

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY –  
PETITION FOR DECLARATORY ORDER**

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**SUPPLEMENTAL COMMENTS  
OF BNSF RAILWAY COMPANY**

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Pursuant to the Board’s February 26, 2014 decision in this matter, BNSF Railway Company (“BNSF”) is submitting the following supplemental comments on the January 24, 2014 Petition for Declaratory Order (“Petition”), filed by the Environmental Protection Agency (“EPA”). BNSF filed initial comments on February 14, 2014.

**I. Introduction And Summary Of Supplemental Comments**

BNSF explained in its February 14, 2014 Comments that a local government entity like the Southern California Air Quality Management District (“SCAQMD”) cannot impose operating rules on railroads providing transportation services under the jurisdiction of the STB. The ICC Termination Act (“ICCTA”), at 49 U.S.C. § 10501(b), gives the STB exclusive jurisdiction over rail transportation and forbids direct attempts to regulate such transportation at the local level by other entities, particularly state and local government entities. EPA’s approval of a State Implementation Plan (“SIP”) containing locally promulgated operating rules that seek directly to regulate rail operations would not save the rules from preemption. The rules would still be “exactly the type of local regulation Congress intended to preempt by enacting ICCTA to

prevent a ‘patchwork’ of such local regulation from interfering with interstate commerce.” *Ass’n of Am. R.R. v. South Coast Air Quality Mgmt. Dist.*, No. CV 06-01416-JFW(PLAx), 2007 U.S. Dist. LEXIS 65685, at \*23-24 (C.D. Cal. Apr. 30, 2007) (“*Ass’n of Am. R.R.*”). The fact that the SCAQMD rules have been found by a United States District Court, in a decision affirmed by the United States Court of Appeals for the Ninth Circuit, to be unlawful under California’s law implementing the Clean Air Act (“CAA”) provides a further reason why these rules should be found preempted under ICCTA.

BNSF’s supplemental comments address the argument of SCAQMD, the California Air Resources Board (“CARB”) and the East Yards Communities for Environmental Justice (“East Yards”) (collectively the “SCAQMD parties”), that the SCAQMD rules at issue here would not be preempted if approved by the EPA. The essence of the SCAQMD parties’ legal argument is that ICCTA preemption would not apply once the rules took on the color of federal law because the rules advance important federal environmental concerns while only “grazing the periphery” of interests that ICCTA seeks to protect. SCAQMD Comments at 18. While the legal analysis that produced this purported standard of law is flawed, the Board does not need to get deep into the legal weeds here because the SCAQMD rules do not even meet the legal standard advanced by SCAQMD.

Far from “grazing the periphery” of interests sought to be protected by ICCTA, the SCAQMD rules go to the heart of the interests that ICCTA seeks to protect. It is beyond serious debate that Congress’s primary interest in Section 10501(b) was to prevent a patchwork of local regulation of rail transportation by giving STB exclusive jurisdiction over rail transportation and by expressly preempting the direct regulation of rail transportation by other government entities, particularly state and local governments. Other federal statutes, including the CAA, make clear

that Congress's concern about patchwork regulation is particularly strong when it comes to regulation of locomotives. Therefore, with or without EPA approval, the SCAQMD rules are precisely what Congress intended to prevent when it enacted Section 10501(b). The rules at issue here are a direct challenge to Congress's express intent to promote a unified, national regulation of rail transportation and locomotive operations and to preempt fragmented, local regulation of rail operations.

BNSF believes that the preemption question posed by the EPA can and should be addressed as a matter of law based on the nature of the requirements that the rules seek to impose on railroads operating in Southern California. It is the act of regulating railroad operations, particularly the operation of locomotives, that ICCTA condemns here. Because SCAQMD has sought directly to regulate rail operations, the preemption question in this case does not turn on the extent of the burden of the SCAQMD rules on interstate rail transportation. It would be a direct, facial violation of ICCTA to allow SCAQMD to impose special operating requirements on railroads' use of locomotives in Southern California in the face of the STB's exclusive jurisdiction.

While direct regulation of rail operations is not permitted under ICCTA, other government bodies may still adopt generally applicable rules to advance environmental interests so long as those rules do not unduly restrict interstate rail transportation. This principle is not applicable here, however, because the SCAQMD rules at issue are not generally applicable, but rather seek directly to regulate rail operations. But even if the extent of the impact on interstate rail transportation was a relevant consideration, the SCAQMD rules would fail. The rules directly and substantially interfere with interstate rail transportation by seeking to impose idling restrictions in California that are inconsistent with nationwide idling restrictions and equipment

standards that the EPA has adopted for new and remanufactured locomotives. To comply with SCAQMD rules, railroads would have to make sure that their equipment requirements *nationwide* conform to *California's* requirements. The result would be a paradigmatic example of a single state supplanting national standards that were developed based on system-wide considerations and dictating the requirements that interstate railroads must adopt.

The SCAQMD rules would unduly restrict BNSF's rail operations in numerous other ways. The railroad parties to the prior District Court litigation over the SCAQMD rules submitted in that litigation extensive evidence on the interference with interstate rail transportation that the SCAQMD rules would create, and BNSF and Union Pacific Railroad Company ("UP") provided the Board with copies of the factual declarations of the railroad witnesses in the 2006 litigation with their February 14, 2014 Comments in this proceeding. In these supplemental comments, BNSF supplements those prior declarations to address inaccurate and misleading assertions made by the SCAQMD witnesses in the verified statements submitted with SCAQMD's February 14, 2014 filing. Specifically, BNSF submits the following verified statements with these supplemental comments:

- Rob Reilly, BNSF's Regional Vice President, South Operations, describes the operating problems that would be created by the SCAQMD rules that would impair safety and impose delays and congestion in Southern California that would extend outside of Southern California.
- Katie Farmer, BNSF's Group Vice President, Marketing, Consumer Products, explains that the SCAQMD rules would frustrate intermodal shippers' need for timely and reliable service and could lead those shippers to seek alternative sources of transportation, potentially making environmental conditions in Southern California worse.
- John Lovenburg, BNSF's Vice President, Environmental, describes BNSF's commitment to address environmental concerns relating to locomotive emissions and its extensive efforts to address environmental concerns through collaborative efforts with California officials.

## II. The SCAQMD Rules Are Preempted Because They Conflict With Core Interests That Congress Sought To Protect With Section 10501(b).

An important threshold issue in this case involves the proper legal framework for assessing preemption of a local government regulation that has been “federalized” by action of the EPA. The Board has never been asked to resolve a conflict between ICCTA’s grant of exclusive authority to the STB to regulate rail transportation and efforts by a local government to regulate rail transportation that purportedly have the effect of federal law through EPA’s approval of a SIP that includes the local rules.<sup>1</sup> SCAQMD offers the following legal standard that it believes the Board should apply to determine whether the rules at issue here would be preempted if they obtained the color of federal law through EPA approval of the California SIP: “If a challenged provision implements a core purpose of one [federal] law while grazing the periphery of another, full effect must be given to the core purpose of the first statute.” SCAQMD Comments at 18. According to SCAQMD, since the SCAQMD rules “[a]t most . . . are on the ‘periphery’ of interests protected by ICCTA,” they are not preempted. *Id.* at 40.

CARB takes a more aggressive position on the governing legal standard. According to CARB, “[o]nce [environmental] rules have been approved into SIPs and have become federal law, they should not be deemed preempted by the ICCTA.” CARB Comments at 9. CARB’s categorical no-preemption assertion is an abrupt about-face from the position its attorneys took

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<sup>1</sup> BNSF strongly supports the position of the Association of American Railroads (“AAR”) that the EPA does not have the authority to “federalize” a local rule through incorporation of it into a SIP if the local rule is preempted by ICCTA. Indeed, section 110 of the CAA anticipates preemption scenarios and instructs that preempted state law not be included in a SIP. *See* 42 U.S.C. § 7410(a)(2)(E)(i) (limiting SIP provisions to those rules that a state is not “prohibited by any provision of Federal . . . law from carrying out”). AAR details other numerous infirmities with the SCAQMD rules in its supplemental comments. While these infirmities with the SCAQMD rules should give the Board comfort that a finding of preemption does not interfere with otherwise legitimate efforts to implement federal environmental law, the Board does not have to address these issues because the Board can and should find that the rules would be preempted under a straightforward application of ICCTA preemption law.

in 2005, when it expressed doubt that anti-idling regulation would be permitted under ICCTA. CARB explicitly stated in 2005 that there are “serious questions as to whether [an idling-reduction regulation] would be preempted by the ICCTA or other federal laws.” CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, AIR RESOURCES BOARD, JUNE 2005 ARB/RAILROAD STATEWIDE AGREEMENT ON PARTICULATE EMISSIONS FROM RAIL YARDS, PUBLIC COMMENTS RAISING LEGAL ISSUES AND AGENCY RESPONSES 9 (Oct. 24, 2005) (attached as Exhibit 15 to BNSF’s February 14 Comments). In any event, CARB’s own February 14 comments subsequently repudiate its extreme position that idling regulations would be automatically permissible if included in a SIP, suggesting instead that the federalization of a local rule creates only a presumption against preemption, and the presumption could be overcome if there is a “very sharp” conflict with interests protected by ICCTA. CARB Comments at 11.

The legal analysis of both SCAQMD and CARB is flawed because it is based on case law involving the doctrine of “implied repeal.”<sup>2</sup> In cases involving the question of implied repeal, there is no explicit statement by Congress as to how a conflict between two federal statutes is to be resolved, and the court must engage in a balancing test to resolve the conflict. In such cases, there is, in fact, a presumption against implied repeal or preemption, although the presumption can be overcome if the conflict cannot be reconciled.

But those cases, and the notion of a presumption against implied repeal or preemption, are irrelevant here. In ICCTA, Congress spoke directly to the question of state and federal law

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<sup>2</sup> See the following “implied repeal” cases cited by SCAQMD at pages 16-18 of its February 14, 2014 Comments and by CARB at page 8 of its February 14, 2014 Comments: *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *Res. Inv., Inc. v. U.S. Army Corps of Eng’rs*, 151 F.3d 1162, 1165 (9th Cir. 1998); *Morton v. Marconi*, 417 U.S. 535, 551 (1974); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 531 (9th Cir. 2001); *Chao v. Bremerton Metal Trades Council*, 294 F.3d 1114, 1119 (9th Cir. 2002); *Get Out Oil! Inc. v. Exxon Corp.*, 586 F.2d 726, 731 (9th Cir. 1978); *Nat’l Ass’n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007).

preemption. Section 10501(b) explicitly states that the STB has *exclusive* authority to regulate rail transportation and that all other local, state *and federal* laws that seek to regulate such transportation are preempted. Both SCAQMD and CARB ignore the specific language in ICCTA and ask the Board to approach the preemption question as though Congress has not already spoken precisely to the issue.

The question here, unlike the question in an implied repeal situation, is what Congress intended when it *expressly* provided the STB with exclusive regulatory authority over rail transportation and *expressly* preempted all state and federal law that impinges on that authority. The courts and the STB have devoted considerable effort to understanding Congress's intent, and two basic principles have been established.

First, a literal reading of the statutory language as preempting *all* state and federal laws that have an effect on interstate rail transportation is not appropriate. As the STB has explained, such a reading of the statutory language would reach too far and would therefore be “unworkable.” *CSX Transp., Inc.—Petition for Declaratory Order*, STB Fin. Docket No. 34662, slip op. at 9 (STB served Mar. 14, 2005).

Second, notwithstanding the literal scope of Section 10501, Congress intended to allow states and other federal agencies to carry out their independent regulatory functions so long as the exercise of those functions are compatible with ICCTA's objectives – but *not* if they conflict with core ICCTA interests.<sup>3</sup> Thus, states and local governments may advance federal

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<sup>3</sup> The ICCTA Conference Committee Report addressed a single example involving criminal antitrust law, noting that ICCTA was not intended to preempt criminal antitrust law because that federal law did not “collide with the scheme of economic regulation established by ICCTA.” H.R. Rep. No. 104-422, at 167 (1995), reprinted in 1995 U.S.C.C.A.N. 850, 852. But the converse is also true: State and federal statutes that do “collide with” the core interests of ICCTA are preempted. In such cases, no balancing of the interests under conflicting statutes needs to be considered. If implementation of one statute “collides with” the scheme of uniform

environmental law objectives through generally applicable regulation that may affect railroads so long as they do not adopt regulations that conflict with the core interests that Congress sought to protect with Section 10501.<sup>4</sup> See, e.g., *Grafton & Upton R.R. Co.—Petition for Declaratory Order*, STB Fin. Docket No. 35779, slip op. at 6 (STB served Jan. 27, 2014) (stating that ICCTA preemption does not apply to federal environmental statutes unless those statutes are being used “to regulate rail operations or being applied in a discriminatory manner against railroads”); *Green Mountain R.R. Corp.—Petition for Declaratory Order*, STB Fin. Docket No. 34052, slip op. at 6 (STB served May 28, 2002) (“[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes ... unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.”) (quoting *Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water Dist., Cheryl L. Rodgers, Clay Larkin, Kootenai Env'tl. Alliance, R.R. & Clearcuts Campaign*, STB Fin. Docket No. 33966, slip op. at 5-6 (STB served Aug. 15, 2001)); *United States v. St. Mary's Ry. West, LLC*, No. CV 513-28, 2013 U.S. Dist. LEXIS 181015 (S.D. Ga., Dec. 4, 2013) (unpublished) (holding that provisions of the Clean Water Act were not preempted because they did not directly regulate rail operations and did not conflict with ICCTA’s purpose of preventing balkanized regulation).

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regulation of rail transportation established by ICCTA, the implementation of that other statute is preempted.

<sup>4</sup> Most of the legal discussion in the CARB comments is directed to the unremarkable proposition that federal environmental laws generally can co-exist with ICCTA because they do not conflict with ICCTA interests. But the question here is what happens when local rules sought to be incorporated into a SIP *do* conflict with a core interest protected by ICCTA. The plain language of Section 10501(b) would require preemption under those circumstances.

Therefore, the SCAQMD parties' legal analysis is flawed because the supposed presumption against preemption they ask the Board to apply – derived from the law of “implied repeal” – reads out of the statute the specific language of Section 10501(b) and Congress's intent when it enacted that statutory provision. Nevertheless, both SCAQMD and CARB end up focusing on the proper question – do the rules at issue conflict with core ICCTA interests or do they only “graz[e] the periphery” of interests protected by ICCTA? Here, the conflict of the SCAQMD rules with interests protected by ICCTA is direct and irreconcilable. Whether they are “federalized” through SIP inclusion or not, the SCAQMD rules strike at the heart of interests that Section 10501(b) was intended to protect.

