

Law Offices of Ronald M. Johnson LLC

Ronald M. Johnson
rmjohnson@rmjohnsonlaw.com
(301) 767-5105

4909 Scarsdale Road
Bethesda, MD 20816

305857

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
December 21, 2022
Part of
Public Record

December 21, 2022

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

Dear Ms. Brown:

Enclosed for electronic filing is the Motion to Withdraw the Petition and Amended Petition for Declaratory and Cease and Desist Orders of CSX Transportation, Inc. 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.

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

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

I. Introduction

CSX Transportation, Inc. (“CSXT”) files this Motion to Withdraw its Petition and Amended Petition for Declaratory and Cease and Desist Orders, which were filed on, respectively, June 15, 2021 and July 29, 2022. As explained in its Amended Petition, CSXT is no longer seeking declaratory relief that the International Association of Sheet Metal, Air, Rail and Transportation Workers-Transportation Division (“SMART-TD” or “Organization”) must participate in the Board’s Section 11 arbitration procedures, because the New York Dock Section 11 arbitration between CSXT and SMART-TD since resulted in an arbitration award, the VanDagens Award. The VanDagens Award is administratively final because the Organization elected not to file a petition for review. CSXT’s Amended Petition still sought a cease and desist order because the Organization continued to pursue arbitration of this same dispute before the National Railroad Adjustment Board (“NRAB”), an arbitration board established under Section 3, First of the Railway Labor Act (“RLA”), 45 U.S.C. § 153, First. Arbitrator Jacobs, sitting with the NRAB, recently issued an arbitration award dated December 8, 2022, Award No. 31148, dismissing the Organization’s claim, because exclusive jurisdiction to resolve the parties’

dispute was this Board's Section 11 procedures.¹ Because the NRAB dismissed the Organization's case, CSXT's request to this Board for an order directing SMART-TD to cease arbitration at the NRAB is now moot. The VanDagens Award and Jacobs Award obviate the need for any of the relief CSXT had requested in its Petition and Amended Petition.

Arguments by SMART-TD that the Board should nonetheless retain jurisdiction over CSXT's Petition and rule that there was no Board jurisdiction for the Section 11 arbitration lack merit but, in any event, should not be considered by the Board. Under Board precedent and procedure, they should have been raised in the Section 11 arbitration and/or are addressed by the VanDagens Award. In fact, the VanDagens Award held that there was Section 11 jurisdiction and SMART-TD failed to appeal that finding. The issue of Section 11 jurisdiction in this particular case has been resolved. For these reasons, CSXT respectfully requests that its Petition and Amended Petition be withdrawn as moot.

II. Background

The background for the dispute is set out in CSXT's Petition and Amended Petition and described in the VanDagens Award.² CSXT here briefly summarizes the parties' dispute and positions.

A. The Dispute

This dispute grows out of implementation of the Conrail Transaction, specifically implementation of Detroit Shared Assets Area ("SAA") operations. The Board approved the

¹ The Jacobs NRAB Award is attached hereto as Exhibit No. 1. The VanDagens Award is Exhibit No. 1 to CSXT's Amended Petition (filed July 29, 2022). CSXT attaches it again here for convenience as Exhibit No. 2.

² CSXT and SMART-TD's submissions in the Section 11 arbitration are attached as respectively Exhibit Nos. 2 and 3 to CSXT's Amended Petition (filed July 29, 2022). CSXT cites to its Section 11 Submission as "CSXT Sec. 11 Sub." CSXT cites to SMART-TD's Section 11 Submission as "SMART-TD Sec. 11 Sub."

control and division of Conrail by CSXT and Norfolk Southern Railway (“NSR”) in the *Conrail Decision*.³ The rail facilities, operations and employees of Conrail were divided between and became part of CSXT and NSR, except in three SAAs, Detroit, Philadelphia/South Jersey and North Jersey. *Conrail Decision* at 29, 31, 33-34. In the SAAs, Conrail continued to own and operate certain rail facilities as “agent or subcontractor” for CSXT and NSR. *Conrail Decision* at 34. Conrail was no longer an independent carrier. It had no shippers of its own and only performed work for its owners in the SAAs. Traffic handled by Conrail for CSXT or NSR remained in, respectively, CSXT or NSR’s account. The SAA concept, unique to the Conrail Transaction, allows former Conrail customers in a SAA the choice of CSXT or NSR.

CSXT had utilized a CSXT yard job, Y122, to move railcars in CSXT’s account 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 to CSXT’s Amended Petition and also as 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 requested Conrail to 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. VanDagens Award at 2; CSXT Sec. 11 Sub. at 10-11.

³ *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).

SMART-TD then began filing claims for the CSXT conductor who had worked on Y122, arguing that its collective bargaining agreement with CSXT applicable in Detroit, the B&O Agreement, required that this work continue to be done by CSXT conductors.⁴

B. CSXT's Position

CSXT's position is that its replacement of Y122 with a Conrail yard job was authorized by the Detroit SAA Operating Agreement and the New York Dock implementing agreement that implemented changes in train operations in the Detroit SAA, the Detroit SAA NYD Agreement.

CSXT, NSR and Conrail are party to the Detroit SAA Operating Agreement, which governs train operations in the Detroit SAA. Section 3(d)(i) expressly authorizes CSXT to use Conrail as its agent to perform Switching and Yard Service within the Detroit SAA. The transfer of railcars between yards was "Switching and Yard Service" within the meaning of the Detroit SAA Operating Agreement.

CSXT, NSR, and Conrail negotiated seven New York Dock ("NYD") implementing agreements with SMART-TD's predecessor, the United Transportation Union ("UTU"), for various aspects of the Conrail Transaction. CSXT Sec. 11 Sub. at 8-9. The agreements relevant to this dispute are the Master NYD Agreement, which divided the Conrail workforce between CSXT, NSR and Conrail, the Detroit SAA NYD Agreement, and the CSXT Western District NYD Agreement. The Detroit SAA NYD Agreement is Attachment 1 to and part of the Master Agreement.

⁴ That employee was able to hold another position on CSXT and did not lose any earnings from the abolishment of Y122. VanDagens Award at 2; CSXT Sec. 11 Sub. at 11. Locomotive engineers on CSXT and Conrail are represented by the Brotherhood of Locomotive Engineers and Trainmen. The engineers union did not object to the replacement of Y122 with a Conrail job. CSXT Sec. 11 Sub. at 11 n.5.

CSXT argued that the Detroit SAA NYD Agreement, which specifically implemented operations performed in the Detroit SAA, made SMART-TD's agreement with Conrail applicable to operations performed by Conrail as CSXT's agent in the Detroit SAA. The CSXT Western District and Northern Mid-Atlantic District ("NOMAD") NYD Agreements relied upon by SMART-TD, and discussed *infra*, expressly excepted the Detroit SAA from their coverage. VanDagens Award at 6-7; 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.

C. SMART-TD's Position

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." VanDagens Award at 2; SMART-TD Sec. 11 Sub. at 11. The Organization contended that this work "belong[s] to CSX employees and was illegally being 'farmed out' to Conrail SA [Shared Assets]." *Id.* SMART-TD further argued that because the transfer of railcars between the CSXT Rougemere Yard and Conrail Livernois Yard was allegedly interchange, Rule 106 of the B&O Agreement required CSXT to enter an agreement with SMART-TD providing for an equitable sharing of this work between SMART-TD represented CSXT conductors and Conrail conductors.

SMART-TD argued that Article IV of the Master NYD Agreement for the Conrail Transaction and the CSXT Western District NYD Agreement applied, because Detroit was in the Western District. SMART-TD then argued that those NYD Agreements made the B&O Agreement the governing agreement for CSXT work in Detroit. VanDagens Award at 5-6;

SMART-TD Sec. 11 Sub. at 37-38. SMART-TD also argued that a subsequent New York Dock implementing agreement, the 2010 NOMAD NYD Agreement, reaffirmed that the B&O Agreement applied in the territory within the Western District including Detroit. SMART-TD Sec. 11 Sub. at 38.

D. Section 11 Arbitration 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.” *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 87 (1979).⁵ Board precedent is clear that Section 11 applies to disputes over New York Dock implementing agreements as well as disputes over the conditions themselves.⁶ The Rougemere-Livernois Yard transfer dispute clearly involved such disputes since CSXT and SMART-TD both relied on their differing interpretations of New York Dock implementing agreements to determine which collective bargaining agreement applied to the work CSXT had requested Conrail to perform as its agent: the B&O Agreement, as claimed by SMART-TD, or the Conrail-SMART-TD collective bargaining agreement, as claimed by CSXT. CSXT invoked arbitration under Section 11 of the New York Dock conditions. VanDagens

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

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).

