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

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

Dear Ms. Brown,

This is regarding the above-captioned matter where CSX Transportation, Inc. (“CSX”) has filed a Petition for Declaratory Order and Cease and Desist Order. Enclosed for electronic filing is the International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division’s Response to CSX’s Motion to Withdraw the Petition and Amended Petition for Declaratory and Cease and Desist Orders of CSX.

Please do not hesitate to contact me with respect to any questions or concerns.

Sincerely,

/s/ Shawn M. McKinley
Shawn M. McKinley
Assistant General Counsel for SMART-TD

Cc: Ronald Johnson, Counsel for CSXT

CERTIFICATE OF SERVICE

The undersigned declares that the foregoing was served upon the following by electronic mail on December 28, 2022.

Ronald Johnson
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/s/ Shawn M. McKinley
Shawn M. McKinley

Counsel for SMART-TD

BEFORE THE SURFACE TRANSPORTATION BOARD

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

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

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

I. INTRODUCTION AND FACTUAL BACKGROUND

As this is now the third filing before the Surface Transportation Board (“STB” or “Board”) with respect to this matter, SMART-TD will briefly summarize the relevant procedural history and factual background of the matter, with the knowledge that all entities involved are well-acquainted with the underlying dispute. On June 15, 2021, CSX filed its Petition with the STB, seeking declaratory and cease and desist orders with respect to the appropriate arbitral forum for resolving a dispute over the abolishment of job Y122 which performed work between CSX’s Rougemere Yard to the Conrail Livernois Yard. After three-and-a-half years of claims filed by SMART-TD, CSX took the position that the matter was subject to Section 11 arbitration established in *New York Dock Ry. – Control Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). At that time, CSX invoked said procedures while SMART-TD progressed the claims it had filed to the National Railroad Adjustment Board (“NRAB”), which led to CSX’s filing of its Petition.

SMART-TD awaited the STB’s decision with respect to the Petition and engaged in good faith with Section 11 arbitration, where on or around June 27, 2022, Neutral VanDagens issued an award on the matter. That award stated that the Carrier’s actions were an operational change permitted by the Conrail transaction and that no violation occurred and no remedy is required. Notwithstanding the foregoing, while the matter was still pending before the STB, SMART-TD continued to progress the filed claims to the NRAB for arbitration.

On July 29, 2022, CSX filed its Amended Petition with respect to its initial Petition, still seeking a cease and desist order as it had originally, but withdrawing its request for a declaratory order following arbitration under the Article I, Section 11 process. The Parties fully briefed that issue before the STB, just as they had with respect to the Petition. At that time, CSX still sought a cease and desist order with respect to arbitration before the NRAB, but self-servingly withdrew its request for a declaratory order now that it had achieved its desired result under Section 11 arbitration. SMART-TD argued that the Board should still issue a decision with respect to the appropriate forum for the reasons stated in its response to CSX's Petition.

Neutral Jacobs issued an award dated December 8, 2022, under NRAB procedures, dismissing the claim, relying on the award issued by Neutral VanDagens with respect to jurisdiction. Now, CSX has filed the present Motion, seeking to stop the STB from issuing a decision with respect to the jurisdictional issue CSX itself brought before it, and which has been exhaustively briefed and ripe for judgment.

II. ARGUMENT

SMART-TD's position with respect to the current Motion remains substantially similar to its position with respect to CSX's Petition and Amended Petition. Put succinctly, CSX sought a ruling from the Board with respect to the jurisdictional dispute when it filed its Petition.¹ Once it achieved the result it desired before Neutral VanDagens, it then asked the Board to ignore the substantial filings made by both parties and further disregard its request for the STB to issue a finding with respect to jurisdiction in its Amended Petition. Now, it argues that SMART-TD

¹ Of note, CSX waited three-and-a-half years to take its present position, then aggressively pursued the matter before the Board without any meaningful engagement with SMART-TD representatives to attempt to resolve the matter.

failed to appeal the award issued by Neutral VanDagens, self-servingly ignoring the fact that the matter has been fully briefed before the Board and pending decision since July of 2021. For the reasons stated herein, and in SMART-TD's responses to the Petition and Amended Petition, CSX's arguments are without merit, and the Board should issue a decision with respect to the question of jurisdiction.

