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June 14, 2018

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By Hand-Delivery

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ENTERED
Office of Proceedings
June 14, 2018
Part of
Public Record

Re: Jimmy Lee Waneck and Starr Swearingen Waneck, et al.—Pet. for
Declaratory Order, STB Fin. Docket No. 36167

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter is an original and ten copies of CSX Transportation, Inc.'s Petition for Reconsideration. A check for the filing fee is enclosed.

Please date-stamp the extra copies of the Petition and return them to our messenger. Thank you for your assistance in this matter. If you have any questions, please contact the undersigned.

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Enclosures

Sincerely,



Matthew J. Warren

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36167

**JIMMY LEE WANECK AND STARR SWEARINGEN WANECK, ET AL.
– PETITION FOR DECLARATORY ORDER**

**CSX TRANSPORTATION, INC.’S PETITION FOR
RECONSIDERATION**

I. Preface and Summary of Argument

The Board’s May 25, 2018 Decision¹ reached the right result. The Board correctly reasoned that it should deny a Petition for Declaratory Order asking the Board to opine on settled preemption issues that had twice been before the U.S. District Court for the Southern District of Mississippi (“District Court”), but where the District Court had not referred any issues to the Board and in fact had already made its decision on preemption.

But after reaching that right result, the Board strayed when it offered blanket guidance to the District Court that section 10501(b) does not preempt “rail-safety related” claims. This sweeping assertion is located in two paragraphs at the top of page 4 of the *Decision*. See *Decision* at 4 (“Guidance”). We are confident it was unintentional, but the Guidance plainly conflicts with well-settled agency precedent and controlling federal authority. Moreover, not only did the District Court not ask for any such guidance, it had already ruled on the preemption issues and denied a motion to reconsider that ruling before the Board issued its guidance. The District Court followed binding precedent from the Fifth Circuit, which is consistent with

¹ *Jimmy Lee Waneck, at al.–Pet. for Declaratory Order*, STB Fin. Docket No. 36167 (served May 25, 2018) (“*Decision*”).

prior ICCTA preemption decisions from the Board and the federal courts, but which cannot be reconciled with the Guidance. See *Waneck v. CSX Corp.*, No. 17-cv-106, 2018 WL 1546373, at *5 (Mar. 29, 2018) (citing *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 807 (5th Cir. 2011)).

If left in place, this unnecessary Guidance will create uncertainty and confusion. The Board should remedy this material error by withdrawing the “guidance paragraphs” of the *Decision*—specifically, the first two paragraphs of Page 4. There is simply no need for guidance to a federal court that correctly applied a broad body of law and concluded that some but not all of the state law claims were preempted by the ICC Termination Act (“ICCTA”). In the alternative, if the Board feels compelled to issue guidance to the court over settled legal principles, it should at a minimum clarify that: (1) it is not departing from controlling agency precedent that overlaps between ICCTA and Federal Rail Safety Act (“FRSA”) do not lessen the preemptive effect of section 10501(b); and (2) ICCTA preemption continues to apply to state law claims like those here that directly seek to regulate the design and construction of railroad tracks.

II. The *Decision* Materially Erred By Issuing Preemption “Guidance” to A District Court That Had Already Twice Ruled on Preemption.

In recent years the Board has occasionally responded to a petition for a declaratory order about a preemption issue by denying the petition but issuing some general, boilerplate guidance for the court and parties. Whatever the merits of this practice may be, issuing such guidance was plainly inappropriate and unnecessary here, where two federal district courts had fully and finally decided the preemption issues.

The Board has acknowledged that district courts are well-equipped to decide ICCTA preemption issues in the first instance. *Decision* at 3. That is exactly what the courts did here, well before the Board issued the *Decision*. The Texas plaintiffs

in the *Voigt* matter voluntarily dismissed their claims against CSXT in August of 2017, approximately nine months before the Board issued its May 23 Decision. And as CSXT notified the Board on March 30, 2018, the Mississippi District Court in the *Waneck* matter issued its order granting in part CSXT's motion to dismiss on the basis of ICCTA preemption on March 29, 2018. In doing so, the Mississippi District Court did not ask for the Board's assistance and did not delay its ruling to await the Board's decision (even though the Court was served with a copy of plaintiffs' March 5, 2018 Petition for a Declaratory Order nearly three weeks before entering its preemption order). Instead, the District Court applied binding Fifth Circuit precedent to hold that ICCTA preempts some, but not all, of the plaintiffs' claims, specifically negligence claims that "directly attempt[ed] to manage or govern a railroad's decisions in the economic realm such as the construction and operation of tracks." *Waneck*, 2018 WL 1546373, at *5 (citing *Elam*, 635 F.3d at 807).

