

235882

BEFORE THE
SURFACE TRANSPORTATION BOARD
Finance Docket No. 35803

ENTERED
Office of Proceedings
April 14, 2014
Part of
Public Record

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
– PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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April 14, 2014

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The Association of American Railroads (“AAR”) submits these reply comments regarding the Petition for Declaratory Order (“Petition”) filed by the United States Environmental Protection Agency, Region IX (“EPA”) on January 24, 2014. For the reasons stated herein, in the AAR’s initial comments filed February 14, 2014 in this proceeding, and in the AAR’s supplemental comments filed on March 28, 2014,¹ the Board should rule that Rules 3501 and 3502 enacted by the South Coast Air Quality Management District (“SCAQMD” or “the District”) are preempted by Section 10501(b) of the ICC Termination Act (“ICCTA”), whether or not the rules are approved by EPA as part of the California State Implementation Plan (“SIP”).

With ICCTA, Congress revealed its intent to centralize regulation of the interstate rail network to prevent a patchwork of conflicting regulations. Absent a congressional grant of authority, the specific prohibition in ICCTA against state and local regulation of rail operations must prevail. Here, nothing in the Clean Air Act gives states the authority to override ICCTA and regulate rail operations by including the local regulations in a SIP.

¹ See Reply of the Association of American Railroads (Feb. 14, 2014) (“AAR Initial Comments”); Supplemental Comments of the Association of American Railroads (March 28, 2014) (“AAR Supp. Comments”).

INTRODUCTION

Congress's assertion of federal authority over the railroad industry has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); accord, *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1088-91 (8th Cir. 1989) (ICA so pervasively occupies the field of railroad governance that it completely preempts state law claims). In 1996, with ICCTA, Congress broadened the federal regulatory scheme and scope of that federal preemption. The express preemption clause in Section 10501(b) provides that the jurisdiction of the Board over transportation by rail carriers "is exclusive." The federal courts have observed that "[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of [] train operations ... is under the exclusive jurisdiction of the STB" *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001). It is indeed "difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996). See AAR Initial Comments at 4, 13.

The touchstone of any ICCTA preemption analysis must therefore begin with this broad and plain statement of Congress's intent to place exclusive jurisdiction with the Board. See AAR Supp. Comments at 4; AAR Initial Comments at 13-14. The Board has explained that Section 10501(b) "is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce." *CSX Transp., Inc. - Petition for Declaratory Order*, 2005 WL 584026, at *9 (S.T.B. served Mar. 14, 2005). It further observed that "[e]very court that has examined the statutory language has concluded that the preemptive effect of Section 10501(b) is broad and sweeping, and that it blocks actions by

states or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations." *Id.* at *6.

In this case, the Board is faced with a novel issue. The District's attempt to regulate rail operations has already been found facially preempted by ICCTA by two federal courts because the rules seek to regulate rail operations. The novel question presented by EPA's request for a declaratory order is whether Congress intended to authorize states to include regulations that are otherwise prohibited by federal law into a SIP; in other words, does the inclusion of the otherwise unlawful regulation in an approved SIP trump the federal prohibition against local regulation of rail operations? Proponents of these idling regulations say yes; the rail industry says no, not without some express indication in the Clean Air Act that Congress intended to permit regulations in a SIP to override ICCTA.

AAR submits that there is a deep and fatal flaw in proponents' argument. Nothing in the Clean Air Act supports the idea that mere inclusion of a local regulation in an approved SIP overrides the express and specific prohibition in ICCTA against local regulation of rail operations.² To the contrary, Section 110 of

² If California had pursued the waiver provision for regulations related to emission standards, the preemption inquiry might be different. Section 209 of the Clean Air Act "expressly preempt[s]" states and local agencies from adopting "any standard or other requirement relating to the control of emissions from" new or remanufactured locomotives; state regulation of locomotives that are not new or remanufactured is also barred absent a unique California waiver from EPA. *See* 42 U.S.C. § 7543(b), (3)(1)(B); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1081 & n.21 (D.C. Cir. 1996). With the waiver provision of section 209(e)(2) the Clean Air Act, Congress carved out a limited role for California state regulation of railroad locomotive emissions from non-new and non-remanufactured engines, but only where EPA found the rules necessary "to meet compelling and extraordinary conditions" and consistent with federal standards. 42 U.S.C. § 7543(e)(2)(A)(ii). It is worth noting that the proposed rules would apply to all locomotives: new, remanufactured, or otherwise. In any event, California did not pursue a waiver. In addition, California could not show compelling and extraordinary conditions to impose these rules on the railroads, and certainly not on such a small portion of the fleet; nor could California show that the rules are consistent with federal standards.