Award at 2-3; CSXT Sec. 11 Sub. at 16. SMART-TD responded that Section 11 was not appropriate for the parties' dispute. VanDagens Award at 3.

SMART-TD also argued for the first time in the Section 11 arbitration that CSXT's Rougemere Yard was not within the Detroit SAA. SMART-TD Sec. 11 Sub. at 18. SMART-TD also argued that CSXT's invocation of the Section 11 dispute resolution procedures was improper, because Section 11(a) supposedly required that a dispute had to be submitted to arbitration within 20 days from when it arose. SMART-TD argued that CSXT had waited too long to invoke arbitration. VanDagens Award at 4. As a related matter, SMART-TD argued that CSXT's invocation of Section 11 arbitration should be barred by the doctrine of laches. VanDagens Award at 4-5. SMART's new timeliness and laches arguments required the interpretation or application of the New York Dock conditions, specifically Section 11(a). SMART-TD's new argument that Rougemere Yard was not in the Detroit SAA required the interpretation of the Detroit SAA NYD Agreement, because Article III of that Agreement defined the Detroit SAA.

Arbitrator VanDagens issued the award of the Section 11 Committee, which was joined in by CSXT's member of the Committee, effective on June 27, 2022. Rejecting all of the Organization's arguments, the Arbitrator found that jurisdiction under Section 11 was proper, that CSXT's replacement of Y122 with a Conrail yard job did not violate the B&O Agreement, and no remedy was warranted. *See, e.g.*, Award at 8. A petition to review the VanDagens Award pursuant to 49 C.F.R. § 1115.8 would have been due by July 18, 2022.⁷ SMART-TD elected not to appeal.

⁷ The 20th day fell on July 17, a Sunday.

E. NRAB Arbitration Proceedings

After CSXT invoked the Section 11 dispute resolution process, SMART-TD invoked arbitration under Section 3 of the RLA with the NRAB First Division submitting its Claim that CSXT's use of Conrail violated the B&O Agreement.⁸ 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 and effectively decides a dispute.

Arbitrator Jacobs held a hearing on September 14, 2022, and issued Award No. 31148 for the NRAB First Division, which became effective on December 8, 2022. Exhibit No. 1. Arbitrator Jacobs found that SMART-TD was making the same arguments to the NRAB that it made in the Section 11 arbitration and that the parties' dispute required the interpretation of New York Dock implementing agreements and of the New York Dock conditions. Award at 10-11. Following NRAB precedent, Arbitrator Jacobs dismissed SMART-TD's claim, finding that the NRAB lacked jurisdiction because "the NYD Section 11 dispute resolution process is thus the controlling process for the resolution of such disputes." Award at 10. Therefore, he ordered "Claim dismissed." Award at 11.

F. CSXT's Petition and Amended Petition to This Board

Because SMART-TD was at the time trying to frustrate the Section 11 proceedings 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.

⁸ The First Division of the NRAB hears disputes involving the conductor and engineer crafts. The other three divisions hear disputes involving other crafts.

After the issuance of the VanDagens Award, and SMART-TD's failure to appeal same, CSXT filed an Amended Petition on July 29, 2022 dropping its request for declaratory relief 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 was still pursuing arbitration by the NRAB of the very same issues decided by the VanDagens Award, CSXT continued its request for an order from this Board directing SMART-TD to cease and desist that arbitration. SMART-TD filed a Response on August 5, 2022.

The Board has not acted on any of the above pleadings. Given the VanDagens Section 11 Award and Jacobs NRAB Award, there is no need or basis for the Board to address the matters raised in CSXT's Petition as Amended or in SMART-TD's Responses thereto.

III. Argument

A. CSXT's Request for Declaratory Relief Is Rendered Moot by the Unappealed VanDagens Section 11 Award

As explained in CSXT's Petition, CSXT originally sought declaratory relief because SMART-TD was trying to frustrate the Board's Section 11 dispute resolution procedures. "The Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty." *Norfolk Southern Ry. Co.—Petition for Declaratory Order*, Finance Docket No. 36522, slip op. at 9 (served June 17, 2022). The "controversy" and "uncertainty" initially created by SMART-TD's efforts to block the appointment of a neutral and refusal to acknowledge the Section 11 arbitration process were removed by subsequent events. A neutral member, Arbitrator VanDagens, was appointed by the National Mediation Board pursuant to Section 11(a) of the New York Dock conditions and SMART-TD participated in the arbitration. The Section 11 Committee chaired by Arbitrator VanDagens issued its Award in CSXT's favor, finding that the replacement of CSXT job Y122 with a Conrail yard job did not violate the B&O

Agreement.⁹ Since SMART-TD did not appeal, the declaratory relief originally sought by CSXT is moot.

B. CSXT's Request for a Cease and Desist Order Is Rendered Moot by Jacobs
NRAB Award

The NRAB's dismissal of SMART-TD's claim renders the remaining relief requested by CSXT's Amended Petition moot because the NRAB proceedings have concluded.

Arbitrator Jacobs discussed and followed longstanding NRAB precedents that the NRAB does not have jurisdiction over claims that require the interpretation of the New York Dock conditions and/or New York Dock implementing agreements. NRAB Award at 7,10. These precedents hold that, because this Board and its predecessor, the Interstate Commerce Commission ("ICC"), established an exclusive dispute resolution procedure in Article I, Section 11 of its protective conditions to resolve such disputes, when a case filed with the NRAB

⁹ The Labor Members filed a dissenting opinion to the Jacobs NRAB Award, which is attached to, but not part of, that Award. Their dissent is not germane to this Board's Section 11 proceedings. However, the Organization there mischaracterizes the VanDagens Award stating as follows:

The Arbitration ruling in the New York Dock Article 1[sic], Section 11 Committee Award did not address grievances filed by the employee and left those duties to the [NRAB] Division which states that it lacks jurisdiction to do so. This places the aggrieved employee in the conundrum of having no place to turn for final and binding adjudication as neither the cited STB Section 11 Committee Award nor the Division Award address the subject grievances." Dissent at 2.

The dissent's description of the VanDagens Award is obviously incorrect. As stated in the employee's claim and discussed in the VanDagens Award, the employee's grievance was premised on the claim that CSXT violated the B&O Agreement when it replaced Y122 with a Conrail job. VanDagens Award at 2. The VanDagens Award expressly addressed the Organization's arguments that the B&O Agreement had been violated and held that it was not and "no remedy is required." Award at 8. Thus, there was a final and binding adjudication of the employee's grievance by the Section 11 Committee.

requires such interpretation, the NRAB dismisses the case for lack of jurisdiction. The parties must use this Board's exclusive dispute resolution procedures. Jacobs Award at 10.¹⁰

Arbitrator Jacobs likewise found that SMART-TD was raising issues that required the interpretation of New York Dock implementing agreements and the New York Dock conditions. He also found that these same issues had already been addressed and resolved by the VanDagens Section 11 Award. Therefore, he dismissed SMART-TD's case. Jacobs Award at 10-11.

C. SMART-TD's Arguments to the Board That It Lacked Jurisdiction Under Article I, Section 11 Are Without Merit And Foreclosed by the VanDagens Award

SMART-TD contended in its August 5, 2022 Response to CSXT's Amended Petition that its arguments that the Board lacked jurisdiction under Section 11 were still alive because not addressed by the VanDagens Award, arguing as follows:

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.

¹⁰ The union appealed the NRAB's dismissal of its contracting out claims in Awards 38988 and 39878, which are cited by Arbitrator Jacobs Award at 7, pursuant to the RLA. The court agreed that the NRAB properly dismissed the claims for lack of jurisdiction because the proper arbitration forum was New York Dock Section 11 arbitration. *Brotherhood of Maintenance of Way Employees Div. IBT v. Consolidated Rail Corp.*, 789 F. Supp.2d 533 (D. N.J. 2011).

Aug. 5, 2022 Response at 4.

