

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Public Record

STB Docket No. FD 36167

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

RESPONSE TO CSXT REPLY TO PETITION FOR DECLARATORY ORDER

The Petitioners in this proceeding hereby submit this brief response to several aspects of the Reply of CSX Transportation, Inc. in Opposition to Declaratory Order (“Reply”) filed in this proceeding on March 26, 2018. The Petitioners ask the Board to accept this Response into the record of this proceeding because it will provide the Board with a more complete and accurate record upon which to make a decision. *See City of Alexandria, Va.—Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply “(i)n the interest of compiling a full record”); *followed by, Finch Paper, LLC – Pet. For Declaratory Order*, FD 35981, slip op at 3, note 4, (STB served January 11, 2017), and numerous other STB decisions. More specifically, in its Reply, CSX Transportation, Inc. (“CSXT”) has grossly mischaracterized the relief sought by the Petition and the underlying court cases. In addition, CSXT’s Reply mischaracterizes the STB precedent upon which CSXT relies to argue the Petition should be denied.

Petitioners have asked the STB to provide clarification to Petitioners, the parties in the Mississippi court case,¹ and the Mississippi Federal District Court on the interplay between the rules governing preemption of state tort claims under 49 U.S.C. §10501(b) and 49 U.S.C. §20106(b), as amended in 2007. Despite a ruling in the case on March 29, 2018 addressing the preemption issues, this remains an issue before the Mississippi District Court,² and it is squarely within the Board's jurisdiction. Moreover, the Board previously addressed the interplay between these statutory provisions in STB Docket FD No. 35792, *Thomas Tubbs, Trustee of the Thomas Tubbs Revocable Trust, et al. – Petition for Declaratory Order* (served October 29, 2014) ("*Tubbs*"), *aff'd Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141 (8th Cir. 2015). Inexplicably, CSXT did not inform the Mississippi District Court of the Board's decision in *Tubbs* that state tort law claims arising out of railroad maintenance practices that violate the Federal Rail Safety Act are not completely preempted by ICCTA. Rather, CSXT asserted that the opposite is true. Motion at 4, 7.³ Accordingly, the Board's guidance on this issue is important to accurately inform the Mississippi court on the proper scope of §10501(b) in these circumstances.

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

² On March 29, 2018, the Mississippi District Court issued an order which ruled that some of the claims of the plaintiffs were preempted by §10501(b) and the Federal Rail Safety Act. *Memorandum Opinion and Order Granting in Part and Denying Without Prejudice in Part Defendant CSX Transportation, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint, and Granting in Part and Denying Without Prejudice in Part Defendant CSX Transportation, Inc.'s Motion to Dismiss Cross-Claims of Defendant Louis Ambrose Jr.*, filed March 29, 2018. See Attachment 1. The plaintiffs intend to seek reconsideration of this order.

³ Having argued extensively before the Mississippi and Texas District courts that tort claims arising out of maintenance practices at humped crossings that violate the FRSA and common law are completely preempted by §10501(b), CSXT's Reply now concedes that such cases are to be decided on a case-by-case basis. Reply at 6-7. However, a case-by-case review without clear direction from the STB on the application of §20106(b) will result in all humped crossing cases brought in state and federal courts requiring review by the STB to determine whether there is §10501(b) jurisdiction, an extremely costly and inefficient exercise. The Board should declare that legitimate claims that improper maintenance practices that violated state common law and/or

Consistent with well-established STB precedent and practice, and many petitions for declaratory order submitted pursuant to 4 U.S.C. §554(c) and 49 U.S.C. §721, the Petition asks for either a declaratory order from the Board, or if the Petition is denied, guidance from the Board to the Court of the applicable legal rules it should apply when considering whether state law claims covered by §20106(b) are preempted by §10501(b).

In an attempt to convince the Board that it should do nothing, CSXT mischaracterizes the Petition and the relief sought, the effect of the Petition on Petitioners' state claims and cases, and even the STB precedent CSXT relies upon in its Reply.