There is abundant case law, discussed below, describing two core interests that Section 10501(b) was intended to protect. First, Congress gave exclusive authority to regulate rail transportation to the STB to prevent a patchwork of local regulation of rail transportation by other entities, particularly state and local governments. Second, Congress sought to promote efficient interstate rail transportation by preempting state and federal laws that unduly interfere with interstate rail transportation. The SCAQMD rules at issue here conflict irreconcilably with both core ICCTA interests. EPA's incorporation of the rules into a SIP would not resolve the conflict with ICCTA interests but rather would exacerbate the conflict by encouraging more local government entities to try to regulate rail transportation through the SIP process.

### **III. ICCTA Preempts Local Government Rules That Seek Directly To Regulate Rail Transportation, Particularly In The Area Of Locomotives.**

#### **A. A Core Interest Of ICCTA Is To Avoid Patchwork Regulation Of Rail Transportation By Multiple Entities.**

The direct regulation by a local government entity of rail transportation violates the plain language of Section 10501(b), which provides that “[t]he jurisdiction of the Board over . . .

transportation by rail carriers . . . is exclusive.” While other government entities may be able to enact rules and regulations of general application that *affect* railroads, any overt or direct effort to regulate rail transportation by an entity other than the Board is prohibited under the statute.<sup>5</sup>

A long line of STB and court cases have recognized this first principle of Section 10501(b) that direct regulation of rail operations by entities other than the STB is prohibited. The point is well illustrated by the District Court case finding the SCAQMD rules at issue here preempted. *See Ass’n of Am. R.R.*, 2007 U.S. Dist. LEXIS 65685 at \*21-22 (“Because the Rules directly regulate rail operations such as idling, they are preempted without regard to whether they are undue or unreasonable.”). Other cases reach the same conclusion. *See, e.g., CSX Transp., Inc.—Petition for Declaratory Order*, STB Fin. Docket No. 34662, slip op. at 3-4 (STB served May 3, 2005) (“[T]he preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself.” Such regulations are automatically preempted by ICCTA because they “would directly conflict with the Board’s regulatory authority over rail operations.”); *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443-44 (5th Cir. 2001) (state statute limiting the time a train could block a street or rail crossing preempted because “it is beyond peradventure that regulation of KCS train operations . . . is under the exclusive jurisdiction of the STB” and “[r]egulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length and scheduling, the way a railroad operates its trains. . .”).<sup>6</sup>

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<sup>5</sup> Some cases discuss this issue in terms of “discrimination” against railroads. *See, e.g., N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007). But the question in those cases is the same: Is another government entity applying generally applicable rules to railroads or is it “targeting the railroad industry” for regulation? *Id.*

<sup>6</sup> There is a limited exception in the area of safety regulation, where Congress specifically gave authority to regulate rail safety to another federal agency, the FRA, and expressly reserved some

Congress explained in the legislative history of ICCTA why it sought to prohibit the direct regulation of rail transportation by any entity other than the STB, stating that the direct regulation of rail operations by entities other than the STB is prohibited because it would lead to the “balkanization and subversion of the Federal scheme of minimal regulation of rail operations.” H.R. Rep. No. 104-311, at 96, as reprinted in 1995 U.S.C.C.A.N. at 808. Congress wanted uniform, national regulation of railroads and it did not want other government entities, particularly state and local governments, to threaten the uniformity of regulation through direct regulation of rail transportation.

The case law recognizes that Congress’s core interest in Section 10501 was to avoid fragmented regulation of railroads by multiple entities. *See Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 532 (5th Cir. 2012) (“[The] purpose [of federal rail regulation] is to promote ‘uniformity in such operations and expediency in commerce.’ Those enactments that ‘have the effect of managing or governing,’ and not merely incidentally affecting, rail transportation are expressly or categorically preempted under the ICCTA.”) (citations omitted). *Providence & Worcester R.R. Co.—Petition for Declaratory Order—Gardner Branch*, STB Fin. Docket No. 35393, slip op. at 4 (STB served May 26, 2011) (“The purpose of the federal preemption is to prevent a patchwork of state and local law and regulation from unreasonably interfering with interstate commerce.”); *City of Cayce v. Norfolk S. Ry. Co.*, 706 S.E.2d 6, 11 (S.C. 2011) (ICCTA sought “to prevent the development of a patchwork of local and state regulations affecting the railroad industry, as the enactment of differing standards and

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authority to the states to regulate rail safety. *See Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517 (6th Cir. 2001). In addition, as discussed below, Congress expressly gave the EPA limited authority to regulate new and remanufactured locomotives, and reserved limited authority, under the “waiver” process, to the states with respect to locomotive regulation. Neither of these exceptions apply here.

requirements would inevitably be detrimental to the orderly functioning of the industry as a whole.”).<sup>7</sup>

There is no question that the SCAQMD rules seek directly to regulate rail transportation. Congress defined rail transportation broadly and specifically included locomotives in that definition. *See* 49 U.S.C. § 10102(9).<sup>8</sup> Indeed, SCAQMD acknowledges that the rules at issue are designed to regulate railroad operations. *See* Letter from Barbara Baird, District Counsel, SCAQMD to Ellen Peter, Chief Counsel, CARB at 2 (Aug. 9, 2012) (attached to EPA’s Petition) (stating that the idling requirements are “operational requirements which are not preempted under § 209(e) [of the CAA]”). It characterizes the rules as operational because, as SCAQMD also acknowledges, the CAA expressly preempts state regulation of locomotive emissions. *See* SCAQMD Memorandum for SIP Submittal, ICCTA Does Not Preempt South Coast AQMD Rules 3501 and 3502 at 4 (Nov. 2, 2011) (attached to EPA Petition) (arguing that “[t]he CAA does preempt states from adopting ‘standards’ relating to the control of emissions from nonroad

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<sup>7</sup> *See also* *Fayus Enters. v. BNSF Ry.*, 602 F.3d 444, 452 (D.C. Cir. 2010) (“Congress also recognized that enforcement of state law outside the contract realm could easily lead to balkanization, with shipments subject to fluctuating rules as they crossed state lines.”); *Borough of Riverdale—Petition for Declaratory Order*, STB Fin. Docket No. 35299, slip op. at 2 (STB served Aug. 5, 2010) (“The purpose of the federal preemption—which applies without regard to whether the Board actively regulates the particular rail carrier transportation activity involved—is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce.”); *Desertexpress Enters., LLC—Petition for Declaratory Order*, STB Fin. Docket No. 34914, slip op. at 1, (STB served May 7, 2010) (“[F]ederal regulation of rail transportation in interstate commerce is intended to avoid a patchwork of conflicting and parochial regulatory actions that impede the flow of people and goods throughout the nation.”).

<sup>8</sup> *See, e.g., Soo Line R.R. Co. v. City of St. Paul*, 827 F. Supp. 2d 1017, 1020 (D. Minn. 2010) (stating that “[a]s defined in the ICCTA, ‘transportation’ has a very broad meaning that includes ‘a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail’”).

engines, a category including locomotives” but that the SCAQMD idling requirements are not emissions standards but regulations affecting the “‘use or operation’ of the locomotive”).

While one might take issue with SCAQMD’s artful contention that the rules are not designed to regulate emissions (a claim that calls into question what purpose the rules are purportedly designed to serve), SCAQMD’s admission that the rules directly regulate rail operations puts the rules squarely at odds with the Board’s exclusive jurisdiction over rail operations. Indeed, SCAQMD’s rules are no less preempted than would be rules telling railroads that they could only operate for a certain number of hours each day as a means to reduce emissions or rules barring railroads from operating at all on days when pollution levels are above a certain limit. The anti-idling rules are no different in nature – like the other types of rules hypothesized here, they intrude on how railroads conduct their business, even if they might arguably advance a goal of some other federal statute.

Such rules cannot stand whether or not included in a SIP. The “federalization” of SCAQMD’s rules would not change their essential character. The rules would still be rules promulgated by a local entity that seek to impose regulations on how railroads provide transportation. Giving the rules the color of federal law would not change the fact that implementation of the rules would create precisely the patchwork of local regulation that Congress expressly sought to prevent with Section 10501. Indeed, EPA’s approval of the rules would make the patchwork problem worse, since it would likely encourage other local jurisdictions to develop their own version of otherwise preempted local rules governing railroad operations under the guise of federal environmental law.

The Board has expressly found that this core interest of avoiding patchwork regulation applies in cases arising under federal environmental law. In the Board’s recent decision in

*Grafton & Upton R.R. Co.—Petition for Declaratory Order*, STB Fin. Docket No. 35779 (STB served Jan. 27, 2014), the Board addressed the preemption of certain environmental rules designed to protect a local aquifer. The Board first explained that a core purpose of ICCTA was “to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” *Id.* at 4. In discussing the interplay between federal environmental law and ICCTA, the Board noted that the ICCTA objective of avoiding patchwork regulation of rail transportation is not necessarily frustrated by state and local governments exercising authority under federal environmental laws, so long as those governmental entities are not seeking directly to regulate rail operations. For this reason, the Board explained, federal environmental laws are not generally preempted by ICCTA “*unless the federal environmental laws are being used to regulate rail operations or being applied in a discriminatory manner against railroads.*” *Id.* at 6 (emphasis added). Thus, while there is clearly a role for state and local governments in enforcing federal environmental laws, local governments cannot directly regulate rail transportation even when they are seeking to advance federal environmental objectives.<sup>9</sup>

**B. Congress’s Intent To Avoid Patchwork Regulation Is Particularly Evident With Respect To Locomotives.**

The STB’s exclusive jurisdiction under Section 10501(b) of ICCTA over “transportation by rail carrier,” a term that as noted above is defined to specifically include locomotives, precludes efforts by states or localities to regulate locomotive operations, which is precisely what SCAQMD was enjoined from doing by the United States District Court in *Association of American Railroads*. While SCAQMD has argued that ICCTA should be narrowly construed here in face of the interests intended to be protected by the CAA, the CAA and other federal laws

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<sup>9</sup> Local governments have even less justification for seeking to regulate rail transportation when, as here, their actions are not even lawful under their own state law or when their claim to be advancing federal law objectives is a mere pretext.

actually underscore Congress’s intent that there be national uniform standards applicable to rail transportation, particularly with respect to locomotives, a policy that would be undermined if the SCAQMD rules were allowed to be included in California’s SIP.

The fact that Congress was particularly concerned with protecting locomotives from balkanized regulation is illustrated by the CAA itself. The CAA expressly preempts any state or local “requirement relating to the control of emissions” for new locomotives or those with refurbished engines. *See* Section 209(e) of the CAA, 42 U.S.C. § 7543(e). With respect to older locomotive engines, the CAA allows for limited state regulation but only where the state seeks authorization from EPA and the EPA finds that the proposed rule is necessary “to meet compelling and extraordinary conditions.” *Id.* California has made no effort to satisfy that test.<sup>10</sup>

Further evidence of that same preference for national uniformity can be found in another federal statute, the Locomotive Inspection Act (“LIA”), 49 U.S.C. § 20701, *et seq.* The LIA states in relevant part that “A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—(1) are in proper condition and safe to operate without unnecessary danger of personal injury; (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and (3) can withstand every test prescribed by the Secretary under this chapter.” 49 U.S.C. § 20701. The Supreme Court confirmed in *Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261 (2012), that the LIA broadly preempts local regulation

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<sup>10</sup> BNSF is mindful that EPA, as expressed in its March 21, 2014 submission to the STB, has not asked the STB to offer its view on whether SCAQMD’s rules are preempted by the CAA. However, the point here is that Congress has expressed its clear intent in Section 7543(e) to limit the balkanized regulation of locomotives, which reinforces the core interest of Section 10501 of ICCTA to avoid fragmented regulation of rail transportation in the specific area of regulation covered by the SCAQMD rules, *i.e.*, locomotive equipment and operations, and that issue goes directly to the question that the EPA has asked the Board to address.

of locomotives because in enacting the LIA, Congress intended to occupy the field regarding regulation of locomotive equipment. In doing so, the Court held that LIA preemption was not limited to state regulation or legislation but extended to personal injury and failure to warn claims because such claims would influence railroads' choice of particular equipment and thus were "directed to the subject of locomotive equipment." *Id.* at 1268 n.4. The *Kurns* Court reaffirmed an earlier Supreme Court case arising under the predecessor to the LIA, *Napier v. Atlantic Coast Line*, 272 U.S. 605 (1921), which held that the federal law occupied the field, precluding states from adopting any locomotive equipment requirements, even to the extent that the state's requirement is intended for a health-related purpose. *See Napier*, 272 U.S. at 612.

Here, the SCAQMD rules set forth requirements clearly designed to encourage railroads to install anti-idling devices on their locomotives. Such locally-applicable requirements fly in the face of the national uniformity sought by Congress under the LIA.<sup>11</sup> Inclusion of the SCAQMD rules in a SIP does not change this result; separate requirements for locomotives in the one air quality district covered by the SIP would no less disrupt the national uniformity embedded in the LIA's terms than would SCAQMD's own adoption of the rules at issue. As the Ninth Circuit observed in a case interpreting the preemptive scope of the LIA,

This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation 'is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.'

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<sup>11</sup> Whether or not BNSF and other railroads have in fact equipped locomotives that operate in the SCQAMD area with such anti-idling devices is not the operative issue. The point is that the LIA provides that any equipment requirements must emanate from a single federal source so that uniform national standards for equipment that is inherently mobile by its nature are maintained.

*Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997). The same is no less true of railroads operating those locomotives in interstate commerce, which likewise require national uniformity in terms of locomotive equipment and use.

The provisions of ICCTA, the CAA and the LIA discussed above leave no doubt that Congress intended to ensure national uniformity in the regulation of rail transportation, with particular concern for the uniform regulation of locomotive equipment and operations, to the exclusion of patchwork regulation of the sort at issue here. As noted above, by their nature, locomotives are capable of moving across numerous jurisdictions, a fact which no doubt prompted Congress to build preemption provisions relevant to the very matter in dispute into these federal statutes. Were the law otherwise, BNSF could be subject to different locomotive idling and other rules as each train passes from one state or air district to another, a proposition that would impose heavy burdens on interstate commerce of the sort at odds with the three federal statutes discussed here.

