

233651

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
January 8, 2013
Part of
Public Record

Finance Docket No. 35701

**NORFOLK SOUTHERN RAILWAY COMPANY'S
REBUTTAL STATEMENT IN SUPPORT OF
PETITION FOR DECLARATORY ORDER**

Dated: January 8, 2013

Communications with respect to this
document should be addressed to:

GARY A. BRYANT
WILLCOX & SAVAGE, PC
440 MONTICELLO AVENUE
WELLS FARGO CENTER, STE. 2200
NORFOLK, VIRGINIA 23510
(757) 628-5520

JOHN M. SCHEIB
NORFOLK SOUTHERN RAILWAY
COMPANY
THREE COMMERCIAL PLACE
NORFOLK, VIRGINIA 23510
(757) 629-2836

ATTORNEYS FOR NORFOLK
SOUTHERN RAILWAY COMPANY

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35701

**NORFOLK SOUTHERN RAILWAY COMPANY'S
REBUTTAL STATEMENT IN SUPPORT OF
PETITION FOR DECLARATORY ORDER**

Preliminary Statement

The Plaintiffs' reply to Norfolk Southern Railway Company's ("Norfolk Southern's") Petition does not take issue with the plain language of ICCTA preempting all state and local remedies aimed at transportation by a rail carrier. Instead, Plaintiffs argue that this Board has created an exception to the preemption provision for inverse condemnation claims even if they do not involve a "taking" under the United States Constitution. According to Plaintiffs, if states have enacted laws allowing inverse condemnation suits seeking traditional nuisance damages, then ICCTA's preemption provision does not apply, and the suits may proceed seeking nuisance damages regardless of the fact that the target rail line has been in operation for over a hundred years. If the Plaintiffs' position is correct, then this "inverse condemnation" exception swallows the entire preemption provision. According to the Plaintiffs' theory, in Virginia one can sue a railroad for nuisance damages regardless of when the line was built, as long as the plaintiffs attach the "inverse condemnation" label to the claim.

The language of ICCTA is clear. All state law remedies aimed at rail transportation, including those rooted in state constitutions, are preempted regardless of the label. Allowing an exception for inverse condemnation claims would eviscerate the preemption provisions of ICCTA, and result in an avalanche of claims for nuisance damages, all under the guise of

“inverse condemnation.” The Board should reject the Plaintiffs’ “inverse condemnation” exception to ICCTA preemption absent a taking which requires compensation under the United States Constitution.

Factual and Procedural Background

The Plaintiffs do not challenge the factual and procedural background set forth by Norfolk Southern in its original Petition. While the Plaintiffs use hyperbole in claiming that their property is “bombarDED” by the effects of the rail line, Norfolk Southern sees no need to respond to such language other than to say that the Plaintiffs take no issue with the undisputed fact that the rail line about which they now complain has been in operation for well over a hundred years, and long before the Plaintiffs acquired their property. Nor do the Plaintiffs dispute that their property is not even adjacent to Norfolk Southern’s property, as the property belonging to the power company--APCO--is between the Plaintiffs’ property and Norfolk Southern’s rail line. Indeed, some of the Plaintiffs’ property is separately not only by the APCO property, but by other homes, and even a public road. With regard to the Plaintiffs’ contention that the Board already has decided that inverse condemnation claims are not preempted, that the Plaintiffs’ complaints allege facts amounting to a “taking,” or that Norfolk Southern has “blatantly misread” *Petition of Mark Lange*, STB Finance Docket No. 35037 (Jan. 24, 2008) (“*Mark Lange*”), these are legal conclusions the rightness of which the Board can determine for itself.

Argument

The Plaintiffs posit three arguments in opposition to Norfolk Southern’s Petition. First, the Plaintiffs contend that the Petition is moot in light of the decision of the Circuit Court for Roanoke County. Second, the Plaintiffs contend that the Board already has held in *Mark Lange* that all inverse condemnation claims escape ICCTA preemption. Third, the Plaintiffs argue that

inverse condemnation claims are a necessary corollary to condemnation proceedings, and you cannot have one without the other.