the Clean Air Act anticipates the possibility of preemption by requiring states to provide assurances that the State is not prohibited by Federal law from carrying out its SIP. 42 U.S.C. § 7410(a)(2)(E)(i). Nowhere do proponents explain why Congress would require this assurance if including the regulation in a SIP trumped other federal laws such as ICCTA.

With these reply comments, AAR responds to a variety of arguments against preemption by ICCTA raised by various parties, including the following:

- i. EPA's position that the waiver provision and SIP approval provision in the Clean Air Act are irrelevant to the issue presented;
- ii. California Air Resources Board's ("CARB's") contention that the *Grafton* standard – stating that environmental laws cannot be used to “regulate rail operations” – is a new formulation;
- iii. The District's contention that – all evidence and two court decisions to the contrary – it is not seeking to regulate rail operations;
- iv. The argument that the Board is faced with two conflicting federal laws: the Clean Air Act and ICCTA;
- v. The suggestion that preventing a patchwork of local regulation of rail operations is not a core objective of ICCTA;
- vi. The inference in several comments that the AAR's position before the Board is inconsistent with its position before the Ninth Circuit;
- vii. The District's contention that these rules governing the use of locomotives will not impose a significant burden on the railroads;
- viii. The District's cavalier dismissal of FRA's safety concerns; and
- ix. The idea that the Board can rely on the states (the fox) to guard against the burdens on interstate commerce from a patchwork of conflicting regulations of rail operations (the hen house).

ARGUMENT

I. THE BOARD HAS PROPERLY HELD THAT ENVIRONMENTAL LAWS ARE PREEMPTED IF USED TO “REGULATE RAIL OPERATIONS.”

A. The Board’s *Grafton* standard is not a new formulation.

The Board has held that federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act are generally outside the scope of Section 10501(b) preemption, “*unless the federal environmental laws are being used to regulate rail operations or being applied in a discriminatory manner against railroads.*” *Grafton & Upton R.R. Co. - Petition for Declaratory Order*, 2014 STB LEXIS 12, at *15 (S.T.B. served Jan. 27, 2014) (emphasis added). However, CARB believes that the Board’s standard in *Grafton* constitutes a “new formulation.” CARB Initial Comments at 10 n.11 (Feb. 14, 2014).

Grafton’s standard is not new. In the first place, the *Grafton* standard tracks the language of the statute. Section 10501(b) provides that except as otherwise provided, “the remedies provided under this part *with respect to regulation of rail transportation are exclusive and preempt* the remedies provided under Federal or state law.” 49 U.S.C. § 10501(b) (emphasis added). ICCTA defines “transportation” to include not only locomotives and other equipment and facilities “related to the movement of passengers or property, or both, by rail,” but also “services related to that movement.” *Id.* § 10102(9). Thus, the “regulation of rail transportation” preempted by ICCTA clearly includes the regulation of rail operations.

Second, the “regulate rail operations” standard is not new to the federal courts. *See, e.g., Guild v. Kansas City S. Ry. Co.*, 541 F. App’x 362, 366 (5th Cir. 2013) (“[f]or a state court action to be expressly preempted under the ICCTA, it

