluidity of railcar movements and more efficient train operations in the Detroit SAA by improving the transfer of railcars between

Rougemere and Livernois Yards. They decided that having a nighttime Conrail job originating in Livernois Yard rather than the daytime CSXT Y122 originating in Rougemere Yard perform the transfer would improve operations. This has proved to be the case as explained in the Ferrera Verified Statement. In addition, this solution had the added benefit of reducing congestion through Delray Tower, which sees 54 trains per day on average. *See Ferrera Verified Statement*, p. 3. This was an operational judgment entrusted to CSXT and Conrail by the Detroit SAA Operating Agreement. CSXT made similar operational improvements in the Philadelphia/South Jersey SAA in 2019. *Ferrera Verified Statement*, p. 3-4. CSXT replaced CSXT yard jobs with Conrail jobs to transfer railcars moving in CSXT's account between CSXT yards and Conrail yards within Philadelphia. These operational changes were implemented pursuant to the similar Operating Agreement for the Philadelphia/South Jersey Shared Assets Area. The Organization made no objection to this "farming out" of yard transfer work to Conrail even though the B&O Agreement also applies to CSXT work in Philadelphia.

In sum, the Detroit SAA Operating Agreement expressly allows CSXT, as part of the Conrail Transaction, to use Conrail instead of a CSXT job to perform the transfer of railcars between Rougemere and Livernois Yards. As CSXT next explains, this right supersedes the B&O Agreement by virtue of its approval by the STB.

2. STB Approval of the Detroit SAA Operating Agreement
Supersedes the B&O Agreement

a. STB Approvals Supersede the RLA and RLA Collective
Bargaining Agreements

The Organization took the position in the on-property handling that STB approvals in Finance Docket No. 33388, including STB approval of the Conrail Transaction and the Detroit

SAA Operating Agreement, could not override collective bargaining agreements negotiated under the RLA. For example, the Organization stated as follows in its January 20, 2021 e-mail:

Furthermore, it is our position that the Finance Docket does not grant relief from its obligation to abide by the CBA regardless of what is stated in FD 33388. Simply stated CSX is bound by the Contract with its employees and its operations need to reflect what is contained in the [B&O] Agreement unless changed through the RLA. . . . Furthermore FD 33388 does not grant relief from the CBA nor to farm out our work to another rail road.

Exhibit No. 16, p. 1 (emphasis added). In its April 8, 2021 letter, the Organization similarly argued that “the agreement rules in place between SMART-TD (*formerly UTU*) and the Carrier are indeed applicable and binding upon the Carrier, and above any operating arrangement made in the Finance Docket No. 33388.” Exhibit No. 19, p. 1 (emphasis added).

Contrary to the Organization’s contention that RLA agreements are “above” STB authorized transactions, it has been long settled that the STB’s approval of a transaction under 49 U.S.C. §§ 11323 -11324 supersedes requirements of the RLA and RLA collective bargaining agreements that would frustrate the implementation of a STB-approved transaction or its efficiencies. The override of RLA requirements and agreements is based in 49 U.S.C. § 11321(a), and the imposition of labor protection under 49 U.S.C. § 11326. Section 11321(a) provides that a transaction approved under Sections 11323 and 11324 is “exempt from . . . all other law . . . as necessary to let . . .” the transaction be carried out. The Supreme Court has held that “all other law” includes collective bargaining agreements reached under the RLA. *Norfolk & Western Ry Co. v. Am. Train Dispatchers Ass’n*, 499 US 117 (1991) (interpreting Section 11321(a), then 11341(a)). Exhibit No. 36.

The STB and ICC have explained in numerous decisions that its merger approvals supersede requirements of the RLA and RLA labor agreements that would frustrate the efficiencies from the approved transaction. *See, e.g., Union Railroad Co. and Bessemer and*

Lake Erie Railroad Co.—Arbitration Review—United Steel Workers, 1998 WL 877620 (S.T.B.),
* 4 (“These decisions, in turn relied on precedent which established that the Board’s approval of a transaction automatically removes its implementation from the RLA, and that the Board or arbitrators acting under authority delegated under New York Dock may exempt a transaction from the provisions of the RLA and may override collective bargaining agreements as necessary to realize public transportation benefits of an approved transaction.”) (Exhibit No. 37), *aff’d*, *Union Railroad Co. v. United Steelworkers*, 242 F.3d 458 (3d Cir. 2001) (Exhibit No. 38).

b. The Organization’s Interpretation of B&O Agreement
Conflicts With CSXT’s Rights Under Detroit SAA
Operating Agreement

The Organization does not deny a direct conflict between its application of the B&O Agreement and CSXT’s right to use Conrail as its agent to perform Switching and Yard Services under the STB-approved Detroit SAA Operating Agreement.

As discussed, Section 3(d)(i) allows CSXT to request Switching and Yard Services from Conrail “without limitation.” The Organization’s interpretation of the B&O scope rule would bar CSXT from using Conrail as its agent in the Detroit SAA. The Organization’s interpretation of Rule 106 and Article 3 to require CSXT to make an agreement for equitable sharing of transfer work by CSXT and Conrail trainmen also interferes with the ability of CSXT to use Conrail. Under the Organization’s logic, absent a sharing agreement, CSXT cannot use Conrail as its agent because of the B&O scope rule. An equitable sharing agreement may as a practical matter frustrate the operational efficiencies CSXT could obtain by only using Conrail. In any event, an equitable sharing requirement clearly limits the extent to which CSXT could use Conrail contrary to CSXT’s right to use Conrail “without limitation.”

CSXT does not agree with the Organization's reliance on the scope rule in the B&O Agreement. It is not a traditional scope rule; it does not mention let alone reserve any particular work exclusively to CSXT trainmen represented by the Organization.

CSXT also disagrees that the work of moving railcars between Rougemere and Livernois Yards is interchange within the meaning of Rule 106 of the B&O Agreement, which work must be shared between CSXT and Conrail crews. As explained, this movement is not interchange because the railcars are always in the account of CSXT, Conrail acts as agent for CSXT, and under the Detroit SAA Operating Agreement, there cannot be interchange between CSXT and Conrail. Moreover, the work equities language in Rule 106(a)(5) is inapplicable for two additional reasons. Rule 106(a)(5) requires preservation of "previously established" work equities between carriers. However, the Organization failed to show that there were previously established work equities between CSXT and Conrail when they did interchange railcars prior to the 1998 Conrail Transaction, when Conrail was still an independent carrier. Otherwise, Rule 106(a)(5) requires establishment of work equities when the carriers were not using yard crews to move cars in both directions. Here, CSXT was using a CSXT yard job (Y122) to move railcars in both directions until it decided to use a Conrail yard job to move the railcars in both directions.

CSXT also disagrees that Article 3(e) of the B&O Agreement requires the percentage sharing of transfer work between CSXT and Conrail crews. Article 3 applies to "transfer work between foreign lines and The Baltimore and Ohio Railroad." As CSXT explained in the on-property handling, Conrail is not a "foreign line" in relation to CSXT (former B&O). Conrail acts as the agent for CSXT, the railcars it handles are always in the account of CSXT, and the

transfer move occurs entirely within the Detroit SAA. In addition, Article 3(e) only requires that an “effort be made” to arrange for an equitable sharing of transfer work.

The Committee need not, however, resolve the conflicting interpretations of the B&O Agreement. Even assuming the Organization was correct, CSXT satisfies the STB’s criteria for when its approvals supersede or override requirements in collective bargaining agreements, as CSXT next explains.

c. CSXT Meets STB Criteria When There Is A Conflict
Between a RLA Collective Bargaining Agreement and STB
Approval

The override of collective bargaining agreements by STB approvals under 49 U.S.C. §§ 11323-324 must satisfy the STB’s criteria set out in its *Carmen III* decision, *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al. (Arbitration Review)*, 1998 WL 661418 (Exhibit No. 32). The criteria are:

- the change in operations must be related to a STB approved transaction;
- the collective bargaining agreement override must be necessary to realize the public transportation benefits of the approved transaction; and
- rights, privileges and benefits must be preserved.

CSXT easily satisfies these criteria.

First, CSXT’s use of Conrail as its agent to transfer railcars between Rougemere and Livernois Yards is obviously related to the STB-approved Conrail Transaction in Finance Docket No. 33388. As explained, the STB specifically approved the Detroit SAA Operating Agreement, as part of the Transaction, which allows CSXT to use Conrail as agent to perform switching services in the Detroit SAA.

Second, override of the provisions in the B&O Agreement relied upon by the Organization is necessary to realize the public transportation benefits of the STB’s approval of

the SAA concept. The STB has found that an override meets the “necessity” test “where there are transportation benefits of the underlying transaction,” which would be frustrated by the collective bargaining terms. *Carmen III* at *14. The STB found that, in the Conrail Transaction, “the most important public benefit resulting from the transaction will be a substantial increase in competition by allowing both CSX and NS to serve where only Conrail served before.” *Conrail Decision* at 129. The STB singled out the Shared Assets Area as an important aspect of this increased competition. *Id.* (“This will bring new competition to shippers in such markets as . . . Detroit . . .”). As explained, Conrail’s role as subcontractor or agent for CSXT and NSR is critical to operations in the Detroit SAA. More efficient operations are also a public transportation benefit, and the replacement of Y122 with the Conrail Yard Job has resulted in improved rail operations and less congestion in the Detroit SAA. Ferrera Verified Statement, p. 2-3; Johnson Verified Statement, p. 2-3. Application of the B&O Agreement as argued by the Organization frustrates these benefits by prohibiting CSXT from using Conrail as its agent.

Third, override of the B&O Agreement in this case does not infringe on any “rights, privileges or benefits.” The STB has defined “rights, privileges and benefits” to “include such things as group life insurance, hospitalization and medical care, free transportation, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workman’s Compensation, and unemployment compensation.” *Carmen III* at * 15. CSXT trainmen continue to enjoy all of these benefits. Conversely, the STB has explained that “rights, privileges and benefits” do not embrace scope rules, seniority provisions, and other work rules such as the provisions of the B&O Agreement relied upon by the Organization. *Id.* at * 16 (“almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction”).

B. Detroit SAA NYD Agreement Supercedes the
B&O Agreement by Making Conrail Agreement
Applicable to Work Performed by Conrail As Agent for CSXT

As explained, the STB's approval of the Conrail Transaction required the parties to reach New York Dock agreements implementing the approved Transaction. The Detroit SAA NYD Agreement implements the Detroit SAA Operating Agreement. To implement Conrail's role as agent for CSXT under the Detroit SAA Operating Agreement, the NYD implementing agreement for the Detroit SAA provides that, when Conrail performs work as such agent, the work is subject to Conrail's own collective bargaining agreement with the Organization, not the B&O Agreement. In effect, the Detroit SAA NYD Agreement overrides the B&O Agreement by making the Conrail labor agreement the applicable agreement thus realizing the purposes of the Operating Agreement.

As explained, the Detroit SAA Operating Agreement allows CSXT, NSR and Conrail to operate over each other's tracks using their own crews. As discussed, to achieve the procompetitive purposes of the Detroit SAA, CSXT or NSR can request Conrail to perform Switching and Yard Services for them as their agents, including over their tracks. The trainmen craft on CSXT, NSR and Conrail is represented by the Organization, and the Organization is party to similar collective bargaining agreements with each carrier. The parties arrived at a simple, straightforward solution in the Detroit SAA NYD Agreement as to the applicable collective bargaining agreement with the Organization whenever CSXT, NSR or Conrail are conducting train operations in the Detroit SAA in accordance with the Detroit SAA Operating Agreement.

Article VI of the Detroit SAA NYD Agreement provides that whenever CSXT, NSR or Conrail operate within the Detroit SAA, it does so with its own train crews subject to its own

collective bargaining agreements with the Organization. Article VI—Service and Qualifying of the Detroit SAA Implementing Agreement states as follows:

- A. CRC [Conrail] employees may be required to perform service throughout the SAA territory in accordance with the CRC schedule agreement.
- B. CSXT and NSR will operate trains into, out of, and through the SAA, and will be able to operate the trains with their road crews to any allocated, shared or customer operated facility as if operating in their own territory, under the terms of their collective bargaining agreement.

(Emphasis added.) Likewise, Article II of the Detroit SAA NYD Agreement provides that “[f]or CRC employees working within the Shared Asset Areas (SAA’s) the CRC collective bargaining agreement will be the effective agreement for SAA employees.” (Emphasis added.) Articles II and VI mirror the provisions of the Detroit SAA Operating Agreement discussed above that, when CSXT, NSR or Conrail perform train operations within the Detroit SAA, they do so with their own train crews. The Detroit SAA NYD Agreement correspondingly provides that, when they do, their labor agreements with the Organization apply.¹²

By referring to the Shared Assets Area, and not just the Shared Assets, in Articles II and VI.A, the parties clearly recognized that Conrail would be operating over CSXT (or NSR) track and facilities, not just the Conrail Shared Assets, with its own crews subject to its own labor agreements with the Organization. Otherwise, there is no reason for the language in Article II and Article VI.A referencing operations by Conrail “throughout the SAA territory” or “within the “Shared Assets Areas.” The only reason that Conrail would be operating outside of the Conrail Shared Assets and on CSXT track within the Detroit SAA is if CSXT requested it do so

¹² The similar NYD implementing agreement that the parties negotiated for the North Jersey and South Jersey/Philadelphia SAAs contains similar Articles II and VI.A, which provide that, when Conrail provides services for CSXT or NSR the Conrail agreement with the Organization applies to this work. Exhibit No. 8 (New Jersey/Philadelphia SAA NYD Agreement).

pursuant to Section 3(d)(i) of the Detroit SAA Operating Agreement, since Conrail has no operations other than what CSXT and NSR request it to perform.