First, CSXT attempts to obfuscate matters by wrongly stating that Petitioners are seeking a ruling from the STB that "ICCTA and FRSA must be 'harmonized' such that ICCTA never preempts state law claims that may also implicate the FRSA's savings clause." Reply at 4. This is clearly not the case. Petition at 8, and cases cited. Rather, Petitioners seek clarification from the Board that, contrary to CSXT's representations to the Mississippi court and the overly broad language of the Texas Court Order (that was intended only to address whether the case should be remanded to state court), state tort law claims that fall within the scope of §20106(b) are not completely preempted by §10501(b). Further, determining whether such claims are cognizable is the responsibility of the court in which the state claims are brought, after discovery and submission of evidence and argument. Along these lines, CSXT's assertion that "the Petitioners want the STB to declare that the proper forum to resolve all state tort law disputes is in state court, and they can never be removed to federal court," is simply false and further obfuscates the narrow issues presented by the Petition. Reply at 8. As CSXT itself notes, the Petition clearly states that it asks

the FRSA created or worsened the profile at a crossing and caused damages are not completely preempted by §10501(b).

the Board to declare in part “That to the extent state tort law claims are raised the proper forum for determining whether the claims are actionable or are preempted by the FRSA *is the court in which they are raised*,” a statement on its face that is not restricted only to state courts and encompasses state claims brought in federal court. Petition at 15 (emphasis added).

Second, CSXT mischaracterizes the Petition as an “end run” around the Texas courts by the plaintiffs in the Texas District Court case, and as “interfering” with the deliberations of the Mississippi District Court. That the Petitioners who were plaintiffs in the Texas District Court did not appeal the Texas order is a red herring raised by CSXT to further mislead the Board and mischaracterize the relevant issues. Importantly, CSXT had also objected to personal jurisdiction in Texas, an objection that was strengthened by the Supreme Court’s opinion in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, et al.* 137 S. Ct. 1773 (2017). Just a few days after the Supreme Court issued this jurisdictional opinion, the Texas plaintiffs non-suited their claims against CSXT in Texas, so that they could later file suit against CSXT in a state that clearly has jurisdiction.

Nor are those Petitioners collaterally attacking the action of the Texas District Court or the new Mississippi court ruling by participating in the filing of the Petition. To 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. By filing this Petition, the Petitioners are seeking to avoid any confusion that the inclusion of the overbroad Texas court decision into the record of the Mississippi court or the new overly narrow ruling by the Mississippi court would foster about the respective roles of 49 U.S.C. §10501(b) and 49 U.S.C. §20106(b), given there has been only one STB decision directly addressing this issue.

Additionally, the notion that by seeking a declaration of the applicable rules and/or guidance from the STB the Petition is “interfering” with the Mississippi District Court’s deliberation is similarly misplaced, and belied by ample precedent supporting the STB’s providing guidance to federal and state courts either upon formal request of the court, or has here, where such guidance has not been formally sought.⁴

Third, Petitioners are not raising new legal arguments that should have been presented to the Mississippi District Court. Instead, Petitioners are merely summarizing for the Board the decisions where the agency has stated its practice, supported by the courts, “that where there are overlapping federal statutes, the Board attempts to harmonize the two statutes, with each statute given effect to the extent possible.” *Tubbs*, slip op. at 7 (analyzing the interplay between §10501(b) and §20106(b)). As this task is specifically within the Board’s jurisdiction, the issuance of the requested declaratory order, or alternatively at least providing guidance to the Court on these issues, would in no way constitute new arguments by a party that were not presented on a timely basis, contrary to the cases CSXT cites in its Reply. Reply at 5.

Fourth, CSXT also mischaracterizes the Petition by stating it is asking the Board to engage in an exercise of statutory interpretation regarding section §20106(b), Reply at 7-8. The Petition

⁴ In support of its effort to distort the Petition and the applicable rules, CSXT mischaracterizes and/or selectively quotes STB decisions that actually support the Petitioner’s claims. For example, when asserting that “the Board rejects attempts to use the Board as an end-run around the judicial process,” CSXT cites the following passage from *Ingredion*, which is offered for the assertion that the Board refused to become involved in that case: “[T]he state court is able to address any preemption arguments that may become relevant and has not referred any issues to the Board.” *Ingredion* at 3. However, CSXT inappropriately fails to remind the Board that *immediately after* this sentence the STB stated that it would indeed offer guidance to that court and the parties on the principles of §10501(b) preemption “to assist in the resolution of this dispute” if such issues arose in the court proceeding. *Id.* *Ingredion* provides no support for CSXT’s sweeping claim that “The STB has concluded that when a judicial proceeding is pending, there is rarely any need for the agency to step in and issue a declaratory order.” Reply at 4.