must seek to regulate the operations of rail transportation”) (quoting *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 413 (5th Cir. 2010)); *Ass’n of Am. R.Rs. v. SCAQMD*, 2007 WL 2439499, at *7 (C.D. Cal. Apr. 30, 2007) (“*District Court Opinion*”) (“Because the Rules directly regulate rail operations such as idling, they are preempted without regard to whether they are undue or unreasonable”); *CNFR Operating Co., Inc. v. City of Am. Canyon*, 282 F.Supp.2d 1114, 1118 (N.D. Cal. 2003) (ICCTA does not preempt regulation that did not “attempt to regulate rail operations”). In affirming the district court’s decision that the District’s rules are preempted by ICCTA, the Ninth Circuit used a substantively identical standard, finding that State laws are preempted when they “may reasonably be said to have the effect of managing or governing rail transportation.” See *Ass’n of Am. R.Rs. v. SCAQMD*, 622 F.3d 1094, 1097-98 (9th Cir. 2010) (“*Ninth Circuit Opinion*”).³ As the Fourth Circuit has recognized, the Ninth Circuit’s standard is synonymous with regulation of rail operations: ICCTA’s “preemption provision [] displace[s] only ‘regulation,’ i.e., those state laws that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation.” *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157 (4th Cir. 2010) (quoting *Fla. E. Coast Ry.*, 266 F.3d at 1331). See also *Guild*, *supra*, 541 F. App’x at 367 (same, citing *Fla. East Coast Ry. Co.*).⁴

Finally, the “regulate rail operations” standard is not new to the Board. Little more than a year ago, the Board applied the standard in a rulemaking,

³ See also *United States v. St. Mary’s Ry. W., LLC*, 2013 U.S. Dist. LEXIS 181015, at *8 (S.D. Ga. Dec. 4, 2013) (“the preemption provision displaces only those laws that ‘have the effect of ‘managing’ or ‘governing’ rail transportation’”) (citing *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)).

⁴ Cf. *City of Auburn v. United States Gov’t*, 154 F.3d 1025, 1029 (9th Cir. 1998) (“Congress and the courts long have recognized a need to regulate railroad operations at the federal level”).

holding that State and local bodies retain police powers to protect the public health and safety “so long as the state and local regulations do not serve to regulate railroad operations or unreasonably interfere with interstate commerce.” *Solid Waste Rail Transfer Facilities*, Ex Parte No. 684, 2012 WL 5873121, at *5 (S.T.B. served Nov. 20, 2012). The Board’s Office of Environmental Analysis has also applied this standard in its environmental assessments and impact statements.⁵

B. The District is plainly seeking to regulate railroad operations.

The District acknowledges the *Grafton* standard that environmental laws are not generally preempted, *unless* they are being used to regulate railroad operations. District Supp. Comments at 35 (Mar. 28, 2014). The District then argues that its rules are not regulating railroad transportation because they do not intrude on matters “directly regulated” by the Board, such as rate, services, construction, and abandonment. *Id.* The District appears to recognize that

⁵ See, e.g., Post Environmental Assessment, *Arizona Eastern Ry. – Construction and Operation – In Graham County, Arizona*, 2009 WL 1074759, at *3 (S.T.B. served Apr. 6, 2009) (“States can take appropriate actions to protect public health and safety so long as their actions do not serve to regulate rail operations or unreasonably interfere with interstate commerce”); Post Environmental Assessment, *Norfolk S. Ry. Co., Pan Am Rys., Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am S., LLC in NY, NH, VT, MA and CT*, 2009 WL 289607, at *7 n.21 (S.T.B. served Jan. 30, 2009) (“The Board has also consistently held that states retain their historic police powers and can take appropriate action to protect public health and safety so long as their actions do not serve to regulate railroad operations or unreasonably interfere with railroad operations”); Draft Environmental Impact Statement, *Six Cntys. Ass’n of Gov’ts Construction and Operation Exemption – Rail Line Between Levan and Salina, Utah*, 2007 WL 2020032, at *319 (S.T.B. served June 29, 2007) (“States retain their police powers and can take appropriate actions to protect public health and safety so long as their actions do not serve to regulate rail operations or unreasonably interfere with interstate commerce”); Post Environmental Assessment, *New England Transrail, LLC, d/b/a Wilmington and Woburn Terminals R.R. Co. – Construction, Acquisitions, and Operation Exemption – In Wilmington and Woburn, MA*, 2004 WL 3007309, at *28 (S.T.B. served Dec. 22, 2004) (same).

regulations seeking to control rates or routing decisions, to require pre-approval of new construction or abandonments, or to direct the provision of transportation services itself would be unlawful, even if included in an approved SIP. Yet the District urges the Board to conclude that its rules are not an attempt to regulate rail operations, but are instead “attenuated and peripheral” to the direct regulatory purposes of ICCTA and therefore should survive. *Id.* at 37.