As a threshold matter, the Board should not consider the above arguments because SMART-TD's request that it do so is contrary to well settled Board precedent that disputes over the interpretation of the New York Dock conditions and implementing agreements must first be presented to a Section 11 arbitrator.¹¹ These issues include "the issue whether New York Dock applies."¹² If SMART-TD believed that Arbitrator VanDagens overlooked its arguments, its recourse was to appeal the Award to the Board for failing to address them. The Board also should not address these arguments because, as CSXT explains below, the VanDagens Award actually addressed the issues that SMART-TD claims are "unanswered." While SMART-TD dislikes how the Award resolved those issues, SMART-TD's recourse again was to appeal the Award to the Board. SMART-TD elected not to appeal under the Board's "Lace Curtain" standards for review of New York Dock arbitration awards.¹³ The Arbitrator found that CSXT's invocation of Section 11 was proper (Award at 3,8), that the Section 11 Committee had authority to address the parties' dispute (Award at 3), and that "[t]he Arbitration Committee has

¹¹ See, e.g., *Norfolk Southern Ry. Co.—Acquisition and Operation—Certain Rail Lines of the Delaware & Hudson Co.*, Finance Docket No. 35873, Decision No. 8, slip op. at 4 (served Sept.18, 2015) ("[I]t would not be appropriate for the Board to resolve it at this time. Rather this matter must be resolved in the first instance by arbitration."); *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."); *Canadian National Ry. Co., et al.—Control—Wisconsin Central Transportation Corp., et al.*, Finance Docket No. 34000, 2008 STB LEXIS 321, * 8 ("And it has been the Board's policy not to intervene in matters subject to arbitration before they have been considered by an arbitrator.") (footnote omitted).

¹² *Canadian National Ry. Co., et al.—Control—Wisconsin Central Transp. Corp., et al.*, Finance Docket No. 34000, 2008 STB LEXIS 321, * 7.

¹³ *Chicago & North Western Transp. Co.—Abandonment*, 3 I.C.C.2d 729 (1987, *aff'd sub nom. International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988)). The Lace Curtain standards grant deference to the findings of the arbitrator. See, e.g., *Union Pac. Corp., et al.—Control and Merger—Southern Pac. Rail Corp., et al.*, Finance Docket No. 32760 (Sub-No. 45), 2010 STB LEXIS 547, * 16-18.

jurisdiction to determine whether changes in operation are related to the implementation of an STB-approved transaction,” *Id.* SMART-TD did not appeal any of these jurisdictional findings.

CSXT next reviews each shortcoming alleged by SMART-TD.

1. The Board’s Jurisdiction Is Not “Timeless and Limitless”

SMART-TD’s July 13, 2021 and August 5, 2022 Responses cited *Delaware and Hudson Ry. Co.—Lease and Trackage Rights Exemption—Springfield Terminal Ry. Co.*, Finance Docket No. 30965 (Sub-No. 1 and 2), 8 I.C.C.2d 839, 1992 WL 46807 (“*Delaware & Hudson*”) and *CSX Transportation, Inc. v. Transportation Communications Int’l Union*, 480 F.3d 678 (4th Cir. 2007) (“*CSXT v. TCU*”) for the proposition that the Board’s jurisdiction to resolve disputes involving New York Dock implementing agreements is not “timeless and limitless.” July 13, 2021 Response at 6-8; Aug. 5, 2022 Response at 2. SMART-TD then contends that, because it has been 20 years since the Conrail Transaction was approved, the Conrail Transaction has been “completed” and “the transaction is done.” July 13, 2021 Response at 2, 8. It should be noted that SMART-TD did not make any arguments in its Section 11 arbitration submission citing these precedents. SMART-TD’s only mention was buried in Exhibit Y to SMART-TD’s Section 11 Submission, which was its July 13, 2021 Response to CSXT’s Petition to the Board. Arbitrator VanDagens can hardly be faulted for not discussing them when SMART-TD did not bring them to her attention. In fact, the VanDagens Award does address the issue whether the Board has jurisdiction under Section 11 over the parties’ dispute.

In *Delaware & Hudson*, the Board’s predecessor looked at two factors to find that there was jurisdiction under Section 11 over the implementing agreement dispute in that case. The ICC explained these considerations as follows: “First it is incontrovertible that what is at issue here is the proper interpretation of two central terms of the Harris Award involving the intended

consequences of permitting reduced crew sizes and allowing ST's incidental work rule. . . . Any dispute concerning the proper interpretation of the effect of these critical terms must be resolved within the framework of the labor protective conditions we impose, that is under the authority of the ICA and not the RLA." 8 I.C.C.2d at 846, 1992 WL46807, * 5 (emphasis added).¹⁴ Second, the ICC looked at the proximity of the implementing agreement to the dispute, there two years. The ICC held the dispute had to be arbitrated under the Section 11 procedures.

In *Delaware & Hudson*, the ICC found that "[t]he items in issue go directly to the heart of the elements of the implementing agreement found necessary to permit the transaction to go forward." 1992 WL46807, * 5. Arbitrator VanDagens similarly found on the record that the proper interpretation of key terms in Conrail Transaction New York Dock implementing agreements was central to CSXT's ability to use Conrail as its agent within the Detroit SAA, a critical feature of the Conrail Transaction as approved by the *Conrail Decision*. As explained, CSXT relied on Article II and Article VI of the Detroit SAA NYD Agreement to argue that they made the SMART-TD-Conrail collective bargaining agreement, not the B&O Agreement, applicable to work done by Conrail as CSXT's agent. Therefore, the B&O Agreement was not violated when CSXT replaced Y122 with a Conrail yard job. SMART-TD relied on Article IV of the Master NYD Agreement and Article I of the CSXT Western District NYD Agreement to argue that they made the B&O Agreement applicable to work performed by or for CSXT in the Detroit SAA, and CSXT violated the B&O Agreement by "farming out" the work of Y122 to Conrail. Thus, as in *Delaware & Hudson*, the parties' dispute here required the interpretation of

¹⁴ In *Delaware & Hudson*, the implementing agreement was imposed by arbitration under the Mendocino Coast conditions, the Harris Award. Article I, Section 11 of the Mendocino Coast conditions is identical to Section 11 of the New York Dock conditions.

key terms in Board-required implementing agreements. Arbitrator VanDagens examined the terms cited by both parties and agreed with CSXT's interpretation.

The need to interpret New York Dock implementing agreements in this case is also why *CSXT v. TCU* does not support SMART-TD, as CSXT pointed out in its Section 11 Submission, page 20 n. 8. There, CSXT appealed awards of the NRAB pursuant to the RLA arguing that the proper forum was Section 11 because the dispute required interpretation of a New York Dock implementing agreement. The court of appeals upheld the NRAB awards, agreeing with the NRAB arbitrators' analysis that interpretation of the New York Dock implementing agreement was not necessary to resolve the underlying collective bargaining agreement dispute in those cases. 480 F.3d at 684-85. The instant dispute is very different. Unlike the arbitrators in *CSXT v. TCU*, Arbitrator Jacobs sitting with the NRAB, as well as Arbitrator VanDagens, found that the parties' dispute here required the interpretation of New York Dock implementing agreements and conditions and therefore jurisdiction was proper in Section 11 arbitration.¹⁵

SMART-TD has never denied that the instant dispute required the interpretation of terms in New York Dock implementing agreements and conditions. SMART-TD's argument boils down to one that, even if New York Dock agreements and conditions must be interpreted, the Board somehow lost jurisdiction in this case because it has been 20 years since the Conrail Transaction was "completed" and "the transaction is done." SMART-TD cites no authority for the proposition that the passage of time alone terminates Board jurisdiction over disputes arising

¹⁵ As discussed *supra* at note 10, the trackworkers union appealed NRAB awards dismissing its contracting out claims for lack of jurisdiction. The union cited *CSXT v. TCU* for the proposition that the Board's Section 11 jurisdiction was not "timeless and limitless." The court in *Brotherhood of Maintenance of Way Employees Div. IBT v. Consolidated Rail Corp.*, 789 F. Supp.2d 533 (D. N.J. 2011) distinguished *CSXT v. TCU* on the basis that, unlike that case, the contracting out claims required the interpretation of New York Dock implementing agreement.

out of the New York Dock conditions or New York Dock agreements. To the contrary, Board precedent holds that there is not a fixed time period in which it no longer has jurisdiction over disputes arising under the New York Dock conditions. *See, e.g., CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review)*, Finance Docket No. 28905 (Sub-No. 27), 1995 ICC LEXIS 308, * 23 (“But we have never imposed a deadline on making merger-related operational changes.”), *aff’d sub nom. United Transp. Union v. STB*, 108 F.3d 1425, 1430-31 (D.C. Cir. 1997). Neither *Delaware & Hudson* nor *CSXT v. TCU* placed a 20-year or any fixed time limit on the Board’s jurisdiction under Section 11.