As discussed, as part of its settlement with the Applicants to support the Conrail Transaction before the STB, the Organization agreed “to utilize its best efforts to negotiate agreements implementing the Operating Plans” *Conrail Decision* at 351. The Detroit SAA NYD Agreement resulted from those negotiations. The Organization entered into Agreement with full knowledge that the Detroit SAA Operating Plan established Conrail’s unique role as agent for CSXT and NSR and that all of the work performed by Conrail was, in the union’s words, “subcontracted” to it by CSXT or NSR. Unions typically are opposed to an employer’s ability to contract out. For the Conrail Transaction, the work “subcontracted” to Conrail is still being performed by trainmen represented by the Organization and covered by the Organization’s labor agreement with Conrail. In addition, if CSXT employees can show they were adversely affected by CSXT use of Conrail, they may be eligible for generous labor protective benefits under the New York Dock conditions, including up to six years of income protection. And, as discussed, the Organization achieved benefits beyond New York Dock from the Applicants in return for their support of the Conrail Transaction and negotiating implementing agreements.

The Organization is now arguing that the scope rule in the B&O Agreement makes that Agreement applicable to the Rougemere-Livernois Yard transfer work and bars CSXT from subcontracting this work to Conrail unless CSXT agrees to share this work with CSXT trainmen pursuant to Rule 106 and Article 3. In other words, the Organization is trying to create a conflict between the requirements of the B&O Agreement and CSXT’s rights under the Detroit SAA Operating Agreement to use Conrail as its agent “without limitation” to do work that CSXT had been doing. But, that is exactly the kind of conflict that the Detroit SAA NYD Agreement was

designed to avoid by making each carrier's collective bargaining agreement apply to the work done by that carrier within the Detroit SAA. Because the Detroit SAA NYD Agreement makes the Conrail collective bargaining agreement applicable to work performed by Conrail as agent for CSXT, the Organization's reliance on the B&O Agreement with CSXT is again misplaced. It simply has no application here.

C. CSXT Western District and NOMAD NYD Agreements Do Not Apply to Work Performed by Conrail for CSXT

Ignoring the New York Dock implementing agreement that actually applies to the Detroit SAA, the Organization argues that two other New York Dock implementing agreements, the CSXT Western District NYD Agreement and the 2010 NOMAD NYD Agreement, make the B&O Agreement apply to the work of transferring railcars for CSXT between Rougemere and Livernois Yards. The Organization is wrong. These other agreements expressly excepted the Detroit SAA from their coverage.

The Organization argued in its January 20, 2021 e-mail summary of the dispute that CSXT's use of a Conrail Yard Job was in violation of "The Conrail Implementing Agreement." Exhibit No. 16. The Organization later contended in its April 8, 2021 letter that its position was supported, not only by the "1999 UTU/CSXT Conrail Implementing Agreement," but also by another New York Dock implementing agreement, "the Northern Mid-Atlantic Agreement." Exhibit No. 19. By its references to the "Conrail Implementing Agreement" and "1999 UTU/CSXT Conrail Implementing Agreement," the Organization is necessarily referring to the CSXT Western District NYD Agreement.¹³ The CSXT Western District NYD Agreement made

¹³ The Conrail Transaction NYD implementing agreements with the Organization's predecessor, UTU, were all reached in 1998, not 1999, as stated erroneously in the Organization's April 8, 2021 letter.

the B&O Agreement applicable to CSXT train operations in the Western District. Because Rougemere Yard is in the Western District, the Organization is apparently contending that the Western District NYD Agreement makes the B&O Agreement applicable to transfer work that has historically been performed by CSXT trainmen between Rougemere and Livernois Yards prior to the Conrail Transaction.

In 2010, the NOMAD NYD Agreement combined the CSXT Western, Eastern, and Northern Districts into a larger consolidated district, the Northern Mid-Atlantic District, and made the B&O Agreement applicable to trainmen work in the larger NOMAD district, which, again, included Rougemere Yard. Exhibit No. 39 (excerpts). Therefore, the Organization reasons that the NOMAD NYD Agreement reconfirmed that the CSXT Western District NYD Agreement made the B&O Agreement applicable to the transfer of railcars between Rougemere and Livernois Yards.

The Organization's argument that the CSXT Western District NYD Agreement is the controlling NYD implementing agreement fails for three reasons.

First, as discussed, the parties contemporaneously negotiated a NYD implementing agreement specifically for the Detroit SAA—the Detroit SAA NYD Agreement, which is Attachment 1 to the Master NYD Agreement.

Second, in recognition of the above, the CSXT Western District NYD Agreement expressly excepts the Detroit SAA from its coverage. After describing the limits of the Western District, the Agreement states: “The above includes all mainlines, branch lines, yard tracks,

industrial leads, stations between points identified, and all terminals that lie at the end of a line segment except Detroit SAA.” See Article I.A (emphasis added).¹⁴

Third, application of the CSXT Western District NYD Agreement, and through it the B&O Agreement, conflicts with the STB’s approval of CSXT’s use of Conrail as its subcontractor or agent “without limitation” pursuant to the Detroit SAA Operating Agreement. Rather than implement the Operating Plan for Detroit, which is what a NYD implementing agreement is supposed to do, the Organization’s application of the CSXT Western District NYD Agreement –to make the B&O Agreement controlling –would frustrate the Detroit SAA Operating Plan by prohibiting or limiting CSXT’s ability to use Conrail as its agent in the Detroit SAA.

Moreover, when parties desired an equitable sharing of work by employees from two or more rail carriers, they adopted specific language doing so. An example is Side Letter 7 to the CSXT Western District NYD Agreement providing for an equitable sharing of work between points on the former B&O and former L&N with CSXT trainmen with seniority on the former B&O and former L&N. Exhibit No. 9, p. 22-24. There is no such equitable sharing language in the Detroit SAA NYD Agreement, which is the NYD Agreement that actually applies to operations in the Detroit SAA.

Likewise, the NOMAD NYD Agreement does not support the Organization’s position that the B&O Agreement applies to work that CSXT requests of Conrail. The NOMAD NYD Agreement’s preamble explained its purpose as follows:

¹⁴ The CSXT Eastern District NYD Agreement similarly excepted the North and South Jersey SAA’s from its coverage, since they were covered by a separate NYD implementing agreement, the UTU SAA New Jersey/Philadelphia NYD Agreement, which is Attachment 2 to the Master NYD Agreement. See Eastern District NYD Agreement, Art. I.A (“except . . . North and South Jersey SAA . . .”).

WHEREAS, notice was served under Surface Transportation Board Docket No. 33388 of the intent of CSX Transportation, Inc. (“CSXT” or “Carrier”) to transfer, consolidate, coordinate and merge train operations and the associated work force in the territory covered by the Northern District (former Conrail), territory covered by the Eastern District (former B&O) and certain contiguous parts of the Western District (former B&O), to include all terminals, mainlines, and intersecting branches and subdivisions located therein into a new larger territory for train operations, to be known as the Northern Mid-Atlantic District, (hereinafter “the B&O/Conrail Consolidation”)

Article IV.C of the Agreement placed all work and employees in the NOMAD under the B&O Agreement. However, the NOMAD NYD Agreement, like the CSXT Western District NYD Agreement, and using similar language, excepted the Detroit SAA from its coverage: “The above includes all mainlines, branch lines, yard tracks, industrial leads, stations between points identified, and all terminals, including those that lie at the end of a line segment except: Richmond, Huntington, and SAA (Detroit, North and South Jersey).” See Article I.A (emphasis added) (Exhibit No. 39, p. 2). The Detroit SAA NYD Agreement, not the CSXT Western District or NOMAD NYD Agreement, applies to the Rougemere-Livernois Yard transfer work.

V. Conclusion

Conrail’s STB-approved role as “agent ” is vital to the proper working of the Detroit SAA. The Committee should find that the B&O Agreement is superseded by the STB’s approval of CSXT’s right in the Detroit SAA Operating Agreement to use Conrail as its agent and by the the Detroit SAA NYD Agreement’s implementation of that right.

Respectfully submitted,

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Dated: January 21, 2022

EXHIBIT 3

SMART-TD SECTION 11 SUBMISSION

National Mediation Board – New York Dock Arbitration

ORGANIZATION'S EX-PARTE BRIEF

**Finance Docket No. 33388 (Sub-No. 102), New York Dock
Protection**

**(SMART-TD File No. 18-53433-T&E-BOUTU/1760,
Carrier File No. 18-53433-T&E-BOUTU)**

**SMART-TD B&O (formerly UTU) v. CSX TRANSPORTATION
(P. GAY, CLAIMANT) (Former B&O R.R.)**

I. STATEMENT OF CLAIM

There is not a claim for New York Dock Protection by the Claimant. However, the Claimant did file numerous claims (penalty grievances) for violations of the Collective Bargaining Agreement and is provided immediately below for your review.

“Allow the a basic eight (8) hour day penalty due to CSX’s willful violation of the CBA, in particular but not limited to the Scope Rules/Articles, Rule 59, Article 3, and Rule 106, BLE 1971 Interchange agreement. The violation of the CBA has eliminated a prior right employees ability to work an assignment of his choosing belong to CSX employees and was illegally “farmed out” to Conrail SA to which they are not entitled to, in an attempt to eliminate assignment to reduced costs for the stockholders. Consider this claim as notice that this is a continuous claim starting on November 19, 2017 and will be continued until resolved under the RLA. If CSX chooses to deny and not resolve the issue they do so at their own peril and should pay all claims in the full amount.”

II. STATEMENT OF FACTS

The facts before the Board are not disputed by either party and are as follows. On November 14, 2017, CSXT issued a T&E Daily Message with an effective date of November 18, 2017 that independent yard assignment Y122 at CSXT’s Detroit Rougemere Yard would be abolished (**Exhibit A**). To the same effect, Conrail issued a letter dated October 27, 2017¹, to the SMART-TD Conrail Local Chairperson, G. Karkosa, advising that *they* [Conrail] would begin to handle all the interchange work at Rougemere Yard with CSXT. This letter also depicted the interchange tracks to be utilized. Prior to the effective date of the abolishment the Claimant and incumbent employee(s) of yard assignment Y122 was displaced from the assignment by the CSXT’s Crew Management Center at 0937 hours on November 17, 2017, a day prior to the abolishment taking affect while the Claimant was observing two (2) advertised rest days of the Y122 (**Exhibit B**).

¹ Letter provided on page 20 of the Brief and as Attachment 1 in Employee Exhibit H.

The Y122 assignment transferred rail freight cars between CSXT's Detroit Rougemere Yard (owned solely by CSXT) and its purpose was to interchange with the Conrail Shared Assets Operations² at their Livernois Conrail Rail Yard and return. When CSXT abolished the Rougemere Y122 assignment they allowed Conrail to perform all of the work previously performed by the Claimant.

III. TIMELINE OF DISPUTE

Due to the amount of correspondence and information exchanged in the instant dispute a brief timeline of events is provided herein below, as well as a brief synopsis in order to hopefully facilitate a better understanding of the dispute. Additionally, to aid in understanding the yards and areas involved, a map taken from FD 33388 (AKA "1999 CSX/NS Joint Purchase of Conrail"), Volume 3B of 8, will serve as a visual identifier of the location(s) in question (**Exhibit C**).

As a result of the work belonging to CSXT crews, which was now being farmed out to Conrail, the Claimant submitted penalty claims in a timely fashion citing that the B&O Agreement was being violated. Included therein, the Claimant when submitting his claims supplied answers in the appropriate Q&A field given, which was subsequently denied by the Carrier (**Exhibit D**). The Local Chairman holding jurisdiction properly submitted the claims for appeal on July 23, 2018, to Labor Relations for review with supportive documentation attached as an addendum in the Labor Claims Admin Tracking³ (**Exhibit E**).

Following the claims being appealed the Carrier then sat for over two (2) years without any response. Consequently, a formal conference of the claims was requested to seek resolution on the issue as the claims had sat dormant in the claim tracking system without a response by CSXT Labor Relations. Following discussion over the claims with CSX Director of Labor Relations (HDO), Jennifer Manz, and the Organization then emailed her on January 20, 2021, outlining the Organization's position on the matter

² The former Consolidated Rail Corporation (Conrail) is now commonly referred to as Conrail Shared Assets Operations (CSAO) and is a jointly owned subsidiary between CSX Transportation and the Norfolk Southern (NS).

³ Labor Claims Admin Tracking commonly referred to as LCAT is an electronic system owned and operated by the Carrier that the Organization may use to appeal claims if chosen versus a postal service.

and included pertinent attachments supporting our position that the B&O Agreement was violated (**Exhibit F**). Approximately two-and-one-half (2 ½) months later, on April 6, 2021, HDO Manz replied via email with a formal letter attached detailing the Carrier's position and supplied the Conrail Shared Assets Operations portion of FD 33388 as an attachment (**Exhibit G**). The Carrier's position was that the work was not interchange work since Conrail acts as an agent for CSXT with the rail freight billing remaining in CSXT's account under Finance Docket 33388. The Carrier further takes the position that *their* (CSXT/NS/Conrail) operating arrangement renders the B&O Agreement moot, claiming it was replaced with FD 33388 for the Detroit Shared Assets Area. In addition, the Carrier also states for the first time that part of their position is that the current dispute is a New York Dock Protection issue, with jurisdiction lying with the Surface Transportation Board (STB) under Article I, Section 11 of New York Dock and that an arbitration board under the RLA lacks subject matter over such disputes.