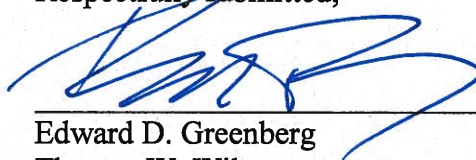
does nothing of the sort. It merely asks the Board to (1) confirm its prior ruling in *Tubbs* that state tort law claims that are based on alleged violations of FRA regulations applicable to railroad track maintenance are not completely preempted by §10501(b); (2) provide similar guidance on an issue that the STB has yet to address but is nevertheless before the Mississippi District Court, *i.e.*, that state tort law claims based on the factors of §20106(b) other than a violation of a FRA regulation are also not completely preempted by §10501(b),⁵ and (3) the proper forum for determining whether such claims are nevertheless preempted by the FRSA by being outside the scope of §20106(b) is the court in which the case is brought. Providing confirmation of these principles does not require the STB to “interpret” the FRSA any more than it was necessary for the Board to be familiar with both statutes in order to harmonize them in the *Tubbs* case.⁶ Even CSXT seems to realize the weakness of this argument, implicitly admitting that in order to harmonize §10501(b) and §20106(b) and opine on how to properly apply them, the Board must interpret the intent and meaning of each statute to some extent. Reply at 7.

⁵ See, CSXT’s broad assertion in its Memorandum in Support of its Motion to Dismiss that “to the extent plaintiffs’ premise their tort claims on supposed duties of safety beyond those established by FRA rail safety regulations, the claims are preempted by the FRSA,” a statement contrary to the statutory language of §20106(b). Memorandum in Support at 4.

⁶ Here again, CSXT mischaracterizes STB precedent. In support of its argument that the Board should not “opine” on statutes other than the Interstate Commerce Termination Act of 1995, CSXT cites to a decision where statutory interpretation was not even at issue, and modifies a passage from the decision to misleadingly support its conclusion. CSXT then combines this modified passage with a quotation from a different case without attribution to further distort Board’s holding. See Reply at 8, (where CSXT (1) inserted “[of another statute]” in a passage from *CL Consulting & Mgmt. Corp. – Pet. for Decl. Order*, Docket No. FD 36042, (served Jan. 25, 2017), a case dealing with regulations, and (2) failed to attribute the statement “between the statutory responsibilities of the Board and of federal safety regulatory agencies” to the Sixth Circuit in *Tyrell v. Norfolk S Ry.*, 248 F.3d 517, 523 (6th Cir. 2001). CSXT also inappropriately cites to *dicta* in *U.S. EPA – Petition for Declaratory Order*, Docket FD 35803, slip op. at 10 (served December 30, 2014), another case that involved a request for the Board to interpret the regulations of another agency, not a case where there are overlapping federal statutes the Board must harmonize.

In conclusion, this brief Response to CSXT's reply should be accepted into the record because it provides the Board with a more complete and accurate record upon which to make a decision. For the reasons expressed herein and in the Petition the Board should grant the Petition. However, if the Board decides in its discretion to decline to issue a declaratory order, the Petitioners ask that the decision denying the Petition nevertheless provide guidance to the parties and to the courts that are presently adjudicating this matter.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Ed Greenberg', is written over a horizontal line.

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Dated: April 4, 2018

Attachment 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

STARR SWEARINGEN WANECK
AND JIMMY LEE WANECK

PLAINTIFFS

v.

CIVIL NO. 1:17cv106-HSO-JCG

CSX CORPORATION, ET AL.

DEFENDANTS

**MEMORANDUM OPINION AND ORDER GRANTING IN PART
AND DENYING WITHOUT PREJUDICE IN PART DEFENDANT
CSX TRANSPORTATION, INC.'S MOTION [9] TO DISMISS
PLAINTIFFS' AMENDED COMPLAINT [1-1], AND GRANTING
IN PART AND DENYING WITHOUT PREJUDICE IN PART
DEFENDANT CSX TRANSPORTATION, INC.'S MOTION [16] TO
DISMISS CROSS-CLAIMS [3] OF DEFENDANT LOUIS AMBROSE, JR.**

BEFORE THE COURT are Defendant CSX Transportation, Inc.'s Motion [9] to Dismiss Plaintiffs' Amended Complaint [1-1] and Motion to Dismiss [16] Cross-Claims [3] of Defendant Louis Ambrose, Jr. These Motions are fully briefed. The Court finds that Defendant CSX Transportation, Inc.'s Motions [9] [16] should be granted in part and denied without prejudice in part.

