

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

233615

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Finance Docket No. 35701

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**ENTERED**  
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January 2, 2013  
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Public Record

**BRIEF IN OPPOSITION TO PETITION OF NORFOLK SOUTHERN  
RAILWAY COMPANY FOR EXPEDITED DECLARATORY ORDER**

Dated: January 2, 2013

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**BRIEF IN OPPOSITION TO PETITION OF NORFOLK SOUTHERN RAILWAY  
COMPANY FOR EXPEDITED DECLARATORY ORDER**

David W. Jones, Sandra A. Atkins, Roy A. Richardson, Linda R. LeFever, Michael and Deborah Agee, James A. Hill, Dianne M. Maxey, Dale and Dee Pfeiffer, Sakhone Manivong, Richard and Barbara Schilling, Nancy and Susan Doyle, Katherine A. Durham, Joshua Wilkinson, Joseph and Jennifer Burtch, Angelo and Robin Juliano, Matthew and Cynthia Owens, Ronald and Christine Sustakoski, and David and Elizabeth Weisman (hereinafter referred to as "Owners"), by counsel, submit this brief in opposition to Norfolk Southern Railway Company's Petition for Expedited Declaratory Order.

**FACTUAL AND PROCEDURAL BACKGROUND**

The Owners own property near one of Norfolk Southern's rail lines in Roanoke County, Virginia. Their properties are being bombarded by the rail line's negative effects. The rail line discharges smoke, dust, dirt, and other foul particulates onto their properties and creates noise and vibrations that disturb their homes. (Complaint, Paragraphs 14-15). As such, they have brought actions in the Circuit Court for Roanoke County alleging that

Norfolk Southern “has taken and/or damaged the property of the Owners within the meaning of Article I, Section 11 of the Constitution of Virginia without paying just compensation.” (Complaint, Unnumbered Prayer for Relief). Simply put, these are inverse condemnation claims under the Virginia state constitution for the taking and/or damaging of private property.

Norfolk Southern has demurred to the Owners’ claims, asserting preemption under the ICCTA as a defense. As Norfolk Southern pointed out in its Petition filed November 28, 2012, there was a hearing scheduled for its demurrer on December 10, 2012 before the Honorable Clifford R. Weckstein of the Roanoke County Circuit Court, which Norfolk Southern sought to avoid by filing a motion asking the Court to stay its consideration of the ICCTA preemption defense. (Norfolk Southern Petition, pp. 6-7). However, the hearing was held as planned, and the Court denied Norfolk Southern’s motion to stay. The Court then ruled that the ICCTA does **NOT** preempt inverse condemnation claims.

Norfolk Southern’s petition, at this point, serves no purpose. The Court has already ruled that the ICCTA does not preempt inverse condemnation claims. The STB should deny Norfolk Southern’s petition for that reason alone. But even beyond that, the STB should deny Norfolk Southern’s petition because the STB itself has already decided the issue in favor of the Owners. In Mark Lange, STB Finance Docket No. 35037 (Jan. 24, 2008), the STB held that state inverse condemnation claims are not preempted by the ICCTA.

## ARGUMENT

Mark Lange held that state inverse condemnation claims are not preempted by the ICCTA. Norfolk Southern tries to limit the import of Mark Lange by arguing that the STB merely recognized that Lange could assert an inverse condemnation claim under the 5<sup>th</sup> and 14<sup>th</sup> Amendment. The “ICCTA, which is a federal statute, does not and cannot preempt claims asserting rights guaranteed under the United States Constitution.” (Norfolk Southern Petition, p. 12).

Unfortunately, Norfolk Southern has blatantly misread Mark Lange. Lange was not pursuing an inverse condemnation claim under the federal constitution for interference with his federal constitutional rights. He was pursuing an inverse condemnation claim under the Wisconsin *state* constitution for interference with his *state* constitutional rights. Lange asserted a claim under Wis. Stat. 32.10, the *state* inverse condemnation statute. Lange at 4. After determining that the claim was not preempted, the STB “[e]ft it to the Wisconsin state courts to determine *under state law* whether Lange has, in fact, pled such a [inverse condemnation] claim.” Lange at 4 (emphasis added). The case the STB cited in support of its finding that there was no preemption was Suchon v. Wisconsin Central Ltd., No. 04-C-0379-C, 2005 WL 568057 (W.D. Wis. Feb. 23, 2005). In Suchon, the court held that a state common law nuisance claim was preempted by the ICCTA, but evaluated the *state* inverse condemnation claim on its merits and determined that Suchon had failed to state an inverse condemnation claim under “*Wisconsin law*.” Suchon, 2005 WL 568057, at 2 (emphasis added).