The District’s position is without merit for four reasons. *First*, two federal courts have already determined that SCAQMD’s regulations are being used to directly regulate railroad operations and railroad transportation. AAR Supp. Comments at 12-13. The district court found that the rules were preempted precisely because they “directly regulate rail operations such as idling.” *District Court Opinion*, 2007 WL 2439499, at *7. The Ninth Circuit similarly found that the rules were preempted because they “may reasonably be said to have the effect of managing or governing rail transportation.” *Ninth Circuit Opinion*, 622 F.3d at 1098 (citation omitted). The District argues that these findings should have “no precedential impact for purposes of this proceeding.” District Supp. Comments at 4 (emphasis in original). These federal courts did not address the novel issue now facing the Board of whether the prohibition in ICCTA needs to be harmonized with provisions of the Clean Air Act. But the finding of both courts regarding the *nature* of the proposed regulations as an attempt to “directly regulate rail operations” remains binding.

Second, the District’s position is inconsistent with the position of CARB. In its Supplemental Comments, CARB frames the legal question as surrounding the “role for federal State Implementation Plan (“SIP”) *regulation of railroad operations* under the Clean Air Act. . . .” CARB Supp. Comments at 1 (Mar. 28, 2014) (emphasis added); *see also id.* at 7 (contrasting EPA rules as not “focus[ing]

primarily upon *operational matters*, as opposed to equipment specifications, even though *operations can be an important emission source.*") (emphasis added); *id.* ("Any *operational control measures* adopted by a state or local government agency would be incorporated in SIPS only as appropriate or necessary.") (emphasis added).

Third, the rules are obviously intended to regulate railroad operations. Indeed, the District submitted verified statements about how railroads can comply with these rules by changing operating protocols. District Supp. Comments at 38-40 & Johnson/Beall V.S. at 5-21; District Initial Comments at 26-27 & Reistrup V.S. at 4-5, 10-12 (Feb. 14, 2014). The Massachusetts Department of Environmental Protection ("Mass. DEP") made similar arguments. It acknowledges that regulations with an "incidental or remote" effect on rail transportation are permitted, while those "having the effect of managing or governing rail transportation are preempted." Mass. DEP Supp. Comments at 7 (Mar. 28, 2014) (citing *Fla. E. Coast Ry. Co.*, 266 F.3d at 1329). However, Mass. DEP then argues (*id.* at 9) that railroads can comply with these idling regulations by:

- Adjusting train schedules;
- Adding anti-idling devices;
- Adding auxiliary power to units to provide heat and circulate cooling water; or
- Using logistics and scheduling software to provide information about the location of other trains and crews.

Mass. DEP Supp. Comments at 9. Regulations that require railroads to adjust train schedules, add auxiliary power, or buy scheduling software are clearly "having the effect of managing or governing rail transportation" or otherwise "regulating rail operations."

Finally, ICCTA preemption applies without regard to whether or not the Board actively regulates the particular activity involved. *See, e.g., Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1188-89 (10th Cir. 2008) (preemption applies to activities on spur track, which are not regulated by the Board); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005); *CSX Transp., Inc. – Petition for Declaratory Order*, Fin. Docket No. 34662, 2005 WL 584026, at *6 (S.T.B. served Mar. 14, 2005), (observing that a “state statute restricting a train from blocking an intersection [is] preempted, even though there is no Board regulation of that matter”). This does not leave the subject of the air quality implications of locomotive idling unaddressed by the federal government. Congress granted EPA authority in this arena under Section 213 of the Clean Air Act, pursuant to which EPA has address the issue of idling controls through uniform national rules.

II. THE DISTRICT’S ATTEMPT TO REGULATE RAILROAD OPERATIONS IS FACIALLY PREEMPTED BY ICCTA, EVEN IF THE RULES ARE IN AN APPROVED SIP.

A. To harmonize ICCTA and the Clean Air Act, STB cannot ignore relevant provisions of the Clean Air Act as urged by EPA.

On March 25, 2014, EPA filed narrow comments in this proceeding. EPA expressed concern that parties had made arguments regarding preemption of state and local regulation of locomotives under the Clean Air Act and assertions regarding EPA’s authority to approve the rules into the California SIP. EPA contended that these arguments are outside of the scope of the issue presented by EPA’s petition to the Board, which concerns only whether SCAQMD Rules 3501 and 3502, if approved into the SIP, would be preempted under 49 U.S.C. § 10501(b). EPA Comments at 1 (Mar. 25, 2014). EPA argued that issues concerning EPA's ability to approve the rules into the California SIP under the Clean Air Act are not relevant to that question. *Id.* at 2.