In this setting, ICCTA preemption should be applied in a particularly robust manner. Allowing SCQAMD to directly regulate locomotive idling, and indirectly regulate locomotive equipment, through the SIP process would undermine Congress's repeatedly and clearly expressed intent to avoid patchwork regulation of rail transportation, and in particular regulation of matters involving locomotives.<sup>12</sup>

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<sup>12</sup> The federal interests in locomotive safety, as reflected in the regulations of the Federal Railroad Administration ("FRA") adopted under the Federal Railroad Safety Act, 49 U.S.C. § 20101, *et seq.*, also merit note. FRA maintains extensive regulations governing locomotive safety at 49 C.F.R. Part 229, as well as regulations at 49 C.F.R. Part 232 governing brake safety. As the Board is aware, FRA has expressed its concerns to EPA about adverse safety implications of some aspects of the SCAQMD rules. *See* September 27, 2013 letter from FRA Administrator Joseph C. Szabo to EPA Regional Administrator Jared Blumenfeld (attached as Exhibit 14 to BNSF's February 14 Comments).

#### **IV. The SCAQMD Rules Also Violate Core ICCTA Interests By Imposing An Unreasonable Burden On Safe And Efficient Interstate Rail Transportation.**

As explained above, when a local government seeks directly to regulate a railroad's operations, Congress's delegation of exclusive regulatory authority to the STB over rail transportation is directly violated. It is unnecessary to examine the extent of the impact of such local regulation on interstate rail transportation to conclude that such local regulation of rail transportation subjects railroads to a patchwork of regulation, which Congress expressly sought to prohibit. The act of regulating railroads is what ICCTA preempts, regardless of the extent of the impact on rail transportation.

Indirect regulation of railroads by local governments through generally applicable and non-discriminatory laws and regulations can also subject railroads to an impermissible patchwork of regulation. But in these cases, it is not the act of regulating railroads that violates ICCTA's grant of exclusive regulatory jurisdiction to the STB, but rather the effect of such regulation on interstate rail transportation. Thus, in a number of cases involving state and local implementation of environmental laws, the Board has stated that state and local governments may implement federal environmental laws through generally applicable regulations "unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce." *Green Mountain R.R. Corp.—Petition for Declaratory Order*, STB Fin. Docket No. 34052, slip op. at 6 (STB served May 28, 2002) (quoting *Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water Dist., Cheryl L. Rodgers, Clay Larkin, Kootenai Envtl. Alliance, R.R. & Clearcuts Campaign*, STB Fin. Docket No. 33966, slip op. at 5-6 (STB served Aug. 15, 2001)).

The question whether a generally applicable law or regulation by a local government unduly restricts railroad operations or burdens interstate rail transportation "is a fact-bound

question.” *Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer, MA*, STB Fin. Docket No. 33971, slip op. at 9 (STB served May 1, 2001). That fact-bound inquiry does not need to be made in this case because the SCAQMD rules directly seek to impose operating requirements on railroads, thus creating a facial conflict with Congress’s grant of exclusive authority to regulate rail transportation to the STB. But even if the SCAQMD rules were evaluated for preemption under the standard applied to generally applicable regulation, they would fail. As explained by BNSF’s witnesses, the SCAQMD rules unduly restrict the railroad from conducting its operations and unreasonably burden interstate commerce.

BNSF’s witness Mr. Reilly describes the numerous ways in which the SCAQMD rules “unduly restrict” BNSF’s operations in Southern California, both on main line tracks and in yards. Offering concrete examples of how the SCAQMD rules would interfere with sound BNSF operating practices, Mr. Reilly explains that the idling-reduction rules would impose delays associated with shutting down and restarting locomotives, as well as delays created by the additional crew functions that would need to be performed as a result of the required shutting down of locomotives. The delays would have a substantial impact on train operations both within Southern California and a ripple effect outside of Southern California by creating congestion and undermining the efficient utilization of rail facilities. BNSF’s witness Ms. Farmer explains that BNSF’s intermodal customers place a premium on reliable and efficient rail service, so any degradation in that service resulting from compliance with the SCAQMD rules could lead BNSF’s intermodal customers to seek alternative transportation.

Mr. Reilly describes the impact of the SCAQMD rules on the safety of rail operations. Unlike EPA’s rules, which explicitly recognize the need for locomotives to remain operating in some cases to maintain air brake pressure, the SCAQMD rules contain no exception to its shut

down requirements to address brake integrity. Indeed, as noted above, the FRA wrote to the EPA to express its concerns with the SCAQMD's rules in regard to brake integrity, among other issues. Compliance with SCAQMD's idling-reduction requirements would also force BNSF's employees to engage in numerous additional activities, subjecting them to the risk of injury. For example, Mr. Reilly explains that compliance with the SCAQMD rules would require that BNSF's employees perform more visual inspections of trains, more testing of air brake integrity, and more setting of hand brakes.

Mr. Reilly explains that the burdensome recordkeeping and reporting requirements of the SCAQMD rules would interfere with the efficient utilization of crew and yard personnel. As Mr. Reilly explains, given the frequency of train stops in Southern California, road and yard crew would be required to keep track of a massive amount of data. The time they could devote to train operations would be reduced. Moreover, the electronic reporting and certification requirements would create intrusive new activities that would undermine productivity. Mr. Reilly also explains that the need to keep track of frequent idling events would create distractions for crew members that increase the risk of injury while those crew members are performing other tasks that often involve heavy machinery.

Mr. Lovenburg explains that the interference with rail transportation created by the SCAQMD rules is particularly inappropriate in light of BNSF's extensive efforts to reduce diesel emissions from rail operations in Southern California, including among other things, accelerating the introduction of cleaner burning locomotives, voluntarily retrofitting the California intrastate locomotives to install idling-reduction devices, and fulfilling BNSF's commitments under two voluntary agreements with the CARB. Mr. Lovenburg explains that BNSF has made other extensive efforts across its network to improve fuel efficiency and reduce locomotive emissions.

As to the “burden on interstate commerce,” it is unnecessary to look beyond the face of the rules themselves. The SCAQMD rules effectively impose an idling limit of 15 minutes. However, the EPA’s rules governing new locomotives and remanufactured locomotives permits such equipment to be equipped with idling-reduction devices that would allow idling up to 30 minutes. Since line-haul locomotives frequently cross state borders and cannot easily be adjusted, the SCAQMD rules would therefore force railroads to establish a restrictive 15-minute idling limit on its new and remanufactured interstate locomotives even though EPA would allow up to 30 minutes of idling time on those locomotives. Even if SCAQMD’s direct objective was only to limit idling within Southern California, the establishment of restrictions on locomotive idling that are more stringent than those contained in national standards effectively extends the local requirements to the entire interstate network. The SCAQMD rules therefore have a direct and substantial burden on interstate rail transportation.

## **V. Conclusion**

For the reasons set out above and in BNSF’s February 14, 2014 Comments, the Board should advise EPA that the SCAQMD rules would be preempted by ICCTA even if they were included in an EPA-approved SIP.

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March 28, 2014

## CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March 2014, I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon all parties of record in this case as follows:

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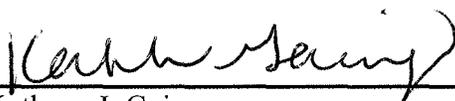
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**VERIFIED STATEMENT OF**  
**ROB M. REILLY**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35803**

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY –  
PETITION FOR DECLARATORY ORDER**

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**VERIFIED STATEMENT OF ROB M. REILLY**

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My name is Rob Reilly. I am Regional Vice President, South Operations, for BNSF Railway Company. I began working for a predecessor of BNSF in 1989 in Kansas City, and I have worked for BNSF or its predecessor for twenty-five years. My career has included a variety of transportation and intermodal positions starting with trainmaster and included, among others, Division Superintendent Los Angeles Division, General Director Southern California Division, General Manager Los Angeles Division, General Manager Chicago Division and Assistant Vice President Locomotive Utilization. In my work as General Manager Los Angeles Division, I was responsible for train operations from Hobart Yard down to and including BNSF train operations at the Ports of Los Angeles and Long Beach, as well as our intermodal hub operations at Hobart Yard.

I am submitting this verified statement to address the adverse safety and operating effects that certain locomotive idling rules proposed by the South Coast Air Quality Management District (“SCAQMD”) would have on BNSF’s operations in Southern California. As I explain, the SCAQMD rules would impair rail safety, expose BNSF employees to the risk of injury, delay BNSF’s trains, interfere with efficient scheduling of train operations and crew dispatching,

disrupt the efficient use of limited line and yard capacity in Southern California and cause delays that would radiate beyond the South Coast Basin. The SCAQMD rules illustrate what happens when government entities that do not understand railroad operations try to tell railroads how to operate.

BNSF's concerns about the impact of the SCAQMD rules on train operations have been addressed previously in 2006 litigation over the SCAQMD rules in the Central District of California, where several BNSF witnesses presented testimony. In particular, a BNSF employee who has since retired, Mr. Chris Roberts, described in detail how the SCAQMD rules would compromise rail safety, interfere with efficient management of BNSF's train operations and crews, and significantly reduce the throughput capacity of BNSF's infrastructure in Southern California. *See* Direct Trial Testimony Declaration of Chris A. Roberts, which BNSF submitted to the Board as Exhibit 8 to BNSF's February 14, 2014 submission in this proceeding. The SCAQMD rules at issue here are the same ones that Mr. Roberts addressed in his prior testimony, and Mr. Roberts' concerns continue to be valid concerns today. I have reviewed Mr. Roberts' testimony and agree with his description of the problems that would be created by the SCAQMD rules.

My purpose here is to supplement Mr. Roberts' testimony as necessary to address the claims made by two SCAQMD witnesses in this proceeding – Mr. Reistrup and Ms. Nakamura – that the SCAQMD rules would have only a minimal impact on rail transportation. These SCAQMD witnesses offer little more than vague and unsubstantiated opinions that the railroads operating in Southern California would somehow find a way to deal with new idling limits and the massive data collection and reporting requirements that would be imposed by the SCAQMD rules. These witnesses ignore the complexity and unpredictability of rail operations and the

numerous ways in which compliance with the SCAQMD rules would disrupt and complicate rail operations in the real world. I provide the Board in this verified statement with a number of concrete examples to show how the SCAQMD rules could have a substantial, adverse impact on rail safety and operations.

**I. The Challenge Of Conducting Efficient Rail Operations In Southern California.**

Southern California is a particularly challenging market for railroad operations. As BNSF's witness Ms. Farmer describes in testimony that is being filed along with my verified statement, the Los Angeles area is an important gateway for the movement of international freight throughout the United States as well as an important transportation market for traffic originating and terminating in Southern California itself. There are two major ports in the area providing a constant supply of inbound freight from container vessels. There is a high volume of domestic intermodal traffic that is becoming an increasingly large segment of BNSF's business in Southern California. The area is a multimodal network of rail lines, highways, deep-water ports, air cargo facilities, intermodal service facilities, passenger rail service, distribution centers and warehouses. Almost half of the entire population of California lives in the region.

Mr. Roberts' testimony provides detailed background information on the basic elements necessary to provide rail service in Southern California. As Mr. Roberts explained, much of the traffic in the area involves intermodal transportation, that is, transportation that is or can be provided by multiple transportation modes. This transportation is usually handled in containers that can be transferred from container vessels or transloaded in intermodal facilities from one transportation mode to another. Since intermodal traffic can be handled by rail or truck, it is particularly important for railroads to provide efficient and reliable service. Railroads have been

able to attract intermodal traffic from trucks by providing increasingly high quality transportation service. We could lose that traffic if we are unable to sustain efficient operations.

Intermodal trains can range from a mile to two miles in length. As Ms. Farmer explains, BNSF has been able to increase the length of its intermodal trains to 10,000-foot trains. As train length increases, the number of locomotives needed to run the train may increase, and distributed power is more widely used in longer trains. The construction of the basic train takes longer as train length increases. As the train lengths increase, there is a premium on efficient, well managed train operations on main line tracks and in yards.

The locomotives on BNSF's trains may be located at the front of the train in consists of three to five locomotives. Usually, it is only the lead, or front, locomotive in a consist that is occupied by crew members. This is important under the SCAQMD rules, which have special provisions relating to "unattended" locomotives, as well as "trailing" locomotives. Increasingly, BNSF is using "distributed power," where there is not only a locomotive consist at the front of the train but also a locomotive consist in the middle of the train or at the rear of the train. The remote locomotives are controlled through a radio link that is maintained by keeping the lead locomotive on the train and a locomotive in the remote consist running.

Locomotives are large, mobile diesel power plants that generate the power necessary to operate the electric traction motors that drive the train. They are sophisticated equipment that cannot be shut down or restarted instantaneously. As Mr. Roberts explained, a locomotive can take anywhere from 5 to 10 minutes to manually start or shut down. Since there are multiple locomotives on a train, the process of manually shutting down the locomotive consist on a train and restarting it can take a substantial amount of time. The locomotive engines must also be protected from excessive starting and stopping. In addition to generating the power necessary to

move the train, the locomotives generate the electric power used to provide other necessary functions, including the compressor to maintain air brake pressure, heat/air conditioning in the locomotive cabin and radio functions.

Trains rely on air brakes to slow and stop the train and to hold an assembled train in place. The brakes in each car and locomotive are activated and maintained by air pressure. The air brake system on a train is created by coupling hoses on locomotives and cars from the front to the rear of the train to create an air brake “pipe.” The lead locomotive provides the air pressure that charges this air brake “pipe” and that maintains the air pressure necessary to provide the braking function. If the locomotive providing air pressure is shut down, the air pressure begins to bleed out of the air brakes. When air pressure goes below a certain level, tests and inspections must be performed to ensure proper operation of the air brake system.

As Mr. Roberts explained, railroads have limited infrastructure to provide service, and in Southern California that infrastructure is heavily utilized and is often constrained. Unlike our truck competitors, railroads must build and maintain the rail lines. And since capacity is limited, there are limited options for moving between points on the rail network. Given the size of trains that we operate, there is a limited number of yards and sidings where trains can wait to allow other trains to pass, to pick up or deliver cars, to enter ports or intermodal yards, or to bypass other trains that have been held up. If something unexpected happens on heavily used rail facilities like those in Southern California, the network can easily come to a grinding halt.

A yard typically has few tracks that are capable of holding a full train that is ready to move out of the yard. If that train’s movement is delayed, the exit point from the yard may well get plugged and prevent other trains from exiting the yard. If trains are unable to leave the yard, the remaining yard tracks become congested, preventing crews from constructing new trains.