The Organization promptly responded via email on April 8, 2021, with an attached letter accompanied with supporting documentation of our position. Wherein, the response and documents affirmed that the agreement in place between SMART-TD (B&O Committee) and the CSXT was indeed the B&O Agreement in the 1998 Master UTU/CSXT Conrail Implementing Agreement, and further in the subsequent 2010 Northern Mid-Atlantic Agreement. Consequently, being the B&O Agreement governed the working rules and conditions, this entitled the employee(s) at Rougemere on the Y122 to an equitable percentage of the interchange work between CSX and Conrail, and to which they had been afforded until CSXT decided to operate otherwise, which was in violation of the B&O Agreement. The Organization further asserted that the matter was not a New York Dock Protection issue but rather a violation of the governing Collective Bargaining Agreement with jurisdiction belonging to the NRAB under Section 3 of the RLA. The Organization further advised that we were not agreeable to the formation of a Section 11 Committee under Section 11 of Article I of the New York Dock (**Exhibit H**) since the matter was a New York Dock claim or issue. In reply to the Organization's letter, the Carrier responded on April 20, 2021, maintaining their position and reiterating that the CSAO Detroit SSA agreement – between the interchanging Carriers – nullifies (or supersedes) the B&O Agreement they have with the Organization.

Furthermore, the Carrier took the position that the B&O Agreement is irrelevant concerning equitable interchange as the work, although now being performed by Conrail (a common Carrier), because they claimed the costs remain in CSXT's account as an owner/operator of Conrail Shared Assets and will continue to pursue Article I, Section 11 Committee (**Exhibit I**). However, the Carrier never formally established the Section 11 Board with the NMB.

On April 29, 2021, the Organization filed the dispute with the National Railroad Adjustment Board First Division via a Notice of Intent under the prescribed the "NRAB uniform rules of procedure" encompassing all claims related to the dispute including the Claimant's Statement of Claim (**Exhibit J**). The NRAB replied the following day on April 30, 2021, with acknowledgment of receipt and assigned Case No. NRAB -00001-210254 (**Exhibit K**).

On May 3, 2021, the Carrier sent another letter via email continuing to push forward with an establishment of Section 11 Board by identifying a method for which to select a neutral arbitrator, although the NMB was still never contacted by Carrier to establish a Section 11 Board. (**Exhibit L**). On May 7, 2021, the Organization responded again disagreeing with Section 11 arbitration as the proper venue and advised that the matter was already slated for a review at the NRAB and thus would be adjudicated under Section 3 of the Railway Labor Act (**Exhibit M**).

On May 24, 2021, the Carrier sent two (2) Letters to the NMB addressed to Terri Brown, the Director of Arbitration Services. In one letter the Carrier was insistent that the First Division Case Number NRAB-00001-210254 be closed and thus the Division dismiss the Organization's claim as the CSAO SSA CBA with its employees supersedes the B&O Agreement in Shared Assets Territory. The Carrier further professed that the STB had exclusive jurisdiction – not the NRAB – as reason for dismissal of our case (**Exhibit N**). In the second letter the Carrier requests for the NMB to appoint an arbitrator to serve as a neutral member of a New York Dock Section 11 Committee, although a Section 11 Board was never formally established (**Exhibit O**). The following day on May 25, 2021, the Organization penned a letter in reply to the Carrier's letter to dismiss NRAB-00001-210254 that the request was unfounded and improper; further illustrating to the NMB that the claims were indeed properly presented for adjudication

under the process under Section 3 of the Railway Labor Act (**Exhibit P**). The following day, on May 26, 2021, a letter from National Mediation Board Director of Office of Arbitration Services, Terri Brown, was received by the Organization requesting comments on the matter and issuing a deadline of June 9, 2021, for response involving the establishment of a Section 11 New York Dock conditions of the STB (**Exhibit Q**).

The Organization responded as directed advising of our position that the formation of the Section 11 New York Dock was improper and listed several reasons with cause that the dispute was properly before the First Division and should not be disturbed (**Exhibit R**). The Carrier on June 11, 2021, further issued unsolicited comments two (2) days after the deadline, disagreeing with Organization position as incorrect (**Exhibit S**). No response to our request for comments was received by the NMB.

On June 15, 2021, NMB Director, Terri Brown, sent a letter to CSXT advising Vice-President Labor Relations, Jeff Wall, that his May 24, 2021, letter requesting them to dismiss the First Division case was addressed improperly to the NMB and also explained the difference of the two entities and that the Carrier's letter to dismiss First Division Case No. 00001-210254 should be submitted to the Chairman of the NRAB (**Exhibit T**). The same day, June 15, 2021, the Carrier re-issued their original May 24, 2021, letter to the NRAB requesting the Board dismiss Case No. NRAB-00001-210254 (**Exhibit U**). On the same date of June 15, 2021, the Carrier through their counsel of Ronald M. Johnson filed before the Surface Transportation Board a Petition for Declaratory and Cease and Desist Orders with the STB under Finance Docket No. 33388 (Sub-No. 102) requesting expedited handling of the on-going dispute (**Exhibit V**).

The National Mediation Board Director of Office of Arbitration Services Terri Brown issued a letter dated June 16, 2021, directed to the Carrier and carbon copied the Organization in reference to the request of the NMB to appoint an arbitrator to serve as a neutral member of a Section 11 New York Dock Committee advising the process for selection of neutrals and enclosed was a list of thirty (30) qualified neutrals to choose from that was to be remitted no later than June 30, 2021. (**Exhibit W**). The Organization, while maintaining our procedural objections to the improper establishment of the Section 11 Board, also

sent names since the NMB failed to respond to our June 9, 2021, requested comments. These letters concerning selecting arbitrators were to be kept confidential as stated by the NMB and therefore respecting that aspect, are not included herein.

On July 1, 2021, the NMB issued correspondence addressed to both parties regarding the request to furnish a list of neutrals to hear the dispute of New York Conditions under Section 11 of the Surface Transportation Board listing seven neutrals. The method for which to derive at a neutral was determined to be through the strike method (**Exhibit X**).

On July 13, 2021, Assistant General Counsel Shawn M. McKinley for SMART-TD responded to the CSXT's June 15, 2021, Petition for Declaratory and Cease and Desist Orders with the STB under Finance Docket No. 33388 (Sub-No. 102). In essence that the STB's jurisdiction over disputes from transactions such as CSXT's acquisition of Conrail are not "timeless and limitless." CSXT's attempt to invoke New York Dock arbitration more than 20 years after the completion of the Conrail acquisition is merely an attempt to avoid any liability as a result of the abolishment off the Y122, and its request for relief should be denied (**Exhibit Y**).

On July 16, 2021 the Organization penned a letter to Terri Brown of the NMB posing three (3) questions as to the proper process using the strike method due to the Carrier's inference that the Organization must immediately provide a strike choice immediately succeeding their own (**Exhibit Z**). The questions posed were 1) should the parties use the strike method in such a manner and send the strikes via the NMB, or directly between the parties? 2) What is the time frame that the strikes should occur? 3) Can you kindly provide the parties with the specific procedures of the NMB we should follow? The Carrier in response to the Organizations letter on July 19, 2021 penned a letter to Terri Brown offering their opinioned view of events during the strike process (**Exhibit ZA**). On the same date of July 19, 2021 CSXT also filed a reply including a request for leave to file a reply with the STB to SMART-TD's response to CSXT's Petition for Declaratory Order and Cease and Desist order for Finance Docket No. 33388 (Sub-No. 102). CSXT concludes that SMART-TD's arguments are without merit and their Petition and reply to the board should be granted (**Exhibit ZB**).

Terri Brown of the NMB replied on July 21, 2021 to both the Organization and the Carrier with an attached memo regarding procedures for selecting a neutral in New York Dock cases **(Exhibit ZC)**. On the same day of July 21, 2021, the Carrier initiated an email correspondence with the Organization expecting to finalize the strike method by the close of business. In reply the email the Organization stated that the NMB's letter with attached memo did not specify a timeframe for the neutral selection. Furthermore, as the Carrier had issued a Petition for Declaratory and Cease and Desist Orders with the STB under Finance Docket No. 33388 (Sub-No. 102) that the process should be finalized before taking action as the dispute is now essentially following three (3) different paths and clarification would be prudent **(Exhibit ZD)**.

In a letter dated July 23, 2021, the Carrier authored another letter to Terri Brown of the NMB stating that the Organization was refusing to participate in the selection of a neutral and requested that the NMB immediately designate one of the two remaining neutrals to be the neutral member of the Section 11 Committee **(Exhibit ZE)**. The Organization responded to the Carrier's letter on the same date July 23, 2021, to Terri Brown Director of Arbitration Service of the NMB objecting to the Carrier's request as improper and unfounded. The Organization reiterated that before taking action that the Carrier's Petition for Declaratory and Cease and Desist Orders with the STB under Finance Docket No. 33388 (Sub-No. 102) decision should be rendered before the selection process should be completed. By allowing a decision in the Carrier's Petition for Declaratory and Cease and Desist Orders with the STB to occur would provide a clear path for all parties involved in proper handling of the dispute **(Exhibit ZF)**.

On September 22, 2021, Terri Brown Director, Office of Arbitration Services of the NMB authored a letter to Kathryn A. Vandagens and carbon copied both respective parties of the Carrier and the Organization advising of the appointment as the neutral member of the Section 11 Committee **(Exhibit ZG)**. The parties conferenced with Neutral Kathryn A. Vandagens via Zoom on October 22, 2021 and finalized the dates to exchanging briefs, responsive pleadings, and the hearing of the briefs. Neutral Kathryn A. Vandagens reduced the conference agreement to writing and mailed to both parties on October 25, 2021, the dates agreed upon **(Exhibit ZH)**.

IV. POSITION OF THE EMPLOYEES

At onset, the Board should understand that this issue presented here are simply penalty claims arising out of a denial of equitable portions of work in violation of the property CBA. However, the Carrier attempts to divert this matter down several avenues to cause confusion of the matter and try to obtain a Board ruling that they do not have to adhere to their clear and unambiguous contractual obligations in the B&O Agreement. Therefore, the Board will have to address the jurisdiction matter as CSXT claims that the stack of penalties involved in this dispute are not ripe for a ruling at the NRAB First Division, but claims a Section 11 Committee can resolve the matter. In contrast, however, the Employees affirm that the claims presented for review (lead claim for a batch matching claims) is clearly a dispute falling under purview of the CBA and the RLA and thus is not properly before this Board.

1. Procedural Issue:

The Employees maintain that the claims in question belong properly before the First Division under the Collective Bargaining Agreement (B&O Agreement) and the Railway Labor Act, as amended. The Claimant, the Carrier, and the Organization at all levels of handling, addressed the claims from onset based on a dispute triggered on November 18, 2017, as a violation the Collective Bargaining Agreement, *vide infra*. This was solely due to CSXT employees being deprived of work (or a percentage of the work) they are entitled to under the clear and plain language in the B&O Agreement. As clearly evinced in the claim/grievance, the Claimant did not progress a grievance in any manner claiming to be a displaced/dismissed employee as defined under NYD Protections related to FD 33388, but only that Conrail was now performing all the interchange work at a CSXT Rougemere Yard and his CSXT job (Y122) was improperly abolished as a result. Nevertheless, assuming, *arguendo*, the Carrier failed to identify in their initial handling of the grievance (their declination of the claim) that the proper process would be that of a New York Dock matter (protective grievance), nor did they make CSXT employees aware of their potential New York Dock protections from the effective date of their operating change. Moreover, had the Claimant believed this was a New York Dock dispute, he would have been required to fill out the proper claim form

which was contained in the 2010 Northern Mid-Atlantic District Implementing Agreement in order to begin the protective benefits afforded under New York Dock. The NYD claim form and process for handling is contained in Attachment “D” of the CSXT Western District of the Implementing Agreement, and was codified into the 2010 Northern Mid-Atlantic Implementing Agreement. **(Exhibit ZI)**.

Additionally, it is very noteworthy for the Board to understand that the Organization had to prod the Carrier on advancement of the issue since the penalty claim appeals by the Local Chairman were never responded to by the Carrier. Moreover, it was not until a letter dated April 06, 2021, when the Carrier replied to the Organization’s January 20, 2021, email concerning the conference over the penalty claims that the Carrier advanced a position claiming it to be a New York Dock matter. This, of course, was after the dispute had sat dormant for several years⁴. Simply put, the Carrier is attempting to circumvent their agreement obligations and misconstrue the facts over trackage rights by claiming the matter before the Board is dealing with a New York Dock protection issue related to FD 33388.