AAR has not asked the Board to rule on issues concerning EPA's ability to approve the rules into a SIP. Before EPA, AAR has argued that these rules cannot be included in the SIP for a variety of reasons.⁶ Those are questions of compliance with the Clean Air Act and ultimately for EPA and the federal courts to decide. In this proceeding, AAR only pointed to the preemption provision in the Clean Air Act regarding regulation of locomotive emissions as "further support that Congress intended a very limited role for states in this arena." AAR Initial Comments at 22. Looking to those provisions for that limited purpose does not impinge on EPA's realm.

Moreover, even though EPA has asked the Board to focus on ICCTA and not on the Clean Air Act criteria for approval of SIPs – in particular the requirement that states provide assurances that it will not be prohibited by federal law from implementing the SIP – this proceeding *requires* the STB to consider the language of both statutes to 1) determine if there is a conflict and 2) to seek to harmonize any apparent conflict between the two Congressional

⁶ One such reason is the lack of state law authority to promulgate these idling rules, as was held by the District Court. Another reason is the failure of the state to obtain a waiver of preemption under section 209 of the Clean Air Act for regulations related to locomotive emissions, like the section 209 waivers that the state has obtained from EPA before. *See, e.g.*, 77 Fed. Reg. 32, at 9239 (Feb. 16, 2012) ("EPA has granted the California Air Resources Board (CARB) its request for a waiver of preemption and authorization to adopt and enforce California's Truck Idling Requirements"). The District argues that idling controls are "in-use" restrictions rather than "requirements" that need a waiver. AAR does not agree. In its 2008 national locomotive rules, EPA plainly considered idling controls as "standards or other requirements" within the meaning of the CAA. *See* 40 C.F.R. § 1033.115. In any case, these rules are plainly more than just in-use restrictions unrelated to emission standards of locomotives. They are an attempt to force railroads to install equipment to meet local standards which are more stringent than the national standards promulgated by EPA. As UP noted in its initial comments, and AAR echoed in its Supplemental Comments, CARB itself revealed that the true purpose of these idling rules is to "hav[e] the effect of making the railroads install idling reduction devices without actually mandating the devices" as the only way the railroads can escape the burdens imposed by the "resource-intensive operational and reporting requirement." AAR Supp. Comments at 11.

directives. In any case of statutory interpretation, the Board must begin “with the language of the statute.” *CSX Transp., Inc. v. Alabama Dep’t of Revenue*, 131 S. Ct. 1101, 1107 (2011).⁷ That is also the case when courts seek to harmonize two statutes. *In the Matter of Tarby*, 2012 WL 1390201, at *3 (Bankr. D. N.J. Apr. 20, 2012) (“To reconcile these two seemingly conflicting statutes, we start, as always, with the text”) (citing *CSX Transp., Inc., supra*). It is black letter law that in the case of seemingly conflicting statutes, courts should give effect to each word, term, and provision in the statutes. *Wilderness Soc’y v. Morton*, 479 F.2d 842, 881 (D.C. Cir. 1973) (“Courts should make every effort to reconcile allegedly conflicting statutes and to give effect to the language and intent of both, so long as doing so does not deprive one or the other of its essential meaning.”); *see also Myers v. Hollister*, 226 F.2d 346, 348 (D.C. Cir. 1955). The Board cannot seek to reconcile a perceived conflict between ICCTA and the Clean Air Act without looking at both statutes.

B. There is no conflict between ICCTA and the Clean Air Act in these circumstances.

Parties maintain that “[t]he Board is faced with two conflicting federal laws: the [Clean Air Act] and the ICCTA.” *See, e.g.,* Mass. DEP Supp. Comments at 6. But the parties fail to explain *where* the two laws conflict. What language in the Clean Air Act shows Congress’s intent to permit states to regulate rail operations? Where is there any suggestion that Congress intended to permit state

⁷ *See also, e.g., Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose”) (citation omitted); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010) (where issue is one of statutory construction, “we begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose”) (citation omitted).

and local officials to create a patchwork of regulations directed at railroad operations by including those rules in a SIP?