Crews cannot perform their switching work until the tracks become clear enough for them to resume construction of new trains, so crew utilization becomes degraded. The yard becomes a chokepoint that will cause backups on the mainline leading to the yards, further complicating the assignment of crews and the operation of trains.

## **II. The SCAQMD Rules Would Impair Rail Safety.**

The SCAQMD rules have two parts. Rule 3501 imposes onerous data collection and reporting requirements relating to the locomotives operating in the South Coast Basin. On a daily basis, railroads would be required to record every instance in which certain locomotives idle for more than 30 minutes anywhere in the South Coast Basin for any reason. As to these locomotive idling “events,” a substantial amount of information must be provided. Rule 3502 establishes a complex set of limits on the amount of time that locomotives can idle and corresponding rules about when anti-idling devices are “engaged,” are “not tampered with,” and when the idling restrictions have been “circumvented.” The rules establish fines of up to \$25,000 to \$75,000 per violation per locomotive per day.

Compliance with these rules would have a substantial adverse impact on rail safety. Safe railroad operations are of utmost concern to BNSF, and we devote a very large amount of time and resources to ensuring safety for our employees and for the communities where we operate. BNSF judges every operating practice by its safety implications. BNSF goes to great lengths to create an accident-free and injury-free work environment.

The SCAQMD rules would create unsafe working conditions because of the effect that the rules would have on maintaining adequate air brake pressure and because of the distractions that would be created by the onerous recordkeeping requirements that would have to be carried

out while BNSF's employees are performing other functions. I address each of those issues in turn.

First, the Federal Railroad Administration has written to the Environmental Protection Agency to convey its concerns about the impact of the SCAQMD rules on the integrity of the air brake systems on trains. I will provide an example of these concerns later in this statement. It hardly needs to be said that it would be a very bad policy to impose local operating rules on railroads that create the risk of runaway trains.

Second, the rules would put our employees at a heightened risk of injury due to the extra operating activities that they would be required to perform to comply with the rules. Our employees would have to carry out more visual inspections of trains, more testing of air brake integrity, and more setting of hand brakes. I provide concrete examples later in this statement. The performance of these functions puts our employees at risk in a number of different ways, as I describe in the examples.

Third, compliance with the rules would require BNSF's employees to spend a substantial amount of time keeping track of train stops and idling "events," even while those employees are actively engaged in operating trains and related equipment. To promote employee safety, it is necessary to minimize unnecessary tasks and distractions to avoid circumstances under which accidents might happen. But Rule 3501 would require employees to undertake very extensive recordkeeping duties, which would have to be performed while employees are also performing other necessary functions using large equipment, like switching operations or operating the locomotives. When train crew members are in the cab, they must focus on the tasks at hand to ensure their safety and the safety of others. The onerous recordkeeping burdens that the rules would impose and the need to constantly monitor idling time to produce the required records

would cut into the attention and effort that the crew members need to put into operating the train equipment.

Mr. Reistrup tries to dismiss these safety concerns. He does not dispute that the rules would require BNSF to shut down locomotives in some cases to comply with the rules. But he says that the Board should not worry about the shut-down requirement imposed by the rule because such a requirement “makes operational sense.” Reistrup VS at 9. Mr. Reistrup goes on to say that “with certainty, shutting down an unattended locomotive is good practice.” *Id.* Mr. Reistrup may be willing to ignore the added exposure to injury and unsafe conditions based on some abstract notion of what constitutes good operating practice, but BNSF is not. Nor can I agree with him that shutting down an unattended locomotive, which would include a distributed power locomotive, is always good operating practice.

Mr. Reistrup also says dismissively that gathering the information required by the SCAQMD’s reporting requirements “would not be difficult.” Reistrup VS at 6. In fact, for each “idling event,” the crew member would have to record the name of the locomotive owner and operator; the serial number of the locomotive; the location of the “idling event,” including milepost information; the date and time of the “idling event onset,” the duration of the “idling event;” and if the train is idling for two hours or more, an explanation of the reason. As Mr. Roberts explained and I can confirm from my own experience, BNSF’s locomotives in Southern California stop hundreds of times a day. Under the SCAQMD rules, a record would have to be created for each instance in which certain locomotives stop in case the duration of the stop is 30 minutes and thus becomes an “idling event” that would need to be reported. The time spent making and keeping the necessary records would be particularly burdensome for locomotives

located in the yard where yard and line-haul locomotives are moved by hostlers and maintenance personnel that are not assigned to a particular locomotive during a shift.

These records would have to be kept while BNSF's employees are engaged in the numerous other functions they must carry out. The distractions would clearly increase the risk of a costly mistake.

### **III. The SCAQMD Rules Would Also Disrupt Train Operations.**

The SCAQMD rules would also interfere with BNSF's rail operations, creating delays and inefficiencies that would likely be felt throughout Southern California and in other parts of BNSF's network. Mr. Roberts explained that the basic source of the operating interference and burdens that would be created by the rules are the delays to train operations from the additional time required to shut down and restart locomotives and to perform the additional functions associated with shutting down and restarting locomotives, like terminal air brake tests, that would not otherwise be required.

As Mr. Roberts described, the additional time could be substantial. It takes a minimum of 5-10 minutes per locomotive to shut down manually, and a train typically has between three and five locomotives. If a train has four locomotives, that means that the time it takes to manually shut down the locomotives – potentially as much as 40 minutes – could exceed the total amount of time that the rules allow for locomotive idling – 30 minutes. In other words, it might be necessary to begin shutting down the locomotives on a train as soon as the train pulls up to a signal light to ensure compliance with SCAQMD's Rule 3502. Restarting the locomotives also takes 5-10 minutes per locomotive, and even more time in trains with distributed power. Moreover, when locomotives are shut down for four hours and the appropriate brake pipe pressure is not maintained, an air brake test must be performed on the

entire train to check air brake functionality. Mr. Roberts described the necessary activities and the amount of time they would take to perform. Roberts Declaration at 4, 17, 20-21. Mr. Roberts also described the additional activity and time that would be needed to deal with trains using distributed power, including the need to relink the remote locomotive consist. *Id.* at 5, 19.

The additional time that would be required to deal with the shutting down and restarting of locomotives would not just add time to the train's overall transit time. BNSF's customers value on-time delivery, and we work hard to meet delivery expectations. Delays obviously make it harder to provide on-time service. But delays caused by complying with the shut down and restart requirements would cause far more fundamental operating problems than just lengthening delivery times. As I explained above, delays could prevent trains from leaving yards, resulting in additional congestion in the yard and delays for other trains seeking to leave the yard.

Construction of new trains would be impeded if yard track is tied up holding trains that are waiting to leave the yard. Trains that are stopped on mainline tracks would also experience delays caused by the shut-down requirements. If one train on a mainline track is unable to move, other trains on the mainline will be held up until the track clears. I provide examples of these concerns below.

Mr. Reistrup claims that there would not be any additional time associated with restarting locomotives to resume service. Mr. Reistrup bases this claim on his "direct experience." Reistrup VS at 11. I have no way of knowing what Mr. Reistrup's experience has been, but it is directly contrary to BNSF's experience. Ms. Nakamura claims that locomotives can be restarted "nearly instantly." Nakamura VS at 20. Ms. Nakamura does not have any locomotive operating experience. Instead, she bases this statement on the supposed observation by "District staff" on a single visit to a rail yard who observed the restarting of a single locomotive that was "nearly

instantly” restarted. The information provided about this single observation is so sketchy that it is impossible to know what the circumstances were. In any event, in our experience, the shutting down and restarting of locomotives is not “nearly instantaneous.”

Mr. Reistrup also claims that gathering the information necessary to comply with the reporting requirements of the rules would not be difficult because much of the information is available from locomotive event recorders. Locomotive event recorders keep track of a range of data relating to locomotive operations, but they do not capture all of the information that would be required by Rule 3501. Locomotive event recorders record when a locomotive physically stops moving, but they do not capture when a locomotive is shutdown versus when it is running. And even as to data that can be obtained from the event recorders, the only way to be sure that all of the data is captured is to stop the locomotive to download the data.

Moreover, it is not enough under the rules to capture and record the necessary data. The rules require that the data be reported electronically and that a “responsible company official” must certify the accuracy of the data. As Mr. Roberts explained, it could take employees in the yard approximately 20 minutes at the end of their shift simply to input the data required by the SCAQMD rules for electronic reporting. Crews from line-haul locomotives likely would have fewer “idling events,” but they would have to make the report for each locomotive on the train. This additional time to generate electronic records would be added to normal operating activities of crew members, hostlers, and maintenance personnel and thus would shorten time available for employees to perform their required functions in the yard and in line-haul trains. Employee productivity would decrease. Crew members would exceed their hours of service limit more often, requiring the use of replacement crews, causing further delays. Mr. Roberts described the

adverse impact on operations and capacity utilization that results from having to avoid violations of hours of service limits. Roberts VS at 7-8, 23.

#### **IV. Concrete Examples Of Problems That Would Be Caused By The SCAQMD Rules.**

To help the Board understand the impact of the SCAQMD rules on the safety and efficiency of BNSF's operations, I set out below several concrete examples that illustrate the real world difficulties and disruptions that would result from the SCAQMD rules. These examples address the problems that would be created by the SCAQMD rules for locomotives that must be shut down and restarted manually. While the number of these manual shut-down locomotives has declined as BNSF increases its use of locomotives that have been equipped with idling-reduction devices, there still are a significant number of locomotives in BNSF's fleet, and in the locomotive fleets of other railroads whose locomotives are used in run-through power arrangements, that are not equipped with idling-reduction devices. Also, as I explain below, the rules create their own set of problems for locomotives that are equipped with idling-reduction devices.

Example 1: Assume that a train has been constructed in a yard but the road crew has not yet arrived. All of the locomotives that are to be used on the train are "unattended" because the train is not yet ready for movement out of the yard. If it takes more than 30 minutes for the road crew to arrive, the SCAQMD rules would require that all of the unattended locomotives must be shut down. Under BNSF's operating rules, the trailing locomotives in the train would be shut down after one hour, but the lead locomotive would remain operating to retain air pressure in the train's brake pipe. Complying with the SCAQMD rules would require shutting down all locomotives, which would mean that the air pressure in the brakes would start to bleed out since there is no locomotive power available to retain the air pressure. And if the locomotives are shut

down for an extended period of time, it would become necessary to conduct additional inspections and air brake tests. These inspections and tests could take over an hour to complete, potentially interfering with the ability of the constructed train to leave when the crew arrives and a main line slot becomes available.

Example 2: Assume that the train is fully assembled and a crew is ready to depart. However, departure from the yard has been delayed due to a problem on the mainline, or due to some other reason that requires that the train remain in the yard. It may be unclear when the signal will be given to go ahead, but the delay is approaching the 30-minute limit. The SCAQMD rules would require that the crew begin shutting down the trailing locomotives in advance of the 30-minute limit. As I described above, the shut-down process takes 5-10 minutes per locomotive, and the start-up, when the go ahead signal comes through, also takes 5-10 minutes per locomotive. If the problem that kept the train in the yard gets resolved, the train will not be able to promptly leave the yard because it would either be in the middle of the shut-down process or it would need to go through the time-consuming start-up process once again. In the meantime, the train is blocking the exit for trains that would otherwise be able to depart.

Example 3: As I explained previously, BNSF uses distributed power on many trains operating in Southern California. In a distributed power train, a link needs to be established between the lead locomotive and the remote locomotive consist. If the locomotives are of the type that need to be manually shut down and restarted, shutting down the remote locomotives breaks the link, which would require someone to go to the back of the train to reestablish the distributed power link before the train could proceed. If the locomotives are equipped with idling-reduction devices, shutting down the first locomotive of the remote consist could result in the loss of the link during a restart of the locomotive, which would similarly require a

reestablishment of the link. Assume that a distributed power train is on the main line track. A delay becomes apparent that requires that the train wait until the track clears up ahead. Given the nature of the delay, the crew expects that the delay will last more than 30 minutes. Under these circumstances, shutting down all of the locomotives on a distributed power train would jeopardize the ability to restart when the train is ready to move. If the link needed to be restored, a crew member would have to walk back to the remote locomotive consist and carry out a relatively complex set of steps necessary to restore the linkage with the lead locomotive. This process would take substantial time, thereby delaying the ability of the train to move when the congestion eased and holding up other trains on the line. In addition, the process would subject the crew member to the risk of injury that would be incurred by walking back to the remote locomotive consist to perform the necessary relinking process.

Example 4: Assume a distributed power train in a yard. A yard crew would typically establish the link between the remote locomotives and the lead locomotive. But assume that the road crew has not yet arrived. Indeed, for any number of reasons, the road crew might be delayed in arriving for more than 30 minutes. If all of the locomotives were shut down, the unnecessary delays and potential safety risks discussed above also would be experienced in the yard.

Example 5: Assume a train on the main line track where there is a grade. The crew needs to leave the train (for example to comply with hours of service regulations), but another crew has not yet arrived. Under BNSF's rules, the lead locomotive would remain running to ensure that adequate brake pipe pressure will be maintained. Hand brakes would also be set on the locomotives and on a certain number of the cars to ensure that the train is secured. It is much better to have both the air brakes and the hand brakes set in this circumstance. But the

SCAQMD rules would require that the lead locomotive be shut down after 30 minutes. The result would be that the train is secured only by the hand brakes. But hand brakes could be tampered with, creating a serious risk of a runaway train. Having a maintained brake pipe with the air brakes set on an unattended train, in parallel with handbrakes, would mitigate this concern.

Example 6: Assume a train on the main line that has entered a siding because of congestion that is expected to produce a long delay. Once again, assume that the crew must leave the train before a replacement crew is available. The SCAQMD rules would require that all locomotives be shut down, raising the safety concerns I described above. Also assume that the delay lasts more than 4 hours, and brake pipe pressures do not remain at the required levels. The new crew would now have to inspect the train and perform a new air brake test. The new test may find that the shut-down and start-up of the locomotives and restoration of air brake pressure did not work on one or some of the cars. (This is not such a remote possibility since the possibility of having a failure after restoring air pressure is the entire reason for having to perform the test in the first place.) The failed car or cars would then need to be set out, requiring a substantial additional delay in getting the train back into service. Another possibility is that a locomotive may not restart due to many possible causes, including loss of battery power needed to produce a successful restart.