Moreover, SMART-TD’s argument that the Conrail Transaction has been “completed” does not answer the issue whether CSXT’s replacement of Y122 with a Conrail yard job was an operational change authorized by the Board as part of the “completed” Conrail Transaction. Board precedent provides that whether there is a nexus between an operational change and a Board approved transaction is a matter for the Section 11 arbitrator in the first instance. *See, e.g., Canadian National Ry. Co., et al.—Control—Wisconsin Central Transp. Corp., et al.*, Finance Docket No. 34000, 2008 STB LEXIS 321, * 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.”), cited by the VanDagens Award at 3. *See also, e.g., Canadian Pacific Limited, et al.—Purchase and Trackage Rights—Delaware & Hudson Ry. Co. (Arbitration Review)*, Finance Docket No. 31700 (Sub-No. 13), 1998 WL 638433, * 4 (“An arbitrator’s decision on the issue which petitioners principally rely, i.e., whether the proposed changes are linked to prior transactions, is a factual one.”). Arbitrator VanDagens addressed the nexus issue. She reviewed the Conrail Transaction, *Conrail Decision*, the Detroit SAA Operating Agreement, the Detroit SAA NYD Agreement and

other evidence of record to find that there was a nexus between the Conrail Transaction and CSXT's replacement of Y122 with a Conrail yard job to transfer railcars on CSXT's behalf between Rougemere and Livernois Yards. She found that as part of the Conrail Transaction, the role of Conrail was changed to that of agent for CSXT and NSR in the Detroit SAA. Award at 8. She also found that the Detroit SAA Operating Agreement was still in effect and allowed CSXT to request Conrail to perform Switching and Yard Services as CSXT's agent and that the transfer of railcars between Rougemere and Livernois Yards came within the definition of Switching and Yard Services. Award at 6-7. Thus, CSXT's right to use Conrail to perform operations as its agent, including operations that had been done previously by CSXT, was part of the "completed" Conrail Transaction. She concluded that "[t]he Carrier's replacement of Y122 with the Conrail Yard Job was an operational change allowed by the Conrail Transaction." Award at 8.

SMART-TD's complaint that CSXT farmed out work of Y122 belonging to CSXT conductors overlooks that, pursuant to Board-approved operational changes for the Detroit SAA, for "20 years," all of the work performed by Conrail in a SAA has been "farmed out" to it by CSXT and NSR. The dispute over this particular instance of farming out work to Conrail has only arisen now because SMART-TD waited 20 years to challenge CSXT's rights under the Detroit SAA Operating Agreement, Detroit SAA NYD Implementing Agreement, and *Conrail Decision*.¹⁶ Arbitrator VanDagens recognized that the logic of SMART-TD's argument was that, if the B&O Agreement applied in this case, CSXT could no longer use Conrail as its agent in the

¹⁶ The record showed that CSXT also replaced CSXT jobs with Conrail jobs in 2019 to transfer railcars between CSXT and Conrail yards in the Philadelphia/South Jersey Shared Assets Area yet SMART-TD did not complain that that substitution violated the B&O collective bargaining agreement. CSXT Sec. 11 Sub. at 28. SMART-TD also apparently has not objected to NSR's use of Conrail to transfer railcars in NSR's account between NSR's Oakwood Yard and Conrail's Livernois Yard in the Detroit SAA. *Id.*

Detroit SAA and the entire SAA concept with its public transportation benefits would be undone. Award at 7 (“As a result, the Organization’s position must be rejected, as enforcement as the Organization suggest would frustrate the STB-approved transaction.”).

While SMART-TD is unhappy with her findings, it did not appeal them, and they are binding on SMART-TD.¹⁷

2. CSXT Waived by “Inaction” Ability to Invoke Section 11 Arbitration

SMART-TD argues that, because CSXT allegedly waited four years, from 2017 to 2021, to assert a New York Dock implementing agreement defense to claimed violations of the B&O Agreement, CSXT has somehow waived through “inaction” the right to invoke the Board’s dispute resolution procedures in Section 11 of the New York Dock conditions. July 13, 2021 Response at 9-11. As support for this novel argument, SMART-TD quotes language from Section 11 (a) that supposedly requires that arbitration be invoked within 20 days from when a dispute arises and cites *CSXT v. TCU*.

Whether CSXT timely invoked arbitration in this case is obviously a matter to first be presented in arbitration, because it requires the interpretation or application of Section 11 of the New York Dock conditions. In fact, SMART-TD made essentially the same arguments in the Section 11 arbitration. SMART-TD argued that Section 11(a) requires that arbitration be invoked within 20 days from when a dispute first arises. SMART-TD also argued that waiting four years to invoke arbitration was too long and argued that the doctrine of laches should bar CSXT from arbitration because of prejudice to SMART-TD. VanDagens Award at 3-5. The laches doctrine is simply another way of arguing that CSXT waived arbitration through inaction.

¹⁷ CSXT notes that an arbitrator’s findings on causation, nexus, and interpretation of agreements is owed the highest level of deference under the Board’s Lace Curtain standards.

Arbitrator VanDagens rejected SMART-TD's argument that Section 11(a) requires that arbitration be invoked within 20 days from when a dispute first arises. The Arbitrator found that "Section 11 of the New York Dock conditions do not contain a fixed period for referring a matter to arbitration. The Carrier's referral to arbitration pursuant to Article I, Section 11 was not untimely." Award at 4. Arbitrator VanDagens also rejected the argument that CSXT waited four years to invoke arbitration, finding that "[a]ny delay appears to have been caused by the parties' attempts to resolve this matter informally." *Id.* at 5. The Arbitrator further found that "[l]ack of jurisdiction cannot be waived by inaction." *Id.*

CSXT v. TCU also does not support SMART-TD's waiver argument. The district court's waiver analysis was based on the facts that CSXT had voluntarily submitted the disputes at issue there to RLA arbitration for years before ever asserting jurisdiction under Section 11 and had never invoked Section 11 arbitration. 480 F.3d at 682. In contrast, the record here showed, and Arbitrator VanDagens found, that CSXT asserted that the dispute must be submitted to Section 11 arbitration, objected that NRAB arbitration was not appropriate, and invoked Section 11 arbitration when it became apparent that the dispute could not be resolved by the parties.

Again, SMART-TD did not appeal these findings by Arbitrator VanDagens, and it cannot collaterally attack them now.

3. CSXT Failed to Serve Notice Under Article I, Section 4 of New York Dock

Article I, Section 4 of the New York Dock conditions requires that before a carrier makes a change in operations authorized by a Board merger approval, the carrier must serve a 90-day notice and reach pre-consummation implementing agreements with involved unions. *See, e.g., New York Dock*, 360 I.C.C. at 85; *Conrail Decision* at 125-26. SMART-TD argues that replacement of Y122 with a Conrail yard job was such a change in operations and CSXT failed

to serve a Section 4 notice and reach an implementing agreement with SMART-TD for this change. July 21, 2021 Response at 8-9. SMART-TD likewise argues in its August 2022 Response that CSXT’s supposed failure to give the required Section 4 notice “raises serious doubt as to the jurisdiction of the Board and the Section 1, Article 11 [sic] arbitration process.” Response at 3.

SMART-TD’s argument that CSXT’s alleged failure to give Section 4 notice raises “serious doubt,” not about the Section 11 dispute resolution process, but rather whether SMART-TD even understands that process. This is not a jurisdictional argument, but an argument that CSXT violated Section 4 of the New York Dock conditions. Board precedent is clear that an argument that a carrier failed to comply with Section 4 before making an operational change must first be made in Section 11 arbitration. *See, e.g., Norfolk Southern Ry. Co.—Acquisition and Operation—Certain Rail Lines of the Delaware and Hudson Ry. Co.*, Docket No. 35873, 2015 STB LEXIS, * 8 (whether implementing agreement required under Article I, Section 4 “must be resolved in the first instance by arbitration”); *Illinois Central Corp. and Illinois Central Railroad Co.—Control—CCSP Holdings, Inc., et al.*, Finance Docket No. 32858, 1998 STB LEXIS 147, * 6 (same); *Kansas City Southern Industries, Inc., et al.—Control—Gateway Western Ry. Co., et al.*, Finance Docket No. 33311, 1997 STB LEXIS 305, * 5 (claim that carrier failed to serve Section 4 notice and reach implementing agreement must be first submitted to Section 11 arbitration). In this case, SMART-TD failed to raise this argument in Section 11 arbitration and cannot do so now for two reasons.

First, because SMART-TD never raised this issue in the Section 11 arbitration, it is waived. *Union Pac. Corp., et al.—Control and Merger—Southern Pac. Transp. Co., et al.*

(*Arbitration Review*), Finance Docket No. 32760 (Sub-No. 22), 1997 LEXIS 140, * 5 (“A party can waive its objections only by failing to make them below.”).