In ICCTA, Congress declared that regulation of railroad activities is to be centralized at the STB. If Congress passed another law that granted authority to states or other federal agencies to regulate railroad activities in particular circumstances, then the Board might be presented with a genuine conflict with ICCTA's broad and sweeping pronouncement. The STB would then have to harmonize those two conflicting directives from Congress. This is why, for example, federal agency regulation of safety or routing is not preempted by ICCTA: Congress gave authority to other agencies (such as FRA and TSA) to regulate railroad operations. Congress's directive in ICCTA must be harmonized with those specific grants of Congressional authority. Here, however, there is no evidence that Congress overrode its own commandment and permitted states to regulate rail operations by including those regulations in a SIP.

1. The Clean Air Act does not grant states the authority to regulate railroad operations.

No party has cited any language in the Clean Air Act to support the idea that Congress gave the states authority to regulate railroad operations. Indeed, it is telling that Congress did not even give that authority to EPA, the federal agency charged with protecting the environment. The District concedes this point: "Nothing in this statute gives EPA the authority to regulate the method of operation of locomotives." District Supp. Comments at 25. The District then says, however, that "[t]he fact that the [Clean Air Act] did not give EPA the authority to impose idling limits on existing engines does not mean that Congress stripped the states of their pre-existing authority to regulate idling." *Id.* at 27.

The District misses the point. AAR is not arguing that the Clean Air Act “stripped the states of their preexisting authority” to regulate railroad operations, because they had no such authority since the Staggers Act. Rather, AAR is arguing that Congress did not change its mind and *grant* the states authority to regulate interstate railroad operations in the Clean Air Act. Such a federal grant of authority (if it existed) would then need to be harmonized with ICCTA. But without that federal grant of authority from Congress – or some suggestion that inclusion in a SIP would override the prohibitions in ICCTA – Congress’ directive in ICCTA must prevail.

2. These idling regulations are not compelled by the Clean Air Act.

In its comments, the AAR observed that these idling regulations are not compelled by the Clean Air Act. AAR Initial Comments at 10; AAR Supp. Comments at 12-14. AAR observed that the EPA has already adopted national rules for locomotive emissions and that neither the Clean Air Act nor EPA has required that localities adopt different rules – especially rules that conflict with a federal statute (ICCTA) expressly intended to protect rail operations and interstate commerce by preempting local attempts to regulate rail activities.

Nonetheless, several parties maintain that these rules should not be preempted by ICCTA because they are *required* by the Clean Air Act. CARB argues that these rules should not be preempted when experts within EPA have determined “they are necessary to comply with federal law.” CARB Supp. Comments at 9. EarthJustice similarly claims on behalf of its clients that the AAR’s arguments “infringe on a region and state’s ability to comply with its legally mandated duties under the Clean Air Act.” EarthJustice Supp. Comments at 1 (Mar. 28, 2014). The District makes similar claims.

But Mass. DEP more accurately captures the true nature of a SIP: “The SIP basically embodies a set of choices regarding such matters as transportation, zoning and industrial development that the state makes for itself in attempting to reach the NAAQS” Mass. DEP Supp. Comments at 3 (quoting *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 780 (3d Cir. 1987) (holding EPA may not unilaterally revise a state SIP without complying with the process established in the Clean Air Act)).

If these actions by state officials were *required* by the Clean Air Act, this would be evidence that Congress intended to permit the states to regulate rail operations.⁸ There would then be a conflict between the Congressional directive in the Clean Air Act and the Congressional statement of preemption in ICCTA. But these idling regulations are not required by the Clean Air Act; indeed, the Clean Air Act does not require the states to adopt any particular regulation to meet the national air quality standards. This is most plainly proven by statements from EPA itself. In promoting a broad federal preemption of local regulations of locomotives, EPA reasoned that “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*, EPA420-F-97-050, at 3 (Dec. 1997) (attached as Attachment B to AAR Initial Comments). As EPA stated further, “[s]ince EPA has established such a strong federal program, there is little that any state could do to further reduce locomotive emissions.” *Id.*

⁸ However, Congress cannot compel a state to regulate; it can threaten to regulate itself or entice regulation with federal funds (both approaches were used with the Clean Air Act), but it cannot legislate that a state regulate. *New York v. United States*, 505 U.S. 144, 177-79 (1992).