The STB has already determined that state inverse condemnation claims are not preempted by the ICCTA. It has made a ruling directly on point, and there are no rulings to the contrary from any court in the country. Norfolk Southern can point to as many instances of state common law claim preemption as it pleases, but they are inapt. The ICCTA may bar them, but it does not bar inverse condemnation claims.

Moreover, contrary to Norfolk Southern's assertions, inverse condemnation actions are fundamentally different from the nuisance and trespass type actions that have traditionally been preempted by the ICCTA. An inverse condemnation action is merely a substitute for a straight condemnation.

“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.” First Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 316 (1987).

“The point in issue [in the inverse condemnation proceeding] was the compensation to be made to the owner of the land; in other words, the value of the property taken.... The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value.” Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 407 (1878). “The owner whose property is taken or damaged for public use has a right to waive all other remedies and to sue upon an implied contract that he will be paid therefor such amount as would

have been awarded if the property had been condemned under the eminent domain statute.” Burns v. Board of Sup’rs of Fairfax County, 218 Va. 625, 627 (1977). “The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings.” Hurley v. Kincaid, 285 U.S. 95, 104 (1932).

Thus, like any condemnor, railway companies that have been delegated the power of eminent domain are supposed to initiate condemnation proceedings when they need to take or damage private property for the public use, so that injured property owners are compensated for their property. Virginia Code § 56-347 (delegating the power of eminent domain to railways and authorizing them to use the condemnation procedures in Chapter 2 of Title 25.1). When condemnors fail to initiate straight condemnation proceedings to compensate owners for their use of the eminent domain power, property owners are able to file inverse condemnation actions to obtain just compensation. Virginia Code § 8.01-187. Thus, straight condemnation proceedings and inverse condemnation claims are just opposite sides of the same eminent domain coin. In one, the condemnor petitions to determine the value of the taken and/or damaged property. In the other, the property owner petitions to determine the value of the taken and/or damaged property. Either way, the condemnor- in this case, Norfolk Southern- has exercised its power to take or damage property and must pay just compensation. The only question is who brings the proceeding to determine the amount of just compensation to be awarded.

If Norfolk Southern had brought straight condemnation actions to condemn the Owners’ properties there would have been no question as to their entitlement to just

compensation. Money would have been owed in that case- the same amount of money that will be owed for the taking and/or damaging of their property in this case. Even so, Norfolk Southern is raising ICCTA preemption as a defense to the inverse condemnation claims. Norfolk Southern fails to understand that straight condemnation and inverse condemnations are interconnected. If the ICCTA bars inverse condemnation actions because they require monetary awards that effect rail line operations, how can the ICCTA not also bar straight condemnation actions? They are opposite sides of the same coin- they require the same amount of money to be paid for the same injuries to property. If all state inverse condemnation claims are preempted by the ICCTA, so too are all state straight condemnations. In that event, the ICCTA has stripped every railway company in the country of the power of eminent domain.

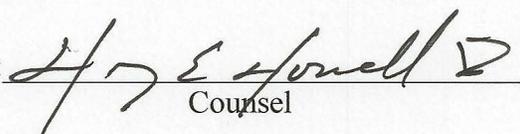
That cannot be the intent or effect of the ICCTA. Straight inverse condemnation claims are not preempted by the ICCTA, and neither are inverse condemnation claims. The STB should uphold its ruling in Mark Lange and deny Norfolk Southern's petition, though it need not even consider the petition as the petition has been rendered moot by the ruling of the Roanoke County Circuit Court.

### **CONCLUSION**

For the foregoing reasons, the Owners respectfully request that the Surface Transportation Board deny this Petition, and deny Norfolk Southern the relief requested.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served the following parties of record in this proceeding and all interested parties with this document by United States Mail:

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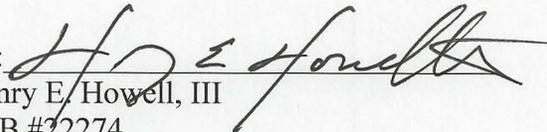
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