Second, even if not waived, SMART-TD’s Section 4 notice argument is foreclosed by the VanDagens Award. Arbitrator VanDagens found that the “[t]he NYD Implementing Agreement permitted the carrier to use Conrail as its agent to transfer cars between Rougemere and Livernois Yards.” Award at 8. Thus, CSXT was not required to serve a new Section 4 notice to reach a new implementing agreement for this particular operational change, because the replacement of Y122 with a Conrail job was already covered by the existing Detroit SAA NYD Agreement. Again, SMART-TD did not appeal these findings.

D. Issues Decided By VanDagens Award Not Capable of Repetition
But Evading Review

SMART-TD argued in its August 2022 Response to CSXT’s Amended Petition that “[i]n 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 . . . ,” the Board should still issue a finding on jurisdiction because “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.” Response at 5 citing *Del Monte Fresh Produce Co. v. U.S.*, 570 F.3d 316 (D.C. Cir. 2009). This argument too is without merit.

As a preliminary matter, there is no question that the VanDagens Award is “final and binding on the parties. ” It is by operation of Section 11(c) of the New York Dock conditions and SMART-TD’s failure to appeal that Award.

Also, there is “clarity” on the issue of whether arbitration under Section 11 was proper in this case. Arbitrator VanDagens found that it was. Her jurisdictional finding did not evade

review, because SMART-TD presumably made an intentional choice not to appeal her Award under 49 C.F.R. § 1115.8 and the Lace Curtain standards.

CSXT does not understand what SMART-TD means by evading “full review before Article I, Section 11 arbitration occurs, as it has here.” If by “full review” SMART-TD means that Section 11 arbitration occurred before the Board had the opportunity to address the appropriateness of Section 11 arbitration in this case, SMART-TD apparently misunderstands how the Board’s Section 11 dispute resolution procedure works. As CSXT explained above, Board precedent requires that parties first present all issues in Section 11 arbitration, including whether Section 11 arbitration is appropriate. Only then does the Board review the Section 11 award in the event that there is an appeal and review is found appropriate under the Lace Curtain standards. *See, e.g., Kansas City Southern Industries, Inc., et al.—Control—Gateway Western Ry. Co., et al.*, Finance Docket No. 33311, 1997 STB LEXIS 305, * 5.

Moreover, SMART-TD does not explain how this case presents issues capable of repetition yet evading review. If there were a future instance where SMART-TD claimed that CSXT’s actions violated its collective bargaining agreement, and CSXT defended on the basis that its actions were authorized by a New York Dock implementing agreement, SMART-TD could challenge CSXT’s reliance on the New York Dock implementing agreement by initiating arbitration under Article I, Section 11 and seeking Board review of a Section 11 award. This is nothing like *Del Monte Fresh Produce*. In that case, the plaintiff applied for a one-year license to export products to certain foreign countries. The plaintiff sought a declaratory judgment that the federal agency’s failure to expeditiously issue the required license violated the Administrative Procedure Act. The district court dismissed the complaint as moot on the basis that the agency ultimately issued the license. The court of appeals reversed, holding that there

was not sufficient time to fully litigate the issue in the time frames for the issuance and duration of the temporary export license. In contrast, there would be ample time for SMART-TD to fully litigate the matter in Section 11 arbitration and then before the Board and obtain a meaningful remedy should it prevail.

Conclusion

For the reasons set forth in this Motion, the Board should allow CSXT to withdraw its Petition as Amended, because the unappealed VanDagens Section 11 Award and Jacobs NRAB Award render the relief requested by CSXT moot.

Respectfully submitted,

/s/ Ronald M. Johnson

Ronald M. Johnson
Law Offices of Ronald M. Johnson LLC
4909 Scarsdale Road
Bethesda, MD 20816
rmjohnson@rmjohnsonlaw.com
301 767-5105

Counsel to CSX Transportation, Inc.

Dated: December 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2022, a copy of the forgoing Motion to Withdraw Petition and Amended Petition for Declaratory and Cease and Desist Orders was served by e-mail on the following persons:

Richard D. Lee, General Chairperson
International Association of Sheet Metal, Air, Rail and Transportation Workers—Transportation Division
12443 San Jose Blvd., Suite 701
Jacksonville, FL 32223
rlee@smartgca49.org

Shawn M. McKinley
Assistant General Counsel
International Association of Sheet Metal, Air, Rail and Transportation Workers—Transportation Division
Legal Department
24950 Country Club Blvd., Suite 340
North Olmsted, Ohio 44070-5333
smckinley@smart-union.org

/s/ Ronald M. Johnson

Ronald M. Johnson
Law Offices of Ronald M. Johnson LLC

Counsel for CSX Transportation, Inc.

STB Finance Docket No. 33388 (Sub-No. 102)
CSXT Motion to Withdraw Petition and Amended Petition

EXHIBIT NO. 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 31148
Docket No. 50955
23-1-NRAB-000001-210254**

The First Division consisted of the regular members and in addition Referee Jeff Jacobs when award was rendered.

PARTIES TO DISPUTE: (SMART – Transportation Division
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“The Organization served notice of its intent to file a submission with the First Division in regard to an unresolved dispute between the parties set forth above, namely the Carrier’s decision to abolish an assignment held by claimant Patrick Gay, ID # 199599.

The Organization’s Statement of Claim is as follows:

“Allow the 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 CSXT 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 CSXT chooses to deny and not resolve the issue they do so at their own peril and should pay all claims in the full amount.”

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

ORGANIZATION'S POSITION

JURISDICTION ISSUE: The Organization asserted that there is jurisdiction to hear and decide this matter on the merits and that the Carrier's assertion that there is no jurisdiction is incorrect factually and contractually. The Organization asserted that the affected work at Rougemere belonged to CSXT crews and that the work was thus "farmed out" to Conrail, hereinafter CRC.

It was due to these undisputed facts that the matter was processed as a grievance under the applicable collective bargaining agreements. As discussed below, the matter was not and does not involve the New York Dock protections and that the Carrier's assertion regarding jurisdiction is flawed and should be rejected.

The Organization outlined the timeline of this dispute in some detail in its submission and asserted that the matter is both properly before this Board and that jurisdiction lies here. The Organization also noted that the NMB issued a letter to the Carrier advising that the Carrier's request to have the NMB dismiss this First Division case was improper and explained that the Carrier's motion to dismiss must be submitted to the chairman of the NRAB. See Organization Exhibit T.

The NMB then issued a letter advising of the process to select arbitrators and provided a list of some 30 arbitrators and required that an arbitrator be selected by June 30, 2021. The Organization further asserted that this matter arises under the Collective Bargaining Agreement, hereinafter, known as the B & O Agreement and the RLA. This dispute centers over an allegation of a violation of the CBA and is therefore properly before this Board. The Organization pointed out that the claimant did not file a grievance claiming that he was a displaced/dismissed employee under the New York Dock Protections, NYD, but instead filed this grievance as a violation of the B & O agreement based on the fact that Conrail was

now performing all the interchange work at a CSXT Rougemere Yard and his CSXT job (Y122) was abolished as a result.

The Organization also argued that the Carrier's position regarding jurisdiction is new and was not properly brought up on property and should be rejected on that basis as well. The Carrier has failed to establish a Section 11 Board.

The Organization also asserted that the B & O agreement has been in place for some 20 years and the argument that it is inapplicable now is both absurd and illogical. The Organization also noted that Finance Docket, FD, 33388 was approved by the Surface transportation Board, 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, 1998.¹ The Carrier is simply trying to avoid its responsibility for penalties for violations of the B & O Agreement and is attempting to have this Board "roll back time" and negate the controlling labor agreements entered into after the decision to approve FD 33388.

The Organization contended that there is clearly jurisdiction over this dispute since it involves a claimed violation of the B & O Agreement and thus is covered by Section 11.

MERITS - On the merits, the Organization noted that 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. Conrail also issued a letter dated October 27, 2017, to the SMART-TD Conrail Local Chairperson, G. Karkosa, advising that Conrail would begin to handle all the interchange work at Rougemere Yard with CSXT.

The Organization asserted that Rougemere is not within the Detroit Shared Assets area and pointed to the map attached to its submission in support of that assertion. The Organization pointed to the color-coded map and noted that while the Shared assets lines are blue, the Rougemere facility is on a brown colored line, which can only mean that it is not part of the of the CSAO, but merely falls within close proximity to the SAA. As noted, the Organization disputed Arbitrator

¹ The Master NYD Implementing Agreement showed that notice was served under Surface Transportation Board Finance Docket #33388 of the intent for CSXT and Norfolk Southern to control and divide the assets and employees of Conrail between them. See Exhibit 5 to the Carrier's submission and Exhibit X to the Organization's submission.

VanDagens' ruling that Rougemere is within the geographic limits of the Detroit SAA.