I. RELEVANT BACKGROUND

A. Relevant Factual and Procedural History

This matter arises out of a collision that occurred on March 7, 2017, when a charter bus, in which Plaintiffs Starr Swearingen Waneck and Jimmy Lee Waneck ("Plaintiffs") were passengers, became wedged on a railroad crossing on Main Street in Biloxi, Mississippi ("Main Street crossing"), and was struck by a freight train operated by Defendant CSX Transportation, Inc. ("CSXT"). Am. Compl. [1-1] at 44-46. Plaintiffs were allegedly injured in the crash, and accordingly filed a

Complaint on March 10, 2017, in the Circuit Court of Harrison County, Mississippi, Second Judicial District, followed by an Amended Complaint on March 20, 2017. Notice of Removal [1] at 1.

The Amended Complaint, which remains the operative pleading in this case, advances claims against Defendants CSX Corporation (“CSXC”) and CSXT as owners/operators of the train; Defendants Echo Transportation Solutions, LLC (“Echo”), and TBL Group, Inc. (“TBL”), as owners and operators of the charter bus in which Plaintiffs were passengers; Defendant Diamond Tours, Inc. (“Diamond”), which planned and promoted the trip; and Defendant Louis Ambrose, Jr. (“Ambrose”), an employee of Echo and the driver of the charter bus. Am. Compl. [1-1] at 41-46. Plaintiffs allege that Defendants breached their respective duties to exercise reasonable care to avoid injuring or killing members of the public, and raise claims for negligence, gross negligence, negligence per se, willful and wanton conduct, recklessness, intentional conduct, and reckless and intentional disregard for the safety of the traveling public. *Id.* at 46-56. The Amended Complaint seeks an award of actual and punitive damages and costs from Defendants, jointly and severally. *Id.* at 56-58.

Plaintiffs’ claims against CSXT and CSXC are for breach of their duties to “operate a train at a speed for the then existing conditions and be prepared to slow or stop for any hazardous conditions;” failure to inspect, repair, and report unsafe

crossings; intentional disregard for the safety of the traveling public; and failure to adequately man their “dispatch center” and respond to calls about the charter bus being stuck on the Main Street crossing. *Id.* at 47-53. Plaintiffs allege that CSXT and CSXC failed to properly maintain the Main Street crossing and allowed the roadway on both sides of the tracks to be paved and repaved, resulting in a severe incline or “hump,” which condition was not repaired to eliminate the hazardous condition. *Id.* Defendants further failed to operate their trains in such a manner as to accommodate this dangerous condition. *Id.*

With respect to Echo, Diamond, and Ambrose, the Amended Complaint alleges these Defendants were negligent in, among other things, failing to properly operate the charter bus, causing it to become stuck on the Main Street crossing; failing to properly plan the route; failing to abide by and observe railroad signals; failing to yield the right of way to the train; and failing to abide by Mississippi traffic laws. *Id.* at 53-55.

On April 11, 2017, Defendants CSXC and CSXT removed the case to this Court based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331, on grounds that Plaintiffs’ claims arise under “the Interstate Commerce Commission [Termination] Act of 1995 (“ICCTA”), 49 U.S.C. §§ 10101, *et seq.*” and “the principles of supplemental jurisdiction, 28 U.S.C. § 1367.” Notice of Removal [1] at 2 (emphasis in original). Subsequent to removal, Ambrose, the driver of the charter

bus, filed an Answer and Cross-Claims [3] against CSXT and CSXC. Ambrose advances essentially the same claims against CSXT and CSXC as those made by Plaintiffs. Cross-cl. [3] at 11-27.

