

**BEFORE THE
SURFACE TRANSPORTATION BOARD****ENTERED**
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Part of
Public Record

STB Docket No. FD 36167

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

REPLY TO PETITION FOR RECONSIDERATION**I. Preface and Summary of Argument**

On June 14, 2018, CST Transportation Inc. (“CSXT”) filed a Petition for Reconsideration (“Petition”) of the Board’s May 25, 2018 Decision in this declaratory order proceeding (“*Decision*”). The Petition is remarkable in many respects, both in tone and substance. Its condescending tone is especially remarkable in the context of this overall matter, where it is undisputed that CSXT’s maintenance practices caused a road crossing on railroad right-of-way owned and solely maintained by CSXT to degenerate to the point that a tour bus operating trying to drive across the track at a heavily used grade crossing became stuck on the raised hump that CSXT alone created. Then, while the people on the bus were trying to escape it, a freight train operated by CSXT failed to stop, slammed into the bus, destroying it and killing a number of the passengers and seriously injuring many more. CSXT’s Petition is the latest in a chain of litigation procedural maneuverings it has engaged in before state and federal courts in Mississippi and Texas to avoid any liability for the harm its maintenance of the crossing and the operation of its train inflicted upon the Petitioners. CSXT seeks reconsideration of the Board’s proper and important provision of guidance to Petitioners and the District Court of the District of Mississippi on disputed

federal preemption issues critical to the court cases brought as a result of this incident, and for cases that have yet to be filed.

CSXT condescendingly asserts that it is “confident” the Board’s guidance was “unintentional.” This insinuation that the Board was somehow lax and unserious about this very serious issue that has involved the loss of life and injuries to Petitioners is jarring. The Petition’s overall lecturing tone should be also offensive to the Board in and of itself, but it should be even more so in these circumstances, where the obvious goal of CSXT has been, and continues to cut off attempts to hold it accountable for its actions in a fair trial by attempting to misuse federal preemption of any state economic regulation to shield it from any liability for even willfully negligent behavior. Substantively, the Petition is wrong on many levels, which Petitioners address in this Reply.

Under 49 CFR §1115.3(b), a petition for reconsideration “will be granted only upon a showing of one or more of the following points: (1) The prior action will be affected materially because of new evidence or changed circumstances. (2) The prior action involves material error.” CSXT’s Petition is based solely on an allegation that the Board committed “material error” when it denied the Petition for Declaratory Order but nevertheless included guidance clarifying the interplay between §10501(b) and Federal Rail Safety Act (“FRSA”) preemption, an issue that Board had previously directly addressed in only one other decision. The provision of requested guidance in response to petitions for declaratory orders is a well-established practice of the Board in numerous declaratory order proceedings, including cases involving CSXT.¹ CSXT accordingly

¹ *SEA-3 Inc.—Pet. for Declaratory Order*, FD 35853 (STB served March 17, 2015); *14500 Limited LLC—Pet. for Declaratory Order*, FD 35788 (STB served June 5, 2014); *see also Adrian & Blissfield Rail Road Co.—Pet. for Declaratory Order*, FD 36148 (STB served January 31, 2018); *Washington & Idaho Railway—Pet. for Declaratory Order*, FD 36017 (STB served March 17, 2017); *Pet. of Union Pacific Railroad Co. for Declaratory Order*, FD 35960 (STB served September 30, 2016).

bears a heavy burden to demonstrate that the Board committed “material error” in following this well-established agency practice in this proceeding. CSXT falls well short of meeting this burden because (1) the issues presented in the Petition for Declaratory Order and addressed in the *Decision* were not mooted by the actions of the court in the *Waneck*² case, and the guidance supplied by the Board was to all Petitioners, not just those who are plaintiffs in that proceeding; (2) the guidance provided by the Board is fully supported by applicable Board and judicial precedent; (3) the Board did not misunderstand the actions of the court in the *Waneck* case, which are of marginal relevance in any event; and (4) the guidance is both legally accurate and correct from a policy standpoint.

II. Argument

A. The Issues Presented in the Petition for Declaratory Order and Addressed in the *Decision* are Before the Mississippi Court and Will Soon be Before Other Courts

CSXT first asserts that it was material error for the Board to issue the guidance in the *Decision* because, in CSXT’s view, by the time the Board issued the *Decision*, “there was no longer any active preemption dispute for the Board to help resolve.” Petition at 3.³ In a nutshell, CSXT argues that because the Board’s guidance was supplied after certain actions of the judge in the *Waneck* case pending in the U.S. District Court for the Southern District of Mississippi, the Board committed material error. Tellingly, CSXT cites no STB decisions or judicial precedent in support of this critical underpinning of its Petition. There is in fact no legal basis for CSXT’s position, but in any event CSXT’s assertion that there is no longer an active preemption dispute in the *Waneck* case is flatly wrong. The issue of the interplay between 49 U.S.C. §10501(b) and FRSA

² *Starr Swearingen Waneck and Jimmy Lee Waneck v. CSX Transportation, Inc.*, C.A. No. 1:17-cv-00106.