Example 7: Assume a train that has been constructed in the yard and is waiting for fuel, maintenance or another servicing requirement. The crew leaves the train, but the crew remains in the vicinity of the train such that they could readily control the brake system. This example illustrates the difference between FRA's definition of "unattended equipment" and the SCAQMD's definition of an "unattended" locomotive. Under the SCAQMD rules, the

locomotives would be considered unattended because no crew member is physically on board a locomotive, and all locomotives would have to be shut down. Under BNSF's rules, the lead locomotive would remain idling to maintain the air brakes, and the hand brakes would not need to be set because of the crew's ability to readily control the brake system. However, if the lead locomotive must be shut down as required by the SCAQMD rules, the hand brakes must be set on a certain number of cars. In some cases, setting the hand brakes on a car can be difficult. For example, on some grain and intermodal trains, the employee must climb a ladder 10-15 feet up and exert pressure to secure the hand brake while holding onto the side of the railcar. Weather could affect the difficulty of the maneuver.

Example 8: Occasionally trains in Southern California need helper service. Assume that the train needing helper service has a crew in the lead locomotive, but the train is delayed. The helper locomotive has its own crew. The SCAQMD rules would define the helper as a trailing locomotive, and it would therefore have to shut down if the delay exceeds 30 minutes. However, the locomotive must operate to maintain heat and air conditioning in the cab. An FRA regulation requires occupied locomotive cabs to be heated to a certain temperature. 49 C.F.R. § 229.119(d).

**V. BNSF's Acquisition Of New Locomotives With Idling-Reduction Equipment Would Not Eliminate The Delays And Safety Concerns From The SCAQMD Rules.**

As I noted above, BNSF has been acquiring locomotives that are equipped with idling-reduction devices that automatically shut down a locomotive that has been idling for more than a certain period of time. Mr. Reistrup claims that the type of problems I have described above would not arise if trains were equipped with idling-reduction devices that were set to shut down at 15 minutes or less since the rules supposedly would not require any further compliance actions. Reistrup VS at 8-9. There are three basic problems with Mr. Reistrup's argument.

First, even though BNSF has been steadily increasing its use of locomotives equipped with idling-reduction devices, BNSF's entire fleet of locomotives has not been converted to this new technology. As Mr. Reistrup acknowledges, there are still a number of BNSF locomotives operating in Southern California that do not have idling-reduction technology. Moreover, BNSF, like other railroads, often use run-through locomotives, that is, locomotives owned by other railroads that are part of a consist of a BNSF train. BNSF does not control the technology that is used on those other locomotives, including whether they are equipped with idling-reduction technology and if they are, whether it is set to shut down at thirty minutes as the EPA regulations permit or fifteen minutes as the SCAQMD rules would require.

Second, the 15-minute shut-down rule conflicts directly with the EPA's rule that requires the use of idling-reduction devices on new and remanufactured locomotives that can be set at shut-down intervals up to 30 minutes. Locomotives used in interstate transportation have to be able to move across the rail network from state to state without accounting for different shut-down requirements. The shut-down feature on an AESS locomotive cannot be "dialed down" as a locomotive moves across a state or local border, as SCAQMD appears to believe.

Third, Mr. Reistrup oversimplifies the complex rules that SCAQMD has developed as those rules apply to locomotives equipped with idling-reduction technology. The rules raise serious concerns with respect to their application to AESS-equipped locomotives in several areas that BNSF's operating employees would have to confront and resolve on a daily basis. I give several examples below.

1. The automatic shut-down/start-up system ("AESS") on BNSF's locomotives is designed to be disengaged after a certain number of shut-downs and start-ups to protect the engine components. Particularly in a busy transportation region like Southern California, the

limit can be easily and often reached, thereby allowing the locomotive to idle for periods longer than the 15 minutes specified in the SCAQMD rules.

2. As I explained previously, in trains using distributed power, the lead and remote locomotive must remain operating to avoid losing the radio link when the locomotive is restarted. Therefore, if the remote locomotive is an AESS-equipped locomotive, the automatic shut-down is not allowed to function to avoid having to reset the radio connection with the lead locomotive.

3. Under some weather conditions, the locomotive operators may also need to over-ride the automatic shut-down by the AESS system to maintain appropriate cabin conditions, like heat or air-conditioning, in an occupied locomotive. The locomotive needs to be operating to keep the heating and air-conditioning units on. The SCAQMD rules appear to prohibit overriding the idling-reduction device in a way that would circumvent its normal operation. The EPA rules governing idling-reduction devices contain a specific exception for heating and cooling the locomotive cabin. 40 C.F.R § 1033.115(g)(5).

4. On occasion, a locomotive needs to be examined to troubleshoot an apparent problem. A mechanical employee may need to disable the AESS system while looking at the locomotive to ensure that it does not shut down while the employees are examining it. As noted above, the SCAQMD rules appear to prohibit disabling the idling-reduction device in a way that would circumvent its normal operation.

5. The AESS system is designed to ensure that the locomotive operates when it is necessary to maintain air brake pressure regardless of the length of time the locomotive is idling. There is no exception in the SCAQMD rules that would allow idling to address air brake

pressure concerns. In contrast, the EPA rules expressly permit locomotives to continue idling to maintain air pressure for brakes. 40 C.F.R § 1033.115(g)(2)(ii).

7. A similar problem arises with respect to battery power. The automatic shut-down feature does not apply when it is necessary to preserve or restore battery power. There is an exception in the SCAQMD rules for idling necessary to restart the locomotive, but there may be circumstances where the locomotive needs to re-engage to provide battery power that exceeds this minimum level. Here again, the SCAQMD rule is inconsistent with EPA regulations, which more generally permit the engine to operate in order to recharge the locomotive battery. 40 C.F.R § 1033.115(g)(2)(ii).

This list of concerns is not intended to be exhaustive. Indeed, if BNSF was required to comply with the SCAQMD rules, I am confident that we would constantly find new instances where our operating practices would come into question or need to change, with potential adverse impacts to safety and operating efficiency. This list of issues is intended to show the Board the wide range of concerns that arise in the real world when a local government tries to establish rules governing complex rail operations and the management of our sophisticated locomotive equipment.

**VI. Delays Caused By Compliance With The SCAQMD Rules Would Have A Serious Adverse Impact On Rail Operations And Other Important Policy Objectives In Southern California.**

The delays caused by the inability of a single train to leave a yard on time or to move on a main line track could create serious operating problems in an area like Southern California, where there is a high volume of traffic and a complex web of yards, tracks, intermodal facilities, ports, passenger traffic and other transportation infrastructure. But as Mr. Roberts explained, the

delays that would be caused by the SCAQMD rules have the potential of holding up or preventing the movement of *several* trains per day.

Mr. Roberts discussed the impact of the delays that would be caused by the SCAQMD rules with a focus on the Hobart Yard. Roberts Declaration at 13. As Mr. Roberts explained, the Hobart Yard is BNSF's principal yard to which intermodal containers are trucked from the Ports of Los Angeles and Long Beach for transfer to railroad flat cars. In today's market, the concerns described by Mr. Roberts would be particularly apparent in the San Bernardino Yard, which handles a substantial amount of domestic intermodal traffic. The domestic intermodal segment of the intermodal market has grown substantially over the last few years. Much of this growth has come by attracting new rail traffic from trucks operating over an all-highway route. But because this traffic is highly competitive with trucks operating over an all-highway route, shippers in this area are particularly sensitive to delays. If shippers begin to face delays in rail transportation as a result of increased congestion in Southern California that would be caused by compliance with the SCAQMD rules, the same traffic that we have been able to attract from trucks could go back to truck service over time. However, railroads are cleaner than trucks in terms of emissions. Any shift from rail to trucks would subvert the very environmental objectives that SCAQMD is seeking to advance. If delays on the rail network push shippers back to truck service, the number of trucks on Southern California highways would increase since a single intermodal train takes 280 trucks off of the highways, and the diesel emissions in the region could likely get much worse as a result.

Congestion caused by train delays in Southern California could also have an adverse impact on commuter rail service operating over freight rail lines. As I noted previously, commuter trains operate over the same lines as freight trains. While the commuter trains have

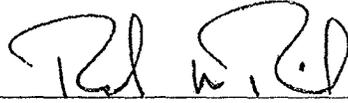
priority over freight trains, commuter service would inevitably be degraded if overall congestion on the rail lines is increased. Additional delays of commuter rail service would likely cause some rail commuters to increase their use of cars, undermining efforts to reduce highway congestion and auto emissions.

Other consequences would flow from the congestion and delays that would be caused by the SCAQMD rules. As Mr. Roberts explained, there are two major ports in the region – the Port of Los Angeles and the Port of Long Beach. These ports serve a steady stream of ocean-going vessels that pick up and deliver containers that move in intermodal service. When there is congestion on rail lines leading to or from the ports, the throughput of containers in the port facilities slows down, reducing the ability to process incoming and outgoing freight. When ocean going vessels cannot unload their freight or are unable to reload for outbound movements, they must wait, producing their own pollution that would add to environmental concerns.

Finally, the Board is well aware that in a rail network, congestion and operating problems in one area of the network can quickly spread to other parts of the network. Given the limited capacity of rail lines and yards in Southern California, train delays in that region would require holding trains outside of Southern California, interfering with rail operations in those regions. For example, congestion in Southern California can delay trains in New Mexico. The delays created by the SCAQMD rules thus would have an impact on trains in BNSF's network far outside of Southern California.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on March ~~28~~, 2014

A handwritten signature in black ink, appearing to read 'Rob M. Reilly', written over a horizontal line.

Rob M. Reilly  
Regional Vice President, South Operations  
BNSF Railway Company

**VERIFIED STATEMENT OF**  
**KATIE M. FARMER**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35803**

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY –  
PETITION FOR DECLARATORY ORDER**

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**VERIFIED STATEMENT OF KATIE M. FARMER**

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My name is Katie Farmer. I am Group Vice President, Consumer Products of the Marketing Department for BNSF Railway Company. In that position, I am responsible for the commercial activities, including marketing, sales, and logistics, of BNSF's intermodal and automotive business. I began my career with the former Burlington Northern in 1992, where I held various positions in Fort Worth and Houston, Texas. In 1998, I was named Director, Plastics Marketing. I moved to the position of General Director, Chemical Products Sales in 2001. I was appointed to the position of Assistant Vice President, Carload Equipment, and in that capacity, I supported the Carload, Agricultural Products and Coal business units in 2002. I became Vice President Sales, Industrial Products in 2005. I was promoted to the position Vice President, Domestic Intermodal in 2010, where I was responsible for BNSF's sales and marketing activities for the domestic intermodal business unit, including truckload, less than truckload, parcel, and temperature controlled freight. I was also responsible for new business development and marketing/pricing. I have a Master of Business Administration and Bachelor of Business Administration from Texas Christian University.

I am submitting this verified statement to address the commercial implications for both BNSF and its shippers of certain rules that the South Coast Air Quality Management District (“SCAQMD”) is seeking to impose on freight railroads in Southern California. The rules, which are discussed by other BNSF witnesses in this proceeding, seek to regulate locomotive idling and to impose onerous recordkeeping and reporting of locomotive “idling events.”

I understand that these same rules were the subject of litigation in 2006 in a federal district court in California. In that case, my predecessor, Mr. Steve Branscum, provided detailed testimony on the nature of intermodal traffic, the market for BNSF’s intermodal rail services in Southern California, the importance of efficient and timely rail service to our intermodal customers, and on the adverse effect that the SCAQMD rules would have on BNSF’s ability to meet the service expectations of our customers. Mr. Branscum summarized his concerns about the SCAQMD rules as follows:

BNSF and other railroads would suffer from diminished capacity to provide the efficient service their customers require. Not only would this cause the railroads significant financial harm, but it would require their shipping customers to scramble to find other ways to get their goods delivered. If they cannot find other ways, their output will be reduced. If they can find other ways, those ways are likely to be more expensive, which will make them less competitive and increase the costs to consumers and exporters. Any diversion to trucks will also increase congestion on the highways and result in significantly more fuel consumption and emissions than rail transportation.

*See Branscum Declaration at 12 (attached to BNSF’s prior filing as Exhibit 9).*

I share Mr. Branscum’s concern that the SCAQMD rules would seriously undermine the interests of BNSF and its customers in efficient and reliable intermodal transportation, and they could have the unintended consequence of making congestion and diesel emissions in Southern California worse by forcing freight traffic from the railroads onto the trucks operating on all-highway routes. BNSF’s witness Mr. Reilly explains why the SCAQMD rules would cause

delays, reduce the productivity of our rail operations, and increase congestion on the already high volume rail lines in Southern California. These consequences would reverse years of efforts that BNSF has made to improve the throughput of rail operations. This increased efficiency has been central to our success in attracting time-sensitive intermodal traffic from trucks. Diminished service caused by misguided local regulation would harm railroads and shippers as well as the general public.

Mr. Branscum's testimony in 2006 was based on characteristics of intermodal transportation and the market for rail services in Southern California that have not changed significantly since 2006. Therefore, it is unnecessary for me to repeat in detail here the testimony of Mr. Branscum. Instead, my verified statement will build on the testimony of Mr. Branscum and supplement that testimony to reflect current conditions. As I discuss below, one recent development that reinforces Mr. Branscum's expectation that the SCAQMD rules would have an adverse impact on the commercial interests of BNSF and its shippers is the recent substantial increase in domestic intermodal traffic, which is particularly sensitive to service delays. As I explain, BNSF has been able to attract this traffic from all-highway moves by offering timely and consistent service, but we could not expect to hold onto that traffic over time if the service reliability that allowed us to capture the traffic in the first place is undermined.

#### **I. Intermodal Rail Transportation Is Vital to Southern California.**

Los Angeles is an important gateway for the movement of international traffic throughout the country as well as an important transportation market for domestic traffic originating or terminating in Southern California. Two of the nation's largest ports—the Ports of Long Beach and Los Angeles—are located in Southern California. Those ports are a gateway for a large volume of international intermodal traffic that arrives in the United States by container vessel.

As Mr. Branscum explained, intermodal traffic refers to traffic in containers that move or can move by more than one transportation mode. The international intermodal traffic that originates at the ports in Southern California moves to points inside the United States in a variety of ways. Containers may be loaded directly onto railcars at the dock facilities. They may be trucked from the dock terminals to inland facilities where they are transferred to rail cars. Or they may be handled by trucks to domestic destinations.