A. THE PETITION IS NOT MOOT

The Virginia circuit court ruling applies to one of eighteen¹ cases filed in Roanoke County Circuit Court, and that the ruling was on demurrer where the court was required to accept as true all of the Plaintiffs' allegations, including the allegation that the Railroad's conduct amounted to a "taking." This Board is not hampered by the procedural restrictions of a demurrer hearing. The record properly before the Board (and with which the Plaintiffs take no issue) makes clear that the allegations of the complaints cannot, under any set of circumstances, be characterized as a "taking" in violation of the United States Constitution. *See Richards v. Wash. Terminal Co.*, 233 U.S. 546, 553-54 (1914) (smoke, vibration and similar annoyances incidental to the operation of a rail line not a "taking" within the constitutional provision). In light of this procedural distinction, and in light of the fact that the circuit court ruling applies to just one of eighteen cases, the ICCTA preemption issue still is very much alive.

More importantly, *Schilling v. Appalachian Power Co. & Norfolk Southern Railway Company*, Case No. CL11-001047-00 ("*Schilling*"), the case in which the court ruled, is, and was intended by Plaintiffs' counsel, as a test case. Indeed, the matter was brought as a declaratory judgment action in Virginia wherein the Plaintiffs are asking the court to "declare" that they have valid state-law claims for nuisance damages against Norfolk Southern arising out of the operation of a rail line built in the 1890s. The Virginia constitutional provision allowing inverse condemnation damages on which the Plaintiffs base their claims is not unique to Virginia, as several other states have enacted similar provisions, allowing for "damages" for something less

¹ On December 18, 2012, Plaintiff Dianne M. Maxey moved to nonsuit her claim against Norfolk Southern, which effectively means that, as soon as the court grants the nonsuit (non-discretionary in these circumstances), Maxey's claim will be dismissed.

than a “taking” which requires compensation under the United States Constitution. Accordingly, this is an important issue that clearly has caused controversy.

The Board has discretionary authority to issue a declaratory order to resolve a controversy pursuant to 5 U.S.C. 554(e). In the instant case, addressing the preemption issue is particularly important in light of the sweeping consequences resulting from the Plaintiffs’ position that there is an exception to ICCTA preemption for state inverse condemnation claims seeking nuisance damages, and particularly in light of the fact that the Plaintiffs’ position is based largely on this Board’s ruling in *Mark Lange*.

Norfolk Southern does not seek the Board’s guidance with regard to whether the ICCTA preempts inverse condemnation claims for compensation resulting from a “taking” under the Fifth and Fourteenth Amendments of the United States Constitution. Norfolk Southern readily recognizes that such claims may proceed, as the ICCTA cannot preempt claims securing rights guaranteed by the federal Constitution. Instead, Norfolk Southern asks the Board to determine whether the ICCTA preempts purely state law inverse condemnation claims seeking nuisance damages, which claims are not made in connection with contemporaneous condemnation proceedings by the railroad, but more than 100 years after the railroad condemned the property and put it to the public use of a rail line.

B. *MARK LANGE* DID NOT CREATE AN “INVERSE CONDEMNATION” EXCEPTION TO ICCTA PREEMPTION

The Plaintiffs take no issue with Norfolk Southern’s characterization of ICCTA as preempting all state law remedies aimed at transportation by a rail carrier. Nor do the Plaintiffs take issue with Norfolk Southern’s contention that state law remedies include those arising under state constitutions in light of the fact that federal preemption is rooted in the Supremacy Clause. Instead, Plaintiffs contend that this Board has enacted an exception, having “already determined”

in *Mark Lange* “that state inverse condemnation claims are not preempted by ICCTA.” Reply Br. at 4. That statement alone justifies this Board’s consideration of Norfolk Southern’s Petition, as *Mark Lange* does not create an exception for inverse condemnation claims seeking nuisance damages under state law.