Nevertheless, the Carrier’s late and new found position that the dispute lies with the STB under NYD Protection can only be viewed as an attempt to deflect their contractual obligations as a hopeful shield from the pending liability over the years. In fact, had the Carrier truly believed that the proper direction for the dispute was to proceed with a NYD Section 11 Board, they must have done so within twenty (20) days of the dispute, which they clearly failed to do. Bearing in mind that these claims were several years old and were also formally appealed in writing to the Carrier as violations of the governing CBA, their timeframe for such a position has been far exceeded and thus barred, even assuming, *arguendo*. As noted in the Organization’s reply to the NMB requesting comments on dispute falling under a NYD issue **(Exhibit R)**, Section 11 of Appendix III, clearly outlines the requirements to establish a Section 11 Board which the Carrier did not follow and continues to ignore today. Pertinent parts of Section 11 of Appendix III contained in both the 1999 Conrail Implementing Agreement reads as follows;

⁴ See Exhibit G

“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 Section 4 and 12 of this Article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.” (Underlining added for emphasis)

Based on the timeline of events and clear and unambiguous language, *supra*, the Carrier has failed to properly establish a Section 11 Committee in the prescribed amount of time and follow the proper notice procedures and therefore the doctrine of laches becomes relevant and binding. The Carrier had twenty (20) days after the dispute arose to refer to an arbitration committee, not four years after the triggering of the dispute, and certainly not twenty (20) years after FD 33388 was approved by the STB (July 23, 1998) and with the Master Implementing Agreement becoming effective on August 6, 1998. Moreover, proper notice is required by either party to identify a New York Dock claim as to not prejudice either party due to delay and to allow each side a proper means to defend their positions. Here, the record is undeniably clear that the Carrier never served proper notice (or gave any notice whatsoever) and ignored the twenty (20) day statute of limitations after the dispute arose to establish a Section 11 Committee. Moreover, it would be improper for the Board to toll the twenty (20) day limitation, as it would render the language the STB requires in New York Dock transactions meaningless for both involved parties. What is more, again assuming, *arguendo*, if the claims were New York Dock claims as the Carrier infers, to consider their *new* position after this many years of handling the claims as a violation of the agreement would give them an unfair advantage. Whereas, they could simply manipulate any grievance by claiming it was a dispute under New York Dock and road block the employees to their rights to resolution under the RLA. If that were to occur, the employee(s) would suffer as a result. Additionally, the proper procedures to protect a New York Dock Guarantee would not be known by the employee. The delay here only benefits the Carrier by means of providing them with a financial windfall and shield them of potential liabilities. As a result, this would set a new standard in the industry that all a railroad has to do is ignore an issue, then take the position that it is a New York Dock claim, no matter how long the issue has been in debate. Consequently,

this would leave no way for the employees to protect their agreement. While Laches is more often used in rulings against labor, in the case at hand it also applies to the Carrier as they are the moving party in calling for the establishment of the Section 11 Committee and pursuing a New York Dock dispute to adjudicate these claims in an improper forum.

The Carrier's delay of four (4) years did in fact prejudice the Claimant as they cannot retroactively act to protect a displacement guarantee, nor did the Carrier take the required snap shot of test period earnings under New York Dock protections. To this point, several Neutrals have ruled with likeminded awards citing the Doctrine of Laches as a well-established and relied upon method in dealing with protection and equity claims resulting from a Finance Docket before the I.C.C. and STB as the Awards listed below will indicate (**Exhibit ZJ**). In Case No. 3 of I.C.C. Finance Docket No. 30000, Neutral Member LaRocco ruled in a Section 11—New York Dock Committee when the Claimant delayed filing a protective claim after four years, as he states in pertinent part;

“Even in the absence of express time limits, the doctrine of laches operates to bar a claim which is filed beyond a reasonable time period and prejudices the opposing party. The purpose of the doctrine is to prevent stale claims. Allowing old, stale claims to perpetually fester hardly promotes stable and predictable railroad labor-management relations. As stated above, a delay, even an unreasonable delay, is insufficient to invoke the laches defense. The Carrier must also demonstrate that the Claimant's procrastination operated to its prejudice...”

Claimant's delay in bringing this this claim prejudiced the Carrier because it cannot retroactively act to minimize the amount of Claimant's displacement allowances. Furthermore, the Carrier detrimentally relied on Claimant's apparent manifestation that he desired continued Job Stabilization Agreement protection. Although the Organization asserted that the Carrier deceived Claimant into thinking that he was not entitled to New York Dock protection, the Organization has not brought forward any evidence to support its bare assertion. The record is void of any evidence showing the Carrier surreptitiously concealed Claimant's potential right to New York Dock protective status.

Finally, in TCU v. UP, NYD .11 Arb. (Stallworth, 11/26/880, the Arbitration Committee rejected the Carrier's attempt to impose a strict ninety day filing period, following an initial displacement, for an employee to file for New York Dock benefits. Nonetheless, the Arbitration Committee observed that Laches maybe a valid defense. It simply denied to impose a standard filing period, since, as discussed above, Section 11 of the New York Dock Conditions contain no fixed timed limit for initiating a claim.

This Claim is stale. Due to Claimant's unreasonable delay which prejudiced the Carrier, this claim is barred by laches."

Likewise, Neutral Muessig in New York Dock Protection Award 195 of I.C.C. Finance Docket 28250, ruled against the International Brotherhood of Boiler Makers, Iron Ship builders, Blacksmiths, Forger and Helpers due to the lapse of three years before protection claims were filed due to laches by citing;

"The Claimants waited about three years after the occurrence of the events upon which their claims are based before they were submitted to the Carrier. Certainly the doctrine of Laches has been recognized in this industry as well as by other arbitral precedent to bar claims filed beyond a reasonable time period. The theory underlying the laches doctrine is that the failure to litigate a claim presently by deferring action until unspecific but distant time in the future results in bias or prejudice the party against whom the claim is ultimately filed. The purpose of Laches is to bar the submission of stale claims. Clearly, in protective matters, it is critical that the claims be filed without delay. In the cases at hand, and while we have fully considered the General Chairman's aggressive and skilled comments before us, the Claimants' failure to act in a timely manner precludes consideration of the issue at hand."

Similarly, Special Arbitration between CSX Transportation, United Transportation Union (Former Chesapeake and Ohio Railway Company-Propor, United Transportation Union (B&O General Committee of Adjustment, C, T, and E), and United Transportation Union (C&O-North General Committee of Adjustment, C, T and E), Neutral Jack W. Cassle was tasked with settling a long-standing equity dispute arising from the diversion of freight by the C&O Proper dating back to 1972 through 1974 under I.C.C. Finance Dockets No. 21160 and I.C.C. Finance Docket No. 30673 in the Coordinated Straight Line

Agreement, along with the Coordinated Queensgate Agreement. Neutral Cassle issued rulings governing identical claims dated November 3, 1990, and in his discussion states:

“The initial issue in this matter is whether the doctrine of laches is binding upon the parties. Laches is the concept established in law and cited frequently in arbitration where a substantial period of time has elapsed without any action on the part of an aggrieved party to force a conclusion to the question(s) involved. There are three (3) criteria available to determine whether laches is applicable to a specific matter. The criteria are unreasonable delay, no or inadequate justification for the delay and prejudice to another who justifiably relied on another party to assert the claim.

A period of eleven (11) to (13) years elapsed from the initial approach to the diversions before the diversion claim for equity was considered in 1985. A period of thirteen (13) to fifteen (15) years elapsed before the Marx’s decision was entered. This decision gave impetus for the processing of equity claim under Article 90 of the UTU’s Constitution. The evidentiary record does not reveal any probative evidence as to the justification of the delay in claiming equity.

As a result of the actions of the C&O proper, the question of laches to this arbitration is considered applicable. However, it is not necessary to utilize the laches doctrine to conclude this dispute.”

Nevertheless, Neutral Cassle, while not applying doctrine of laches, made it very clear that he could have imposed this on the Organizations due to the period of time that had elapsed should it have been deemed necessary. Consequently, this Board should follow the same precedent as the time lines involved in this case shows a significant delay by the Carrier.

2. Merits and Agreement

As to the Carrier’s second assertion that the Shared Assets Area Operating Agreement with Conrail nullifies the B&O Agreement, this is simply untrue and misguided. Whereas, prior to the final authorization of FD 33388 the STB formed a Merger Team which issued final recommendations to be met. Of these conditions, under Labor, Environmental and Other Issues, Item 30(b) (**Exhibit ZK**), it states;

b. We recommend that the Board make a clear statement that approval of this transaction does not indicate approval or disapproval of any of the collective bargaining agreement overrides that applicants have

argued are necessary to carry out this transaction. Those issues should be negotiated if possible, or arbitrated as necessary. The Board should resolve them only as a last resort, giving deference to the arbitrator.

Consequently, taking the recommendations of the “Merger Team” CSXT and SMART-TD (formerly the UTU) met to reach an agreement on the Conrail acquisition to satisfy the terms of Article I, Section 4 of the New York Dock Conditions that may have been imposed by the STB Prior to the STB’s final approval of the Finance Docket. The Master Implementing Agreement (**Exhibit ZL**) reached and subsequently submitted to the STB was approved and deemed acceptable as it did not impede the consolidation proposed, therefore nullifying any future arbitration that may have occurred under Article I, Section 4, if deemed unacceptable by the parties’. It was further expressly agreed upon by both the Carrier (CSX) and this Organization (SMART, formerly UTU) that “the B&O Agreement” (the current agreement) is controlling under Article IV – Seniority and Existing Agreement Preservation, excluding the employees working for the CSXT Northern Lines, and the Detroit Shared Assets Area (Conrail). As discussed later, the employees working on the CSXT Northern Lines (former Conrail territory in the northeast United States being absorbed solely by CSXT) would maintain their working agreement (Conrail Agreement⁵) as would the employees working at Conrail on the Shared Assets Area (SAA). Accordingly, the Master Implementing Agreement denoting the B&O Labor Agreement as the controlling agreement on CSXT also satisfied the terms of Section 2 of the New York Dock Agreement. Thus, there were no impediments to the transaction by applying the existing labor agreements and the process moved forward as planned without incident.

Moreover, after FD 33388 was approved by the STB on July 23, 1998 (well over twenty years ago), Article XV of the Master Implementing Agreement became effective and all parties’ involved in the transaction signed the agreement on August 6, 1998. Soon thereafter, CSXT and this Labor Organization finalized negotiating the district implementing agreements to include the CSXT Western District Agreement⁶ on August 28, 1998, which presides over the instant dispute. In fact, there were

⁵ CSXT Northern Lines (former Conrail) was merged into 2010 under Section 4 and now fall under the B&O Agreement applicable to the 2010 Northern Mid-Atlantic Implementing Agreement (“NMAD”).

⁶ CSXT’s Rougemere Yard lies within the Western District.

multiple respective implementing agreements including; the Western District, the Eastern District and the Northern District. Contained in the CSXT Western District Agreement is the designation of the B&O Agreement (as modified therein) as controlling for the Western Lines including prior owned CSXT territory of Detroit, except the Detroit SSA (CSX/NS jointly owned prior Conrail), and the B&O Chicago Terminal (B&OCT). The Detroit SSA territory was excluded and remains under their separate contract and administered by Conrail operating under their own designated representatives⁷ under Section 152nd of the Act as those prior Conrail employees were excluded from the merger. This is outlined in Attachment "D" the CSXT Western District portion of the 1998 Implementing Agreement Article I, A and B (**Exhibit ZM**). The pertinent parts thereof are reproduced directly below:

A. *Train operations and the associated work forces of the former B&O, B&OCT, C&O (PM-HV), C&O (Proper), C&EI, TTRR, L&N and Conrail, will be merged into the new operating and seniority district hereinafter described:*

Eastern Limits: Cleveland, OH (exclusive)

Willard, OH (inclusive)

Southern Limits: Cincinnati, OH (inclusive)

Louisville, KY (exclusive)

Evansville, IN (exclusive)

Western Limits: St. Louis, MO (inclusive)

Chicago, IL (inclusive)

Northern Limits: Manistee, MI (inclusive)

Midland, MI (inclusive)

Port Huron, MI (inclusive)

⁷ SMART-TD (*formerly UTU*) represents the Trainmen and the BLET represents Engineers under different General Chairmen by each labor organization and by each perspective property – CSXT, NS, Conrail (SSA). The undersigned represents CSXT employees and has no jurisdiction over the Detroit SSA employees at Conrail, nor their labor agreement(s). The undersigned is the authorized Employee representative of the B&O Agreement.

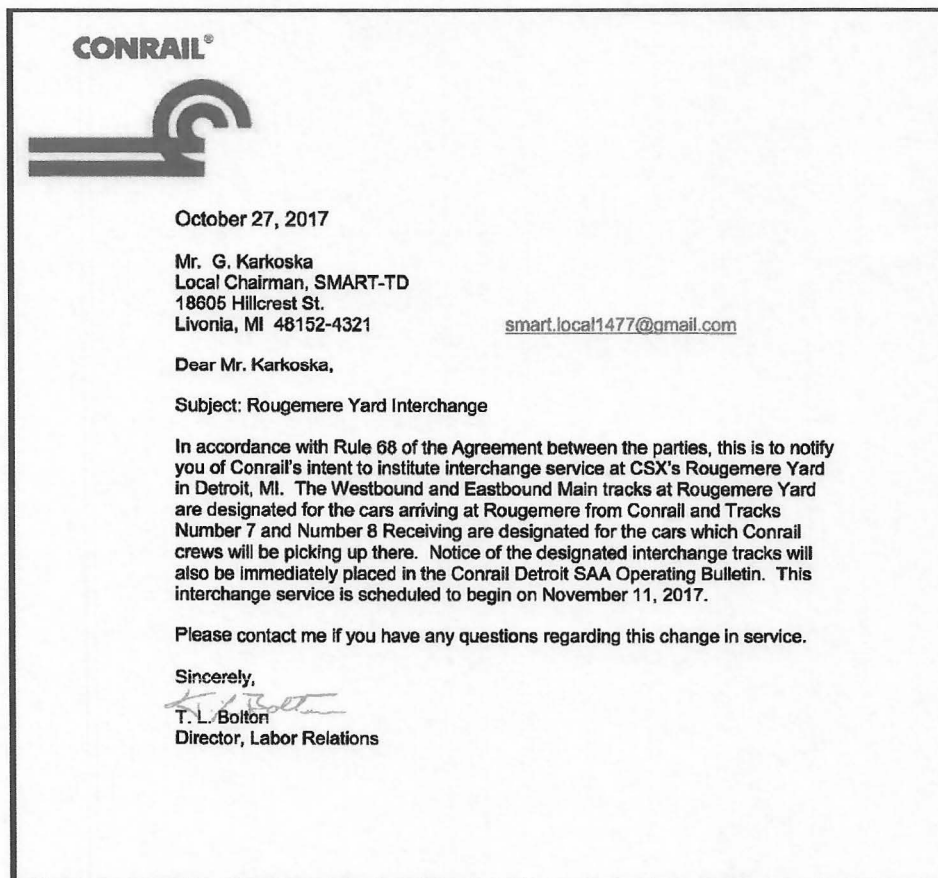
The above includes all mainlines, branch lines, yard tracks, industrial leads, stations between points identified, and all terminals that lie at the end of a line segment except: Detroit (SAA). All branches and industrial tracks intersecting the above lines and all pre-existing territorial rights of the involved districts not in conflict with the intent of this agreement are included in the merged district. A sketch of the above referred-to district is attached.