³ While CSXT chastises the Board for providing guidance even though the court “did not ask for the Board’s assistance” Petition at 3, this lecturing has no legal significance because it is well settled law that such a request is not required. *Adrian & Blissfield Rail Road Co.—Pet. for Declaratory Order*, FD 36148 (STB served Jan. 31, 2018); *Ingredion Inc.—Pet. for Declaratory Order*, FD 36014 (STB served September 30, 2016).

preemption has not been finally decided in the Mississippi Court case. The attached affidavit of William M. Cunningham, counsel for plaintiffs in the *Waneck* case, explains that plaintiffs intend to soon file a motion to remand the case to state court for lack of subject matter jurisdiction as it relates to the crossing maintenance issues previously addressed by the court. Mr. Cunningham further explains that the plaintiffs will seek additional or alternative relief, including referral of the preemption issues to the Board and/or reconsideration of the court's prior decisions on the preemption issue.

Moreover, as Petitioners explained in their Response to CSXT's Reply to Petition for Declaratory Order ("Response"), many of the Petitioners were plaintiffs in the *Voight* case filed in Texas state court but removed to the U.S. District Court for the Northern District of Texas subsequent to CSXT's notice of removal.⁴ Response at 4. As explained in the Response, after the United States Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, et al.*, 137 S. Ct. 1773 (2017), the *Voight* plaintiffs non-suited their claim against CSXT in Texas, so that they could later file suit against CSXT in a state that clearly has jurisdiction. *Id.* As explained in the attached Declaration of Mitchell A. Toups, counsel for many of the Petitioners who were plaintiffs in the *Voight* case, some or all of them will soon renew their state tort law claims against CSXT "in Mississippi or another appropriate forum." Contrary to the faulty premise of CSXT's Petition, the *Decision* - over CSXT's objection⁵ - provides guidance to *all* of the Petitioners, not just the plaintiffs and court in the *Waneck* case. The guidance provided to Petitioners who were plaintiffs in the *Voight* case will aid them and the

⁴ *Dee Voight, et al. v. CSX Transportation, Inc., et al.*, C.A. No. 3:17-cv-01018.

⁵ In its Reply to the Petition for Declaratory Order CSXT argued that the Petition was an "end run" around the Texas courts by the plaintiffs in the Texas District Court case and that this somehow interfered with the deliberations of the Mississippi District Court. See Reply at 4.

court(s) they file their actions in and should therefore remain in place for that reason alone. It would be a waste of time and scarce resources for the Board to “withdraw” the guidance it provided to these Petitioners because of actions taken by the court in the *Waneck* case, only to reissue such guidance after other Petitioners’ claims were renewed. To reaffirm what Petitioners stated in the Response, “[t]o the extent the STB can provide the clarity sought by *all* Petitioners on the interplay between FRSA and §10501(b) preemption, *all* affected parties, potential claimants, and relevant courts hearing claims resulting from this incident will benefit.” *Id.* at 4 (emphasis supplied). The *Decision* provided this requested clarity to all Petitioners, not just the Petitioners that are plaintiffs in the *Waneck* case.

Consequently, the Board did not commit material error by issuing the *Decision* providing the requested guidance after the court decisions referenced in the Petition. CSXT’s allegation is unsupported by any legal authority and is wrong from a factual standpoint, as well as a policy standpoint.

B. The Board’s Guidance is Consistent with Existing Board and Court Precedent

Having wrongly chastised the Board for issuing the guidance at all, CSXT next attempts to argue that the Board should “withdraw” the guidance because CSXT has interpreted the guidance to be contrary to existing precedent. Specifically, CSXT claims that in issuing the guidance the Board suggested “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.” Petition at 8-9. Whether the fact that the Board interprets existing precedent differently than one of the parties to a dispute can constitute “material error” is a dubious threshold question, and CSXT once again offers no authority in support of this claim. But in any event, CSXT is wrong.

In the *Decision* the Board’s guidance states, citing prior court and agency precedent, that the Interstate Commerce Commission Termination Act (“ICCTA”) and the FRSA must be construed *in pari materia*; that the Federal Railroad Administration (“FRA”) under FRSA exercises primary authority over rail safety; that the Petitioners’ state tort law claims are safety related, stemming from CSXT’s train colliding with a tour bus; and that therefore FRSA, not §10501(b), provides the applicable standard for assessing federal preemption of Petitioners’ “state law claims.” *Decision* at 4, primarily citing *Tyrrell v. Norfolk Southern Ry*, 248 F.3d 517 (6th Cir. 2001) (“*Tyrrell*”). The reference to “state law claims” in this passage of the Board’s guidance clearly refers to state law tort claims. This is plainly evident from the context of this proceeding, which sought a declaratory order seeking clarification as to the interplay between §10501(b) and the FRSA regarding questions of possible federal preemption of the state law tort claims arising out of CSX’s destruction of the tour bus and resulting death and injury to its passengers. Applying this precedent to the facts underlying the Petition for Declaratory Order, the Board determined that the “Petitioners’ [state tort law] claims here are safety-related claims, stemming from a train’s collision with a bus that resulted in death and injury.” It therefore concluded that “like the claims in *Tyrrell*, any federal preemption questions concerning such claims are governed by what is cognizable under FRSA, including 20106(b), not 10501(b).” *Decision* at 4.