3. The Clean Air Act requires assurances that the state is not prohibited by federal law from implementing proposed regulations in a SIP.

AAR observed that three features of the Clean Air Act demonstrate that SCAQMD cannot seek to regulate rail operations simply by including the local regulation in a SIP. First, the Act requires assurances that it is not prohibited by Federal law from carrying out the SIP. Second, the Clean Air Act's provisions regarding regulation of locomotive emissions reveal that Congress intended a very limited role for states in this arena. Third, the Clean Air Act itself is not a grant of federal authority to the states to enforce their SIPs; the source of that authority must be state law. AAR Initial Comments at 19-25.

Of these three features, the first is perhaps the most damning. Congress clearly was concerned that states not try to sneak into a SIP a regulation that was prohibited by Federal or State law. So in 1990, it amended the Clean Air Act to require states to provide assurances that they are "not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof . . ." 42 U.S.C. § 7410(a)(2)(E)(i).

This provision, on its face, indicates that Congress did not intend for local governments to override Federal law simply by including the provision in a SIP and seeking approval from EPA. AAR Initial Comments at 20 n.13. As AAR has stated, "the most logical meaning of Section 7410(a)(2)(E) is that Congress meant what it said; the state must provide assurances that it is not prohibited by any state or Federal law from carrying out the regulations proposed for the SIP." *Id.* at 21. By adding this language, Congress eliminated the potential for conflicting federal law in a case of clear preemption like this one, leaving ICCTA and the Clean Air Act as complementary, rather than competing, regimes. The text of Section 7410(a)(2)(E) thus stands as powerful *prima facie* evidence that Congress

never granted states the authority to override ICCTA (or any other federal law) and regulate rail operations.

Opponents have offered no meaningful explanation for this provision. Rather, they argue that EPA approval of a purely local regulation as part of the SIP transforms the regulation into a federal law that overrides other federal provisions such as ICCTA. Indeed, they go so far as to suggest that the inclusion of such a regulation in a SIP would override the Locomotive Inspection Act (“LIA”). *See* CARB Supp. Comments at 2 n.1 (arguing that SIPs are federal laws and that LIA and case law interpreting it in the state law preemption context is therefore irrelevant). But if this is what Congress intended, then why would it require states to provide assurances that they are not prohibited by Federal law from carrying out the regulations proposed for the SIP?

AAR maintains that viewing this provision from Congress’s perspective, there is really only one viable interpretation. The Clean Air Act reflected Congressional dissatisfaction with the progress of existing air pollution programs and a determination to “tak[e] a stick to the States,” to guarantee the prompt attainment and maintenance of specified air quality standards. *See Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976) (citation omitted). The Supreme Court explained that “the heart of the Amendments [to the Clean Air Act] is the requirement that each State formulate, subject to EPA approval, an implementation plan designed to achieve national primary ambient air quality standards [] necessary to protect the public health. . . .” *Id.* Each state is given wide discretion in formulating its plan, and EPA’s role is to approve the plan so long as it is not contrary to the minimum federal standards set forth in the Clean Air Act. *Id.* But the Act provides no evidence that Congress intended – when it “took a stick to the States” – to permit them to trample over other Federal laws and, in this case, to

intrude into the operation of railroad activities, which Congress declared the exclusive province of the STB. Rather, Congress intended for states to use *existing* authority more aggressively to protect the environment—*i.e.*, to take steps currently permitted by state law and not otherwise prohibited by other federal laws like ICCTA.

C. Preventing a patchwork of local regulation of rail operations is a core objective of ICCTA, not merely “grazing the periphery.”

The District, CARB, and Mass. DEP urge the Board to permit the District’s attempt to regulate rail operations because the rules advance the “core” purpose of the Clean Air Act and are only of marginal importance to ICCTA. For example, Mass. DEP acknowledges that “The purpose of the ICCTA is to prevent state regulation of rail transportation.” Mass. DEP Supp. Comments at 7. But it then argues: “[I]n view of the more limited core purposes of the ICCTA, the Board must conclude that ICCTA § 10501(b) does not preempt the broad purposes of the federal [Clean Air Act] to prevent air pollution and promote public health.” *Id.* at 8; *see also* District Initial Comments at 17-18 (“in harmonizing statutes, an examination of the core purposes of each is key. . . . If a challenged provision implements a core purpose of one law while grazing the periphery of another, full effect must be given to the core purpose of the first statute”); CARB Supp. Comments at 3-4 (SIPs are at “the heart” of the Clean Air Act’s program to achieve national primary ambient air quality standards necessary to protect public health).