B. All road territory and terminals within the districts will have one common work force operating under one labor agreement. The former B&O labor agreement, as modified herein, will apply in the Western District, except the B&OCT labor agreement will remain applicable in the B&OCT territory. (Underscore added)

Nevertheless, the Carrier now takes an awkward position over twenty (20) years later that the B&O Agreement is not applicable with FD 33388 in place and further that the Division lacks authority over the dispute but the proper authority lies within the jurisdiction of the STB. The Employees disagree. As well, their *new* position is very misguided and in conflict with the Master Implementing Agreement and the CSXT Western District Agreement, which was in fact signed after the FD 33388 was approved and implemented. In other words, the Carrier is suggesting that an Agreement entered into after the approval and implementation of FD 33388 holds no governing authority or relevance. This argument should be rejected as illogical as it does not pass the smile test. Given the circumstances and timeframes involved, the Carrier is simply attempting to skirt their liability of penalties for clear-cut violations of the B&O Agreement and hoping that the STB will declare jurisdiction and say they have right to allow Conrail crews to solely perform the work belonging to CSXT employees at CSXT's Rougemere Yard (owned exclusively by CSXT). In essence, the Carrier is attempting to have a Board (any board) roll back time and negate the controlling labor agreements entered into after the decision to approve FD 33388. This however would not serve any purpose but to add strife and promote inconsistencies in an already volatile setting. Consequently, the Committee should rule that the matter is not properly before the New York Dock Section 11 Committee and should be progressed before the National Railroad Adjustment Board Division.

Based on the Carrier's position, it's obvious that this matter is now somewhat tangled with Finance Docket 33388. However, when reviewing the prior correspondence from the Carrier, their position

appears to be that the cited the B&O Agreement scope rules, interchange rules, or transfer do not apply as the freight never leaves CSXT's account as they are the owner operator of both CSXT and the SSA (Conrail) and thus cannot be classified as a "foreign carrier" (*see* Employee **Exhibits G, H and I**). However, it must be pointed out that this is simply not true and very misleading. The Conrail Shared assets is just that, assets shared between the Norfolk Southern and CSXT with the Norfolk Southern owning the majority, but clearly operated as "Conrail" (a recognized common rail carrier). Additionally, CSXT tries to assert that their solely owned and operated facility at Rougemere Yard is now somehow a part of the Conrail Shared Asset. This simply is not the case. In fact, this is evident as CSXT crews were abolished by a CSXT crew center message (not mentioning new interchange arrangements) and the Conrail employees were notified of the new interchange work amendments via letter from T. L. Bolton, the Director Labor Relations at Conrail, which reads:



It's noteworthy to mention that Conrail Labor Relations cited Rule 68⁸ in his letter to Conrail Local Chairperson Karkosa referring to "the [Conrail] agreement between the parties". Thus, if what CSXT awkwardly claims is true, one would have to call into question why Conrail Labor Relations found it pertinent to mention the controlling rules of the Conrail labor agreement governing interchange with a foreign Carrier (*I.e.*, "**CSX's Rougemere Yard**"). Conrail Labor Relations clearly made no mention of a "joint operated" facility at CSX'S Rougemere Yard. Rather, Conrail Labor Relations referred to it as what it is – a foreign Carrier, especially in the eyes of the labor agreement. Moreover, the work changes mentioned fell under the interchange rules of the Conrail agreement as well. Furthermore, CSX confirms this as interchange as seen in their abolishment notice (*Employees' Exhibit H Attachment 3*). Bearing these important facts in mind, it is impossible to conclude that CSXT and Conrail are "one carrier" and that the separate labor agreements on each perspective property would somehow legally bleed together under FD 33388 and shield CSXT from their obligations to their employees under the B&O Agreement. Whereas, the Carrier is required under Rule 106 of B&O Agreement, *vida infra*, to afford equitable portions of the interchange work with foreign line carriers. For anyone to see it otherwise would render the clear language and historic applications of the B&O Agreement – one of the oldest and most respected labor agreements in the industry – moot.

To further illustrate that the only territory that is part of the Detroit Conrail Shared Assets (SAA) is the territory that both the Norfolk Southern and CSXT jointly maintain and was a previous Conrail territory (still under Conrail Agreements). The area encompassed in the dispute is provided in **Exhibit C**, which is a color coded map taken from FD 33388, Volume 3B of 8, denoting each railroad's territory. As you'll note upon review, all the Conrail Shared Assets are colored blue. However, as clearly seen, CSX's Rougemere Yard is not blue, but in fact is colored brown. Again, the facts clearly proves that CSX Rougemere Yard is not a part of the Detroit SAA, but merely falls within close proximity to the SSA.

⁸ Rule 68 ("Interchange") of the Collective Bargaining Agreement *between* Consolidated Rail Corp (Conrail) and the United Transportation Union (*now SMART*) governs interchange with connecting Carriers at Conrail in the SAA and is provided in *Employee Exhibit "H"*.

Consequently, this Board should reject all of CSXT's arguments to the contrary as they are without support and without merit.

As for the work involved, the duties performed by the CSXT Y122 job at Rougemere and now performed by Conrail have been described as transfer yard assignment that facilitates an interchange between the two (2) Carriers, CSXT and Conrail. Similar to this case, in PLB 6411, Award 1 with Neutral David Twomey (**Exhibit ZN**), the Board was tasked with settling a dispute over equity when the BNSF gave all the interchange work exclusively to the Minnesota Commercial at their Twin Cities Terminal after the ICC granted trackage rights. The point of dispute was the national language contained in Article VII, Section 5 of the 1972 National Agreement. This is important because the language in that dispute is the same language applicable here and that is currently codified into the B&O Agreement under Rule 106. In the decision Arbitrator Twomey ruled that the Carrier was bound by the contractual language, stating in pertinent part;

“The ICC’s grant of trackage rights to Commercial allowed Commercial to utilize BN tracks for interchange with BN at BNs Northern Yard. The ICC did not grant Commercial exclusive rights for interchange between the BN and MC. As set forth previously, granting trackage rights and changing an interchange location for efficiency purposes does not discharge BN’s obligation to its employees covered by Article VII, Section 5.”

Moreover, the neutral while maintaining jurisdiction over the case further ruled that a timeline be followed that the Carrier supply the Organization with a study to determine the settlement of claims and to finalize equity. Pertinent parts reading;

“The factual assertions are so dramatically opposite from each other for a period covering well over a decade that should it turn out that the Organization’s assertion are supported by the business records studied, then the Carrier, in working out its interchange with Commercial, shall see to it that a equal division of interchange work will apply. Should the study indicate that a substantial (not de minimis) or pattern division of interchange work exists rather than an equal division, then the Carrier in working out the interchange arrangement with commercial shall see to it that such equity will apply. (...) The Carrier shall have sixty days after concluding the study and finding either an equal division of interchange work or a substantial or pattern division

of interchange work, to work out an appropriate interchange arrangement with Commercial. Jurisdiction is maintained.”.”

As evinced herein, the long standing principles of interchange have been disputed by both the Carriers and multiple Organizations but the guiding precedential Awards have remained consistent with these principles of equity entitlements of work when required by the labor agreements in play. This case is no different as the agreement language mirrors what numerous other tribunals have already decided. For that reason, the Committee should follow the sound precedent and remand jurisdiction to the NRAB Division to decide equitable rights to interchange work since the B&O Agreement requires it.

V. SUMMARY

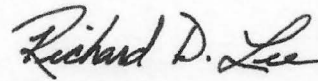
This dispute is not as complex as the Carrier would have one believe. It is simply an issues of CSXT employees being deprived of portions of the interchange work between CSXT and Conrail. While the Carrier takes the position that the issue is subject to a review by the STB and not the NRAB Division, their position is simply unfounded. Nevertheless, considering the timeline of events involved, they have failed to comply with the parameters set forth in the New York Dock conditions.

Moreover, the Employees were completely transparent from onset. The Claimant explained what the basis of the claims were and cited the agreement rules being violated, which were furthered on the appeal of the claim. At no point did the Claimant, nor this Committee, put forth anything about the Claimant falling under protective conditions from FD 33388, implemented well over twenty years ago. Nonetheless, the claims sat in their LCAT claim tracking system after the Local Chairman appealed the Carrier's initial declination since 2018 yet the Carrier did not respond to the appeals. Their late position of claiming a NYD dispute is merely a ploy to divert them from the real issue; violations of the B&O Agreement.

Finally, the Employees properly filed the case with the First Division after reaching an impasse following several conferences and the Carrier is bound by the agreement and the Act to adjudicate

the rules claims and the relevant matter related thereto. Consequently, this Committee should not entertain the Carrier's position and remand jurisdiction to the NRAB Division.

FOR THE ORGANIZATION:

A handwritten signature in black ink, reading "Richard D. Lee". The signature is written in a cursive style with a large, stylized "R" and "L".

Richard D. Lee

General Chairperson

EXHIBIT 4

SMART-TD NRAB SUBMISSION

I. STATEMENT OF CLAIM

“Allow the a basic eight (8) hour day penalty due to CSX’s willful violation of the CBA, in particular but not limited to the Scope Rules/Articles, Rule 59, Article 3, and Rule 106, BLE 1971 Interchange agreement. The violation of the CBA has eliminated a prior right employees ability to work an assignment of his choosing belong to CSX employees and was illegally “farmed out” to Conrail SA to which they are not entitled to, in an attempt to eliminate assignment to reduced costs for the stockholders. Consider this claim as notice that this is a continuous claim starting on November 19, 2017 and will be continued until resolved under the RLA. If CSX chooses to deny and not resolve the issue they do so at their own peril and should pay all claims in the full amount.”

II. STATEMENT OF FACTS

The facts before the Board are not disputed by either party and are as follows. On November 14, 2017, CSXT issued a T&E Daily Message with an effective date of November 18, 2017 that independent yard assignment Y122 at CSXT’s Detroit Rougemere Yard would be abolished **(Exhibit A)**. To the same effect, Conrail issued a letter dated October 27, 2017¹, to the SMART-TD Conrail Local Chairperson, G. Karkosa, advising that *they* [Conrail] would begin to handle all the interchange work at Rougemere Yard with CSXT. This letter also depicted the interchange tracks to be utilized. Prior to the effective date of the abolishment the Claimant and incumbent employee(s) of yard assignment Y122 was displaced from the assignment by the CSXT’s Crew Management Center at 0937 hours on November 17, 2017, a day prior to the abolishment taking affect while the Claimant was observing two (2) advertised rest days of the Y122 **(Exhibit B)**.

¹ Letter provided as Attachment 1 in Employee Exhibit “G”

The Y122 assignment transferred rail freight cars between CSXT's Detroit Rougemere Yard (owned solely by CSXT) and its purpose was to interchange with the Conrail Shared Assets Operations² at their Livernois Conrail Rail Yard and return. When CSXT abolished the Rougemere Y122 assignment they allowed Conrail to perform all of the work previously performed by the Claimant.

III. TIMELINE OF DISPUTE

Due to the amount of correspondence and information exchanged in the instant dispute a brief timeline of events is provided herein below, as well as a brief synopsis in order to hopefully facilitate a better understanding of the dispute. Additionally, to aid in understanding the yards and areas involved, a map taken from FD 33388 (AKA "1999 CSX/NS Joint Purchase of Conrail"), Volume 3B of 8, will serve as a visual identifier of the location(s) in question (**Exhibit C**).

As a result of the work belonging to CSXT crews being farmed out to Conrail the Claimant submitted penalty claims in a timely fashion citing that the B&O Agreement was being violated. Included therein, the Claimant when submitting his claims supplied answers in the appropriate Q&A field given, which was subsequently denied by the Carrier (**Exhibit D**). The Local Chairman holding jurisdiction properly submitted the claims for appeal on July 23, 2018, to Labor Relations for review with supportive documentation attached as an addendum in the Labor Claims Admin Tracking³ (**Exhibit E**).

Following the claims being appealed the Carrier then sat for over two (2) years without any response. Consequently, a formal conference of the claims was requested to seek resolution on the issue as the claims had sat dormant in the claim tracking system without a response by CSXT Labor Relations. Following discussion over the claims, with CSX Director of Labor Relations (HDO) Jennifer Manz, the

² The former Consolidated Rail Corporation (Conrail) in Detroit is now commonly referred to as Conrail Shared Assets Area and is a jointly owned subsidiary between CSX Transportation and the Norfolk Southern (NS is still Conrail and also a Carrier in the eyes the Railway Labor Act.