B. CSXT's Motions [9] [16] to Dismiss¹

CSXT moves the Court to dismiss Plaintiffs' Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), Mot. to Dismiss [9], arguing that Plaintiffs' purported tort claims are premised upon the rail crossing's configuration, maintenance, and operation such that they are completely preempted by the ICCTA. *See* CSXT Mem. in Supp. [10] at 1. CSXT contends that the claims as to train operations and CSXT's obligations over rail crossings are preempted by the Federal Railroad Safety Act of 1970 ("FRSA"), as amended, 49 U.S.C. §§ 20101, et seq. *See id.* In addition, CSXT takes the position that the Amended Complaint is subject to dismissal because it does not state any facially plausible claims under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See id.* at 12-13. CSXT has also filed a Motion [16] to Dismiss Cross-Claims of Defendant Ambrose, incorporating by reference its Motion [9] to Dismiss Plaintiffs' claims and supporting Memorandum

¹ CSXC filed a separate Motion [7] to Dismiss the Amended Complaint and a separate Motion [17] to Dismiss the Cross-Claims based upon lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). On September 21, 2017, the Court denied these Motions [7] [17], without prejudice to CSXC's right to reurge them upon completion of jurisdictional discovery, which is ongoing.

[10] and arguing that Ambrose's Cross-Claims should be dismissed for the same reasons. Mot. to Dismiss [16] at 1-2. CSXT characterizes Plaintiffs' and Ambrose's claims against it as follows:

The [amended] complaint takes aim at the Main Street crossing—specifically, at CSXT's configuration, care and maintenance of the crossing. Plaintiffs contend that this rail crossing is “dangerous and severely inclined or ‘humped,’” [Am. Compl.] ¶ 25; that the crossing is “dangerous” due to “automated CSX railroad maintenance practices,” *id.*; and that “[t]he Collision described in this Complaint is a direct and proximate result of the negligence of the Defendant Railroad” in creating a “severe incline or ‘hump,’” *id.* ¶ 44.

The complaint adds a series of alleged safety-related duties that CSXT is said to have violated: supposed duties regarding train operations, (*id.* ¶¶ 36-39); failure to inspect and repair unsafe crossing, (*id.* ¶¶ 40-43); and failure to report unsafe conditions, (*id.* ¶¶ 51-54).

The complaint asserts common law claims of negligence, gross negligence, (*id.* ¶¶ 35-54) and “Intentional Disregard For Public Safety,” (*id.* ¶¶ 60-64) and seeks compensatory and punitive damages.

CSXT Mem. in Supp. [10] at 2-3 (footnote omitted).

Plaintiffs' and Ambrose's respective Responses [33] [19] in Opposition to CSXT's Motions are essentially identical and maintain that their claims against CSXT are not preempted because they are “grounded in negligence or intentional tort, both of which are time-honored creatures of Mississippi common law.” Pls. Resp. in Opp'n [33] at 1-2; Pls. Mem. in Opp'n [34] at 2; Ambrose's Mem. in Opp'n. [20] at 7-8. They dispute that their claims concerning the Main Street crossing relate in any way to its design or construction and insist their allegations are

simply limited to maintenance of the crossing. Plaintiffs further assert that their “well-pled 18 page [Amended] Complaint set[s] forth specific, factual allegations regarding CSXT’s duties and its violations thereof,” satisfying the requirements of Federal Rule of Civil Procedure 8.

II. DISCUSSION

A. Relevant Legal Standard

In considering a motion to dismiss under Rule 12(b)(6), the “[C]ourt accepts ‘all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.’” *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (citation omitted). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Specifically, a plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Wooten v. McDonald Transit Associates, Inc.*, 788 F.3d 490, 498 (5th Cir. 2015).

The purpose of this requirement is “to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). The factual allegations in the complaint need only “be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* (footnote and citations omitted). “[D]etailed factual allegations” are not required, but the pleading must present “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

Id. (footnote omitted).

B. Preemption under the ICCTA and the FRSA

CSXT contends that Plaintiffs’ and Ambrose’s claims relating to the maintenance of the Main Street crossing are in fact claims pertaining to the design and construction of the crossing such that they are completely preempted by federal law. CSXT Mem. in Supp. [10] at 8. With respect to the claims that relate to the configuration, operation, and maintenance of the Main Street crossing and related rail structures, CSXT contends that Plaintiffs are attempting to interfere with CSXT’s decisions on how to run “crossing-related aspects of its rail operations” which is preempted by the ICCTA and/or FRSA. *Id.* at 7-8. CSXT further maintains that FRSA preempts the claims concerning train operations, the failure to inspect and repair an unsafe crossing, unsafe crossing conditions, and the failure to report unsafe conditions. *Id.* at 10. Plaintiffs and Ambrose counter that they have only raised state law causes of action sounding in tort and that CSXT is attempting to rewrite their claims in order for them to be preempted.