The Organization acknowledged that Arbitrator VanDagens ruled otherwise in her award cited herein but dissented from that award and contended that it was incorrect legally and factually and should be disregarded or overruled.

The Organization also asserted that the Carrier's position regarding whether Conrail is a foreign Carrier is untrue and misleading. The Organization asserted that Conrail Shared assets are just that, assets shared between the Norfolk Southern and CSXT with the Norfolk Southern owning the majority, but clearly operated as "Conrail."

The Organization also countered the Carrier's position that its solely owned and operated facility at Rougemere is now a part of the Conrail Shared Asset. The Organization asserted that this is not the case and that 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.

The Organization pointed to several of the exhibits attached to its submission as important to understanding the dispute and to understand why the Carrier's position is incorrect in this instance. See Exhibit C, Exhibit F at page 12, Exhibit H, Exhibit K, and Exhibit Y. The Organization cited these documents as supportive of its position that penalties are due for the Carrier's actions in this matter.

The Organization also cited several prior awards in support of its position. In Special Board of Adjustment No. 33, Award 321, (attached as Exhibit AD to the Organization's submission.) There the Chairman ruled that 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. That was an on-property decision involved a case where a former B & O Railroad 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.

See also, PLB 6411 Award 1, attached as Exhibit AE to the Organization; submission, where the neutral member of the Board ruled that the Carrier was bound by contractual language and further ruled that the Carrier, was required to

see to it that an 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 Organization also cited First Division Award 16743 dated August 12, 1954 (attached as Exhibit AF), where the neutral referee ruled that the Carriers' duties to designate interchange tracks was basically absolute. The Organization asserted that essence, the Neutral affirmed its talking points 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.

Further, in SBA 423, Award 226, dated December 14, 1979 (attached as Exhibit AH), the neutral discussed the principles of interchange rules and held that they do not restrict the Carrier from handling foreign line freight. Rather, agreement rules requiring designated tracks also provide 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.

Lastly, the Organization asserted that the seniority rights of affected employees must be respected and protected in accordance with the applicable Article 3 language. The Organization noted that claimant has no seniority rights on Conrail property and this cannot bid any work on those assignments, but that this fact illustrates the separation of the agreements and highlights the problem in the Carrier's position that work being performed now by Conrail is not interchange work. The Organization further cited several awards in support of its position in this regard. See, NRAB Third Division Award 29697 (attached as Exhibit AJ), NRAB Third Division Award 13236 further states (attached as Exhibit AK); and NRAB First Division Award 351 the following (attached as Exhibit L).

In summary, the Organization asserted that the dispute is not as complex as one might at first imagine and simply involves 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 not 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.

The Organization asserted that there is little question that the Carrier violated the B & O agreement and that as such there is both jurisdiction to reach the merits of this dispute and clear evidence of that violation. The Organization seeks a remedy rendering 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 difference avenues the Carrier has attempted, the Division should retain jurisdiction over the matter until the dispute, including payments and equity arrangements, is finalized.

CARRIER'S POSITION

The Carrier's position is that there is no jurisdiction by this Board to render a decision on the merits of this matter. The Carrier first noted that Arbitrator VanDagens' award in *CSX Transportation, Inc. and International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division*, Docket #33388, (VanDagens 06/27/22,) was rendered under the NYD and that she properly ruled that there was jurisdiction "to determine whether changes in operations are related to implementation of an STB approved transaction." See VanDagens' award at page 8.

Further, her award demonstrates clearly that the Organization's arguments that CSXT violated the B & O Agreement are intertwined with the parties' positions on the applicable New York Dock implementing agreements. In effect, the Organization is trying in this proceeding to collaterally attack the VanDagens Award's interpretation of the Detroit Shared Assets Area New York Dock Implementing Agreement and its finding that CSXT's use of Conrail did not violate the B & O Agreement.

The Carrier asserted that in order to reach the questions raised under the B & O Agreement by the Organization one must by definition on these facts delve into the NYD Implementing Agreements. Thus, the dispute resolution process under Section 11 governs this result.

The Carrier asserted for some 50 years, it has long been held and acknowledged that the NRAB does not have jurisdiction over NYD disputes – and

that this is clearly such a dispute.² Thus, the proper result is to dismiss this matter before even reaching the merits of the dispute. See pages 8 – 24 of the Carrier's submission in this matter and cases cited therein. See, Award 27079 First Division (Neutral Member Wallin 2010) where the Board dismissed a claim that was similar in content as having no jurisdiction under the NRAB. The Board stated that “the instant claim arises out of the imposed New York Dock protective conditions and not from a work Rule that the parties’ negotiated,” the claim was dismissed. Likewise, NRAB Third Division Award # 29660 (Neutral Member McAllister 1993, where the Board came to a similar result on similar facts to those presented here. See also, NRAB First Division Award # 24804 (Neutral Member Malin) where the Board also dismissed the claim as without jurisdiction to consider the merits as the matter arose under the NYD protections. See also, NRAB Third Division award # 38988 (Neutral Member Benn 2008), NRAB First Division Award # 25983 (Neutral Member Dennis 2004), NRAB Second Division Award # 13977 (Neutral Member Conway 2008) and PLB 5621 (Stallworth 1996) for a similar result.

The Carrier also cited NRAB Third Division Award # 39878 (Neutral Member Meyers 2009). There was a spirited dissent by the labor member in that case as well but as here, there was no appeal to the STB and that the case became final. The Carrier also noted that while there was a dissent to Arbitrator VanDagens award the Organization failed to perfect an appeal to the STB.

The Carrier cited the LaRocco decision in NRAB Third Division Award # 36276 with particular emphasis and noted that he firmly held that “although the claim clearly rests on Rule 5(d), the claim arose out of the transfer and assignment of employees to new positions on a newly created entity which is governed by the November 2, 1998 Implementing Agreement. For several reasons, the claim herein is inextricably tied to the provisions of the Implementing Agreement. ... These issues all involve interpreting provisions of the November 2, 1998 Implementing Agreement. Because the Implementing Agreement was negotiated under the auspices of Article I, Section 4 of the New York Dock Conditions, the parties must utilize the dispute resolution mechanism in Article I, Section 11 of the New York Dock Conditions to resolve this dispute.” The Board then dismissed the claim. The Carrier asserted that this case is virtually identical factually, legally and contractually.

² The NYD Implementing Agreements cited by the parties are at Exhibits 5, 6 and 39 of the Carrier's submission and Exhibits X and Y of the Organization's submission.

The Carrier maintained most adamantly that this case must be dismissed, just as all of those others were based on the inextricable intertwining with the NYD Implementing Agreement. The Carrier asserted that it has long been held that such cases must proceed under the NYD procedure and that NRAB does not have jurisdiction to determine the matter.

MERITS. On the merits, the Carrier again cited *CSX Transportation, Inc. and International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division*, Docket #33388, (VanDagens 06/27/22,) an arbitration held pursuant to Article I, Section 11 of the New York Dock Conditions, which the Carrier asserted controls the result in this matter. The Carrier argued that the VanDagens award is controlling and that the Board there clearly ruled that no violation occurred and that the facts there are the same as here.

The Carrier also noted the dissent in the VanDagens award and that the Organization did not appeal that award. The Carrier argued that the instant matter involves the same substantive issue that was already decided by Arbitrator VanDagens and seeks a denial of the instant grievance and an order directing the Organization to cease and desist pursuing arbitration before this Board of the same issues decided by Arbitrator VanDagens.

The Carrier asserted too that the factual issues before Neutral member VanDagens were virtually identical and that the Organization made the same arguments to that Board as it presented here. The Carrier also noted that it has filed a request with the STB to order the Organization to cease and desist pursuing arbitration before this Board but is awaiting a decision from that agency at this juncture.

The Carrier also noted that Neutral VanDagens ruled that Rougemere is in the Detroit Shared Assets area, see above, contrary to the assertion by the Organization. See, page 5 of the VanDagens award where the Board ruled that “Rougemere lies in the geographic area covered by the CSXT Western District Agreement.” The Board then dropped a footnote that explained that the NOMAD NYD Agreement combined the CSXT Western, Eastern and Northern district 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 the Rougemere Yard.”

She also ruled squarely that “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.”

The Carrier asserted that after all is said and done, that ruling is now final since the Organization did not file an appeal with the STB. Its dissent is thus of no force or effect and has no bearing or controlling impact on the decision here.

The Carrier noted throughout the proceeding that the facts are virtually identical and that Organization is now seeking to end run the VanDagens award and reverse those findings.

The Carrier asserted that the matter must therefore be denied even if one reaches the merits of the case in any event.