Moreover, the District Court denied the plaintiffs' motion for reconsideration of the preemption ruling on April 26, 2018, nearly one month before the Board issued the Guidance. The Court explained that the plaintiffs merely "proffer[ed] conclusory assertions of errors of law and cit[ed] in support the same cases the Court previously considered in reaching its decision." Order Denying Plaintiffs' Motion for Reconsideration of Memorandum Opinion and Order, *Waneck v. CSX Corp.*, No. 17-cv-106, ECF No. 154, at 5 (S.D. Miss. Apr. 26, 2018). The plaintiffs have not filed an interlocutory appeal from this ruling, and the deadline to do so has now expired. See FED. R. CIV. P. 5(a)(2); 4(a)(1)(A) (providing 30 days to file such an appeal).

Simply put, by the time the Board issued the Guidance, there was no longer an active preemption dispute for the Board to help resolve. The Decision's provision of "guidance to the court" to "assist in the resolution of this dispute" was therefore unnecessary and unwarranted, and it constituted a material error. The Guidance

plainly could not “assist in the resolution” of preemption questions that were decided well before the Board issued the Guidance. It was a material error for the Board to include the Guidance in the Decision, and it should be withdrawn.

III. The *Decision*’s “Guidance” Directly Contradicts Board Precedent and Misstates Settled Law.

The Board’s desire to offer guidance and assistance to a federal district court judge who did not seek its help, had already conclusively decided the issue, and is presiding over ongoing litigation might have been harmless had the Guidance been clear and legally correct. It was neither.

The Guidance makes the sweeping assertion that no claims in cases that are “rail-safety related” can be preempted by section 10501(b). *Decision* at 4. That assertion is inconsistent with prior holdings by the Board and the federal courts, which have recognized that the intersection of ICCTA preemption and FRSA preemption is a nuanced inquiry that requires careful harmonization in order to carry out Congress’s intent. Indeed, that is precisely the sort of harmonization that the District Court performed in this case to find that ICCTA preempted certain of plaintiffs’ claims aimed squarely at the design and construction of CSXT’s tracks, but that CSXT had not shown that either ICCTA or FRSA preempted other claims related to CSXT’s train and dispatching operations. The Guidance’s contrary suggestion that ICCTA can have no relevance to any of the claims in this case is incorrect, and it should be withdrawn.

The Board’s decisions do not support the Guidance’s assertion that any federal preemption questions concerning “rail safety-related claims . . . are governed by what is cognizable under FRSA, including § 20106(b), not § 10501(b).” *Id.* On the contrary, the Board has explicitly held that ICCTA preemption extends to regulations that are issued in the name of “rail safety.” The Board’s leading case for this point is *CSX Transportation, Inc.–Petition for Declaratory Order*, STB Fin.

Docket 34662 (served Mar. 14, 2005) (“*CSX I*”). After the District of Columbia enacted a law preventing railroads from transporting hazardous material through the District, the Board issued a declaratory order holding that, although section 10501(b) must be “harmonized” with other federal statutes, “states or municipalities are not free to impose any requirements that they wish on a railroad in the name of police power.” *CSX I* at 10. The Board went on to explain that “contrary to the District’s and the Sierra Club’s claims, section 10501(b) applies even though other federal agencies have responsibility over rail safety and national security matters.” *Id.* (emphasis added). And the Board explicitly adopted the U.S. Department of Transportation’s argument that ICCTA preemption and FRSA preemption “overlap” in different matters, and that this overlap did not lessen the preemptive effect of either provision:

As U.S. DOT points out, the fact that the preemption contained in section 10501(b) overlaps with the preemptions contained in FRSA and HMTA does not lessen the preemptive effect of section 10501(b) or vice-versa. *Tyrrell*, 248 F.3d at 523 (both the Board and FRA have jurisdiction over railroad safety and the ICCTA and FRSA preemptions should each be taken into consideration to determine whether a particular action is federally preempted).

Id. The Guidance’s suggestion that ICCTA preemption is somehow supplanted by FRSA for any safety-related matter is completely at odds with *CSX I*’s holding.

