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

RE: *Finance Docket No. 33388 (Sub-No.
102), CSX Transportation, Inc. –
Petition for Declaratory Order and
Cease and Desist Order*

Dear Ms. Brown,

Enclosed for electronic filing is Respondent International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division's ("SMART-TD") Response to Petitioner CSX Transportation, Inc.'s Amended Petition for Declaratory Order and Cease and Desist Order in the above-captioned matter.

Sincerely,

/s/ Shawn M. McKinley

Shawn M. McKinley

Assistant General Counsel for SMART-TD

Cc: Ronald Johnson, Counsel for CSX

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388 (Sub-No. 102)

INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL
AND TRANSPORTATION WORKERS – TRANSPORTATION DIVISION’S
RESPONSE TO PETITIONER CSX TRANSPORTATION, INC.’S AMENDED PETITION
FOR DECLARATORY AND CEASE AND DESIST ORDERS

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The following serves as the response of the International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division (“SMART-TD”) with respect to CSX Transportation Corporation’s (“CSX” or “the Carrier”) Amended Petition for Declaratory and Cease and Desist Orders (“Amended Petition”).

I. INTRODUCTION

On July 29, 2022, CSX filed its Amended Petition with respect to its initial Petition, still seeking a cease and desist order as it had originally, but withdrawing its request for a declaratory order following arbitration under the Article I, Section 11 process. SMART-TD requests that the Board give full consideration and issue a decision on CSX’s initial Petition for Declaratory and Cease and Desist Orders for the reasons stated below.

II. FACTUAL BACKGROUND

On June 15, 2021, the Carrier filed its original Petition for Declaratory Relief and Cease and Desist Orders with respect to a dispute that had arisen over the Carrier’s abolishment of a position Y122, which does interchange work between Rougemere and Livernois Yards. The Carrier asserted that the proper forum for dispute resolution was Article I, Section 11 arbitration, while SMART-TD took the position that the proper forum was arbitration before the National Railroad Adjustment Board.

The reasons supporting SMART-TD’s position with respect to the proper forum are laid out in more detail in its Response to CSX’s Petition, which was filed on July 13, 2021. Put succinctly, SMART-TD asserts that, “[a]t some point, STB jurisdiction over the interpretation of an implementing agreement ceases, and the parties will be required to resort to the Railway Labor Act to resolve disputes arising under the collective bargaining agreements then in effect,” and that STB jurisdiction is not “timeless and limitless.” *CSX Transp., Inc. v. Transp.*

Communications Intern. Union, 480 F.3d 678, 684 (4th Cir. 2007). This is of import because the abolishment of Y122 occurred 20 years after the Conrail transaction was approved, which raises serious doubt as to the jurisdiction of the Board and the Section I, Article 11 arbitration process. Further, SMART-TD objected to Section I, Article 11 arbitral jurisdiction on the grounds that CSX had failed to provide 90-day notice of the abolishment of Y122, which is required by *New York Dock*, upon which it was relying. 60 I.C.C. 60, 77 (1979) (“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.”). As with the decades that have passed since the Conrail transaction was approved, CSX’s failure to comply with the requirements of *New York Dock* raise serious questions as to the appropriateness of Article I, Section 11 arbitration. Finally, SMART-TD argued in its Response that CSX waited years to assert that the dispute was subject to those procedures, which constitutes waiver of such a claim now. *See Transp. Communications Int’l Union*, 480 F.3d at 682.

Turning to the present, the Board had yet to issue an order on the matter when SMART-TD was compelled to Article I, Section 11 arbitration before Neutral Kathryn VanDagens. On or around June 27, 2022, Neutral VanDagens issued an award (“Award”) with respect to the abolishment of Y122. The Award stated that the Carrier’s actions were an operational change permitted by the Conrail transaction and that no violation occurred and no remedy is required. (Exhibit (“Ex.”) A). With respect to the appropriateness of Section 11 arbitration, the Award stated:

“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.”

Id. The conclusory analysis put forth by the neutral in the Award only takes into consideration assertions made by the Carrier with respect to the appropriate arbitral forum for resolution of the dispute. As stated in SMART-TD’s previous filing before the STB and herein, this matter is not proper for *New York Dock* arbitration. The Award’s reliance on CSX’s assertion that the abolishment of Y122 was permitted by the Conrail transaction, and thus, jurisdiction existed, creates a scenario where any action by the Carrier is proper for Article I, Section 11 arbitration if they assert it is. The Award does not address the precedent and arguments made in SMART-TD’s Response to CSX’s first Petition, which remain pending here. Specifically, no reference was made to the limits on STB jurisdiction over disputes as expressed by the Fourth Circuit in *Transp. Communications Int’l Union*. Further, no mention was made of CSX’s failure to post a 90-day notice to comply with *New York Dock* conditions. These arguments that form the basis for SMART-TD’s challenge to Article I Section 11 arbitration remain unanswered.¹

III. ARGUMENT

In support of its Amended Petition, CSX asserts that SMART-TD has failed to appeal the Award pursuant to 49 C.F.R. § 1115.8. The Carrier then asserts that it is no longer seeking a declaratory order because “the New York Dock Section 11 arbitration resulted in an arbitration award that completely resolved the dispute.” (Amended Petition at pg. 1). This is a self-serving position that should be rejected. The fact remains that CSX sought declaratory relief with respect to the appropriate arbitral forum, to which SMART-TD objected. That objection, which is

¹ The Award does find that CSX’s failure to invoke *New York Dock* for several years was not fatal to proceeding at Article I, Section 11 arbitration, though it does not address precedent cited by SMART-TD.

incorporated here by reference, is SMART-TD's challenge to the jurisdictional authority of the Board and remains pending. Now, CSX wishes to withdraw that request, because it remains that the Board has the authority to deny their request and find that Article I, Section 11 arbitration is not appropriate. SMART-TD requests that the Board deny CSX's Petition and find that Article I, Section 11 arbitration was improper, and allow the parties to proceed at arbitration before the National Railroad Adjustment Board.

In the event the board considers the Award final and binding on the parties and accepts that CSX's request for a declaratory order is withdrawn, SMART-TD requests that the Board still issue a finding on the jurisdictional dispute outlined with respect to CSX's initial Petition, to resolve the matter as to the proper forum and provide clarity on future disputes. While the Board may be concerned that the matter is moot with the withdrawal of CSX's request for a declaratory order, it remains that future disputes are likely to arise. Rather than permit a repeat scenario wherein CSX receives years of claims and then asserts that the proper forum is Article I, Section 11 arbitration, rendering those claims meaningless, it would benefit both parties to have clarity on this matter to have a final resolution and avoid future proceedings before this Board that may evade full review before Article I, Section 11 arbitration occurs, as it has here. *See, e.g., Del Monte Fresh Produce Co. v. U.S.*, 570 F.3d 316 (D.C. Cir. 2009) (noting capable of repetition yet evading review standard for denying mootness argument).

IV. CONCLUSION

For the aforementioned reasons, SMART-TD requests that the Board deny CSX's Petition and Amended Petition. In the event CSX's withdrawal of its request for a declaratory order is accepted, SMART-TD requests in the alternative a finding as to the proper forum for future dispute resolution to avoid the time and expense of litigating in this forum.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 2022 a true and correct copy of the foregoing document was served on counsel for all parties of record listed below via email:

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