DISCUSSION

The facts are clear that in 1998 CSXT and Norfolk Southern Railway and their various parent corporations applied to the STB for authorization to control Conrail and to divide most its assets between them. STB approved that request pursuant to Finance Docket # 33388 as discussed above.

Further, under Article I, section 4 of the New York Dock conditions the applicants reached agreements with the Organization and/or its predecessor for the trainmen craft and that most of former Conrail lines, equipment and facilities were allocated to CSXT or Norfolk and Southern, NSR.

It was also clear that there is a Detroit Shared Assets Operating Agreement, and that that document defines the Shared Assets Area as the “geographic area comprising the Shared assets and Operator Facilities and jointly operated facilities directly...attached to the trackage included within the Shared assets, which it defines as the ‘Detroit’ Shared Assets area.”

There was some dispute about whether Rougemere was actually in the SAA. As noted, neutral VanDagens ruled that it was. More to the point, a careful review of the

documents and maps presented on this record confirms that decision and shows that indeed Rougemere is within the SAA, as the Carrier asserted.

It was of some note that the Organization had apparently argued to Neutral VanDagens that since the Rougemere yard was within the area covered by the Western District Agreement, the terms of the Western District NYD Agreement must be governed by the B & O Agreement which she noted was negotiated after the Conrail decision was approved by the STB.

This was a similar argument to that which Organization made here and as Neutral VanDagens correctly ruled, the governing agreement must be the Detroit SAA NYD Agreement. On these facts the NYD Section 11 dispute resolution process is thus the controlling process for the resolution of such disputes.

It was of some concern that the Organization noted that the Carrier failed to comply with the parameters set forth in the New York Dock conditions governing arbitration of disputes. This too was a somewhat inconsistent position with regard to jurisdiction. As noted, since Arbitrator VanDagens properly ruled that she had jurisdiction while operating pursuant to the NYD procedure, that too implies that there is no jurisdiction under other potential procedures for the resolution of this type of dispute.

It was clear too that the Organization's concern as expressed before neutral VanDagens was similar if not virtually identical in all material ways to that presented here and that the Carrier's replacement of Y122 with a Conrail yard job "was an operational change allowed by the Conrail transaction." As noted, it was clear that the STB approved transaction overrides the conflict obligations under the parties B & O Agreement and that no violation occurred. Thus, it would be problematic of the Organization's case even if the merits were to be reached.

However, on these facts it was clear that there is no jurisdiction and that the matter must be dismissed before making any determinations on the merits of the case. As Neutral LaRocco and the others cited above have held, since this matter arises under the auspices of the New York Dock Conditions, the parties must utilize the dispute resolution procedures set forth in the NYD Conditions to resolve this dispute. Accordingly, the matter is dismissed per the Carrier's assertion to do so for the jurisdictional reasons set forth and in accordance with the cases cited by the Carrier herein.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 8th day of December 2022.

LABOR MEMBERS' DISSENTING OPINION

To

FIRST DIVISION AWARD No. 31148; DOCKET No. 50955

(Referee Jeffrey W. Jacobs)

The Organization respectfully dissents to the Majority's ruling that the NRAB First Division lacks jurisdiction to resolve penalty time claims advanced by the Employees concerning agreement rules related to interchange/transfer violations.

Whereas, the interchange work being performed was formerly operated by CSX crews which is now being solely performed by Conrail Shared Assets – without any equity being allocated to the B&O employees – after twenty years of the B&O Agreement being the controlling and agreed-upon CBA for employees working at CSX Detroit Rouge mere Yard. Section 3 of the RLA and Circular No. 1 of the NRAB mandates a grievance process to resolve grievances of all disputes arising out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. Because the Parties were unable to reach an adjustment to this dispute on the property, the matter was properly petitioned to the appropriate Division of the National Railroad Adjustment Board. When reviewing Circular No. 1, jurisdiction of the Division is made clear and states, “To have jurisdiction over disputes involving train and yard-service employees of Carriers; that is Engineers, Firemen, Hostlers, and Outside Hostlers, Conductors, Trainmen, and Yard-Service employees”. With this being written into Circular No. 1, any jurisdictional issues are explicitly answered in that the grievance submitted by the employees is properly before the Division.

Additionally, the ruling of the Board to defer its obligation under Section 3 of the RLA and Circular No. 1 to the third party of the STB is outside of their jurisdiction to do so. The Arbitrator for the STB also recognized this salient fact as the Agency's primary jurisdiction to resolve questions of protective conditions in regards to eligibility for displaced or dismissal allowances due to imposed conditions as part of a railroad merger under Section 4 and the formation of implementing agreements. The Section 11 Committee certainly would not have the jurisdiction to interpret and apply the Scope Rules or Interchange Rules left untouched by the Implementing Agreement and all other provisions of the CBA. To this point, the STB Section 11 Committee

Award cited by the t Neutral neither disturbed the process under the RLA properly before the Division nor did it render a ruling on the employee grievance before it, with pertinent parts stating:

“As for showing of prejudice, the RLA claim is active before the NRAB; the Carrier’s assertion has not changed that.”

The Arbitration ruling in the New York Dock Article 1, Section 11 Committee Award did not address the grievances filed by the employee and left those duties to the Division which states that it lacks jurisdiction to do so. This places the aggrieved employee in the conundrum of having no place to turn for final and binding adjudication as neither the cited STB Section 11 Committee Award nor the Division Award address the subject grievances. Therefore, the Majority’s decision of lack of jurisdiction is a failure of the Board to comply with its jurisdictional command under the Railway Labor Act that is required to resolve this dispute on the merits by applying an interpretation, and application of the CBA, and by failure to do so failed to perform its duties under Section 3.

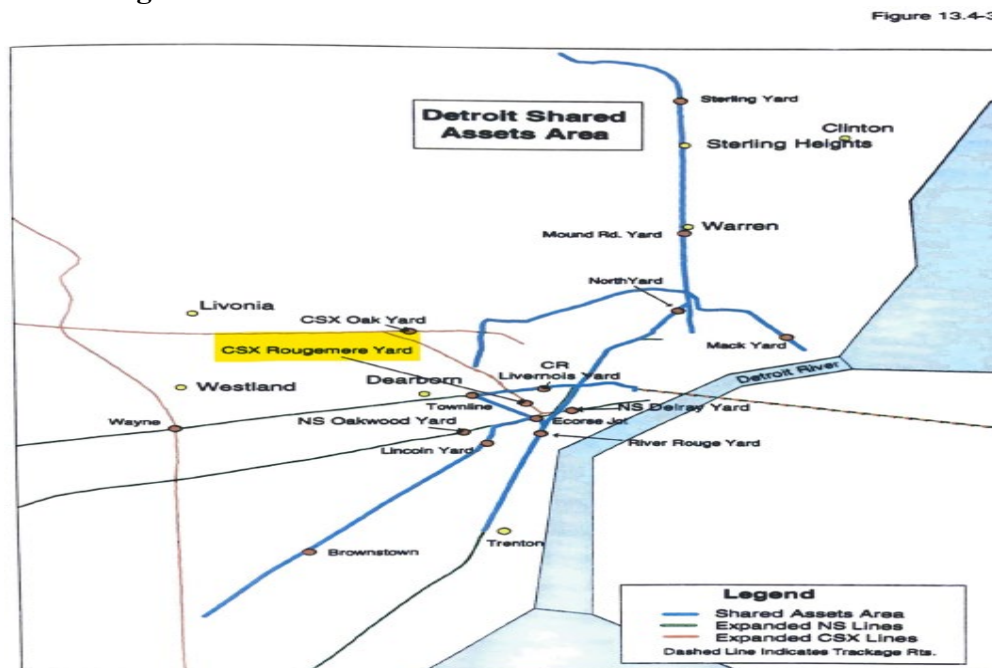
Furthermore, the Majority, while not ruling on the merits of the case, cites at length in the Merits and Discussion sections of the Division Award, several of the Carrier’s arguments supplied in a late Carrier’s supplemental submission that were not addressed on property and thus was decided by the Board to not be referenced. The Majority also wrote that they would not read the supplemental submission but seems to have reversed course as the bulk of the Merits and Discussions used to base the Division Award is derived from the Carrier’s supplemental submission. Also cited is the STB Section 11 Committee Award rendered by Neutral VanDagens’ to which the Majority expands upon before dismissing the claims citing jurisdictional issue. Reliance on the STB as a basis in the First Division ruling and concurrence compels the Organization to highlight the unsound logic in this dissent, just as we did to the STB Section 11 Committee Award. Since the Majority based it’s decision on the STB Award, we feel it is important to explain how that logic is flawed.