1. The Doctrine of Preemption

Generally, “a plaintiff is the master of his complaint and may allege only state law causes of action, even when federal remedies might also exist.” *Elam v Kan. City S. Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011) (citing *Bernhard v. Whitney Nat’l Bank*, 523 F.3d 546, 551 (5th Cir. 2008)). Under the well-pleaded complaint rule, a federal court does not have federal question jurisdiction unless a federal question appears on the face of the plaintiff’s well-pleaded complaint. *Id.* Accordingly, “there is no federal [question] jurisdiction if the plaintiff properly pleads only a state law cause of action.” *Gutierrez v. Flores*, 543 F.3d 248, 252 (5th Cir. 2008) (quoting *Bernhard*, 523 F.3d at 551).

The United States Court of Appeals for the Fifth Circuit has held that

[a]n exception to the well-pleaded complaint rule arises when Congress “so completely preempt[s] a particular area that any civil complaint raising this select group of claims is necessarily federal in character.” *Gutierrez*, 543 F.3d at 252 (quoting *Johnson v. Baylor Univ.*, 214 F.3d 630, 632 (5th Cir. 2000)). Under the “complete preemption” doctrine, “what otherwise appears as merely a state law claim is converted to a claim ‘arising under’ federal law for jurisdictional purposes because the federal statute so forcibly and completely displaces state law that the plaintiff’s cause of action is either wholly federal or nothing at all.” *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 330 (5th Cir. 2008) (internal quotation marks and brackets omitted); *see also Franks [Inv. Co, LLC v. Union Pac. R.R. Co.]*, 593 F.3d [404,] at 407 (5th Cir. 2010)]. “The question in complete preemption analysis is whether Congress intended the federal cause of action to be the exclusive cause of action for the particular claims asserted under state law.” *Barrois*, 533 F.3d at 331; *see also Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003).

Elam, 635 F.3d at 803.

Complete preemption must be distinguished from “defensive preemption” (i.e., “conflict preemption” or “ordinary preemption”) which does not create federal jurisdiction and simply “declares the primacy of federal law, regardless of the forum or the claim.” *Barrois*, 533 F.3d at 331. Generally speaking, complete preemption is less common and more extraordinary than defensive or ordinary preemption, and it is therefore a narrow exception to the well-pleaded complaint rule. *Elam*, 635 F.3d at 803 (citation omitted). The party raising preemption bears the burden of persuasion. *Id.* at 802 (citations omitted).

2. The ICCTA preempts Plaintiffs’ and Ambrose’s claims concerning the physical characteristics and maintenance of the Main Street crossing and related rail structures.

CSXT argues that Plaintiffs’ and Ambrose’s “improper maintenance claims” are in actuality claims concerning the physical characteristics of the Main Street crossing, including the configuration, operation, and maintenance of the crossing and related rail structures. CSXT Mem. in Supp. [10] at 1, 5-8. As such, these claims constitute an attempt to interfere with CSXT’s decisions on how to run “crossing-related aspects of its rail operations” and are completely preempted by the ICCTA. *Id.*

In *Elam*, the Fifth Circuit addressed a somewhat similar situation in which the plaintiffs suffered injuries when their vehicle collided with a stalled train

blocking a crossing. *Elam*, 635 F.3d at 801-02. Plaintiffs in that case advanced claims against the railroad for negligence per se under Mississippi's antiblocking statute, Mississippi Code § 77-9-235. *Id.* at 802. In finding that such claims were preempted, the Fifth Circuit held that

Effective January 1, 1996, the ICCTA abolished the Interstate Commerce Commission (ICC) and created a new Surface Transportation Board (STB) to regulate, inter alia, rail transportation in the United States. 49 U.S.C. § 10501(a)(1); *Friberg*, 267 F.3d at 442. The purpose of the ICCTA is to "build[] on the deregulatory policies that have promoted growth and stability in the surface transportation sector." H.R. Rep. No. 104-311, at 93 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 805. With respect to rail transportation, the ICCTA seeks to implement a "[f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation," and to retain only regulations "that are necessary to maintain a 'safety net' or 'backstop' of remedies to address problems of rates, access to facilities, and industry restructuring." *Id.* at 93, 96; *see also* 49 U.S.C. § 10101(2).