The Board held in *Mark Lange* that the claims which were rooted solely in state law were preempted. The only claim that survived was one for compensation resulting from a physical taking; which claim the Board noted is guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution. Thus, the Board in *Mark Lange* did not allow a claim rooted solely in state law. Instead, the only state law claim the Board held was not preempted by ICCTA was one seeking compensation for an actual taking--a right guaranteed under the United States Constitution. Norfolk Southern Petition at 12-14.²

The Plaintiffs argued that 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.

Reply Br. at 5. The Plaintiff’s characterization of *Mark Lange* is just plain wrong. The Board’s decision makes clear that *Mark Lange* never even mentioned an inverse condemnation claim under Wisconsin law in his state lawsuit or even in his petition to the STB:

Finally, the prayer for relief in Lange’s state court action requests \$20,000 for “the land.” Even though the Amended Complaint does not cite Wisconsin’s inverse condemnation statute... this prayer for relief could be construed by the state court as raising an inverse condemnation claim.

² As Norfolk Southern notes in its original Petition at note 7, the railroad in *Mark Lange* physically invaded Mr. Lange’s property by building a fence across it, literally cutting off Mr. Lange’s access to part of his property, and then using that part of Mr. Lange’s property to store railroad equipment. Far from a case involving “nuisance damages,” *Mark Lange* involved a physical taking without compensation in violation of rights secured by the United States Constitution. Accordingly, it is important for the Board to rule on this issue, particularly in light of the Plaintiffs’ construction of the Board’s decision in *Mark Lange*, as discussed in greater detail below.

Mark Lange at 4. Indeed, the Board concluded that *all* of the claims actually alleged by Lange were preempted. The Board, however, chose to read the prayer for relief broadly to request damages for “the land” which was *actually taken*, noting that the federal Constitution requires compensation for such a taking:

A corollary to a state’s delegation of its condemnation authority, however, is that, just as a state must compensate persons for *the taking* of private property under the *Fifth and Fourteenth Amendments to the United States Constitution*, so must a railroad compensate the owner for the land *taken* when it exercises its eminent domain power.

Id. (emphasis supplied). The Board concluded that “an award of just compensation for an *alleged taking of property*--assuming such compensation has not already been paid--would not unreasonably interfere with rail operations and would not be preempted.” *Id.* Nothing in *Mark Lange* suggests that a party could seek nuisance damages in an inverse condemnation action when no property was taken.

Absolutely nothing in the instant case alleges, and no facts can be construed as demonstrating, anything close to a “federal taking” in violation of the United States Constitution. Nor can there be any doubt that the claims seek “nuisance damages,” as the Plaintiffs specifically allege that, after APCO removed trees on its own property, “[t]he operation of Norfolk Southern’s rail line now constitutes a nuisance” and that “the noise, vibration, and discharges have damaged the owners’ property and decreased its market value” and that “[t]he property of the owners is less valuable, marketable and desirable.” Complaint ¶ 16.

Mark Lange stands for nothing more than that the ICCTA cannot preempt claims seeking redress for rights guaranteed under the United States Constitution. The fact that those rights may be asserted pursuant to state or federal law is irrelevant. Indeed, after finding all of the plaintiff’s state law claims preempted in *Mark Lange*, the Board read the relief sought broadly enough to

recognize the only claim that would not be preempted by ICCTA--one seeking compensation for a “taking” in violation of the United States Constitution.