In the face of this straightforward application of precedent, CSXT fundamentally misconstrues the *Decision* and the Board’s guidance to make “the sweeping assertion that no claims in cases that are ‘rail-safety related’ can be preempted by 10501(b).” Petition at 4. The Petition also wrongly expands the scope of the Board’s ruling, which specifically addressed the specific state tort law claims of Petitioners, to include the preemption of attempts by states to promulgate regulations that infringe on railroad operations in the name of safety. CSXT cites CSX

Transportation, Inc. – Petition for Declaratory Order, FD 34662 (STB served March 14, 2005) (“*CSXT I*”) as “the leading case for this point.” However, using *CSXT I* as the basis for its sweeping assertion that §10501(b) preempts all state tort actions based on allegations of railroad negligence is a red herring that has nothing at all to do with this proceeding.

Similarly, the cases included in footnote 2 of the Petition beginning with *Elam v. Kan. City S. Ry*, 635 F.2d 796 (5th Cir. 2011) (“*Elam*”) primarily deal with similarly unrelated state and local regulations or laws and are therefore also mostly irrelevant, despite CSXT’s attempt to rewrite their holdings. For example, CSXT misrepresents the holding in *Elam* by presenting a selectively edited quotation that, first, deletes nearly an entire paragraph discussing the court’s rationale for holding that a state *statute* was completely preempted by §10501(b), and then inserts the word “claim” in brackets where the actual quotation used the word “statute.” See 635 F.2d at 807-808.⁶ The liberties CSXT takes with the court’s actual holding in *Ayling v. BNSF R. Co.*, No. 14-cv-42, 2014 WL 12605590 (D.N.D October 20, 2014) (“*Ayling*”) are even more egregious. There, CSXT misleadingly combines the court’s separate and distinct holdings on FRSA and ICCTA preemption on separate counts into one conflated, misstated holding jointly dealing with “rail safety” and unreasonable burden on railroad operation. Moreover, *Ayling* actually *fully supports* the Board’s guidance in this proceeding. See *id.* at *4 (“In areas of railroad safety, the Eight Circuit instructs courts to read the ICCTA in conjunction with the FRSA: ‘the [FRA] under the FRSA exercises primary authority over rail safety; and therefore . . . the FRSA, not ICCTA, determines whether a state law relating to safety is preempted.’”) citing, *Iowa, Chicago & Eastern RR Corp. v. Washington Cty, Iowa*, 384 F.3d 557 (8th Cir. 2004) (“*IC&E*”), which is cited by the Board for

⁶ And, of course, the court found that the ICCTA did not preempt the simple negligence claim of those plaintiffs.

support of the guidance provided in the *Decision*.⁷ The rest of the cases cited by CSXT in footnote 2 of the Petition are similarly inapposite.

Accordingly, the Petition's discussion of *CSXT I* and the Board's holding on reconsideration of that decision is irrelevant and in any event proceeds from the flatly wrong premise that the guidance provided by the Board "suggest[ed] that ICCTA preemption is somehow supplanted by FRSA preemption for *any* safety-related matter." Petition at 5 (emphasis added). Moreover, while the Board in *CSXT I* did address the overlap of jurisdiction between the Board and the FRA under ICCTA and the FRSA, respectively, it is important to note that the *CSXT I* decision (as well the decision in that case on rehearing) preceded the enactment 2007 amendment to 49 U.S.C. §20106, in which Congress clarified that plaintiffs could properly pursue state tort law claims against railroads seeking damages arising out of alleged safety-related negligence.

CSXT also argues that the Board's discussion of *Tyrrell* and other precedent in its guidance paragraphs "does not accurately represent the holdings" of the cited cases. This argument is mystifying. As stated above, in the *Decision* the Board summarized the holding of *Tyrrell* as follows: "that ICCTA and FRSA must be construed *in pari materia*; that the FRA under FRSA exercises primary jurisdiction over rail safety; and that therefore FRSA, not 10501(b), provides the applicable standard for assessing primary jurisdiction over state law claims relating to rail safety." *Decision* at 4. This statement of the holding is indistinguishable (let alone materially different) from the Sixth Circuit's statement of its holding in *Tyrrell* that "the agencies' complementary exercise of their statutory authority accurately reflects Congress' intent for the ICCTA and FRSA to be construed *in para materia*," that "Congress vested the FRA with primary

⁷ CSXT's distortion of case holdings and quotations in its Petition is a continuation of similar efforts to mislead in its Reply to the Petition for Declaratory Order. See Response at notes 4 and 6.

authority over national rail safety policy . . .,” and that the Ohio ordinance at issue in the case “was related to rail safety and thus required preemption analysis under FRSA,” not §10501(b). 248 F.3d at 523.⁸

CSXT’s assertion that the Board’s guidance does not find support in *IC&E*, *supra*, is also wrong. On the contrary, the Eighth Circuit in *IC&E*, applying the standard adopted by the Sixth Circuit in *Tyrrell*, construed ICCTA and FRSA *in pari materia* to the facts before it, and concluded that a state’s reasons for directing IC&E to replace unsafe bridges over and under county roads “clearly include a safety component,” and that therefore the FRSA, not §10501(b) determined whether the directive was preempted by federal law. *Id.* at 560. Further, similar to the facts before the courts resulting from CSXT destroying the tour bus in this case after it became stuck on CSXT’s road crossing, the facts of *IC&E* involved unsafe crossings:

The reasons for replacing the bridges as stated in the stipulated record clearly include a safety component. For example, the risk that school buses and emergency vehicles will bottom out on a highway bridge is a safety issue, albeit a highway safety issue. If IC&E is arguing that “rail safety” for purposes of FRSA preemption does not include the highway safety risks created at rail crossings, that cramped reading of the FRSA is inconsistent with [applicable statutes and regulations] and common sense.

