

officials and private persons for railroad business purposes.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at [www.regulations.gov](http://www.regulations.gov) and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Web site:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590.

- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by January 31, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the

**Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or online at <http://www.dot.gov/privacy.html>.

Issued in Washington, DC, on December 10, 2012.

**Robert C. Lauby,**

*Deputy Associate Administrator for Regulatory and Legislative Operations.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

[Docket Number FRA-2012-0059]

#### Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a letter dated June 25, 2012, Napa Valley Railroad/Napa Valley Wine Train (NVRR) has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 232—Brake System Safety Standards for Freight and Other Non-Passenger Trains and Equipment; End-of-Train Devices. FRA assigned the petition Docket Number FRA-2012-0059.

NVRR seeks relief with respect to the application of certain provisions of 49 CFR Part 232, specifically, Appendix B Section 232.17(b)(2) for passenger car maintenance requirements. NVRR requests to extend all air brake clean, oil, test, and stencil periods from 1 year or 15 months to a period of 5 years on nine passenger equipment cars identified in its petition. The operation of the equipment is limited to 25 mph and has mileage estimated to not exceed 18,000 miles per year.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at [www.regulations.gov](http://www.regulations.gov) and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except federal Holidays.

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Issued in Washington, DC, on December 10, 2012.

**Robert C. Lauby,**

*Deputy Associate Administrator for Regulatory and Legislative Operations.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

[Docket Number FRA-2012-0065]

#### Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), this document provides the public notice that by a document dated May 29, 2012, Peter J. Douglas, on behalf of Union Tank Car Company (UTLX), has petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 231—Railroad Safety Appliance Standards; specifically, 49 CFR 231.21(f)(3) that addresses the location of side handholds. FRA assigned the petition Docket Number FRA-2012-0065.

UTLX requests relief for cars where the side horizontal handholds are currently in compliance, as they intend to remove and replace the four horizontal handholds with vertical handholds on each corner of each car. Twelve cars are in the process of being constructed that are affected by the requirements of 49 CFR 231.21(f)(3). UTLX contends that the addition of the ergonomically designed vertical

handhold at each corner of the car would also eliminate the horizontal handhold (“knee knocker”) when boarding the car, and thus eliminate a tripping hazard while egressing. UTLX believes that the installation of the vertical handhold provides a safer means for railroad employees equipped with a radio, remote-control belt pack, and lantern to board the end platform or ride while standing on the sill step, and maintain three-point contact.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at [www.regulations.gov](http://www.regulations.gov) and in person at the U.S. Department of Transportation’s (DOT) Docket Operations Facility, 1200 New Jersey Avenue SE., W12-140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

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Communications received by January 31, 2013 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable.

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65, Number 70; Pages 19477–78), or online at <http://www.dot.gov/privacy.html>.

Issued in Washington, DC, on December 10, 2012.

**Robert C. Lauby,**

*Deputy Associate Administrator for Regulatory and Legislative Operations.*

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[Docket No. FD 35701]

#### Norfolk Southern Railway Company— Petition for Declaratory Order

Norfolk Southern Railway Company (NS) filed a petition for a declaratory order on November 28, 2012, pertaining to 18 inverse condemnation lawsuits filed in the Circuit Court of Roanoke County, Va., against NS and Appalachian Power Company (APCO). In its petition, NS requests that the Board find that under 49 U.S.C. 10501(b), the claims of nuisance and inverse condemnation asserted against NS in those suits are preempted by federal law. For the reasons discussed below, a declaratory order proceeding will be instituted to consider the issues raised in the petition.

#### Background

According to the petition, between 1890 and 1900, NS constructed and began operation on a rail line in Roanoke County, Va., which has been an active line since that time. The plaintiffs in the state lawsuits are homeowners who live in a neighborhood near the NS line. According to NS, operations on its rail line predate the development of the neighborhood. APCO’s property is adjacent to the rail line and lies between plaintiffs’ properties and NS’s rail line.

The petition alleges that, beginning in 2009, APCO began removing trees and erecting electrical transmission towers and lines on its land. Thereafter, plaintiffs filed their state court lawsuits against NS and APCO alleging, in part, that, since APCO removed the trees that had insulated their property from the effects of NS’s rail operations, the dust (including coal dust), dirt, smoke, vibrations, and noise from the operation of NS’s trains have damaged their property and diminished its value. Plaintiffs’ court complaints claim that the operation of NS’s rail line now constitutes a nuisance and that NS has violated Article I, section 11 of the Constitution of Virginia, which provides

that private property shall not be taken or damaged for public use without just compensation to the property owner. NS does not dispute that its operation of the rail line constitutes a public use, but does contend that plaintiffs’ claims are preempted by 49 U.S.C. 10501(b).

#### Discussion and Conclusions

The Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. The Interstate Commerce Act, as revised by the ICC Termination Act of 1995, vests in the Board broad jurisdiction over “transportation by rail carrier,” 49 U.S.C. 10501(a)(1), which extends to property, facilities, instrumentalities, or equipment of any kind related to that transportation, 49 U.S.C. 10102(9). The preemption provision in the Board’s governing statute states 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.” 49 U.S.C. 10501(b). NS argues, and asks the Board to declare, that the claims asserted against it in the state lawsuits are preempted under this provision.

The Board will institute a declaratory order proceeding and establish a procedural schedule for the filing of pleadings. This will ensure that the record is complete on the issue of whether the remedies sought by plaintiffs are preempted by § 10501(b).<sup>1</sup>

The Board will consider this matter under the modified procedure rules at 49 CFR part 1112. NS’s detailed petition will serve as its opening statement. Replies will be due 20 days from the date of service of this decision. NS’s rebuttal will be due 27 days from the service date of this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

#### *It is ordered:*

1. A declaratory order proceeding is instituted.
2. Replies to NS’s petition are due by January 2, 2013.
3. NS’s rebuttal statement is due by January 9, 2013.

<sup>1</sup> In its petition, NS seeks leave to conduct “any appropriate discovery.” The Board, however, generally does not order discovery in declaratory order proceedings involving largely legal issues, *see Md. Transit Admin.—Pet. for Declaratory Order*, Docket No. FD 34975, slip op. at 8 (STB served Sept. 19, 2008), and NS does not explain, nor is it apparent, why discovery is needed here. For those reasons, and given NS’s request for expedited review, the procedural schedule adopted here does not include a period for discovery.