Why Plaintiffs would cite *Suchon v. Wisconsin Central Ltd.*, No. 04-C-0379-C, 2005 WL 568057 (W.D. Wis. Feb. 23, 2005), in support of their position is baffling. The plaintiff in *Suchon v. Wisconsin Central Ltd.* filed claims of nuisance and inverse condemnation alleging that the proximity of the railroad to his property “subjected him and his employees to increased vibrations from passing trains and diesel fumes from locomotives” and that these effects “interfered with the operation of his body shop.” *Id.* at *1. The Federal Court for the Western District of Wisconsin concluded that the nuisance claim was preempted by ICCTA, and that the plaintiff failed to allege a viable inverse condemnation claim as the railroad’s activity did not amount to “an actionable taking” because it did not involve “actual physical occupation by the condemning authority or a restriction on the use of the property that ‘deprives the owner of all, or substantially all of the beneficial use of his property.’” *Id.* at *2 (quoting *Howell Plaza, Inc. v. State Highway Comm’n*, 66 Wis.2d 720, 725, 226 N.W.2d 185, 188 (1975)). Indeed, the court went on to say that “although the dust, inconvenience and noise are unpleasant impediments to the shop’s operation, *they fall far short of a taking.*” *Id.* ICCTA preemption was never an issue. Wisconsin did not recognize inverse condemnation for anything less than a federal taking, so there was no state law claim to preempt.

Put simply, the Plaintiffs’ argument is that the Board should recognize an exception to ICCTA’s preemption of state law remedies when faced with an inverse condemnation claim for nuisance damages against a rail line that has been in place for more than a hundred years. The Plaintiffs’ position should be rejected not only because it is contrary to the plain language of ICCTA, but also because it would essentially eviscerate the preemption provisions of ICCTA as applied to nuisance claims.

C. THE RIGHT OF EMINENT DOMAIN DOES NOT REQUIRE INVERSE CONDEMNATION CLAIMS FOR NUISANCE DAMAGES

Plaintiffs contend that “straight condemnation proceedings and inverse condemnation claims are just opposite sides of the same eminent domain coin” and that, when the condemner “has exercised its power to take or damage property” it “must pay just compensation.” Reply Br. at 6. As applied to railroads, the Plaintiffs are correct when the condemnation proceeding requires the railroad to *take* property. In those cases, the United States Constitution requires compensation. The Plaintiffs are incorrect when the railroad’s public use does nothing more than allegedly create a “nuisance” to nearby property. When the railroad’s public use does nothing more than create a nuisance, no federal constitutional rights are involved. The only “claim” the Plaintiffs can allege are those arising under *state law*. As discussed above, state law claims are preempted, and there are no exceptions for inverse condemnation claims absent a federal taking.

While not particularly relevant for the ICCTA preemption analysis, the Plaintiffs’ entire suit is premised on the dubious notion that the Virginia Constitution recognizes an inverse condemnation claim for “nuisance” damages. The Supreme Court’s decision in *Byler v. Virginia Electric & Power Co.* (a copy of which is attached to the Petition as Exhibit 7) specifically held that nuisance type damages were *not* compensable in an inverse condemnation claim.³

³ ___ Va. ___, 731 S.E.2d 916 (2012). The Supreme Court’s decision specifically rejected a claim for “nuisance damages” arising out of the public use of property by a power company for transmission lines, noting that “a partial diminution in the value of property [is] compensable only if it results in a dislocation of a specific right contained in the property owner’s bundle of property rights.” *Id.* at 921. Applying the rule, the Supreme Court held that there must be “damage to the property itself, [that] does not include a mere infringement of the owner’s personal pleasure or enjoyment.” *Id.* The Court noted that “rendering private property less desirable for certain purposes, or even causing personal annoyances or discomfort in its use, will not constitute the damage contemplated by the constitution.” *Id.* Importantly, the Court concluded that the Plaintiffs not only did not, but *could not* allege a valid claim for inverse condemnation damages notwithstanding their contention that they could plead “blighting effects” from the public use which “could be anything from noise, smoke, or dust to interfering with the light, air, or view or one of the other appurtenant rights to property....” *Id.* at 918.

But even if the law in Virginia (constitutional or statutory) recognized an inverse condemnation claim for nuisance damages, the claim would be preempted under ICCTA to the extent that the claim is aimed at transportation by a rail carrier. Federal preemption is rooted in the supremacy clause, which makes clear that “the laws of the United States... shall be the supreme law of the land... anything in the *constitution* or laws of any state to the contrary notwithstanding.” U.S. Const. Art. VI, SL.2 (emphasis added). The doctrine of preemption “permits Congress to expressly displace state or local law in any given field” including law rooted in state constitutions. *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 156 (4th Cir. 2010) (internal citation omitted). When Congress expressly displaces state or local law in a given field, preemption is mandatory. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

Enacting ICCTA, Congress expressly displaced remedies under state law that regulates rail transportation. Specifically, 49 U.S.C. Section 10501(B) states, in pertinent part:

[R]emedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under federal or state law.