Id. at 560. The court’s holding in *IC&E* therefore provides ample support for the Board’s guidance in the *Decision* that, applying the standard of *Tyrrell*, *et al.*, to the state tort claims of the Petitioners, the claims are safety-related claims stemming from a train’s collision with a bus that

⁸ Also puzzling is CSXT’s interjection into its discussion of *Tyrrell* certain *dicta* set forth in *CSXT I*, which CSXT elevates to the Board “interpret[ing] *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.” Petition at 7. CSXT wrongly asserts this is “complete opposite” of the Board’s summary of the *Tyrrell* holding in the *Decision*. *Id.* Leaving aside the issue of what import to ascribe to the Board’s brief references to *Tyrrell* in *CSXT I*, CSXT provides no explanation of how construing two statutes *in pari materia* is “completely opposite” from considering two overlapping statutory regimes, as opposed to being the exact the same exercise. (See <https://legal-dictionary.thefreedictionary.com/in+pari+materia>. “Statutes *in pari materia* must be interpreted in light of each other since they have a common purpose for comparable events or items.”)

resulted in death and injury, and therefore the question of whether they are preempted is to be decided under the FRSA, not §10501(b).⁹

Also misplaced are CSXT's assertions that the Decision's guidance cannot be reconciled with its holding as to FRSA preemption in *Tubbs – Petition for Declaratory Order*, FD 35792 (STB served October 21, 2014) *aff'd*, 812 F.3d 1141 (8th Cir. 2015). In that proceeding, the Board, in response to the request of the petitioners for a finding that their FRSA-based claims were not preempted by §10501(b), reviewed the overlapping laws per *Tyrrell* and concluded §10501(b) does not preempt claims arising from FRSA regulations governing drainage under railroad tracks. Accordingly, the petitioners' state tort law claims based on alleged violations of the rules of the FRSA were not preempted by §10501(b). This holding was entirely consistent with 49 U.S.C. §20106(b), which explicitly states that “[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party . . . has failed to comply with the Federal standard of care established by a *regulation* or order issued by the Secretary of Transportation (with respect to railroad safety matters)” 49 U.S.C. §20106(b)(1)(A) (emphasis added). The discussion of *Tubbs* in the guidance in the *Decision* merely affirms the Board's recognition in *Tubbs* of FRSA's priority over ICCTA when examining the potential preemption of state law tort claims arising out circumstances involving alleged railroad negligence due to unsafe practices or operations in violation of the FRA's regulations.

⁹ See also, *Rawls, et al. v. Union Pacific R. Co.*, Case No. 1:09-CV-01037, 2012 WL 2803764, at *8 (W.D. Ark. July 10, 2012). (In a case involving a similar instance where a freight train collided with a truck at an unsafe crossing, the court, citing *Elam and IC&E, supra*, declined to find §10501(b) preemption. Citing *IC&E* with approval, the court, stated “[i]f railroad-bridge funding is a safety issue, then surely the crossing conditions claims in this case are too. And if the claims here are safety claims, then the ICCTA may not usurp the FRSA in this safety case. Construed together, the ICCTA has its place, and the FRSA has its own. But the ICCTA's place is not in this crossing-safety case.”)

In summary, the guidance supplied by the Board followed existing precedent and applied the standard first adopted in *Tyrrell*, and followed in *IC&E*, *Ayling*, and *Tubbs* to the facts underlying the Petition for Declaratory Order. Construing ICCTA and FRSA *in para materia* the Board concluded that the state tort law claims asserted by the Petitioners are “safety related claims” and therefore whether such claims are preempted are to be determined by the FRSA, not §10501(b). Despite CSXT’s protestations to the contrary, nowhere in the *Decision* did the Board expressly adopt a “new, narrower” rule that ICCTA preemption “*never* can apply” to state law tort claims that are somehow related to rail safety. *Id.* at 8 (emphasis added). To do so would require the Board to dispense altogether with the requirement in *Tyrrell, et al.*, that it construe ICCTA and the FRSA *in pari materia*. The Board clearly did not do so in the *Decision*.

There is thus no changed interpretation of prior precedent, and therefore no need for an explanation of the changed interpretation or opportunity for public comment.

C. The Board did Not “Misunderstand” the Decisions of the District Court

CSXT next argues that the Board should “withdraw” its guidance based on an assertion that, despite CSXT attaching several hundred pages of district court pleadings and decisions to its Reply, the Board was not capable of reading and understanding “the nature of the state law claims that the District Court found to be preempted by ICCTA.” Petition at 9. CSXT then proceeds to graciously provide the Board with what is apparently CSXT’s “Cliff Notes” version of CSXT’s arguments and the decisions of the Texas and Mississippi courts.