³ Labor Claims Admin Tracking commonly referred to as LCAT is an electronic system owned and operated by the Carrier that the Organization may use to appeal claims if chosen versus a postal service.

Organization emailed her on January 20, 2021, outlining the Organization's position on the matter and included pertinent attachments supporting our position that the B&O Agreement was violated (**Exhibit F**). Approximately two-and-one-half (2 ½) months later, on April 6, 2021, HDO Manz replied via email with a formal letter attached detailing the Carrier's position and supplied the Conrail Shared Assets Operations portion of FD 33388 as an attachment (**Exhibit G**). The Carrier's position was that the work was not interchange work since Conrail acts as an agent for CSXT with the rail freight billing remaining in CSXT's account under Finance Docket 33388. The Carrier further takes the position that *their* (CSXT/NS/Conrail) operating arrangement renders the B&O Agreement moot, claiming it was replaced with FD 33388 for the Detroit Shared Assets Area. In addition, the Carrier also states for the first time that part of their position is that the current dispute is a New York Dock Protection issue, with jurisdiction lying with the Surface Transportation Board (STB) under Article I, Section 11 of New York Dock and that an arbitration board under the RLA lacks subject matter over such disputes.

The Organization promptly responded via email on April 8, 2021, with an attached letter accompanied with supporting documentation affirming that the agreement in place between the Organization and the Carrier (The B&O Agreement) are in fact controlling as agreed upon in the 1998 Master UTU/CSXT Conrail Implementing Agreement, and further as updated by the 2010 Northern Mid-Atlantic Agreement outlining that the CSXT Y122 employee(s) at Rougemere is entitled to an equitable percentage of the interchange work between CSX and Conrail and to operate otherwise was a violation of the scope rules of the B&O Agreement. The Organization further asserted that the matter was not a New York Dock Protection issue but rather a violation of the governing Collective Bargaining Agreement with jurisdiction belonging to the NRAB. The Organization further advised that we were not agreeable to the formation of a Section 11 Committee under Section 11 of Article I of the New York Dock (**Exhibit H**). In reply to the Organization's letter, the Carrier responded on April 20, 2021, maintaining their position and reiterating that the Detroit SSA operating agreement between Conrail, CSXT, and NS nullifies the B&O Agreement. Furthermore, the Carrier further takes the position that the B&O Agreement is irrelevant

concerning equitable interchange as the work, although now being performed by Conrail (a Carrier), because they say the costs remain in CSXT's account as an owner/operator of Conrail Shared Assets and will continue to pursue Article I, Section 11 Committee **(Exhibit I)**. However, the Carrier never formally established the Section 11 Board with the NMB.

On April 29, 2021, the Organization filed the dispute with the National Railroad Adjustment Board First Division via a Notice of Intent under the prescribed the "NRAB uniform rules of procedure" encompassing all claims related to the dispute including our Statement of Claim **(Exhibit J)**. The NRAB replied the following day on April 30, 2021, with acknowledgment of receipt and assigned Case No. NRAB-00001-210254 **(Exhibit K)**.

On May 3, 2021, the Carrier then sent another letter via email continuing to push forward with an establishment of Section 11 Board by identifying a method for which to select a neutral arbitrator, although the NMB was still never contacted by Carrier to establish a Section 11 Board. **(Exhibit L)**. On May 7, 2021, the Organization responded again disagreeing with Section 11 arbitration as the proper venue and advised that the matter was already slated for a review at the NRAB and thus would be adjudicated under Section 3 of the Railway Labor Act **(Exhibit M)**.

On May 24, 2021, the Carrier sent two (2) Letters to the NMB addressed to Terri Brown, the Director of Arbitration Services. In one letter the Carrier was insistent that the First Division Case Number NRAB-00001-210254 be closed and thus the Division dismiss the Organization's claim as the "Operating Agreement" of the Detroit SSA between Conrail, CSXT, and NS supersedes the B&O Agreement. The Carrier further asserted that the STB had exclusive jurisdiction – not the NRAB – as reason for dismissal of our case **(Exhibit N)**. In the second letter the Carrier requests for the NMB to appoint an arbitrator to serve as a neutral member of a New York Dock Section 11 Committee, although a Section 11 Board was never formally established **(Exhibit O)**. On the same date of May 25, 2021, the Organization penned a letter in reply to the Carrier's letter to dismiss NRAB-00001-210254 that the request was unfounded and

improper; further illustrating to the NMB that the claims were indeed properly presented for adjudication under the process under Section 3 of the Railway Labor Act **(Exhibit P)**. The following day, on May 26, 2021, a letter from National Mediation Board Director of Office of Arbitration Services, Terri Brown, was received by the Organization requesting comments on the matter and issuing a deadline of June 9, 2021, for response involving the establishment of a Section 11 New York Dock conditions of the STB **(Exhibit Q)**.

The Organization responded as directed advising of our position that the formation of the Section 11 New York Dock was improper and listed several reasons with cause that the dispute was properly before the First Division and should not be disturbed **(Exhibit R)**. The Carrier on June 11, 2021, further issued unsolicited comments two (2) days after the deadline, disagreeing with Organization position as incorrect **(Exhibit S)**. No response to our request for comments was received by the NMB.

On June 15, 2021, NMB Director, Terri Brown, sent a letter to CSXT advising Vice-President Labor Relations, Jeff Wall, that his May 24, 2021, letter requesting them to dismiss the First Division case was addressed improperly to the NMB and also explained the difference of the two entities and that the Carrier's letter to dismiss First Division Case No. 00001-210254 should be submitted to the Chairman of the NRAB **(Exhibit T)**. The same day, June 15, 2021, the Carrier re-issued their original May 24, 2021, letter to the NRAB requesting the Board dismiss Case No. NRAB-00001-210254 **(Exhibit U)**.

The National Mediation Board Director of Office of Arbitration Services Terri Brown issued a letter dated June 16, 2021, directed to the Carrier and carbon copied the Organization in reference to the request of the NMB to appoint an arbitrator to serve as a neutral member of a Section 11 New York Docket Committee advising the process for selection of neutrals and enclosed was a list of thirty (30) qualified neutrals to choose from that was to be remitted no later than June 30, 2021. **(Exhibit V)**. The Organization, while maintaining our procedural objections to the improper establishment of the Section 11 Board, also sent names since the NMB failed to respond to our June 9, 2021, requested comments. These letters

concerning selecting arbitrators were to be kept confidential as stated by the NMB and therefore respecting that aspect, are not included herein.

IV. POSITION OF THE EMPLOYEES

At onset, the Division should understand that this issue presented here are penalty claims arising out of a denial of equitable portions of work. However the Carrier has attempted to divert this matter down several avenues in an attempt, at least in the eyes of the Employees, to cause much confusion of the matter and try to obtain a Board ruling that they do not have to adhere to their contractual obligations in the B&O Agreement. Therefore, the Division should be advised that they may have to address the jurisdiction matter as CSXT claims that the stack of penalties involved in this case at bar are not ripe for a ruling at the Division. In contrast however, the Employees affirm that the claims presented for review (lead claim for a batch matching claims) is simply a dispute falling under purview of the CBA and the RLA and thus sits properly for review at the Division. However, bearing in mind that conflicts and confusions, the Employees request that the Division maintain jurisdiction over the matter and also provide an opportunity for supplement rebuttal given the multiple paths and complexities currently involved. Therefore, should the need arise, the Employees will provide a supplemental brief to address the subject matter more in depth. The differences of each party are outlined below.

I. Procedural Issue:

The Employees maintain that the claims in question are properly before the First Division under the Collective Bargaining Agreement (B&O Agreement) and the Railway Labor Act, as amended. The Claimant, the Carrier and the Organization handled the claims since onset based on a dispute triggered on November 18, 2017, as a violation the Collective Bargaining Agreement, *vide infra*, for CSXT employees being deprived of work (or a percentage of the work) they are entitled to under the clear and plain language in the B&O Agreement. As noted, the Claimant did not progress a grievance in any manner claiming to be

a displaced/dismissed employee as defined under NYD Protections related to FD 33388, but only that Conrail was now performing all the interchange work at a CSXT Rougemere Yard and his CSXT job (Y122) was abolished as a result. In fact, it was the Organization which had to prod the Carrier on advancement of the issue since the claim appeals were never responded to by the Carrier. Moreover, it was not until a letter dated April 06, 2021 (**Exhibit F**), in reply to the Organization's January 20, 2021, email concerning the conference over said claims that the Carrier advanced a position claiming it to be a NYD matter. This is after the dispute sat dormant for several years.

Nevertheless, the Carrier's late and new found position that the dispute lies with the STB under NYD Protection can only be viewed as an attempt to deflect their contractual obligations as a hopeful shield from the pending liability over the years. In fact, had the Carrier truly believed that the proper direction for the dispute was to proceed with a NYD Section 11 Board, they must have done so within twenty (20) days of the dispute, which they failed to do. Bearing in mind that these claims were several years old and were also formally appealed in writing to the Carrier as violations of the governing CBA, their timeframe for such a position has been far exceeded and thus barred, even assuming, *arguendo*. As noted in the Organization's reply to the NMB requesting comments on dispute falling under a NYD issue (**Exhibit R**), Section 11 of Appendix III, clearly outlines the requirements to establish a Section 11 Board which the Carrier did not follow and continues to ignore. Pertinent parts of Section 11 of Appendix III contained in both the 1999 Conrail Implementing Agreement and the 2010 Northern Mid-Atlantic Agreement reads as follows;

"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 section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee." (Underlining added for emphasis)

Based on the timeline of events and clear and unambiguous language, *supra*, the Carrier has failed to properly establish a Section 11 Board. As to the Carrier's second assertion that the Shared Assets Area

Operating Agreement with Conrail nullifies the B&O Agreement, this is simply untrue and misguided. Whereas, prior to the final authorization of FD 33388 the STB formed a Merger Team which issued final recommendations to be met. Of these conditions, under Labor, Environmental and Other Issues, Item 30(b) **(Exhibit W)**, it states;

b. We recommend that the Board make a clear statement that approval of this transaction does not indicate approval or disapproval of any of the collective bargaining agreement overrides that applicants have argued are necessary to carry out this transaction. Those issues should be negotiated if possible, or arbitrated as necessary. The Board should resolve them only as a last resort, giving deference to the arbitrator.

Consequently, taking the recommendations of the “Merger Team” CSXT and SMART-TD (formerly the UTU) met to reach an agreement on the Conrail acquisition to satisfy the terms of Article I, Section 4 of the New York Dock Conditions that may have been imposed by the STB Prior to the STB’s final approval of the Finance Docket. The Master Implementing Agreement **(Exhibit X)** reached and subsequently submitted to the STB was approved and deemed acceptable as it did not impede the consolidation proposed, therefore nullifying any future arbitration that may have occurred under Article I, Section 4, if deemed unacceptable by the parties’. It was further expressly agreed upon by both the Carrier (CSX) and this Organization (SMART, formerly UTU) that “the B&O Agreement” (the current agreement) is controlling under Article IV – Seniority and Existing Agreement Preservation, excluding the employees working for the CSXT Northern Lines, and the Detroit Shared Assets Area (Conrail). As discussed later, the employees working on the CSXT Northern Lines (former Conrail territory in the northeast United States being absorbed solely by CSXT) would maintain their working agreement (Conrail Agreement⁴) as would the employees working at Conrail on the Shared Assets Area (SAA). Accordingly, the Master Implementing Agreement denoting the B&O Labor Agreement as the controlling agreement on CSXT also satisfied the terms of Section 2 of the New York Dock Agreement. Thus, there were no impediments to the transaction by applying the existing labor agreements and the process moved forward as planned without incident.

⁴ CSXT Northern Lines (former Conrail) was merged into 2010 under Section 4 and now fall under the B&O Agreement applicable to the 2010 Northern Mid-Atlantic Implementing Agreement (“NMAD”).

Moreover, after FD 33388 was approved by the STB on July 23, 1998 (well over twenty years ago), Article XV of the Master Implementing Agreement became effective and all parties' involved in the transaction signed the agreement on August 6, 1998. Soon thereafter, CSXT and this Labor Organization finalized negotiating the district implementing agreements to include the CSXT Western District Agreement⁵ on August 28, 1998, which presides over the instant dispute. In fact, there were multiple respective implementing agreements including; the Western District, the Eastern District and the Northern District. Contained in the CSXT Western District Agreement is the designation of the B&O Agreement (as modified therein) as controlling for the Western Lines including prior owned CSXT territory of Detroit, except the Detroit SSA (CSX/NS jointly owned prior Conrail), and the B&O Chicago Terminal (B&OCT). The Detroit SSA territory was excluded and remains under their separate contract and administered by Conrail operating under their own designated representatives⁶ under Section 152nd of the Act as those prior Conrail employees were excluded from the merger. This is outlined in Attachment "D" the CSXT Western District portion of the 1998 Implementing Agreement Article I, A and B (**Exhibit Y**). The pertinent parts thereof are reproduced directly below:

A. *Train operations and the associated work forces of the former B&O, B&OCT, C&O (PM-HV), C&O (Proper), C&EI, TTRR, L&N and Conrail, will be merged into the new operating and seniority district hereinafter described:*

<i>Eastern Limits:</i>	<i>Cleveland, OH (exclusive)</i> <i>Willard, OH (inclusive)</i>
<i>Southern Limits:</i>	<i>Cincinnati, OH (inclusive)</i> <i>Louisville, KY (exclusive)</i> <i>Evansville, IN (exclusive)</i>
<i>Western Limits:</i>	<i>St. Louis, MO (inclusive)</i> <i>Chicago, IL (inclusive)</i>
<i>Northern Limits:</i>	<i>Manistee, MI (inclusive)</i> <i>Midland, MI (inclusive)</i> <i>Port Huron, MI (inclusive)</i>

⁵ CSXT's Rougemere Yard lies within the Western District.