The ICCTA creates exclusive federal regulatory jurisdiction and exclusive federal remedies. Specifically, the ICCTA provides:

The jurisdiction of the [STB] over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail

transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).

Elam, 635 F.3d at 804-05; *see also Franks Inv. Co, LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, at 406-07 (5th Cir. 2010).

“Put another way, when a plaintiff’s tort claim directly attempts to manage or govern a railroad’s decisions in the economic realm, that claim ‘is either wholly federal or nothing at all.’” *Elam*, 635 F.3d at 807 (quoting *Barrois*, 533 F.3d at 330). *Elam* concluded that by attempting to regulate in areas such as “switching operations, and even a train’s length or speed, or how long a train may occupy a crossing,” Mississippi’s antiblocking statute interfered with interstate commerce and constituted a direct attempt to manage or govern a railroad’s decisions in the economic realm. *Id.* Plaintiffs’ negligence per se claims were therefore completely preempted.² *Id.*; *see also Friberg v. Kan. City S. Ry.*, 267 F.3d 439, 442-44 (5th Cir. 2001). The Fifth Circuit has subsequently determined that, just as a local attempt to regulate the construction of rail lines is preempted, a city’s attempts to regulate “the slope or other features of the embankments for the railroad tracks themselves

² *Elam* remanded plaintiffs’ simple negligence claims to the district court for further proceedings because they were not adequately briefed. *Elam*, 635 F.3d at 813-15.

are expressly preempted.” *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012).

In this case, the Amended Complaint and the Cross-Claims assert that CSXT was negligent in its maintenance of the Main Street crossing by adding layer after layer of asphalt patches which ultimately resulted in a dangerous and severely “humped” crossing, and that it was negligent in its operation of its trains over the crossing. Am. Compl. [1-1] at 45, 47-53. CSXT argues that this is tantamount to a claim regarding the design and construction of the crossing, making it subject to preemption under the ICCTA. The Court agrees. It is readily apparent that the resolution of Plaintiffs’ and Ambrose’s claims against CSXT for negligence arising out of the alleged “improper maintenance” of the Main Street crossing rests entirely upon underlying issues of the crossing’s design, construction, and configuration. These are the sort of claims Congress intended the ICCTA to preempt, namely state law claims that directly attempt to manage or govern a railroad’s decisions in the economic realm such as the construction and operation of tracks, scheduling, a train’s length or speed, or how long a train may occupy a crossing. *See Elam*, 635 F.3d at 807; *Friberg*, 267 F.3d at 442-44.

The Court finds that Plaintiffs’ and Ambrose’s claims for “improper maintenance” of the Main Street crossing are in substance and reality claims arising out of the “design and construction” of the crossing, making them completely

preempted by the ICCTA. Because permitting such claims to proceed would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in enacting ICCTA, these claims should be dismissed.

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (citation and internal quotation marks omitted).

3. CSXT has not met its burden of establishing that the claims for negligence such as the failure to slow the train, to apply the brakes, or to be prepared to stop, are preempted by FRSA.

In 1970, Congress enacted the FRSA “to promote safety in all areas of railroad operations and to reduce railroad-related accidents and incidents.” *Ill. Cent. R.R. Co. v. Cryogenic Transp, Inc.*, 901 F. Supp. 2d 790, 794 (S.D. Miss. 2012) (quoting *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 347 (2000) (citing Title 49 U.S.C. § 20101)). “The FRSA grants the Secretary of Transportation authority to ‘prescribe regulations and issue orders for every area of railroad safety,’ § 20103(a), and directs the Secretary to ‘maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem,’ § 20134(a).” *Shanklin*, 529 U.S. at 347. Congress amended FRSA’s preemption provision in 2007 to clarify, in pertinent part, that FRSA does not preempt state tort claims for “personal injury, death, or property damage” if a railroad defendant has failed to comply with the federal standard of care, the railroad’s own plan or rules, or with a state law that is not incompatible with the FRSA. *Cryogenic*, 901 F. Supp. 2d at

795-96 (citing § 20106). The FRSA does, however, preempt state laws concerning the maximum operating speeds for trains based upon the nature of the track on which they operate as well as laws concerning the warnings required at that track's crossings. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673-76 (1993).