However, this summary misstates CSXT’s positions before the *Voight* and *Waneck* courts and is ultimately of marginal relevance anyway. For example, CSXT states it did not argue that all of plaintiffs’ state tort law claims arising from the collision are preempted by ICCTA. Petition at 9. However, as stated by the district judge in the *Voight* decision denying the plaintiffs’ motion to remand the case to state court, “CSXT claims the Interstate Commerce Commission

Termination Act ('ICCTA') preempts the *CSXT I* and *CSXT II* Plaintiffs' state law negligence claims and thus federal question jurisdiction exists.” Petition for Declaratory Order, Exhibit E, at 2. Clearly, CSXT specifically argued this position in the Texas court even though it now tells the Board it did not do so. CSXT’s additional assertion that the Board’s guidance is based on an incorrect assumption about CSXT’s positions in the *Waneck* case is curious, since the *Decision* clearly identified and recognized the existence of §10501(b) and §20106(b) issues in that case. *Decision* at 2.

CSXT’s additional assertion that the preemption arguments made by CSXT in the federal courts did not supply a reason for the Board “to issue Guidance broadly opining on whether ICCTA preempted any claims related to ‘rail safety,’” seriously misstates the question presented to the Board by Petitioners and the guidance supplied by the Board, as explained above. Moreover, the guidance provided by the Board was in any event provided in response to the request of Petitioners in their Petition for Declaratory Order, not in response to CSXT’s arguments in its pleadings in the court cases¹⁰ or the courts’ decisions. The Petition asked the Board to issue a declaratory order clarifying that state law tort claims arising out of alleged negligence of a railroad in maintaining its road crossings and operating its trains were not preempted by §10501(b) if they are based on any of the factors outlined in 49 U.S.C. §20106(b), and that to the extent such claims are raised, the proper forum for determining whether such claims are preempted is in the court in which the claims were raised. Consistent with well-established precedent, the Board issued its guidance to

¹⁰ This being said, the Board’s guidance is also appropriate due to CSXT’s assertion of inconsistent positions before the District Court and this Board, which added to the uncertainty over the appropriate preemption rules. Specifically, and as stated above, CSXT argued repeatedly before the Mississippi and Texas District courts that tort claims arising out of maintenance practices at humped crossings are *completely preempted* by §10501(b). However, in response to the Petition for Declaratory Order before the Board, CSXT changed its tune, and conceded that preemption disputes of the nature of those raised in the *Waneck* and *Voight* cases are to be decided on a case-by-case basis, i.e., whether the facts state action or regulation at issue “as applied” resulted in preemption. Reply to Petition for Declaratory Order at 6-7.

the Petitioners and the Mississippi District Court on the appropriate interplay between §10501(b) and FRSA preemption. This guidance is well within the scope of the questions raised by the Petition, and the Board has provided valuable guidance to the Mississippi court and to the Petitioners.

D. The Board's *Decision* is Also Sound Policy

In addition to being fully supported by Board and court precedent, the Board's guidance is sound as a matter of policy. The Petitioners' claims against CSXT arise from a situation where its maintenance practices at a highway crossing located on CSXT's right-of-way for its main line track resulted in layers of asphalt building up the roadway to a level that became unsafe for vehicles, including the tour bus at issue. Under these circumstances, a final finding that CSXT's crossing maintenance practices are preempted by §10501(b) would mean that *none* of CSXT's actions falling into the category of "maintenance," no matter how unsafe, could be challenged under state tort law, nor would they be reviewable under the FRSA. Rather, if §10501(b) preemption is determined, then the statute provides that "the remedies provided under [49 U.S.C. 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law." *14500 Limited LLC – Pet. for Declaratory Order*, FD 35788 (STB served June 5, 2014), slip op. at 3.

This preemption would then arguably apply even though a federal remedy may not exist under ICCTA for all instances where a state or local law is preempted. *Tubbs, supra*, slip op. at 7. Indeed, it is well established that ICCTA does not create a federal remedy for tort actions. *Trejo v. Union Pacific R. Co.*, Case No. 3:10-CV-00285, 2011 WL 309614 (E.D. Ark January 28, 2011) ("*Trejo*"), at *4, and cases cited therein; *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126, 1132 (10th Cir. 2007). Consequently, the guidance provided by the Board is supported by sound policy considerations, since by construing ICCTA and FRSA *in pari materia* on these facts and

clarifying that federal preemption questions concerning the Petitioners' state law tort claims are governed by FRSA, the Board has avoided the harsh result clearly sought by CSXT; namely that §10501(b) preemption leaves the Petitioners (or any future potential claimants who may be injured) with no remedy for their damages caused by CSXT's unsafe crossing maintenances practices, without even the option of testing whether remedies are cognizable under the FRSA, whose primary purpose is railroad safety. And this result would attach despite and in the face of the savings clause of 49 U.S.C. §20106(b), which was enacted for the specific purpose of clarifying that state tort law claims could properly be pursued for allegations of railroad violations of safety rules and practices and federal standards of care. *Id.* at *5 ("It would be strange indeed to conclude that the ICCTA, which is concerned with economic regulation rather than railroad safety, completely preempts a state tort action for personal injury when the FRSA, which is concerned with railroad safety, does not."). The Board's guidance on the proper interplay between §10501(b) preemption and FRSA prudently allocates the jurisdiction for adjudicating safety related state tort law claims determined pursuant to the *Tyrrell, et al.* analysis to either the courts or the FRSA, including issues of whether the claims are federally preempted by FRSA.