⁶ SMART-TD (*formerly UTU*) represents the Trainmen and the BLET represents Engineers under different General Chairmen by each labor organization and by each perspective property – CSXT, NS, Conrail (SSA). The undersigned represents CSXT employees and has no jurisdiction over the Detroit SSA employees at Conrail, nor their labor agreement(s). The undersigned is the authorized Employee representative of the B&O Agreement.

The above includes all mainlines, branch lines, yard tracks, industrial leads, stations between points identified, and all terminals that lie at the end of a line segment except: Detroit (SAA). All branches and industrial tracks intersecting the above lines and all pre-existing territorial rights of the involved districts not in conflict with the intent of this agreement are included in the merged district. A sketch of the above referred-to district is attached.

- B. All road territory and terminals within the districts will have one common work force operating under one labor agreement. The former B&O labor agreement, as modified herein, will apply in the Western District, except the B&OCT labor agreement will remain applicable in the B&OCT territory. (Underscore added)***

Nevertheless, the Carrier now takes an awkward position over twenty (20) years later that the B&O Agreement is not applicable with FD 33388 in place and further that the Division lacks authority over the dispute. The Employees disagree. As well, their *new* position is very misguided and in conflict with the Master Implementing Agreement and the CSXT Western District Agreement, which was in fact signed after the FD 33388 was approved and implemented. In other words, the Carrier is suggesting that an Agreement entered into after the approval and implementation of FD 33388 holds no governing authority or relevance. This argument should be rejected as illogical as it does not pass the smile test. Given the circumstances and timeframes involved, the Carrier is simply attempting to skirt their liability of penalties for clear-cut violations of the B&O Agreement and hoping that the STB declare jurisdiction and say they have right to allow Conrail crews to perform the work belonging to CSXT employees at CSXT's Rougemere Yard. In essence, the Carrier is attempting to have a Board (any board) roll back time and negate the controlling labor agreements entered into after the decision to approve FD 33388. This however would not serve any purpose but to add strife and promote inconsistencies in an already volatile setting. Consequently, the Division should rule that the matter is properly before the National Railroad Adjustment Board and rule on the merit of the dispute.

II. Merits and Agreement Violations

Based on the Carrier's position, it's obvious that this matter is now somewhat tangled with Finance Docket 33388. However, when reviewing the prior correspondence from the Carrier, their position appears

to be that the cited the B&O Agreement scope rules, interchange rules, or transfer do not apply as the freight never leaves CSXT's account as they are the owner operator of both CSXT and the SSA (Conrail) and thus cannot be classified as a "foreign carrier" (see Employee **Exhibits G and I**). However, it must be pointed out that this is simply not true and very misleading. The Conrail Shared assets is just that, assets shared between the Norfolk Southern and CSXT with the Norfolk Southern owning the majority, but clearly operated as "Conrail". Additionally, CSXT tries to assert that their solely owned and operated facility at Rougemere Yard is now somehow a part of the Conrail Shared Asset. This simply is not the case. In fact, this is evident as CSXT crews were abolished by a CSXT crew center message (not mentioning new interchange arrangements) and the Conrail employees were notified of the new interchange work amendments via letter from T. L. Bolton, the Director Labor Relations at Conrail, which reads:



It's noteworthy to mention that Conrail Labor Relations cited Rule 68⁷ in his letter to Conrail Local Chairperson Karkosa referring to "the [Conrail] agreement between the parties". Thus, if what CSXT awkwardly claims is true, one would have to call into question why Conrail Labor Relations found it pertinent to mention the controlling rules of the Conrail labor agreement governing interchange with a foreign Carrier (*i.e.*, "**CSX's Rougemere Yard**"). Conrail Labor Relations clearly made no mention of a "joint operated" facility at CSX'S Rougemere Yard. Rather, Conrail Labor Relations referred to it as what it is – a foreign Carrier, especially in the eyes of the labor agreement. Moreover, the work changes mentioned fell under the interchange rules of the Conrail agreement as well. Furthermore, CSX confirms this as interchange as seen in their abolishment notice (*Employees' Exhibit H Attachment 3*). Bearing these important facts in mind, it is impossible to conclude that CSXT and Conrail are "one carrier" and that the separate labor agreements on each perspective property would somehow legally bleed together under FD 33388 and shield CSXT from their obligations to their employees under the B&O Agreement. Whereas, the Carrier is required under Rule 106 of B&O Agreement, *vida infra*, to afford equitable portions of the interchange work with foreign line carriers. For anyone to see it otherwise would render the clear language and historic applications of the B&O Agreement – one of the oldest and most respected labor agreements in the industry – moot.

To further illustrate that the only territory that is part of the Detroit Conrail Shared Assets (SAA) is the territory that both the Norfolk Southern and CSXT jointly maintain and was a previous Conrail territory (still under Conrail Agreements). The area encompassed in the dispute is provided in **Exhibit C**, which is a color coded map taken from FD 33388, Volume 3B of 8, denoting each railroad's territory. As you'll note upon review, all the Conrail Shared Assets are colored blue. However, as clearly seen, CSX's Rougemere Yard is not blue, but in fact is colored brown. Again, the facts clearly proves that CSX Rougemere Yard is not a part of the Detroit SAA, but merely falls within close proximity to the SSA.

⁷ Rule 68 ("Interchange") of the Collective Bargaining Agreement *between* Consolidated Rail Corp (Conrail) and the United Transportation Union (*now SMART*) governs interchange with connecting Carriers at Conrail in the SAA and is provided in **Employee Exhibit "AA"**.

Consequently, the Division should reject all of CSXT's arguments to the contrary as they are without support and without merit.

As for the work involved, the duties performed by the CSXT Y122 job at Rougemere and now performed by Conrail have been described as transfer yard assignment that facilitates an interchange between the two (2) Carriers, CSXT and Conrail. Being that the assignment is a yard assignment, B&O Article 3 (Service to Which Yardmen Are Entitled), governs yard transfer service and is applicable as well as Rule 106 (Interchange), as an interchange is taking place between the two entities. As for the Carrier's argument that "they are one" and thus the Conrail account remains under their control, this argument is actually pervasive in favor of the Employees since providing equitable rights to the interchange work at Rougemere pursuant to the B&O Agreement will not result in any additional costs to the Carrier. Nevertheless, by CSXT allowing a foreign Carrier to perform the interchange solely within in the confines of the CSXT's Rougemere Yard, the Claimant is being deprived of his rights to an equitable portion of the transfer work as required under his labor agreement. Whereas, Article 3 (d) and (e) of the B&O Agreement specifically address the Carrier's obligation to furnish the required percentage of employees in transfer service and when so used between foreign lines. Article 3 is provided as **Exhibit Z**, and reads in pertinent parts:

(d) Percentage Transfer Service.

Each yard will furnish its percentage of yard foremen and yard helpers where transfer crews are operated on percentage basis.

(e) Percentage of Work-Transfer Runs.

Effort will be made to give Baltimore and Ohio yardmen their percentage of all transfer work between foreign lines and The Baltimore and Ohio Railroad.

Likewise, and similar to the reason a letter was provided to the Conrail Local Chairperson from Conrail Labor Relations over the establishment of the new interchange work at CSX's Rougemere Yard, B&O Rule 106, A(5), specifically outlines the process of establishing new interchange service for CSXT

employees. Furthermore, when yard crews are designated to be used for interchange, the Carrier must notify the General Committees involved and provide the necessary data to resolve work equities. However, no data or other information has been provided so that the undersigned General Chairperson could confer with counterpart General Chairperson representing employees working under the Conrail agreement. To the contrary, CSXT simply farmed out the entire work to Conrail. Rule 106, A(5) is provided as **Exhibit AB**, and states in pertinent part.

“5. Crews used in interchange service may be required to handle interchange to and from a foreign carrier without being required to run "light" in either direction. Work equities between carriers previously established by agreement, decision or practice will be maintained with the understanding that such equity arrangements will not prevent carriers from requiring crews to handle cars in both directions when making interchange movements. Where carriers' not now using yard and transfer crews to transfer cars in both directions desire to do so, they may commence such service and notify the General Committees of the railroad involved thereof to provide an opportunity to the General Committees to resolve any work equities between the employees of the carriers involved. Resolution of work equities shall not interfere with the operations of the carriers or create additional expense to the carriers. It is agreed, however, that the carriers will cooperate in providing the committees involved with data and other information that will assist in resolution of work equities.”

Additionally, since the Carrier's continued denial that the B&O Agreement is applicable, the designation of interchange tracks with Conrail to this General Committee has yet to take place, which in itself is a violation and consummates penalties. These requirements are:

3. At designated interchange points, if a carrier does not now have the right to specify additional interchange tracks it may specify such additional track or tracks as the carrier deems necessary providing such additional track or tracks are in close proximity. Bulletins, specifying additional tracks will be furnished the General Chairman or General Chairmen involved prior to the effective date.

The Division should also understand that on several occasions CSXT has failed to provide interchange track locations and thus this has historically been an issue from time to time, ensuing penalties for non-compliance. During prior inquests on the matter the Carrier has either claimed the task is too perplexed or they simply ignore the requests for updated lists of interchange from this Organization.

Nevertheless, the agreement requirement is abundantly clear and this Organization has advised the Carrier numerous times of the potential of penalties for non-compliance. As example, included as **Exhibit AC**, are several letters over the years applicable to Rule 106. In fact, to date the Carrier has still failed to provide the majority of foreign line interchange tracks as required under the B&O Schedule Agreement, although they clearly acknowledge this as indicated most recently in the 2019 (Fresh Pond) and 2011 (Finger Lakes) designated interchange locations mentioned in the examples. Relevant here, by the Carrier not properly notifying the Organization and designating the interchange tracks for Conrail at CSX's Rougemere Yard, they have knowingly disregarded the requirements of the agreement and therefore are subject to penalties.

Simply put, the agreement is very clear that each Carrier involved is required to designate a track or multiple tracks should the volume of traffic exceed a single track. Additionally, should the unforeseen necessity arise, the Carrier is then allowed to use a non-designated on an incidental basis. These principles of interchange between Carriers and Foreign line Carriers has long been upheld in the rail industry due to respecting the different work forces involved and their respective collective bargaining agreements. Moreover, the fundamentals of designation of interchange boundaries also serves to protect the Carriers from outside (foreign) parties utilizing their crews to perform revenue work the other railroad(s) at the others expense. In short, interchange rules protects both the interests of the Carriers' and the Employees'.

Consequently, considering the points above, CSXT's failure to adhere to the clear-cut language of the agreement concerning interchange and by the slide of hand to have Conrail solely perform the interchange work Rougemere deprived CSXT employees of their rights to work.

In support of our argument, we direct the Board to Special Board of Adjustment No. 33, Award 321, (**Exhibit AD**). This on-property decision ruled on this issue when a the former B&O RR entered into a Joint Trackage Agreement with the New York Central in handling cars over 5.2 miles to interchange/deliver cars, thus depriving employees of their seniority and rights to service. However, Chairman Coffey ruled that the an interchange agreement between two Carriers allowing such interchange

to take place does not allow the escape the labor agreements they have made with their employees, as he states in pertinent part:

“Claimants stood for this service under the schedule of rules governing, unless as the Carrier contends its “joint trackage” agreement with N.Y.C. stands at bar.

It is now a settled doctrine that “joint trackage” agreement between participating Carriers do not defeat rights fixed by pre-existing rules schedules, except by consent of the governed. It remains to be seen whether the necessary consent is present”

Similar to this case, in PLB 6411, Award 1 with Neutral David Twomey (**Exhibit AE**), the Board was tasked with settling a dispute over equity when the BNSF gave all the interchange work exclusively to the Minnesota Commercial at their Twin Cities Terminal after the ICC granted trackage rights. The point of dispute was the national language contained in Article VII, Section 5 of the 1972 National Agreement. This is important because the language in that dispute is the same language applicable here and that is currently codified into the B&O Agreement under Rule 106. In the decision Arbitrator Twomey ruled that the Carrier was bound by the contractual language, stating in pertinent part;

“The ICC’s grant of trackage rights to Commercial allowed Commercial to utilize BN tracks for interchange with BN at BNs Northern Yard. The ICC did not grant Commercial exclusive rights for interchange between the BN and MC. As set forth previously, granting trackage rights and changing an interchange location for efficiency purposes does not discharge BN’s obligation to its employees covered by Article VII, Section 5.”

Moreover, the neutral while maintaining jurisdiction over the case further ruled that a timeline be followed that the Carrier supply the Organization with a study to determine the settlement of claims and to finalize equity. Pertinent parts reading;

“The factual assertions are so dramatically opposite from each other for a period covering well over a decade that should it turn out that the Organization’s assertion are supported by the business records studied, then the Carrier, in working out its

interchange with Commercial, shall see to it that a equal division of interchange work will apply. Should the study indicate that a substantial (not de minimis) or pattern division of interchange work exists rather than an equal division, then the Carrier in working out the interchange arrangement with commercial shall see to it that such equity will apply. (...) The Carrier shall have sixty days after concluding the study and finding either an equal division of interchange work or a substantial or pattern division of interchange work, to work out an appropriate interchange arrangement with Commercial. Jurisdiction is maintained.”.