Los Angeles is also a major producing and consuming area in its own right. As a result, there is a substantial volume of domestic freight that moves in intermodal service and serves origins and destinations in the Los Angeles area. In the area covered by the Southern California Association of Governments (“SCAG”), there are more than 18 million people, or 49 percent of California’s population, with more than 7.2 million jobs. *See* 2012 SCAG Regional Transportation Plan 2012-2035. BNSF’s domestic intermodal traffic has grown rapidly in the last few years, increasing by 400,000 units since 2006. Today, BNSF handles nearly one million loads per year of the most time-sensitive freight, including parcel, less-than-truckload and temperature-controlled freight. We move this freight in partnership with over 100 motor carriers, with which we develop arrangements that are customized to meet the needs of specific shippers and leverage the best elements of rail and truck transportation.

The efficient movement of freight is essential to support the economy and quality of life in Southern California. The transportation network in Southern California is a multimodal, coordinated network that includes deep-water marine ports, international border crossings, Class I rail lines, interstate highways, state routes and local connector roads, air cargo facilities, intermodal facilities, and distribution and warehousing clusters. In 2010, over 1.5 billion tons of goods valued at almost \$2 trillion moved across the region’s transportation system. In that same

year, industries dependent on the movement of freight employed over 2.9 million people in Southern California and contributed \$249 billion to Gross Regional Product (“GRP”). Additionally, trade through Southern California’s container ports supports over 3.37 million jobs throughout the United States. *See* Southern California Comprehensive Regional Goods Movement Plan and Implementation Strategy, at 8 (December 2012).

In addition to the inbound movement of freight from container vessels and the substantial movement of domestic intermodal freight in the region, BNSF has seen strong export growth in agricultural products, including those moved in containers from the Midwest to the West Coast via rail for export. The Ports of Los Angeles and Long Beach provide a gateway and critical role for both imports and exports of a range of products, including agricultural products, to flow in and out of the United States.

The customers of BNSF’s intermodal rail service are varied and include some of the largest retail companies, manufacturers and agricultural companies in the United States. Interruption of our intermodal service would have wide ranging impacts throughout the U.S. economy. The products we move in intermodal service cover the full range of consumer goods, finished machinery, industrial products, construction products, and agricultural products, among numerous other types of freight. Our customers include big box retailers like Walmart and Target, building materials and home improvement stores like Georgia-Pacific and Home Depot, automobile manufacturers like Honda and Toyota, oil companies like Exxon and Conoco Phillips, and clothing companies like TJ Maxx and Nike. Major customers of BNSF also include companies like UPS, which rely on BNSF for a wide range of package delivery service and J.B. Hunt, which works with BNSF to provide integrated intermodal service to customers across the United States.

## **II. BNSF's Intermodal Customers Rely On Fast and Reliable Service.**

Intermodal shippers are very sensitive to the quality of service they receive from their transportation provider and the reliability of that service. Many of our customers in this market segment use “just-in-time” inventory methods that require timely and dependable delivery of retail products and manufacturing parts to stock their stores and keep their manufacturing operations running efficiently. These customers reduce their inventory costs by keeping their stocks low and maintaining high turnover. This allows them to improve their profitability and enables them to respond quickly to changes in demand. If their rail transportation supplier cannot meet their needs for reliable on-time delivery, these customers will look for other sources of product, such as ports in other areas of the country or ports in Canada or Mexico, or they will look for alternative ways to transport their freight.

To meet our customer's service requirements, we maintain intermodal train schedules that are designed to allow customers to optimize supply chain efficiencies. We also provide expedited services that have transit times that average 800 miles per day. Obviously, our ability to maintain these services are dependent on operations that can be conducted as efficiently as possible.

The service needs of our intermodal customers were compellingly described by two of our major customers in the domestic intermodal area – UPS and J.B. Hunt – in testimony that was submitted to the court in the 2006 litigation. Those customers explained that they were concerned that delays and congestion caused by the proposed SCAQMD rules would have a serious adverse effect on their own business. As they explained, if compliance with the SCAQMD rules decreases the capacity of freight railroads in Southern California, intermodal rail shippers would have to find other ways to move their goods, or their goods will not move at all. I have attached the declarations of those customers to my verified statement. *See Exhibit A*

(Direct Trial Testimony Declaration of Paul R. Bergant); Exhibit B (Declaration of H. Randall Welch).

Recognizing the need for reliable and efficient service, BNSF has invested heavily in intermodal facilities. These investments have enhanced BNSF's ability to offer rail service with delivery times that are competitive with those offered by trucks operating over all-highway routes.

These investments serve important national policy goals. By creating efficient long-haul intermodal rail service, BNSF and other railroads have been able to establish efficient long-distance supply chains that have become critical to the global trade system. Efficient supply chains have been responsible for allowing manufacturers and retailers across the country to keep prices low and to respond quickly to technological change and changes in the market. Moreover, efficient supply chains are critical to maintaining our global competitiveness. In 2010, the National Export Initiative was announced by the Obama Administration, and a top priority was improving the conditions that directly affect the private sector's ability to export – working to remove trade barriers abroad, helping firms and farmers overcome hurdles to entering new markets, and assisting with financing. The ability of American manufacturers, suppliers and agricultural producers to compete in an increasingly global economy depends on maintaining an efficient long-distance supply chain, and our intermodal business is critical to that supply chain.

### **III. The SCAQMD Rules Would Impair BNSF's Ability To Meet Our Customers' Needs.**

Mr. Reilly explains that the SCAQMD rules would cause significant delays to trains in Southern California and would decrease our rail capacity, thereby creating unacceptable delays and congestion in Southern California and beyond. The loss of a single train movement due to delays would be significant. BNSF has worked hard to increase the size of its intermodal trains.

While we used to run 5,000-foot to 6,000-foot trains in the past, we have been able to run some 10,000-foot container trains that are over a mile and a half long. Indeed, a single double stack intermodal train removes 280 trucks from the region's highways. But the delayed trains also take up an enormous amount of rail infrastructure and capacity. If a single train has to wait because operations have become congested, they occupy main line, siding and yard tracks that could be used by other trains. Other trains become delayed because they are stopped before they reach their destination and are staged while waiting for the congestion to clear ahead. The congestion quickly cascades or spreads through the network.

These delays would have an adverse impact on BNSF's financial results. Train delays would reduce the revenue we can earn from each train that would not move as a result of the SCAQMD rules. Moreover, BNSF's productivity would suffer. BNSF incurs very high infrastructure costs. If BNSF is able to maintain a high utilization rate for its infrastructure, it can lower its average costs, thereby enabling it to reinvest in capacity, improve service, and compete for more container business that can help ease highway congestion. But delays in an important market like Southern California would impact BNSF's utilization of available capacity and raise our costs.

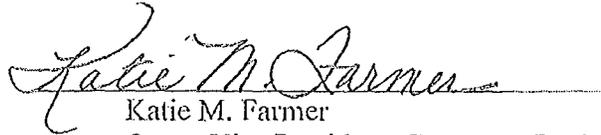
If our higher costs led to price increases, our customers' costs would increase. But even without price increases, the decrease in reliability that would result from delays caused by the SCAQMD rules would undermine our customers' need for timely and consistent service and over time, would cause them to look elsewhere for transportation service. BNSF needs to be able to produce truck-like service and that means that we must provide dependable and responsive on-time service. BNSF was able to grow its domestic intermodal business by working with truckers to jointly develop an intermodal product that takes advantage of the best

elements of rail and truck to produce a superior service and that competes with service offered by trucks operating over an all-highway route. If we are not able to maintain timely and reliable service, there could be modal shifts over time from rail transportation to truck among our domestic intermodal customers.

Compliance with the SCAQMD rules would therefore undermine national, state and local policy objectives of promoting freight rail transportation through uniform federal regulation. This would thwart environmental goals of improving fuel efficiency, decreasing air emissions, and reducing highway congestion.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on March 25, 2014

A handwritten signature in cursive script that reads "Katie M. Farmer". The signature is written in black ink and is positioned above a horizontal line.

Katie M. Farmer  
Group Vice President, Consumer Products  
BNSF Railway Company

# EXHIBIT A

FILED

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CENTRAL DISTRICT OF CALIF.  
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10

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**UNITED STATES DISTRICT COURT**

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**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

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ASSOCIATION OF AMERICAN  
RAILROADS, BNSF RAILWAY  
COMPANY, and UNION PACIFIC  
RAILROAD COMPANY,

Plaintiffs.

vs.

SOUTH COAST AIR QUALITY  
MANAGEMENT DISTRICT; THE  
GOVERNING BOARD OF SOUTH  
COAST AIR QUALITY MANAGE-  
MENT DISTRICT,

Defendants.

CASE NO. CV06-1416 JFW (PLAx)

DIRECT TRIAL TESTIMONY  
DECLARATION OF PAUL R.  
BERGANT

Trial Date: Nov. 14, 2006  
Time: 10:00 a.m.  
Place: Courtroom of the Hon. John  
F. Walter, U.S. Dist. Judge

I, PAUL R. BERGANT, declare as follows:

1. I submit this declaration as my direct testimony in the above-  
captioned case. I have personal knowledge of the facts stated in this declaration  
and if called upon to do so I could and would competently testify thereto.

2. I am the Executive Vice President Marketing, Chief Marketing  
Officer, and President of the Intermodal Division of J.B. Hunt Transport Services,

1 Inc., 615 J.B. Hunt Corporate Drive, Lowell, Arkansas 72745. Prior to becoming  
2 Executive Vice President in 1984, I served as General Counsel from 1978-84. I  
3 previous worked for the Kansas Corporation Commission as Assistant General  
4 Counsel and in private law practice in Chicago, Illinois. I earned a Bachelor of  
5 Science degree from Pittsburg State University and a Juris Doctor degree from  
6 Washburn University School of Law. I am a member of the Intermodal  
7 Transportation Institute Board of Directors at the University of Denver and a  
8 member of the Gladys A. Kelce College of Business Advisory Board at Pittsburg  
9 State University.

10 3. J.B. Hunt is one of the largest transportation logistics companies in  
11 North America. It began as a small trucking company in 1961 and grew in the  
12 following decades to become one of the largest trucking companies in this country.  
13 Until the 1980s, J.B. Hunt conducted relatively little of its business in conjunction  
14 with railroads. Its intermodal operations were limited because it was usually more  
15 efficient and profitable for the company to carry its customers' products from  
16 origin to destination entirely by truck. In the 1980s, however, railroads began to  
17 offer increasingly competitive "trailer-on-flat-car" (TOFC) and "container-on-flat-  
18 car" (COFC) service. (TOFC service involves transporting a truck trailer on a  
19 railroad flat car, while COFC service involves transporting one or more intermodal  
20 containers on a railroad flat car.) The introduction of "double-stack" service (with  
21 containers stacked two-high on flat cars) particularly contributed to the  
22 competitiveness of the railroads' intermodal business and encouraged the railroads  
23 to make further investments in intermodal facilities and equipment.

24 4. In most instances, intermodal service in this country requires truck  
25 transportation (called "draying" if it is for a short distance) at one or both ends of  
26 the rail transportation. Usually, the railroad's lines do not reach the specific  
27 locations where goods originate or terminate. At the origin end the goods must be  
28 trucked to a rail yard or intermodal facility which has the equipment and

1 infrastructure to load trailers or containers onto railroad flat cars and at the  
2 destination end the goods must likewise be unloaded at a rail yard or intermodal  
3 facility and trucked to their ultimate destination. The truck drayage operations can  
4 be offered by the railroads, or by trucking companies working with the railroads or  
5 the shippers, or they can be provided by the shippers themselves.

6 5. J.B. Hunt saw an opportunity to take advantage of its trucking  
7 operations to work with shippers and railroads to provide seamless intermodal  
8 service. In the late 1980s and early 1990s it entered into arrangements with  
9 railroads that permitted J.B. Hunt to sell space on intermodal trains directly to  
10 shippers as part of an intermodal package of truck and rail services. J.B. Hunt  
11 could then give shippers a choice of long-haul truck service from origin to  
12 destination or intermodal truck-rail-truck service. Gradually, more and more of  
13 J.B. Hunt's business moved away from long-haul trucking and toward intermodal  
14 and short-haul trucking. In 1999, J.B. Hunt Intermodal (JBI) became a separate  
15 division of the company, and by 2005 JBI's revenues exceeded J.B. Hunt's  
16 revenues from long-haul and regional truck service. In cooperation with the  
17 railroads, J.B. Hunt has succeeded in building a thriving intermodal network  
18 serving the United States, Mexico, and Canada. Attached as Exhibit A is a  
19 schematic of that network.

20 6. As I understand it, this case is about efforts the South Coast Air  
21 Quality Management District (SCAQMD) is making to impose local  
22 environmental rules on the railroads operating in the South Coast Air Basin. The  
23 Plaintiffs contend that implementation of these rules would adversely affect their  
24 operations. Transportation infrastructure in the Air Basin is already capacity-  
25 constrained, and keeping rail operations fluid is a difficult task. BNSF and Union  
26 Pacific estimate that implementation of SCAQMD's idling rules could reduce their  
27 throughput capacity by 30-40 trains per day.

28 7. From the standpoint of J.B. Hunt and its customers, a capacity

1 reduction of even one train a day is significant, and the impact of a consistent  
2 reduction of the magnitude predicted by BNSF and Union Pacific for their trains  
3 would be severe. J.B. Hunt cannot sell train space that is not available. Our  
4 ability to offer consistent, efficient train service is what has enable J.B. Hunt, the  
5 railroads, and other intermodal companies to move customers away from their  
6 heavy reliance on long-haul trucking to transport their goods. If the rail system in  
7 the Air Basin does not have the capacity to meet our customers' needs, then we  
8 either have to find another way to move their goods, or their goods will not move  
9 at all.

10 8. Finding another way to move those goods is both difficult and costly.  
11 A single intermodal train can carry the equivalent of anywhere from 200 to 400  
12 truckloads of traffic. Long-haul trucking typically requires two-driver teams, so  
13 we need 400 to 800 drivers to move the equivalent of one long-haul train. There is  
14 an acute shortage of such drivers today. If they can be recruited at all, they have to  
15 be paid more than drivers were willing to accept in the past. Moreover, the cost of  
16 diesel fuel has risen substantially in the last few years. Although that has impact  
17 the cost of rail transportation as well as truck transportation, trucks are much less  
18 fuel efficient than trains per ton-mile of cargo carried. Thus, the increase in the  
19 price of diesel fuel has disproportionately affected the cost of truck transportation.  
20 Congestion on the highways has further exacerbated the problem. Trucks spend  
21 more time on the road and burn more fuel. Thus, even assuming J.B. Hunt could  
22 find the drivers and the trucks to offer long-distance over-the-road service to its  
23 customers in lieu of intermodal service, the truck service would be significantly  
24 more expensive.