A. CSX's Argument With Respect to Failing to Appeal the Award Are Without Merit.

CSX argues that SMART-TD's failure to formally appeal the award by Neutral VanDagens supports its Motion entirely ignores the fact that the question of jurisdiction has been before the Board for a year-and-a-half. CSX argues that "Board precedent requires that parties first present all issues in Section 11 arbitration, including whether Section 11 arbitration is appropriate... [o]nly 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." (Motion at pg. 22). Essentially, CSX argues that while it invoked the current proceedings before the Board well before Article 11 arbitration, SMART-TD is now foreclosed from receiving a decision on the matter since CSX has achieved its desired result and SMART-TD has not sought review from the Board on the matter. The logic is circular and self-serving,² as the Board is entirely within its

² For example, CSX argues that SMART-TD failed to raise its argument under Section 4 with respect to notice is now waived because it was not raised in the Article 11 arbitration. (Motion at pg. 20). CSX's position is therefore, although SMART-TD timely raised and fully briefed that argument before the STB as a result of CSX's request to the Board for relief, such is to now be disregarded because SMART-TD did not raise the same argument at arbitration while it was pending here, and as a result, it can no longer be considered by the Board, though the argument was properly raised before the Board in its response to CSX's Petition. The difficulty in following is natural and underscores the lack of logic or consistency in CSX's actions throughout this dispute, where it waited nearly four years before invoking Article 11, went to the Board for relief, then sought to alter its request for relief when it received a desirable result at arbitration, and now seeks to withdraw the matter entirely from the Board's consideration. The continuous

authority to issue a decision with respect to jurisdictional question. Indeed, CSX provides no authority to support any contrary finding.

CSX cites no authority under remotely similar facts as here that supports its argument. No authority raised by CSX has a similar procedural history as exists here. If CSX had simply invoked Section 11 arbitration and followed those procedures, been successful at arbitration, and SMART-TD had then failed to appeal, its argument now would have merit. That is not the case. Rather, CSX sought an order from the Board, withdrew that request because it was successful at arbitration, and continues to engage in the gamesmanship that has been present throughout this matter. In the interim, the matter has been awaiting decision by the Board since before the Section 11 arbitration even began. Such should not be rewarded, and nothing forecloses the Board from issuing a decision as to CSX's Petition.

B. The Awards Issued With Respect to This Dispute Do Not Foreclose Board Action.

The procedural history of this case is unique. While CSX argues that “the unappealed VanDagens Section 11 Award and Jacobs NRAB Award render the relief requested by CSXT moot.” (Motion at pg. 22). This is inaccurate, and the reliance on awards issued before the STB provided a decision on the matter is typical to the procedural gamesmanship demonstrated by CSX beginning in 2017 when it first announced the abolishment of job Y122.

In the event the Board has concerns over issuing a decision with respect to CSX's Petition due to the existence of the VanDagens and Jacobs arbitration awards, such should not dissuade the Board from acting. While CSX apparently takes the position that the VanDagens

gamesmanship from CSX may be good for attorney coffers but should not be rewarded by the Board.

award is now final and binding, it only cites to *New York Dock* for support of such a finding. (Motion at pg. 21). The facts and circumstances of *New York Dock* differ substantially from here, and certainly the Board is well within its authority to issue a decision under the circumstances as currently exist to issue a finding with respect to jurisdiction that obviates the award issued by Neutral VanDagens. Put simply, nothing in any way forbids the Board from acting with respect to the matter, including issuing a decision that renders the VanDagens award moot.

Further, any mention of the award issued by Neutral Jacobs under NRAB procedures has no bearing whatsoever on the present matter. While there, Neutral Jacobs found that Section 11 applied, SMART-TD has until December 8, 2024, to seek to vacate that award under 45 U.S.C. § 152 First(r). A finding by the Board in favor of SMART-TD's position would allow SMART-TD, if necessary, to proceed to district court and vacate the award on the basis of lack of jurisdiction. Accordingly, the awards in no way forbid the Board from acting or in any way render CSX's Petition as moot.

III. CONCLUSION

For the reasons stated herein and in SMART-TD's responses to CSX's prior Petition and Amended Petition, SMART-TD respectfully requests that the Board issue a decision in the matter, finding that the dispute is not subject to the jurisdiction of the Board.

Respectfully Submitted,

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Counsel for Respondent SMART-TD

CERTIFICATE OF SERVICE

I certify that on this 28th day of December, 2022, a true and correct copy of the foregoing document was served on counsel for all parties of record listed below via email:

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