The Board reiterated its holding on reconsideration. *See CSX Transp., Inc.—Pet. for Declaratory Order*, STB Fin. Docket 34662, at 4-5 (served May 3, 2005) (“*CSX II*”) (denying requests for reconsideration and reopening of the decision). The Board specifically rejected arguments that its application of ICCTA preemption to a local safety regulation on hazardous materials transportation “wrongly ignored precedent regarding the role of other relevant federal statutes and forums.” *Id.* The Board explained that “[m]ultiple statutes can be applied in complementary fashion,

including, for example, regulation of railroad safety under FRSA and the Hazardous Materials Transportation Act.” *Id.* at 6.

Nor can the Guidance be reconciled with the Board’s decision in *Thomas Tubbs, et al.—Petition for Declaratory Order*, STB Fin. Docket No. 35792 (served Oct. 31, 2014). The *Tubbs* plaintiffs brought a variety of state law tort claims against BNSF Railway Company, including negligence per se based upon alleged violations of FRA regulations. The Board decided that all of the tort claims were preempted by ICCTA except for the one that relied upon FRA regulations, because harmonization requires solicitude for federal regulations that “do not directly conflict with the uniform federal regulation of railroads under the Interstate Commerce Act.” *Id.* at 7. This is because “where there are overlapping federal statutes, the Board attempts to harmonize the two statutes, with each statute given effect to the extent possible.” *Id.* (emphasis added). *Tubbs* thus recognizes that ICCTA could preclude even FRA regulations when they *do* “directly conflict with the uniform federal regulation of railroads.” *Id.* And it certainly did not find that state law claims could survive ICCTA preemption simply because they were “safety related.” The Guidance’s suggestion that ICCTA has no effect when the underlying dispute is related to rail safety, regardless of whether the regulations at issue are state or federal, cannot be squared with *Tubbs*.

The Board’s consistent treatment of the overlap between FRSA and ICCTA preemption in *CSX I*, *CSX II*, and *Tubbs* accords with that of federal courts. Federal courts have repeatedly held that a state regulation can be preempted by more than one federal statute, and that ICCTA preemption can apply to state law claims even when such claims may also be preempted by FRSA.²

² See, e.g., *Elam v. Kan. City S. Ry.*, 635 F.3d 796, 807-808 (5th Cir. 2011) (“Regardless of why the [plaintiffs] brought their negligence per se claim, the effect of the claim is to economically regulate [the railroad’s] switching operations . . . the [claim] therefore is incompatible with the ICCTA and not saved by the FRSA.”);

While the Guidance purports to reflect the holdings of other federal decisions—most notably *Tyrrell v. Norfolk Southern Railway Co.*, 248 F.3d 517 (6th Cir. 2001)—it does not accurately represent those holdings. Indeed, the Guidance now cites *Tyrrell* for the complete opposite proposition for which it was cited in *CSX I*. *CSX I* correctly interpreted *Tyrrell* as holding that FRSA and ICCTA preemption overlap and that both preemption regimes must be considered when evaluating whether a state law action is preempted. The Guidance, on the other hand, misstates *Tyrrell* as standing for the proposition that ICCTA has no application to regulations that are “rail-safety related.” Such a position has no support in *Tyrrell* or in any other federal or agency precedent.

The Guidance is quite right that *Tyrrell* adopted the position urged by the Board as amicus. *Decision* at 4. But it misstates what position the Board took as amicus. Neither the Board’s amicus brief nor *Tyrrell* itself suggested that § 10501(b) preemption does not reach any rail safety issues. On the contrary, the Board’s amicus position was that:

while state and local entities retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, *their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce.*

Maynard v. CSXT, 360 F. Supp. 2d 836, 843 (E.D. Ky. 2004), *aff'd*, Case No. 04-5448 (6th Cir. Feb. 7, 2005) (“Given the plain language of the ICCTA, even if the Plaintiffs were able to satisfy the savings provisions of the FRSA, the express preemption set forth in [ICCTA] would still be controlling.”); *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 160-161 (4th Cir. 2010) (because ICCTA preempted the City of Alexandria’s attempts to enforce a safety ordinance against a railroad, whether the City’s attempts were also preempted under FRSA was moot); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 n. 18 (5th Cir. 2001) (because negligence per se claim was preempted by ICCTA, whether it was also preempted by FRSA was “moot”); *Ayling v. BNSF Ry. Co.*, No. 14-cv-42, 2014 WL 12605590, at *3-4 (D.N.D. Oct. 20, 2014) (holding strict liability and nuisance claims preempted by both FRSA and ICCTA because the claim related to rail safety and because the liability “would unreasonably burden” the railroad’s operations).

