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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 BRENT MCFARLAND,

8 Plaintiff,

9 v.

10 BNSF RAILWAY COMPANY,

11 Defendant.

No. 4:16-CV-05024-EFS

12
13 **ORDER DENYING DEFENDANT'S MOTIONS**

14 Before the Court, without oral argument, are Defendant's Fed. R.
15 Civ. P. (6)(b)(1)(B) Motion to Enlarge Time to File Rule 12(c) Motion
16 to Dismiss, ECF No. 107; Motion for Leave to Amend Answer to Plead FELA
17 Preemption, ECF No. 108; and Rule 12(c) Motion to Dismiss Based on FELA
18 Preemption, ECF No. 109. On March 21, 2017, the Court set forth an
19 expedited schedule for consideration of these motions because it found
20 the substantive issue of preclusion under the Federal Employers
21 Liability Act (FELA), 45 U.S.C. § 51 et seq., was potentially
22 dispositive of Plaintiff's claim. See ECF No. 110. For the reasons that
23 follow, the Court denies each of Defendant's motions.

24 **I. MOTION TO ENLARGE TIME (ECF NO. 107)**

25 Per the Scheduling Order, all dispositive motions in this matter
26 were due on or before December 2, 2016. ECF No. 19 at 4. Arguing that
it failed to bring such a motion earlier due to "excusable neglect,"

1 Defendant asks the Court to extend the deadline to file a Rule 12(c)
2 motion to dismiss based on FELA preemption. See ECF No. 107.

3 Federal Rule of Civil Procedure 16 allows a district court to
4 control case scheduling and management. Generally, a scheduling order
5 will control unless modified for good cause. See Fed. R. Civ. P. 16(b);
6 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992).
7 Likewise, if a party misses a deadline, under Rule 6(b), the Court "may,
8 for good cause, extend the time . . . if the party failed to act because
9 of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B) (emphasis added).
10 When determining whether a party's failure to meet a deadline amounts
11 to "excusable neglect," the Court is required to apply a flexible four-
12 factor test, analyzing "(1) the danger of prejudice to the opposing
13 party; (2) the length of the delay and its potential impact on the
14 proceedings; (3) the reason for the delay; and (4) whether the movant
15 acted in good faith." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253,
16 1261 (9th Cir. 2010) (citing *Pioneer Inv. Servs. v. Brunswick Assocs.*,
17 507 U.S. 380, 395 (1993)).

18 Here, the first and second factors are closely connected.
19 Plaintiff was forced to choose between two undesirable options; he could
20 either face the prejudice of needing to respond to additional and
21 unexpected filings during the peak period of trial preparation, or he
22 could accept a continuance and delay trial. Plaintiff chose the former,
23 meaning he bore the extra burden of responding to Defendant's late
24 motions, but these motions will not cause delay.

25 The third factor is the most important to the Court's analysis.
26 In essence, Defendant argues that it "overlooked" the FELA preemption

1 defense. See ECF No. 107 at 9. The Court finds this to be an
2 unpersuasive reason to excuse Defendant's delay in bringing its
3 preemption argument. After all, the determination of whether a party's
4 neglect was excusable "is at bottom an equitable one, taking account of
5 all relevant circumstances surrounding the party's omission." *Pioneer*
6 *Inv. Servs.*, 507 U.S. at 395. And unlike the type of understandable
7 mistakes that might otherwise be excused due to equitable
8 considerations, here, the record of this case – as well as defense
9 counsel's expertise in this particular practice area¹ – show that if
10 Defendant's late filing was due to neglect, such neglect was not
11 excusable.

12 Fourth, and finally, the Court finds that it is unclear whether
13 Defendant acted in good faith by raising the dispositive issue of FELA
14 preemption when Plaintiff's counsel was preoccupied with the myriad
15 tasks that must be completed in the last few weeks before trial.
16 Defendant offered to continue trial, which would have partially relieved
17 Plaintiff of the prejudice he now faces. However, as both parties have
18 undoubtedly gone to great efforts prepare for the current trial date,
19 continuance at this late date would burden Plaintiff and his counsel
20 with the additional expenditure of the time and expense required to re-
21 prepare for trial at a later date. The record before the Court does
22 not provide for a finding that Defendant's latest filings were intended
23 to gain a strategic advantage by diverting Plaintiff's attention away
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25 ¹The Court notes that counsel of record for Defendant specialize in railroad
26 law, including FELA cases, and are members of the National Association of
Railroad Trial Counsel. See <http://www.montgomeryscarp.com/scarp/>;
<http://www.montgomeryscarp.com/chait/>.

1 from trial preparation. However, defense counsel's asserted experience
2 in railroad law, the prior filing of two similarly-dispositive motions
3 within the time provided in the Scheduling Order,² and then the filing
4 of the current motions mere weeks before trial, require the Court to
5 find that Defendant's delay in filing was certainly not excusable
6 neglect.

7 The Court therefore finds that Defendant has not shown that its
8 delay was caused by excusable neglect. Further, even assuming
9 Defendant's delay could somehow be based on excusable neglect, the Court
10 finds Defendant has not demonstrated that good cause exists, which is
11 required by Rule 6(b) and Rule 16(b) in order to allow modification of
12 the deadline and relief from the Scheduling Order. And lastly, as
13 discussed below, the Court finds that it would nonetheless deny
14 Defendant's substantive motion. Therefore, Defendant's Motion to
15 Enlarge Time, **ECF No. 107**, is **DENIED**.