25 9. J.B. Hunt and its customers could not make up for loss of intermodal  
26 capacity in the Air Basin by shifting traffic to other port-served cities. In the first  
27 place, J.B. Hunt handles significant amounts of long-haul intermodal traffic that  
28 originates or terminates in Southern California. More importantly, alternative

1 ports on the West Coast do not have anywhere near the transportation  
2 infrastructure the Air Basin has, and what they do have is also capacity-  
3 constrained. The rail yards, rail lines, and highways serving ports like Oakland,  
4 California and Seattle/Takoma, Washington, cannot make up for diminished  
5 intermodal capacity at a gateway like Los Angeles. Even if capacity could be  
6 found at other ports, it would command premium prices and disrupt established  
7 supply chains. Moreover, as I understand it, if SCAQMD were allowed to  
8 implement its rules, there would be nothing to prevent local authorities at other  
9 port cities from adopting their own rules that interfered with the railroads'  
10 operations and reduced intermodal capacity at those ports. Far from being able to  
11 shift intermodal service to those ports, J.B. Hunt and its shippers would find  
12 themselves unable even to move the traffic that currently moves through those  
13 ports.

14 10. If some traffic does not move at all, or moves at significantly greater  
15 expense, as a result of local regulatory efforts like SCAQMD's, the impact on  
16 interstate commerce will be significant. The global trading system today owes  
17 much of its success to the efficiency of intermodal supply chains that make the  
18 long-distance import and export of parts, raw materials, and finished goods  
19 economically feasible. Every intermodal train carries millions of dollars worth of  
20 commodities. If the supply of those commodities is reduced, or the costs of  
21 transporting them goes up, prices to shippers and consumers will go up.  
22 Furthermore, manufacturers, assemblers, and retailers rely on efficient, just-in-  
23 time intermodal service to streamline their operations and maximize the variety  
24 and quality of the products they offer. If those operations are disrupted by train  
25 delays or the inability of the railroads to fill the needs of shippers, and truck  
26 service is unable to fill the gap, then not only will prices go up, but the variety and  
27 quality of products offered will go down.

28 11. In just the third week of October 2006, J.B. Hunt's intermodal

1 business out of Southern California alone accounted for the equivalent of 24  
2 double-stack trains. Much of this business is time-sensitive just-in-time traffic  
3 upon which our customer depend to minimize their inventory costs and get  
4 commodities to their shelves and parts to their assembly lines when and where  
5 they are needed. For example, our largest customer, Walmart, has a special  
6 distribution system—its “Centerpoint” system—that consolidates at some 20  
7 facilities around the country the goods with the highest service requirements  
8 destined to its stores. The largest of these Centerpoint consolidation centers is in  
9 the Los Angeles Basin. Walmart depends on timely, consistent service from our  
10 intermodal operations to get products from its consolidation centers to its store  
11 shelves just when its customers need them. Walmart is not alone in this regard.  
12 Many of our retailers and manufacturers customers have the same kind of just-in-  
13 time requirements. An automobile assembly line, for example, can be forced to  
14 shut down if critical parts do not arrive on time.

15 12. Finally, it bears emphasizing that it is not only parts, raw materials,  
16 and finished products being imported into this country for incorporation into  
17 manufactured goods or direct sales to consumers that would be adversely affected,  
18 but also parts, raw materials, and finished products being exported from this  
19 country for sale abroad. Insofar as the efficiency of these export operations would  
20 be adversely affected by regulations like SCAQMD’s, the international  
21 competitiveness of the businesses would be adversely affected. Further, a  
22 significant amount of intermodal traffic in this country is neither import nor export  
23 traffic. It is nevertheless long-distance traffic that usually crosses numerous state  
24 lines between origin and destination and is just as dependent on the efficiency and  
25 capacity of the railroads’ service as the import and export traffic. That business  
26 too would be adversely affected by delays and capacity restrictions caused by  
27 regulations like SCAQMD’s.

28 13. I am not an expert in rail operations, and I do not here offer an

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opinion about how much regulations like SCAQMD's and any copycat regulations adopted around the country would interfere with rail operations. But if, as BNSF's and UPRR's witnesses have testified, such regulations would significantly diminish the railroads' train throughput capacity, I can say without equivocation that those regulations would have a significant adverse affect on J.B. Hunt, its customers, and interstate commerce generally in this country.

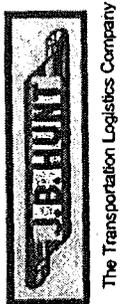
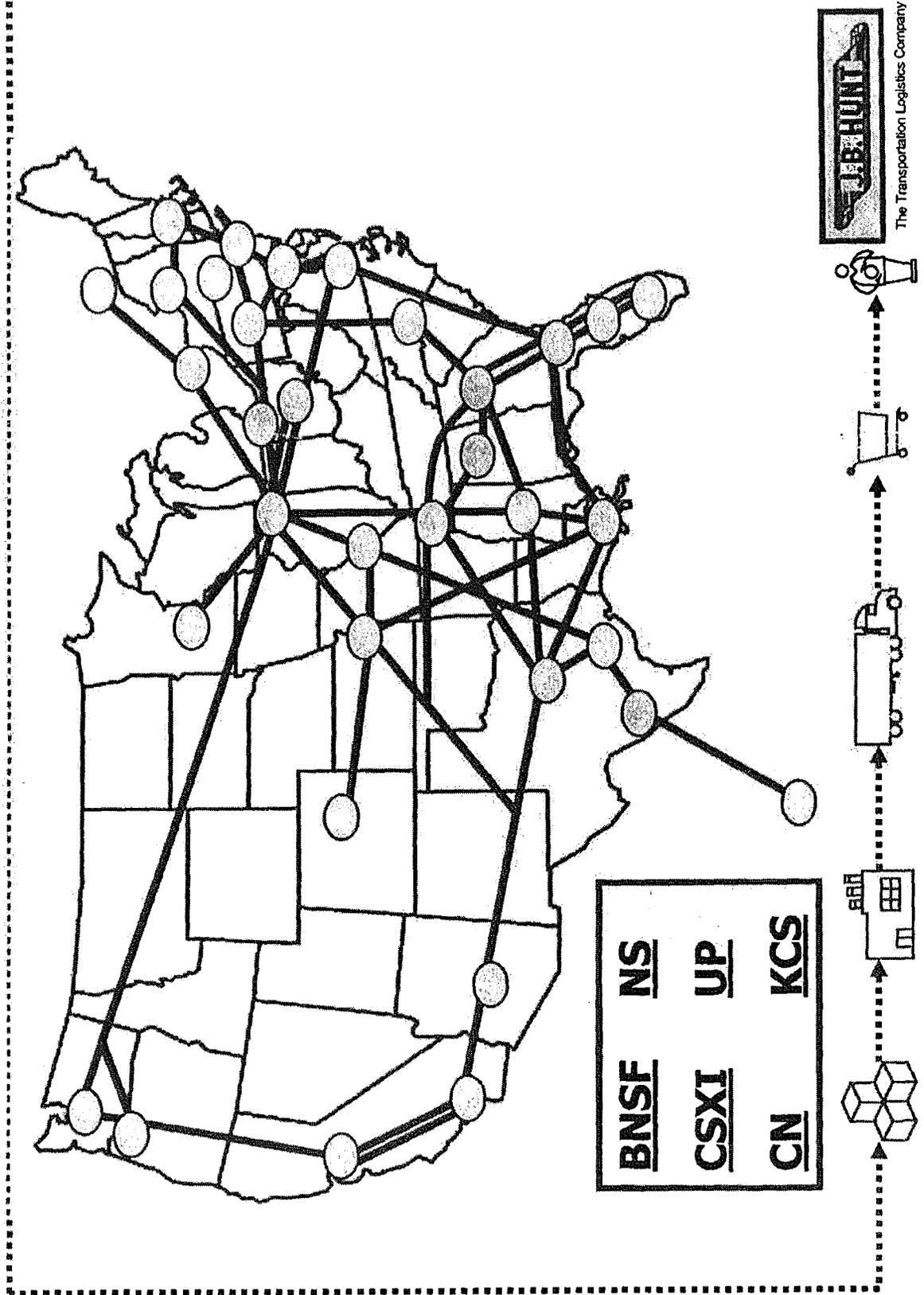
I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of Nov. 2006 in Lowell, Ad.

  
\_\_\_\_\_  
Paul Bergant

# EXHIBIT A

# North American Intermodal Network



# EXHIBIT B



1 (“UPS”). I have been a UPS employee for 35 years. I am currently responsible  
2 for UPS’s Intermodal Operations and Control Center. This encompasses  
3 operations, service, and design for rail operations, truck driver team operations,  
4 and contract carrier (truckload) operations. I am also responsible for  
5 transportation technology development and hub automation technology  
6 development. Prior to being promoted to my current position in 2000, I held a  
7 variety of transportation management positions with UPS, including Region  
8 Transportation Manager in the North Central Region, Region Transportation  
9 Manager in the Northeast Region, and Transportation Manager in Southeast and  
10 Northeast Texas.

11 3. UPS is the world’s largest package delivery company, delivering  
12 more than 14 million packages a day to more than 200 countries around the world.  
13 UPS employs approximately 400,000 people—340,000 in the United States and  
14 60,000 internationally. UPS uses package cars, trucks, airplanes, and trains to  
15 provide its package delivery services. UPS manages one of the largest ground  
16 fleets in the world, with nearly 90,000 vehicles. UPS runs the world’s ninth  
17 largest airline. Finally, UPS is one of the largest users of rail service in the  
18 country.

19 4. UPS’s parcel network operates on a “hub and spoke” model.  
20 Individual packages are gathered by truck, taken to hubs or “centers,” sorted by  
21 destination and service category, and usually packed in trailers for delivery by  
22 truck tractor to another hub for: (a) sorting and final truck delivery; (b) movement  
23 by air to another hub for sorting and final truck delivery; or (c) movement by rail  
24 to another hub for sorting and final delivery. For example, a parcel being shipped  
25 from Wilmington, North Carolina, to San Francisco, California is picked up by a  
26 driver and taken to the UPS center in Wilmington, where it is loaded on a trailer  
27 and driven to the UPS hub in Raleigh, North Carolina. There, the package joins  
28 packages from all over North Carolina, and is carried by truck to the Chicago Area

1 Consolidated Terminal in Hodgkins, Illinois. It is then loaded onto a trailer and  
2 sent by “trailer-on-flat-car” (TOFC) rail service to North Bay, California, where  
3 the trailer is unloaded, forwarded to the delivery center, sorted, loaded onto the  
4 delivery truck, and transported to its final destination.

5 5. UPS offers a variety of different service options to its customers and  
6 there are numerous variations on the ways packages move through its system. All  
7 of those ways, however, have one thing in common—efficiency. UPS uses the  
8 mode, or combination of modes, that produces the necessary service at the lowest  
9 cost. The on-time package delivery business is highly competitive. In addition to  
10 the United States Postal Service, UPS faces competition from other private  
11 delivery providers like Federal Express and DHL. If UPS cannot provide  
12 competitive, quality service, its customers may choose other providers.

13 6. My particular responsibility at UPS is making sure that the  
14 intermodal operations that UPS uses for much of its business can meet the  
15 competitive schedules that are necessary for that business. UPS uses every major  
16 railroad in the United States to provide the rail leg of at least some of its long-haul  
17 business. In the western two-thirds of the country, UPS has the equivalent of  
18 several trainloads of traffic moving every day on trains operated by BNSF  
19 Railway Company and Union Pacific Railroad. UPS also uses the trains of  
20 Norfolk Southern Railway Company and CSX Transportation, Inc. to handle some  
21 of its business in the eastern third of the country. Finally, UPS also utilizes the rail  
22 services of FEC, CN, and Kansas City Railroads.

23 7. BNSF, Union Pacific, and the Association of American Railroads  
24 maintain that proposed regulations promulgated by the South Coast Air Quality  
25 Management District related to idling would result in diminished rail capacity and  
26 substantial train delays. They believe that the throughput capacity of BNSF and  
27 Union Pacific could be diminished by as many as 30-40 trains per day. The kinds  
28 of substantial train delays and diminished capacity they predict could have a

1 serious impact on UPS's rail operations.

2 8. UPS offers guaranteed package delivery times. When it says  
3 packages will arrive, they must arrive, or our customers will find other providers  
4 who can meet their commitments. Recently in the eastern United States, we found  
5 that we were losing business to Federal Express and other package delivery  
6 services because we could not meet their delivery schedules for ground services.  
7 The reason was that, in some corridors, the eastern railroads could not consistently  
8 provide the kind of intermodal service we needed to compete. Accordingly, we  
9 redesigned our ground package network in the East to move significant traffic  
10 volume off intermodal trains and onto long-haul trucks. We were not happy to do  
11 that. It was costly to build up our truck fleet and to recruit and train the drivers for  
12 long-haul service, and the cost to transport by truck is significantly higher than to  
13 transport shipments by rail.

14 9. In the West, we have been able to maintain most of our intermodal  
15 business against our competitors' long-haul trucking offerings. However, the  
16 trains have to operate on very tight schedules. For example, between Los Angeles,  
17 California and Dallas, Texas, if a train carrying UPS's trailers is one hour late, it  
18 misses the sorting schedule at UPS's Dallas hub and our packages arrive late to  
19 our customers.

20 10. Sometimes we can adjust our sorting schedules to accommodate a  
21 slower train schedule for one leg of a shipment, but that has adverse ramifications  
22 for other legs of the shipment. That is exactly what happened earlier this year for  
23 packages moving in trailers from Los Angeles, California that required sorting  
24 first at our Dallas, Texas hub and then at our Memphis, Tennessee hub. Because  
25 trains were unable to meet our Dallas sort schedule consistently, we adjusted our  
26 operations to permit trains to arrive later and still permit us to provide competitive  
27 service to customers in the Dallas area. However, that adjustment meant that some  
28 packages that were destined for the Memphis area could not be sorted and

1 reloaded in time to continue on by train to Memphis. Accordingly, we were  
2 required to reorganize our service to move this traffic between Dallas and  
3 Memphis by truck. The same thing could happen to the Los Angeles-Dallas traffic  
4 if we cannot get consistent, timely train delivery under our current schedule. If  
5 further, persistent delays developed, we may have no choice but to move each  
6 trailer from Los Angeles to Dallas using two-man "sleeper" driver teams.