Brief for the Surface Transportation Board as Amici Curiae Supporting Appellants at 15, *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517 (6th Cir. 2001) (emphasis added) (internal citation omitted). Thus, as amicus, the Board adopted the exact opposite position from that suggested by the Guidance. Even state “public health and safety” regulations are preempted by ICCTA when they foreclose or restrict “the railroad’s ability to conduct its operations or otherwise unreasonably burden interstate commerce.” *Id.* While under the particular facts of *Tyrrell* the court concluded that state regulations specifically related to railroad employee safety were not necessarily preempted, it never adopted the sweeping statement in the Guidance that ICCTA never can apply to safety-related claims. *Tyrrell*, 248 F.3d at 522.

The Guidance’s citation of *Tubbs* is equally unavailing. As discussed above, *Tubbs* held that ICCTA and FRSA preemption must be harmonized, “with each statute given effect to the extent possible.” *Tubbs* at 7. Nowhere did *Tubbs* suggest that ICCTA preemption could never apply to “rail safety-related claims.” Nor does the Guidance find support in *Iowa, Chicago & Eastern R.R. Corp. v. Washington Cty.*, 384 F.3d 557 (8th Cir. 2004). There, the Eighth Circuit was considering state regulations regarding the funding of highway bridge replacements and ruled that such regulations were not necessarily preempted by ICCTA, particularly when they appeared to be consistent with other federal statutes addressing highway bridge replacement. Nowhere did *IC&E* hold that ICCTA preemption could not be applied to “rail safety-related claims.”

In short, there is no support in prior Board or federal court decisions for the Guidance’s sweeping statement that “rail safety-related claims” can only be preempted by FRSA. It was material error for the Guidance to suggest a new, narrower interpretation of ICCTA preemption that breaks with prior Board

precedent without any acknowledgement of that precedent, any explanation for the changed interpretation, or any opportunity for public comment.

IV. The Guidance Should Be Withdrawn Because It Appears to Be Based on a Misunderstanding of the ICCTA Preemption Argument Decided By the District Court.

The Guidance should also be withdrawn because it appears to be based on incorrect assumptions about the nature of the state law claims that the District Court found to be preempted by ICCTA. CSXT did not argue that “all” of plaintiffs’ “state law tort claims” arising from the collision are preempted by ICCTA, as the *Decision* suggests. *See Decision* at 2. Rather, CSXT made a much narrower argument, firmly grounded in precedent, that ICCTA preempted claims related to the design, construction, and configuration of CSXT’s mainline tracks. CSXT never argued that all “rail safety related” claims are subject to ICCTA preemption, and the District Court never reached that conclusion. There was therefore no need for the Board to issue Guidance broadly opining on whether ICCTA preempted any claims related to “rail safety.” *Decision* at 4.

In both the Texas and Mississippi lawsuits, CSXT asserted only that ICCTA preempted plaintiffs’ claims *to the extent they arose from the design, construction, and configuration of the Main Street Crossing*.³ *See* CSXT Notice of Removal at 3, *Voigt v. CSX Transportation Inc.*, No. 3:17-cv-01018, ECF No. 1 (N.D. Tex. filed March 12, 2017) (“Voigt Notice of Removal”); CSXT Mem. in Support of Motion to Dismiss at 1, 7-10, *Waneck*, No. 17-cv-106, ECF 10 (S.D. Miss.

³ Contrary to the *Decision*’s statement at 1-2 that the plaintiffs brought mere “maintenance” claims, the *Waneck* District Court correctly held that these claims “are in “substance and reality claims arising out of the design and construction of the crossing, making them completely preempted.” *Waneck v. CSX Corp.*, No. 17-cv-106, 2018 WL 1546373, at *6. Given that the District Court is significantly closer to the pleadings and facts in this case, the Board’s seeming rejection of the District Court’s conclusion should likewise be withdrawn.

filed Apr. 18, 2017) (“Waneck Motion to Dismiss”). CSXT challenged the plaintiffs’ remaining claims on other, non-ICCTA grounds. *See Voigt* Notice of Removal at 7 (asserting that the Court could exercise supplemental jurisdiction over remaining claims not preempted by ICCTA); Waneck Motion to Dismiss at 1, 7-10 (asserting that ICCTA preempted plaintiffs’ claims relating to “rail crossing configuration, maintenance and operation” while FRSA preempted “claims as to train operations and CSXT’s obligations over rail crossings.”).