Although FRSA preempts "excessive speed claims," the duty to slow or stop a train to avoid a specific, individualized hazard in order to avoid a collision has not been held to be preempted. *Hensling v. CSX Transp., Inc.*, 396 F.3d 632, 640 (5th Cir. 2005) (quotations omitted) (citing *Easterwood*, 507 U.S. at 675). The United States District Court for the Southern District of Mississippi has affirmatively held that, whether a train engineer breached a duty to respond appropriately to avoid a collision where a vehicle was sitting on the tracks is not preempted because it does not "impose a specific limit on the train's operating speed, but rests on factual issues to be decided by a jury as to whether the engineer's efforts to avoid the collision were sufficient." *Cryogenic*, 901 F. Supp. 2d at 804.

Here, at this stage of the proceedings the Court is unable to say that Plaintiffs' and Ambrose's negligence claims regarding CSXT's duty to "operate a train at a speed for the then existing conditions and be prepared to slow or stop for any hazardous conditions," CSXT's alleged intentional disregard for the safety of the traveling public, and CSXT's purported failure to adequately man their "dispatch center" and respond to calls about the charter bus being stuck on the

Main Street crossing, are necessarily preempted by FRSA.³ Dismissal of these claims pursuant to Rule 12(b)(6) would not be appropriate at this time. CSXT's Motions should be denied without prejudice in this respect.

III. CONCLUSION

To the extent the Court has not addressed any of the parties' arguments, it has considered them and determined that they would not alter the outcome. The Court finds that CSXT's Motions [9] [16] to Dismiss Plaintiff's and Ambrose's claims of "improper maintenance" of the Main Street crossing should be granted and those claims will be dismissed with prejudice. At this stage in the litigation, the Court finds that Plaintiffs' and Ambrose's claims regarding CSXT's duty to "operate a train at a speed for the then existing conditions and be prepared to slow or stop for any hazardous conditions," CSXT's alleged intentional disregard for the safety of the traveling public, and CSXT's purported failure to adequately man their "dispatch center" and respond to calls about the charter bus being stuck on the Main Street crossing, should not be dismissed. CSXT's Motions will be denied without prejudice as to those claims.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Defendant CSX Transportation, Inc.'s Motion [9] to Dismiss Plaintiffs' Amended Complaint [1-1]

³ The Court expresses no view on whether some of these claims may later be subject to dismissal on a more developed record following the completion of discovery.

and Motion to Dismiss [16] Cross-Claims [3] of Defendant Louis Ambrose, Jr., as to Plaintiff's and Ambrose's claims for any "improper maintenance" of the Main Street crossing are **GRANTED** and those claims are **DISMISSED WITH PREJUDICE**.

IT IS, FURTHER, ORDERED AND ADJUDGED that Defendant CSX Transportation, Inc.'s Motion [9] to Dismiss Plaintiffs' Amended Complaint [1-1] and Motion to Dismiss [16] Cross-Claims [3] of Defendant Louis Ambrose, Jr., as to Plaintiffs' and Ambrose's claims regarding CSXT's duty to "operate a train at a speed for the then existing conditions and be prepared to slow or stop for any hazardous conditions," CSXT's alleged intentional disregard for the safety of the traveling public, and CSXT's purported failure to adequately man their "dispatch center" and respond to calls about the charter bus being stuck on the Main Street crossing, are **DENIED WITHOUT PREJUDICE**.

SO ORDERED AND ADJUDGED, this the 29th day of March, 2018.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

Certificate of Service

I hereby certify that on this 4th day of April, 2018, I served a true and correct copy of the foregoing document by first class mail on the following parties:

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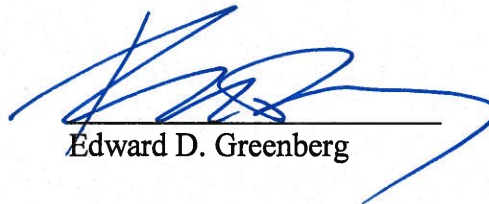
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