In summary, the outcome of adopting CSXT's distorted view of the applicable precedent and withdrawing the guidance provided in the Decision would be that Petitioners and other parties injured by unsafe railroad crossing maintenance practices would be completely foreclosed from pursuing claims for damages from the railroad's negligence - or even gross negligence - on safety related matters. CSXT's view is not supported by the applicable law, and it cannot be the result intended by the passage of the 2007 amendment to 49 U.S.C. §20106, and indeed it was not the intent of that statute. Petition for Declaratory Order at 11-12. For these reasons, the Board should reject CSXT's incoherent offer that the Board should modify its guidance to state "(1) it is not

departing from controlling precedent that overlaps between ICCTA and [FRSA] do not lessen the preemptive effect of 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.” Petition at 2. Not only is this proffered “clarification” a gross misstatement of the applicable precedent, it would produce the result expressly rejected by the Sixth Circuit in *Tyrrell*, namely that state tort law claims based on allegations of unsafe, negligent railroad practices and operations would be preempted by §10501(b) merely because the practice and/or operation “tangentially touches upon an economic area regulated under the ICCTA,” thereby implicitly repealing the savings clause of §20106(b). *Tyrrell*, 248 F.3d at 522-523; *accord*, *IC&E*, 384 F.3d at 560 (a determination that “rail safety” for purposes of FRSA jurisdiction includes “highway safety risks created at rail crossings” is, in part, “common sense.”).

III. Conclusion

For all the reasons set forth hereinabove, the Board should summarily deny CSXT’s Petition.

Respectfully submitted,



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Dated: July 5, 2018

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JIMMY LEE WANECK AND STARR
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-- PETITION FOR DECLARATORY ORDER

DECLARATION OF WILLIAM M. CUNNINGHAM, JR.

Pursuant to 28 U.S.C. § 1746, I, William M. Cunningham, Jr., declare as follows:

1. I am an attorney in good standing licensed to practice law in the State of Alabama and the State of Mississippi. I am also admitted to practice in the United States District Courts for the Middle and Southern Districts of Alabama, and the Northern and Southern Districts of Mississippi, the United States Courts of Appeals for the Fifth and Eleventh Circuits, the Court of Military Appeals (nka the United States Court of Appeals for the Armed Forces) and the Supreme Court of the United States of America. I also have been admitted *pro hac vice* in various other state and federal courts throughout the United States.

2. I am a shareholder and vice president of the law firm of Burns, Cunningham & Mackey, P.C. in Mobile, Alabama. I have practice law almost 44 years. I am AV peer review rated by the Martindale-Hubbell Law Directory. I am a Board Certified Civil Trial Advocate by the National Board of Trial Advocacy. My practice has focused on wrongful death cases, severe injury cases, medical mal-practice cases and business cases in state and federal courts throughout the United States.

3. I am counsel of record for Plaintiffs, Jimmy Lee Waneck and Starr Swearingen Waneck, against CSX Transportation, Inc. regarding a train collision with a bus on March 7, 2017 in Biloxi, Mississippi. The style of the case is *Starr Swearingen Waneck and Jimmy Lee Waneck v. CSX Corporation, et al.* CV-17-106-HSO-JCG pending in the Southern District of Mississippi. Plaintiff,

Starr Waneck, a passenger on the bus, was injured in the collision and her husband, Jimmy Lee Waneck, has asserted a loss of consortium claim in that case.

4. Attached to this affidavit is a proposed Case Management Order drafted by the parties and submitted to the Court on June 29, 2018. A joint conference call with the Magistrate Judge to complete his final information on the Case Management Order is set for July 6 at 10:00 a.m. I expect the final Case Management Order to be filed shortly after our Case Management Conference. The plaintiffs in this action intend to proceed as stated in Paragraph 5 of the proposed Case Management Order with filing a motion to remand for lack of subject matter of jurisdiction as it relates to the maintenance issues previously addressed by the District Court. Plaintiffs will further seek additional or alternative relief for the Court to refer this issue to the Surface Transportation Board and/or reconsider previous rulings on the maintenance issue.

I declare under penalty and under perjury the foregoing is true and correct.

Executed on July 3, 2018, at Mobile, Alabama.


WILLIAM M. CUNNINGHAM, JR

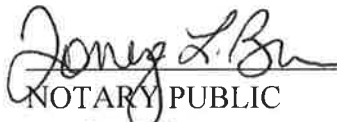
STATE OF ALABAMA)

COUNTY OF MOBILE)

I, the undersigned Notary Public in and for said state and county, do hereby certify that **WILLIAM M. CUNNINGHAM, JR**, whose name is signed to the above declaration and who is known to me, acknowledged before me on this day that the declaration are true and correct to the best of his knowledge, information and belief.

GIVEN under my hand and official seal of office on this 3rd day of JULY, 2018.




NOTARY PUBLIC
My Commission Expires: 7/29/19

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

**STARR SWEARINGEN WANECK
AND JIMMY LEE WANECK**

PLAINTIFFS

v.

**CIVIL ACTION
No. 1:17CV106-HSO-JCG**

CSX CORPORATION ET AL.

DEFENDANTS

CASE MANAGEMENT ORDER

This Order, including all deadlines, has been established with the participation of all parties and can be modified only by order of the Court on a showing of good cause supported with affidavits, other evidentiary materials, or reference to portions of the record.