Moreover, federal courts and this Board have consistently construed “remedies” for the purpose of ICCTA preemption to include any and all claims for damages, regardless of the theory, including claims for damages arising out of an alleged nuisance. *See Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1069 (11th Cir. 2010). There is, and never has been, an “exception” for state law inverse condemnation claims seeking nuisance damages, as “[a]ll state-borne attacks aimed at the target, no matter the weapon used, are rebuffed by the shield of federal supremacy.” *Kiser v. CSX Real Prop., Inc.*, No. 8:07-cv-1266-T-24-EAJ, 2008 WL 4866024 (M.D. Fla. Nov. 7, 2008).

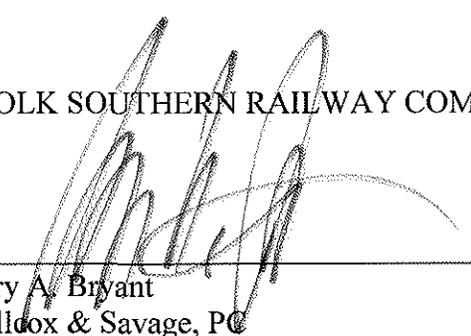
CONCLUSION

For the foregoing reasons, Norfolk Southern Railway Company requests that the Board determine that the claims filed in the Circuit Court for Roanoke County are preempted by the Interstate Commerce Commission Termination Act as the claims are for damages under state law, and not a taking in violation of the federal Constitution.

Dated January 8, 2013.

NORFOLK SOUTHERN RAILWAY COMPANY

By _____



Gary A. Bryant
Willcox & Savage, PC
440 Monticello Avenue
Wells Fargo Center, Ste. 2200
Norfolk, Virginia 23510
(757) 628-5520 Telephone
(757) 628-5566 Facsimile
gbryant@wilsav.com

John M. Scheib
Norfolk Southern Railway Company
Three Commercial Place
Law Department
Norfolk, Virginia 23510
(757) 629-2836 Telephone

CERTIFICATE OF SERVICE

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

The Hon. Clifford R. Weckstein
Roanoke County Circuit Court
P. O. Box 1126
Salem, Virginia 24153-1126

C. Richard Cranwell, Esquire
Cranwell Moore & Emick, PLC
P. O. Box 11804
Roanoke, Virginia 24022

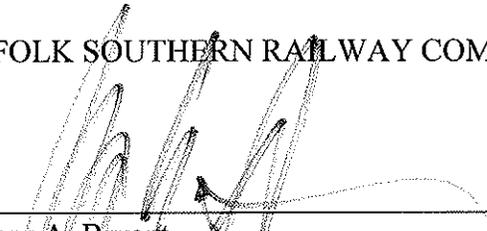
Henry E. Howell, III, Esquire
The Eminent Domain Litigation Group, PLC
One East Plume Street
Norfolk, Virginia 23510

Phillip V. Anderson, Esquire
Frith Anderson & Peake, PC
P. O. Box 1240
Roanoke, Virginia 24006-1240

Dated: January 8, 2013

NORFOLK SOUTHERN RAILWAY COMPANY

By _____


Gary A. Bryant
Willeox & Savage, PC
440 Monticello Avenue
Wells Fargo Center, Ste. 2200
Norfolk, Virginia 23510
(757) 628-5520 Telephone
(757) 628-5566 Facsimile
gbryant@wilsav.com

John M. Scheib
Norfolk Southern Railway Company
Three Commercial Place
Law Department
Norfolk, Virginia 23510
(757) 629-2836 Telephone