As evinced herein, the long standing principles of interchange have been disputed by both the Carriers and multiple Organizations but the guiding precedential Awards have remained consistent with these principles of equity entitlements of work when required by the labor agreements in play. This case is no different as the agreement language mirrors what numerous other tribunals have already decided. For that reason, the Division should follow the sound precedent providing equitable rights to interchange work since the B&O Agreement requires it. In support of our argument, the Employees’ offer the following Awards to demonstrate that the since the Carrier has decided to ignore their obligations it is appropriate that they face the consequences for non-compliance and advised they must abide by the agreement in the future.

In First Division Award 16743 dated August 12, 1954 (**Exhibit AF**), Referee Boyd Leedom, citing other controlling precedent, held that the Carriers’ duties to designate interchange tracks was basically absolute. In essence, the Neutral Leedom affirms our points above that the agreement rules governing designation of interchange also serves to protect each Carrier from having foreign crews perform work outside the normal confines of their employees’ regular assignments, seniority rules and rates of pay, as he states in part:

“These claims are based on the contention that the foreign line, with which the carrier regularly engaged in interchange transfer service, had failed to designate an interchange track and that claimants were required to deliver cars at points to suit the convenience of the foreign line and on more than one track.

There should no longer be serious question on these points: (1) Awards of this division impose upon railroads the duty of designating interchange tracks. (2) When designated tracks will not hold all the cars the surplus may be put on one or more adjoining tracks. (3) When employees of a carrier are required to deliver cars to other tracks than those designated in (2) above in the yard of the connecting line, the carrier, even though no

rule expressly so provides, becomes liable for extra work performed by its employees outside of their regular assignments, under seniority, basic day, and rates of pay rules.”

In First Division Award 18865 (**Exhibit AG**), dated September 16, 1953, Referee Thomas C. Begeley again reinforced these principles of requiring designation of interchange tracks to prevent foreign crews from performing general yard switching for a foreign Carrier as he states in his findings, that:

“A long line of awards on this Division, with and without Referees, holds that if a carrier has designated one interchange track that track must be full to capacity before cars may be placed on an adjoining track. Therefore, it must logically follow that if a carrier has designated more than one interchange track each interchange track must be filled to capacity before another interchange track may be used. Otherwise, as in this case, cars could be placed on any number of interchange tracks which would require the claimants to perform switching in a foreign yard.”

In SBA 423, Award 226, dated December 14, 1979 (**Exhibit AH**), Neutral Van Wart expounded on the principles of interchange rules and holding that they do not restrict the Carrier from handling foreign line freight. Rather, agreement rules requiring designated tracks also provides overflow flexibly when the designated tracks are filled to capacity, even though it is not a designated track. Rule 106 also provides these exact accommodations should the need arise on an incidental basis. In Neutral Van Wart’s Award he states:

“The question of what to do with surplus cars when designated interchange track will not hold all cars was answered on First Division Award 17606, amongst other, which held in pertinent part:

“... The predominating weight of authority of these awards is that the designated interchange track should be filled to capacity after which any surplus may be placed on an appropriate nearby track. See Awards 4110, 9109, 13668, 13780, 14758, 16088, 16131, 16528, 16743”

III. Seniority Rights Must Be Respected:

Supplementary to the above, it’s also very important that the Division consider the seniority rights of the CSXT employees involved. Needless to say, seniority has long been a staple of a union contract and for that reason deserves a diligent review to determine when those rights have been violated. Here, this matter is an ongoing violation of the agreement by the Carrier is farming out his work. Thus the Claimant

(and other on his seniority system) is being denied work rightfully belonging to CSXT employees under the scope rules defined in B&O Rule 3 (Rights To Runs, Promotion, and Seniority Rosters). Rule 3 provided as **Exhibit AI** and copied below for ready reference;

RULE 3.

RIGHTS TO RUNS, PROMOTION, AND SENIORITY ROSTERS

(a) Roadmen and Yardmen: The rights to preference to work and promotion will be governed by seniority in service. Everything being equal, the employee longest in service will be given preference. Train baggagemen will be made from trainmen.

(b) Freight Conductors: Rights to runs and promotion will be governed by merit, ability and seniority. Freight conductors deprived of their rights to passenger service, will upon request, be furnished with written statement from the Superintendent showing cause.

(c) Rights to runs and promotions on the several seniority districts will be preserved. This rule to apply to all merged or consolidated territory and to become effective on the date of any merger or consolidation agreed to by the parties.

(d) Seniority rosters of conductors and trainmen will be issued in January of each year. They will be posted at all on duty points for road men and at all terminals. Local Chairman will be furnished copy of same.

This is important because while the Carrier claims “they are one” under the Finance Docket, the Claimant has no seniority rights on the Conrail property and thus cannot bid or work on any of those assignments. Rather, this illustrates the distinct separation of the agreements (and entities) and aspects thereof. Moreover, this highlights the problems in the Carrier’s arguments that the work being performed now by Conrail is not interchange work. Due to the clear contractual language defining the Claimant’s right to portions of such work, the Carrier is bound by the B&O agreement and cannot unilaterally give the work to the Conrail. Several Awards have been adjudicated when dealing with the subject matter of a Carriers attempting to subvert labor agreement scope rules that contractually belongs to another craft or class of employees. In NRAB Third Division Award 29697 (**Exhibit AJ**) it so states;

"Carrier argues that decisions as to which entity is entitled to perform the work at Cottage Grove is solely within the scope CSXT's decision making authority." - "The Board finds the argument totally unpersuasive."

NRAB Third Division Award 13236 further states (**Exhibit AK**);

“Carrier has, in the record, raised two other defenses to the Claim. It says that it is a management prerogative to have the work performed by modern methods and at the least costs to Carrier. We need say, as we so often have, that the economic consequences of a contract are of no concern to this Board. Having entered into the Agreement, the inherent prerogatives of management are circumscribed by its terms.”

Additionally, Referee Swacker in NRAB First Division Award 351 the following (Exhibit AL);

“The real issue in this case is whether or not the Railway Company can avoid the effect of its schedule with the Engineers by farming its work out under contract to independent companies and permitting them to employ their own labor and operate trains over its track, or not, and we say that they cannot do so without violating the plain provisions of the contract.”

“The only reasonable interpretation and manifest intention of the contract was to embrace all locomotive engineering service to be performed on the railway of the carrier for its benefit. Consequently, the making of the contract with the contractor, according him the privilege of manning the engines operated by him, on and in the work of the carrier, was a breach of the organization contract and deprived engineers represented by the organization of work to which they were justly entitled and for which they should be compensated according to the schedule.”

IV. SUMMARY

This dispute is not as complex as the Carrier would have one believe. It is simply an issues of CSXT employees being deprived of portions of the interchange work between CSXT and Conrail. While the Carrier takes the potion that the issue is subject to a review by the NRAB Division, their position is simply unfounded. Nevertheless, considering the timeline of events involved, they have failed to comply with the parameters set forth in the New York Dock conditions governing arbitration of disputes.

Moreover, the Employees were completely transparent from onset. The Claimant explained what the basis of the claims were and cited the agreement rules being violated, which were furthered on the appeal of the claim. At no point did the Claimant, nor this Committee, put forth anything about the Claimant falling under protective conditions from FD 33388, implemented well over twenty years ago. Nonetheless, the claims sat in their LCAT claim tracking system since 2018 yet the Carrier did not respond to the appeals.

Their late position of claiming a NYD dispute is merely a ploy to divert them from the real issue; violations of the B&O Agreement.

Finally, the Employees properly filed the case with the First Division after reaching an impasse following several conferences and the Carrier is bound by the agreement and the Act to adjudicate the rules claims and the relevant matter related thereto. Consequently, considering that the dispute is properly before the Division the Employees have proved by a preponderance of evidence that the B&O Agreement was violated by the Carriers actions. Therefore, the proper remedy to resolve the dispute is to render a favorable award in the claimant's behalf as it has been demonstrated that this is a willful violation of contract. Additionally, the Carrier should be ordered to facilitate equitable arrangements in determining a percentage of the work to be performed by providing any and all data required as the B&O Agreement requires.

Finally, given the complexities of the different avenues the Carrier has attempted, the Division should retain jurisdiction over the matter until the dispute, including payments and equity arrangements, is finalized.

FOR THE ORGANIZATION:

A handwritten signature in black ink, reading "Richard D. Lee". The signature is written in a cursive, flowing style with a large initial "R".

Richard D. Lee

General Chairperson

EXHIBIT 5

MAP OF DETROIT SHARED ASSETS AREA

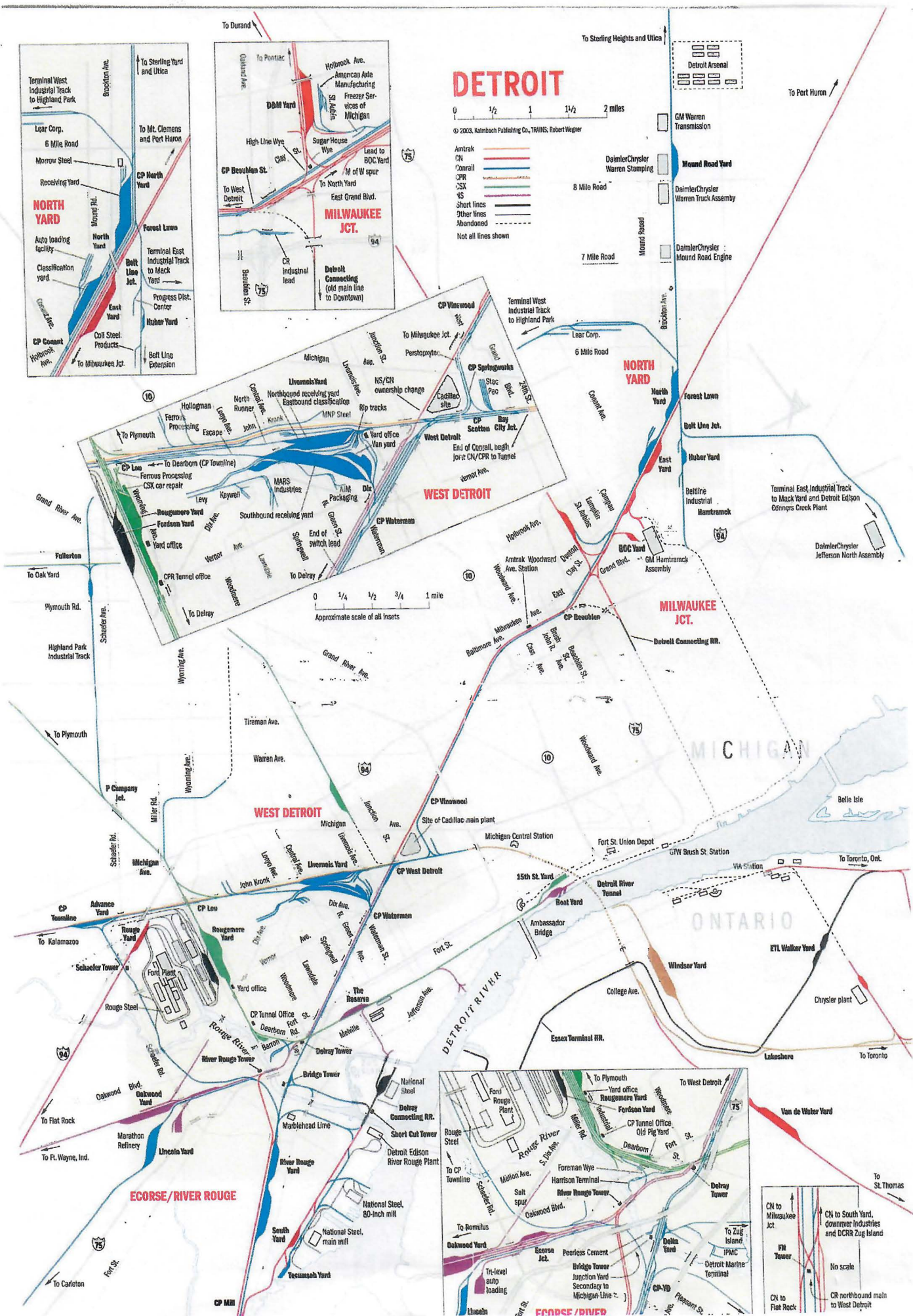


EXHIBIT 6

NMB GUIDELINES FOR NEW YORK DOCK ARBITRATION-NEUTRAL SELECTION



NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

(202) 692-5000

MEMORANDUM

To: Railroad Carriers
Rail Labor Organizations

From: Roland Watkins *Roland Watkins*
Director Arbitration Services

Subject: New York Dock Arbitration - Neutral Selection

Date: April 28, 2000

A number of months ago, the National Mediation Board (Board) began experimenting with a new procedure for providing the parties with balanced panels in New York Dock cases. Since many of you may not have been involved with New York Dock cases recently, please be advised that the following procedures will apply governing the selection of a neutral to resolve disputes in accordance with the provisions of Sections 4 and 11 of the New York Dock Protective Conditions:

- Upon receipt of a request from a party for a neutral, the Board will furnish the parties to the dispute with a list of approximately thirty (30) qualified neutrals. Each party will be requested to provide a list of fifteen (15) preferred neutrals from that list. **This information is confidential and will be used only for the purpose of the selection of a neutral for that dispute.**
- The lists, along with other relevant information, will be considered by the Board in compiling a panel of seven (7) neutrals. The Board will then promptly provide the parties with such a panel. The parties will use the strike method to derive at a neutral and will immediately inform the Board of the selection.

These procedures will not prevent the parties from mutually deciding on a neutral, but will apply only when the parties are unable to agree on a neutral.