IT IS HEREBY ORDERED:

1. ESTIMATED DAYS OF TRIAL: 10

ESTIMATED TOTAL NUMBER OF WITNESSES: 25

EXPERT TESTIMONY EXPECTED: Yes

NO. OF EXPERTS:

10

2. ALTERNATIVE DISPUTE RESOLUTION [ADR]. (Pick one)

Edit #2

Alternative dispute resolution techniques appear helpful and will be used in this civil action as follows:

While the parties have exchanged some medical information, the Plaintiff has not made a formal demand from Defendant. The parties believe alternative dispute resolution is often helpful, but cannot speak as to whether it would be productive in this case at this time.

3. CONSENT TO TRIAL BY UNITED STATES MAGISTRATE JUDGE. (Pick one)

The parties do not consent to trial by a United States Magistrate Judge.

4. DISCLOSURE. (Pick one)

Edit #4

The following additional disclosure is needed and is hereby ordered:

While the parties intend to fully comply with Rule 26 disclosures, CSXT contends, that pursuant to federal law, the National Transportation Safety Board ("NTSB") retains exclusive jurisdiction over the investigation of the events that form the basis of the instant suit and CSXT needs to reach out to the NTSB prior to disclosures. Plaintiffs do not agree. Plaintiffs will seek discovery from the NTSB of items not subject to the NTSB hold and may seek protective orders to allow production of NTSB investigation material prior to its final report.

5. MOTIONS; ISSUE BIFURCATION. (Pick one)

Edit #5

Staged resolution, or bifurcation of the issues for trial in accordance with FED. R. CIV. P. 42 (b) will assist in the prompt resolution of this action. Accordingly, the Court orders that:

The issue of punitive damages will be bifurcated in accordance with Miss. Code Ann. 11-1-65

Early filing of the following motion(s) might significantly affect the scope of discovery or otherwise expedite the resolution of this action:

Plaintiffs anticipate filing a motion to remand for lack of subject matter as it relates to the maintenance issues previously addressed. Plaintiffs will seek additional or alternative relief for the Court to refer this issue to the STB and/or to reconsider previous rulings on this issue. (ECF Nos. 146 and 154). Defendant anticipates objecting to said motions.

6. DISCOVERY PROVISIONS AND LIMITATIONS.

- A. Interrogatories are limited to 25 succinct questions.
- B. Requests for Production are limited to 25 succinct questions.
- C. Requests for Admissions are limited to 25 succinct questions.
- D. Depositions are limited to the parties, experts, and no more than 15 fact witness depositions per party without additional approval of the Court.

- E.** The parties have complied with the requirements of Local Rule 26(f)(2) and (3)(C) regarding discovery of electronically stored information and have concluded as follows:

At this point, the parties agree that electronic discovery may be required in this case. However, the parties recognize that should either party deem it necessary to seek electronic discovery, they will do so under the following terms: (1) the parties agree that the aforementioned discoverable ESI, if any, will be produced in the form(s) which the information is ordinarily and customarily maintained in the usual course of business or, if not reasonably usable in that form, such other form as is reasonably usable; (2) upon request and if reasonably available, a party will make diligent efforts to produce relevant electronically-store emails in native format, except to the extent that necessary and proper redaction makes production in native format impossible; (3) ESI may be produced in CD ROM and/or flash drive and the parties are under no obligation to provide paper copies unless the requesting party agrees to tender payment for such copies; (4) the parties further agree that they will undertake a good faith effort to identify relevant ESI and will preserve any such information identified, but the parties agree that the parties will not be required to deviate from their normal records retention policies (as long as their records retention policies are not in violation of state or federal regulations or in violation of any part's obligations to preserve evidence) with respect to ESI

- F.** The court imposes the following further discovery provisions or limitations:

- ☐ 1. The parties have agreed that defendant may obtain a Fed.R.Civ. P. 35 (L.U.Civ.R. 35) medical examination of the plaintiff (within subpoena range of the court) by a physician who has not examined the plaintiff, and that defendant may arrange the examination without further order of the court. The examination must be completed in time to comply with expert designation discovery deadlines.
- ☒ 2. Pursuant to FED.R.EVID. 502(d), the attorney-client privilege and the work-product protections are not waived by any disclosure connected within this litigation pending before this Court. Further, the disclosures are not waived in any other federal or state proceeding.
- ☒ 3. Plaintiff must execute an appropriate, HIPAA-compliant medical authorization.
- ☒ 4. The court desires to avoid the necessity of filing written discovery motions where court participation in an informal discussion of the issue might resolve it, even after the parties have been unsuccessful in a good faith attempt to do so. Consequently, before a party may serve any discovery motion, counsel must first in good faith as required by Fed. R. Civ. P. 37(a)(1). If the attorney conference does not resolve the dispute, counsel must contact the chambers of the magistrate judge to request a telephonic conference to discuss the issue as contemplated by Fed. R. Civ. P.16(b)(3)(B) (v). Only if the telephonic conference with the judge is unsuccessful in resolving the issue may a party file a discovery motion.
- ☒ 5. Other:
The parties have agreed that defendant may obtain a Fed.R.Civ.P. 35 (L.U.Civ.R 35) medical examination of the plaintiff within 125 miles of her residence in Texas by a physician who has not examined the plaintiff and that defendant may arrange the examination without further order of the court. Plaintiff may have present with her during the examination a designated health care professional of her choice, so long as said professional does not interfere with the examination. The examination must be completed in time to comply with expert designation discovery deadlines.