Both district courts agreed with CSXT, concluding that ICCTA preempts plaintiffs’ state law claims to the extent they arise out of the Main Street Crossing’s “design, construction, and configuration.” *See Waneck*, 2018 WL 1546373, at *5; Order Denying Motion to Remand at 8-11, *Voigt*, ECF No. 31 (N.D. Tex. June 19, 2017). In doing so, the district courts applied well-settled law that ICCTA preempts claims arising from “the slope or other features of the embankments for railroad tracks themselves.” *Waneck*, 2018 WL 1546373, at *5 (citing *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012)); *Voigt*, ECF No. 31 at 8 (same). That was particularly so here, where the plaintiffs’ claims were predicated not upon any federal regulations governing the “design, construction, and configuration” of the Main Street crossing, but rather on a Mississippi state law.

Similarly, the courts correctly rejected plaintiffs’ arguments that ICCTA does not apply simply because these cases involve personal injury claims arising from a collision between a bus and a train. *Waneck*, 2018 WL 1546373, at *4 (citing *Elam*, 635 F.3d at 807); *Voigt*, ECF No. 31 at 6-11 (same). The *Waneck* District Court further recognized the plaintiffs’ remaining claims were governed by FRSA. *Waneck*, 2018 WL 1546373, at *6-7.

In other words, the District Court already correctly “harmonized” ICCTA and the FRSA. Consistent with binding Fifth Circuit precedent and the Board’s previous holdings, the District Court issued a narrow holding that only applied ICCTA

preemption to claims about the construction, design, and configuration of CSXT's tracks. To the extent that the Guidance was based on a belief that CSXT had asked for a broader ICCTA preemption ruling or that the District Court had granted such a broader holding, the Guidance was mistaken. For this additional reason, the Guidance should be withdrawn.

CONCLUSION

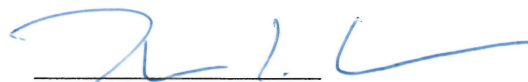
Over the past year, the Board has embarked on a long overdue effort to improve its decisionmaking process by soliciting additional feedback from stakeholders and by relaxing its *ex parte* communication rules. This is a wise path. Better communications between the members and stakeholders foster better decisionmaking. And it avoids the members being asked to render decisions in an echo chamber, without the benefit of an informed discourse with stakeholders.

This case, in contrast, illustrates the great care the Board should take before it declines to begin a declaratory order proceeding while nevertheless weighing in with "guidance." Declaratory order proceedings provide the Board the opportunity to fully consider the implications of its decisions with the benefit of complete briefing from interested parties and a full understanding of the facts. In contrast, short guidance statements that attempt to apply the law to facts undeveloped before the Board risk creating significant tension in the Board's jurisprudence. Whether unintentional or not, changes to the Board's interpretation of ICCTA should not (and cannot) be made through informal guidance documents.

In this case, the federal district court did not seek the Board's input, and it has resolved the preemption questions. Rather than allowing the Court to decide the question, the Board intervened with Guidance that appears to depart from its own precedent. There is no reason in this instance for the Board to expend its scarce resources and undertake the detailed legal analysis – with full input from interested parties – needed to offer an advisory opinion on the interplay between

ICCTA and FRSA. Instead, the Board should remove the Guidance that it included in the first two paragraphs of page 4 of the *Decision* and close this proceeding.

Respectfully submitted,



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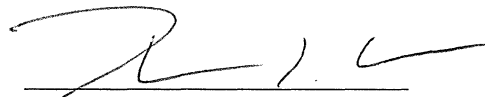
Counsel to CSX Transportation, Inc.

Dated: June 14, 2018

CERTIFICATE OF SERVICE

I certify that on this 14th day of June, 2018, I caused a copy of the foregoing Petition for Reconsideration to be served by first class mail or more expeditious method upon:

Thomas W. Wilcox
Edward D. Greenberg
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Matthew J. Warren