7 11. Our Los Angeles to Portland, Oregon train service is similarly on a  
8 very tight schedule. If we cannot get consistent, timely delivery by intermodal  
9 train, we may be forced to use long-haul trucks to carry the trailers from Los  
10 Angeles to Portland and back.

11 12. Current railroad capacity constraints already impact our operations.  
12 For example, UPS found it necessary for competitive reasons to drop the transit  
13 time for some of our ground service from California to New York from five days  
14 to four days. The UPS trailers had been moving by rail from Los Angeles,  
15 California to Chicago, Illinois, and then interchanged with another railroad in  
16 Chicago. Because of capacity constraints, however, the western railroad was  
17 unable consistently to meet our requirements from Los Angeles to Chicago.  
18 Accordingly, some of that traffic is now moved by teams of drivers from Los  
19 Angeles to Iowa, where they meet another group of drivers who carry the trailers  
20 the rest of the way to Chicago. The trailers are then loaded on an intermodal train  
21 for the rest of the trip to our New York hub.

22 13. If additional capacity constraints are placed on the railroads, as  
23 predicted under the implementation of the proposed regulations, or even if  
24 additional delays are introduced, UPS may be forced to seek other transportation  
25 options, including long-haul trucking, none of which are as cost-effective as  
26 intermodal rail service. UPS uses the cost advantage it has with intermodal  
27 service to keep the cost of its delivery services down and provide a quality service  
28 to its customers at a good price. If UPS's transportation costs are increased, then

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the cost increases may have to be passed on to our customers.

14. The bottom line is that, it is not only UPS and its customers that have an important stake in seeing the railroads maximize the fluidity and capacity of their operations in the South Coast Air Basin and elsewhere, but also the public at large. When train delays result in capacity constraints for rail service, the traffic will seek out other ways to move. In the absence of intermodal rail service which is capable of addressing UPS's capacity needs, as well as its needs for time-critical deliveries, UPS will be forced to consider other transport options to remain competitive, including the use of long-haul trucks. Unfortunately, such a shift will likely result in higher costs of service, and ultimately higher prices to consumers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1 day of Nov 2006 in Atlanta, GA.



H. Randall Welch

**VERIFIED STATEMENT OF**  
**JOHN D. LOVENBURG**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35803**

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY –  
PETITION FOR DECLARATORY ORDER**

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**VERIFIED STATEMENT OF JOHN D. LOVENBURG**

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My name is John Lovenburg. I am Vice President, Environmental for BNSF Railway Company. I lead a team of environmental employees responsible for environmental strategy and communication, sustainability, permitting and compliance, remediation, hazardous materials emergency response, environmental litigation, and public policy leadership. Prior to joining BNSF in 2011 in my present position, I have more than twenty years of experience in environmental consulting with CH2M Hill, which is a global construction, operations, engineering and project management company serving public and private sector clients. I served most recently as Vice President and Director, Global Site Remediation and Revitalization. I earned a Master's of Science in hydrogeology from California State University, San Diego, and a Bachelor of Arts in geology from the University of California, Santa Barbara.

I am submitting this verified statement to explain that BNSF takes seriously the goal of reducing diesel emissions from operations and has succeeded in doing so through numerous actions taken over a period of many years. In the first part of my statement, I explain that BNSF has undertaken many efforts to reduce diesel emissions from rail operations in Southern California, including among other things, fulfilling our commitments pursuant to two voluntary

agreements with the California Air Resources Board (“CARB”). I also briefly describe BNSF’s additional efforts to reduce diesel emissions across its network. BNSF continues to develop new technology to further our goal of fuel efficiency, which results in fuel conservation and emissions reduction.

In the second part of my statement, I explain that the SCAQMD rules undermine the nationwide federal regulation of locomotive idling-reduction devices by creating an inefficient patchwork of local regulation.

**I. BNSF Takes Very Seriously Its Commitment To Reduce Diesel Emissions.**

I understand that the SCAQMD rules at issue here were the subject of litigation in federal court in 2006, and that a BNSF witness in that litigation, Mark Stehly, described BNSF’s extensive efforts to address diesel emissions. *See* Direct Trial Testimony Declaration of Mark P. Stehly at 13, which was attached as Exhibit 11 to BNSF’s prior submission in this proceeding. I will not repeat that discussion of BNSF’s historical efforts. As Mr. Stehly explained, BNSF supported EPA’s development of new national locomotive emissions standards in the mid-1990’s, which would reduce nitrogen oxides (NO<sub>x</sub>) by nearly two-thirds and particulate matter and hydrocarbon emissions by half. BNSF entered into an agreement in 1998 with California Air Resources Board (“CARB”) that committed us to accelerating the reduction of locomotive nitrogen oxide emissions in the Basin. The 1998 agreement has been recognized by CARB as the most “aggressive scrappage and replacement program” with an objective of an overall NO<sub>x</sub> emission reduction of 67% in 2010 in the areas of Los Angeles, Orange, Riverside, and San Bernardino counties. *See* Memorandum of Mutual Understandings and Agreement, South Coast Locomotive Fleet Average Emissions Program, at 2 (July 2, 1998) (citing Measure M14 of the 1994 California State Implementation Plan). The 1998 MOU with CARB was attached as

Exhibit 1 to BNSF's prior filing in this proceeding. BNSF also entered into another agreement with CARB in 2005 to reduce particulate matter emissions from rail yards across the State of California. Among other things, BNSF committed to installing automatic engine start/stop systems (known as "AESS") on "intrastate" locomotives and accelerating the use of low-sulfur diesel fuel on locomotives operating in California. *See California ARB/Railroad Statewide Agreement—Particulate Emissions Reduction Program at California Rail Yards*, at 13-16 (June 2005) (attached as Exhibit 2 to BNSF's prior submission in this proceeding). Mr. Stehly also described BNSF's substantial investments to fund and test new technology, including different idling-reduction systems, new switch engines using LNG fuel, new "gen-set" locomotive engine technologies, and new "hybrid" technologies.

Since 2006, BNSF has fulfilled its commitments under the voluntary agreements negotiated with CARB, and it continues to do so. BNSF has accelerated the introduction of cleaner burning locomotives in Southern California and voluntarily retrofitted its "intrastate" locomotives (i.e., those that spend more than 90% of their time in California) to install AESS over a three-year period. BNSF has fulfilled its commitments in the 2005 MOU to limit non-essential locomotive idling and to establish a statewide visual emission reduction and repair program to identify and repair locomotives with excessive visible emissions. BNSF has prepared emissions inventories and collected data for designated rail yards, which included BNSF's Hobart, Commerce/Eastern, Watson/Wilmington, and San Bernardino rail yards in Southern California. BNSF has also cooperated with CARB in its development of health risk assessment for rail those yards. CARB has confirmed that BNSF met or exceeded its obligations under the 1998 and 2005 MOU. *See Letter from Richard Corey, Executive Officer, Air Resources Board to Carl Ice, President and Chief Operating Officer, BNSF and Lance Fritz, Executive Vice*

President of Operations, Union Pacific, at 1 (Dec. 4, 2013) (attached as Exhibit 3 to BNSF's prior submission in this proceeding); *see also* Letter from Richard Corey, Executive Officer, Air Resources Board to Mary Nichols, Chairman, Air Resources Board (Dec. 4, 2013) (attached as Exhibit 5 to BNSF's prior submission in this proceeding).

These efforts have had a substantial benefit in reducing diesel emissions in rail yards in California. Particulate matter emissions in 2011 at the Hobart yard were estimated to be 77% lower than the 2005 baseline and particulate matter emissions in 2011 at San Bernardino were estimated to be 54% lower.

SCAQMD implicitly recognized that the 2005 BNSF agreement with CARB was effective with respect to the health risk assessments, which were performed by CARB using data from BNSF and cooperation from BNSF, since SCAQMD concluded that CARB's health risk assessments "largely mooted" its own rule that would have required health risk assessments (Rule 3503). *See* Reply of the South Coast Air Quality Management District to Petition for Declaratory Order, Verified Statement of Susan Nakamura, at 2 (filed Feb. 14, 2014). Notably, SCAQMD did not submit that rule for inclusion in the SIP. There can be no serious debate that these voluntary agreements of BNSF with CARB have been very effective in reducing diesel emissions.

In addition to BNSF's work to fulfill the voluntary agreements with CARB, BNSF has continued to be proactive in implementing new technology to reduce diesel emissions from our operations and has made significant capital investments to help us become more fuel efficient. Our efforts have included the following:

- BNSF has purchased ultra-low emission switch locomotives known as "GenSet" switch locomotives, which are EPA-certified diesel switch locomotives. These locomotives have three low-horsepower engines that only operate when needed. BNSF operates 19 of these locomotives in California.

- BNSF has installed intermodal automated gate technology using digital cameras to record images of containers, chassis, tractors and unit numbers as they enter the intermodal facility. The gates have increased facility throughput and reduced truck idling time and air emissions by roughly 50%. BNSF has installed these gates at 10 yards in the United States, including our intermodal facilities in the San Bernardino and Hobart rail yards in Southern California.
- BNSF uses natural gas hostler trucks at its Hobart intermodal facility in Los Angeles, which is the nation's busiest rail intermodal terminal. Ten hostler trucks reduce nitrogen oxide and particulate emissions by 90% compared with standard off-road diesel tractors. BNSF was the first railroad to sponsor low-emissions natural gas hostler trucks to move containers within an intermodal facility in 2007.
- BNSF has proposed to make a large investment in Southern California to develop the greenest intermodal rail yard in the country, the Southern California International Gateway (SCIG) project. The proposed BNSF funded \$500 million project includes over \$100 million of environmental mitigation components. SCIG was permitted by the Port of Los Angeles and the City of Los Angeles in 2013. SCIG will shorten the distance to approximately 4 miles from terminals in the Port of Los Angeles that trucks loaded with cargo need to travel before transferring containers to rail at SCIG, instead of traveling 24 miles on the 710 Freeway to the BNSF Hobart intermodal yard near downtown Los Angeles. It will include wide-span, all-electric cranes, ultra-low emission switching locomotives, and low-emission rail yard equipment.

BNSF has made other extensive efforts across its network to improve fuel efficiency and reduce locomotive emissions, including the following:

- BNSF has purchased more than three thousand line-haul locomotives with AESS since 2000 and retired older units. Our newest locomotives are approximately 15% more fuel efficient than the locomotives they replaced. The automatic start/stop systems from our locomotive manufacturers are EPA Smartway Verified.
- BNSF has devoted substantial management and supervisory resources to training our employees to reduce locomotive idling and improve the efficient use of locomotives. Since 2007, BNSF's Fuel MVP Program has rewarded locomotive engineers for efficiency in train handling.
- BNSF has adopted a locomotive energy management system that controls the throttle and dynamic brake automatically. The technology is designed to maximize fuel efficiency and train handling by optimizing throttle and brake use. Depending on the terrain and train makeup, the locomotive energy management system can achieve fuel savings of up to 10%. This software is installed on approximately one third of BNSF's line haul locomotives.

- BNSF has increased the use of distributed power to reduce total horsepower required for train movements. BNSF has also adopted operating practices for isolating and shutting down unneeded locomotives in trains where possible given tonnage and terrain.
- BNSF was the first rail carrier in the United States to install wide-span electric cranes, which produce zero emissions on site while generating power each time they lower a load. These cranes eliminate the need for as many as six diesel trucks to move containers within an intermodal facility. These cranes have been installed at three facilities in Washington, Kansas, and Tennessee, and as described above, are planned at the SCIG facility in Los Angeles.

These efforts have been very successful on a network-wide basis, as evidenced by the fact that BNSF's fuel efficiency has increased by 7.7% between 1999 and 2013.

Notwithstanding the environmental benefits that have resulted from these prior efforts, BNSF continues to pursue initiatives to improve fuel efficiency and reduce locomotive emissions.

BNSF has made substantial investments in new technology to reduce diesel emissions from rail operations. BNSF began evaluating in 2013 LNG-powered, long-haul locomotive technology, which is one of the cleanest-burning locomotive technologies. BNSF is also experimenting with hydrogen fuel cell switch locomotives through a partnership with the U.S. Department of Defense and others. BNSF continues to develop hybrid fuel-cell technology for potential use in a road locomotive in the future. BNSF is even exploring ways to capture energy generated during braking and reuse it as needed for propulsion.

## **II. The SCAQMD Local Rules Undermine Nationwide Federal Regulation of Locomotive Idling-Reduction Devices**

EPA, through its regulations implementing the Clean Air Act, has properly promulgated nationwide requirements addressed to locomotive equipment. EPA has established requirements that all new and remanufactured locomotives be equipped with AESS, which allows for reduced idling time and thereby reduced diesel emissions associated with locomotive idling. *See* 40 C.F.R. § 1033.115. As EPA has stated, “a patchwork of state and local regulations would be

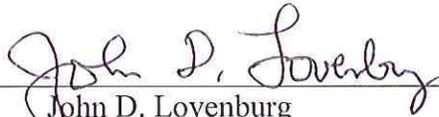
inefficient, and could hinder EPA's ability to implement a uniform national control program." EPA Office of Mobile Sources, Federal Preemption of State and Local Control of Locomotives, EPA 420-F-97-050, at 3 (Dec. 1997). EPA's nationwide requirements for locomotives are impeded by the SCAQMD rules for the South Coast Air Basin in California.

BNSF has complied with EPA's locomotive idle control regulation and indeed exceeded the requirements. In compliance with EPA's equipment requirement, BNSF has purchased new locomotives that are equipped with AESS and has equipped remanufactured locomotives with AESS. In addition, BNSF has voluntarily retrofitted many locomotives already in its fleet to install AESS, even though it was not required to do so under EPA's regulation.

BNSF strives to provide a highly efficient transportation service, and it has every incentive to provide that transportation while maximizing fuel efficiency. Operating dictates by local government – that conflict with uniform federal regulation – would inevitably undermine our efforts to improve fuel efficiency and reduce diesel emissions from rail operations. In short, through inappropriate regulation of rail operations, the SCAQMD rules could undermine the network efficiency objectives that BNSF is trying to advance.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on March 27, 2014

  
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John D. Lovenburg  
Vice President, Environmental  
BNSF Railway Company