Additional information:

7. SCHEDULING DEADLINES

A. Trial. This action is set for JURY TRIAL

RESET DURATION

beginning on: _____, at 9:00, a.m., in Gulfport,

Mississippi, before United States District Judge _____.

THE ESTIMATED NUMBER OF DAYS FOR TRIAL IS _____. ANY CONFLICTS WITH THIS TRIAL DATE MUST BE SUBMITTED IN WRITING TO THE TRIAL JUDGE IMMEDIATELY UPON RECEIPT OF THIS CASE MANAGEMENT ORDER.

B. Pretrial. The pretrial conference is set on: _____, at 9:00, a.m.,

in Choose City: _____, Mississippi, before United States District

Judge _____.

C. Discovery. All discovery must be completed by: _____.

D. Amendments. Motions for joinder of parties or amendments to the pleadings must be

filed by: _____.

E. Experts. The parties' experts must be designated by the following dates:

1. Plaintiff(s): _____.

2. Defendant(s): _____.

8. MOTIONS. All dispositive motions and *Daubert*-type motions challenging another party's expert must be filed by:_____.The deadline for motions *in limine* is fourteen days before the pretrial conference; the deadline for responses is seven days before the pretrial conference.

9. SETTLEMENT CONFERENCE.

Edit #9

If the parties desire judicial assistance to settle the case after initial discovery, they will contact the Court to request a date for a settlement conference when they have obtained the discovery necessary to make the conference effective.

10. REPORT REGARDING ADR. On or before (7 days before FPTC) _____, the parties must report to the undersigned all ADR efforts they have undertaken to comply with the Local Rules or provide sufficient facts to support a finding of just cause for failure to comply. *See L.U.Civ.R.83.7(f)(3).*

SO ORDERED:

DATE

UNITED STATES MAGISTRATE JUDGE

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 36167

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

DECLARATION OF MITCHELL A. TOUPS

Pursuant to 28 U.S.C. § 1746, I, Mitchell A. Touns, declare as follows:

1. I am an attorney in good standing licensed to practice law in the State of Texas and the State of New York. I am also admitted to practice in the United States District Courts for the Eastern, Northern and Southern Districts of Texas, the Northern District of Illinois, the Eastern District of Wisconsin, the United States Court of Appeals for the Third, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits, the United States Court of Federal Claims, and the United States Supreme Court. I also have been, and am, admitted *pro hac vice* in various other state and federal courts throughout the United States.

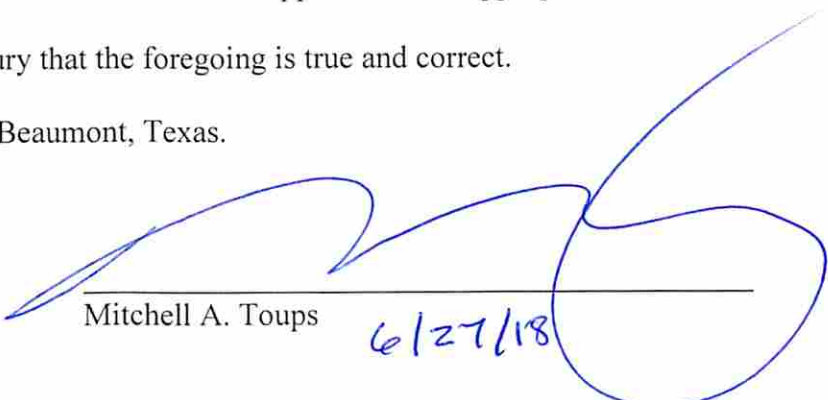
2. I am the manager of Mitchell A. Touns, Ltd., and a partner in the law firm of Weller, Green, Touns & Terrell, L.L.P., in Beaumont, Texas. I have practiced law for over thirty-five years. I am AV peer review rated by the Martindale-Hubbell Law Directory. My practice has focused on catastrophic injury cases, business cases, consumer cases, complex commercial litigation, class actions, and mass actions in state and federal courts throughout the United States.

3. I am counsel of record for Plaintiffs, Darwyn Hanna, Marie Hanna, Helen Dailey, Charles Keathley, Mary Ellen Keathley, Debra King, Shaderic Luttrell, Velma Luttrell, Duane McKervery, Kim McKervery, Gloria Media, Evelyn Viot and Karen Webb, who were victims of a

CSX Transportation, Inc. train traveling on a CSXT track, striking a casino tour bus on March 7, 2017, in Biloxi, Mississippi. I am also serving as the lead negotiator for more than 35 other clients that were passengers on the bus that were also victims of this crash. I expect that these 48 victims will all file suit against CSXT in the future either in Mississippi or another appropriate forum.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 27, 2018, at Beaumont, Texas.



Mitchell A. Toups

6/27/18

Certificate of Service

I hereby certify that on this 5th day of July, 2018, I served a true and correct copy of the foregoing Petition for Declaratory Order on the following counsel of record for the parties in *Starr Swearingen Waneck and Jimmy Lee Waneck v. CSX Transportation Corp., et al.* C.A. No. 1:17-cv-00106 by first class mail, postage prepaid:

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wmcunningham@bcmlawyers

And also by first class mail, postage prepaid on:

The Honorable Halil S. Ozerden
District Judge
United States District Court
for the Southern District of Mississippi
2012 15th Street, Suite 714
Gulfport, MS 39501


Thomas W. Wilcox