Whereas, Neutral VanDagens failed to answer or expand upon how after twenty years with the B&O Agreement being in-place and applied at CSX Rougemere Yard, just as the framers (Carrier members and Organization members) of the Implementing Agreements intended. Simply put, Neutral VanDagens erred when ruling that the Conrail Detroit Shared Assets “Operating Agreement” should be in place as the governing Agreement. Furthermore, it was never explained how a “billing agreement” between the railroads would supersede or somehow negate the governing

Collective Barraging Agreements in place. Moreover, the Organization maintains that the CSX Rougemere Yard, although in the proximity to, was not actually part of the Conrail Shared Assets Area (“SAA”). This so called “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). In the Division Award concurrence with Neutral VanDagens, it is clear that premise of the decision ignored some of the simplest, 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. As cited in the Division Award, the Organization’s Exhibit F page 12 contains pertinent portions of FD 33388 Volume 3B of 8 that clearly define the Detroit Shared Assets area in clear language. This language when accompanied with the color-coded map on page 13, leaves no doubt to what is encompassed in the Detroit SAA. Below is both the map and written portion detailing out what the Shared Assets Area is (SSA is colored blue):

4.1.3 Detroit, MI Present Operation

Conrail: The Detroit Shared Assets Area is comprised of 85 route miles of track from Trenton, MI (MP 20) to Utica, MI (end of track), including; Terminal West Industrial Track to West Belt JCT, Terminal East Industrial Track, The Lincoln Secondary and Conrail’s Michigan Line to “CP-Townline (MP 7.4) and all other Conrail trackage within these boundaries. Detroit Shared Assets facilities are shown in Figure 13.4-3.



As noted above, CSX Rougemere yard is not color-coded blue, but, rather, it 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 Yard and those employees (and their assignments) fall under the 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 Majority 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 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" 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 concurrence of the Majority, that the agreed upon billing methods between the railroads would now somehow override the Collective Bargaining Agreement is not one of sound judgment. To give any weight to the findings of Neutral VanDagens, and the Majority's concurrence 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 of CSX employees, regardless of the agreement rule in question. Clearly, this concept cannot logically occur, and in the STB Section 11 Committee Award, 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 stated in the STB Section 11 Committee 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, 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 the STB Section 11 Committee Award implies in their decision that B&O Rule 106 (interchange rule) is the only rule that would not apply at Rougemere Yard, 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 under the RLA and should not have been dismissed for lack of jurisdiction. What is more, if CSXT had believed their own position to be true, they would have asserted this position long before this dispute arose, but, instead, the Carrier sat silent to the fact since implementation of the Conrail acquisition on June 1, 1999.

Finally, contrary to the logic laid out in by the Neutral in the STB Decision, 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, but, 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 abundance 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 Yard 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, the 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, the Majority’s findings are unsound and illogical in finding that it lacked the jurisdiction to rule upon the Carrier’s replacement of the CSX Y122 with a Conrail yard assignment for transfer or interchange work in violation of the governing agreement rules and concurrence with the STB Section 11 Committee Award. Consequently, the Majority’s 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.

For the foregoing reasons, we dissent from the Majority’s findings and conclusions in this case.

Respectfully submitted,

David B. Wier, Jr

David B. Wier, Jr.
Labor Member, NRAB First Division

Jamie C. Modesitt

Jamie C. Modesitt
Labor Member, NRAB First Division

STB Finance Docket No. 33388 (Sub-No. 102)
CSXT Motion to Withdraw Petition and Amended Petition

EXHIBIT NO. 2

**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

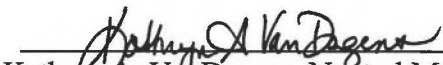
Conrail Detroit SAA Operating Bulletin. This interchange service is scheduled to begin on November 11, 2017.” The Organization contends that the affected employee(s) were entitled to an equitable percentage of the interchange work between CSXT and Conrail, pursuant to the B&O agreement.

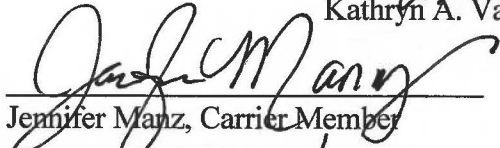
The Carrier responded that despite this statement to the contrary, this was not interchange work because any cars handled by Conrail stayed in CSXT’s account, as Conrail only acted as an agent for CSXT. An interchange occurs only when cars are transferred from the account of one carrier to another. *See, 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**

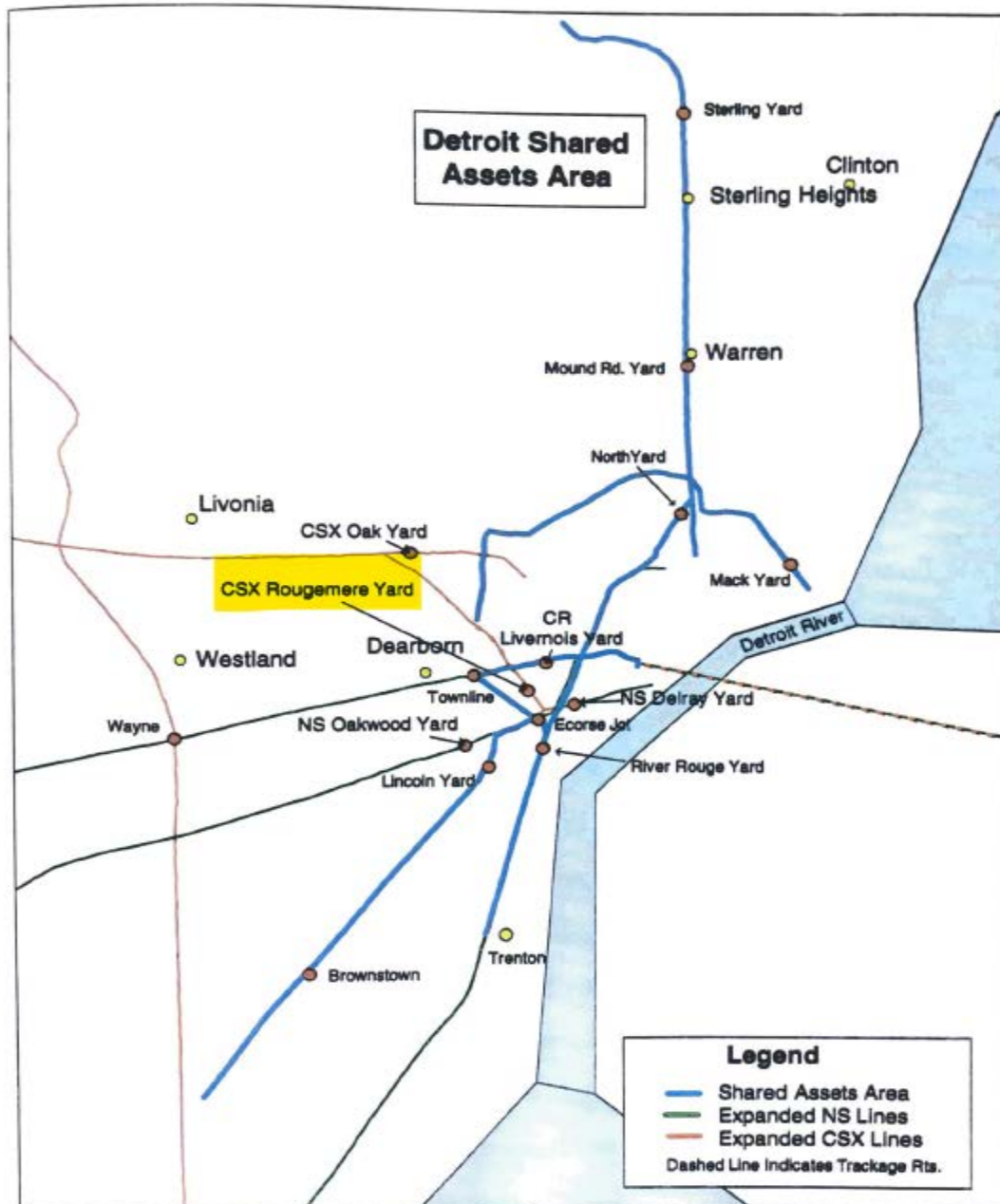
The Organization is compelled to dissent the Award of NMB assigned Neutral, Kathryn A. VanDagens, for the reason set out below.

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.

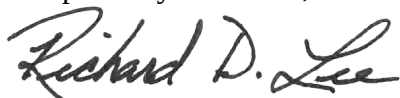
Finally, contrary to the logic laid out in this decision by the Neutral, the approved “Conrail transaction” in 1998 did not address any CBA impediments, because simply none existed. The Neutral stated, in the decision, that the STB-approved transaction overrides conflicting obligations

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