16 **II. MOTION FOR LEAVE TO AMEND ANSWER (ECF NO. 108)**

17 The Court ordered the parties to file all motions to amend the
18 pleadings on or before June 2, 2016. ECF No. 19 at 2. Similar to its
19 request in the Motion to Enlarge, in the Motion for Leave to Amend
20 Answer, Defendant asks the Court to allow amended pleadings well after
21 the deadline so that Defendant may assert a previously unraised
22 affirmative defense: FELA preemption. See ECF No. 108.

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26 ² On March 22, 2016, Defendant filed a Motion to Dismiss Under Fed. R. Civ. P.
12(b)(1) and 12(b)(6), ECF No. 7, arguing that Plaintiff's claim was preempted
by the Railway Labor Act, 45 U.S.C. § 151, et seq. Then, on December 2, 2016,
Defendant filed a Motion for Summary Judgment, ECF No. 40, arguing that the
Rule 16(f) is self-executing and, therefore, Plaintiff could not show
retaliatory motive.

1 As relevant here, a party should be allowed to amend its pleadings
2 "when justice so requires." Fed. R. Civ. P. 15(a)(2). According to the
3 Supreme Court, this means that district courts should grant leave to
4 amend pleadings unless it finds reasons that justify denying such a
5 request, "such as undue delay, bad faith or dilatory motive on the part
6 of the movant, repeated failure to cure deficiencies by amendments
7 previously allowed, undue prejudice to the opposing party by virtue of
8 allowance of the amendment, futility of amendment, etc." *Foman v. Davis*,
9 371 U.S. 178, 182 (1962).

10 In this case, the Court finds that, because of the close proximity
11 to trial, allowing the requested amendment would unduly prejudice
12 Plaintiff. The Court also finds – as discussed below – that allowing
13 the requested amendment would likely be futile. As such, and for the
14 reasons discussed above in denying ECF No. 107, the Court finds that
15 the interests of justice weigh against allowing Defendant to modify its
16 answer so late in the proceedings; **ECF No. 108 is DENIED.**

17 **III. MOTION TO DISMISS BASED ON FELA PREEMPTION (ECF NO. 109)**

18 In its substantive motion, ECF No. 109, Defendant argues that FELA
19 preempts Plaintiff's state-law claim for wrongful termination, and asks
20 that the Court dismiss Plaintiff's complaint. As a preliminary matter,
21 because the Court denied Defendant's requests to file this motion beyond
22 the applicable deadline, **ECF No. 109 is DENIED AS UNTIMELY.** The Court
23 notes, however, that it would also deny Defendant's FELA preemption
24 motion on its merits.

25 Federal preemption is a question of congressional intent.
26 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-17 (1992). Courts

1 look to the statute to determine whether it was the "clear and manifest
2 purpose of Congress to preempt an area of state law." *CSX Transp. v.*
3 *Easterwood*, 507 U.S. 658, 662-64 (1993).

4 Congress enacted FELA in 1906 to "provide a federal remedy for
5 railroad workers who suffer personal injuries as a result of the
6 negligence of their employer or their fellow employees." *Atchison,*
7 *Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561 (1987). Thus,
8 its primary purpose is to enable injured railroad workers to overcome
9 many of the traditional tort defenses that had previously barred
10 recovery, such as assumption of risk, contributory negligence, and
11 contractual waiver of liability. *Lewy v. S. Pac. Transp. Co.*, 799 F.2d
12 1281, 1287 (9th Cir. 1986). And although FELA section 10, 45 U.S.C.
13 § 60, protects railroad employees from retaliation for providing
14 information that may give rise to a FELA action, "it does not encompass
15 employees who are discharged or disciplined because they themselves
16 initiate FELA actions." *Lewy*, 799 F.2d at 1292-93. Importantly, no
17 other FELA provision serves to allow a railroad employee to bring a
18 wrongful discharge claim in court. See *id.* at 1293.

19 In contrast, the purpose of Washington State's tort of wrongful
20 discharge "is to prevent employers from utilizing the employee at-will
21 doctrine to subvert public policy." *Rose v. Anderson Hay & Grain Co.*,
22 358 P.3d 1139, 1141 (Wash. 2015). Its goal is to prevent employers from
23 shielding themselves from liability that would otherwise frustrate a
24 "clear manifestation of public policy," and is intended to encourage
25 both employers and employees to obey the law. *Id.*

1 The Court finds that in enacting FELA, Congress did not manifest
2 a clear intent to preempt state laws and thereby shield railroad
3 employers from liability for wrongful-discharge actions. Instead of
4 arising from a railroad-related injury, Plaintiff's claim is based on
5 Defendant's decision to terminate him in violation of Washington State's
6 public policy. Therefore, FELA does not preempt Plaintiff's claim.

7 Accordingly, **IT IS HEREBY ORDERED:**

8 **1.** Defendant's Fed. R. Civ. P. (6)(b)(1)(B) Motion to Enlarge Time
9 to File Rule 12(c) Motion to Dismiss, **ECF No. 107**, is **DENIED**.

10 **2.** Defendant's Motion for Leave to Amend Answer to Plead FELA
11 Preemption, **ECF No. 108**, is **DENIED**.

12 **3.** Defendant's Rule 12(c) Motion to Dismiss Based on FELA
13 Preemption, **ECF No. 109**, is **DENIED**.

14 **IT IS FURTHER ORDERED** that the Clerk's Office is directed to enter
15 this Order and provide copies to all counsel.

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17 **DATED** this 7th day of April 2017.

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19 s/Edward F. Shea
 EDWARD F. SHEA
20 Senior United States District Judge
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