However, *preemption of localized regulation of rail operations is a core objective of ICCTA*. For the opponents to argue otherwise ignores decades of growing dissatisfaction by Congress with the degree of state interference with interstate

rail operations and perhaps the broadest pronouncement of federal preemption found in any federal law.

In ICCTA, Congress eliminated all state regulation of intrastate rail operations that had previously been permitted under the pre-ICCTA version of 49 U.S.C. § 11501, even when such regulation was consistent with federal law.⁹ It also significantly expanded the scope of federal preemption of regulation of rail operations, providing: “Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided *under Federal or State law.*” 49 U.S.C. § 10501(b) (emphasis added). The new preemption language broadened the old “exclusivity” provision of the Staggers Act by also including federal law as being preempted by the Interstate Commerce Act. The Conference Report on ICCTA explained that the new language cements the “exclusivity of Federal remedies with respect to the regulation of rail transportation.” H.R. Rep. No. 104-422, at 167 (1995). The new preemption language also resolved any ambiguity as

⁹ The Staggers Act added an exclusivity provision to Section 10501 which provided that the “jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.” Staggers Rail Act of 1980, Pub. L. No. 96-448, § 214(d), 94 Stat. 1895, 1915. Section 11501, in turn, allowed states to regulate intrastate transportation, provided that they received certification from the ICC that their standards and procedures were in accordance with those of the ICC. *Id.*, § 214(b), 94 Stat. at 1913-15. See *State Intrastate Rail Rate Authority*, 46 Fed. Reg. 23335 (Apr. 24, 1981) (finding certification applications of 40 states to be inadequate). Although the ICC ultimately approved the applications of 24 states for a five-year period, some states continued to fail to satisfy the certification requirements. See, e.g., *State Intrastate Rail Rate Authority – Texas*, 1 I.C.C.2d 26 (1984) (denying certification); *Intrastate Rail Rate Authority – Colorado*, 1985 ICC LEXIS 399, at * 3 (I.C.C. served May 17, 1985) (provisionally granting certification); *Intrastate Rail Rate Authority – Kentucky*, 1985 ICC LEXIS 138 at * 2 (I.C.C. served Oct. 15, 1985) (same). By 1995, only 22 states remained certified. See *State Intrastate Rail Rate Authority – Pub. L. No. 96-448 – Recertification Process*, 5 I.C.C.2d 360 (1989); *id.*, 5 I.C.C.2d 680, 686 (1989); S. Rep. No. 104-176, at 17 (1995).

to whether ICCTA preemption of other Federal or State laws applies without regard to whether or not the Board actively regulates the particular activity involved.

As a result, ICCTA now contains one of the clearest and broadest statements of express preemption. One court observed that “[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of [] train operations ... is under the exclusive jurisdiction of the STB” *Friberg*, 267 F.3d at 443. Another court observed that it is “difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *CSX Transp.*, 944 F. Supp. at 1581. The clear and precise language used, as well as the failed experiment of dual regulation of intrastate rail operations under the preexisting Section 11501, shows that the District, CARB and Mass. DEP are off-base in asserting that protecting the industry from these kinds of local regulations of rail operations is not a core objective of Congress.

D. For preemption purposes, regulations in a SIP are not the same as federal regulations, even if they also “have the force and effect of federal law.”

No party has cited *any* specific provision of the Clean Air Act to demonstrate that Congress intended to permit local officials to regulate rail operations by including the regulation in a SIP. It is well-established that “[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation and quotation marks omitted). Instead, proponents rely on the general concept that once included in a SIP, the regulations “have the force and effect of federal law” which allegedly requires the Board to harmonize the District’s rules with ICCTA. *E.g.*, CARB

Supp. Comments at 3-4; Mass. DEP Supp. Comments at 6; District Supp. Comments at 5. *See also* CARB Supp. Comments at 2 (“[t]he California SIP is federal law” such that “federal harmonization analysis therefore applies to any alleged conflict with ICCTA.”).

For preemption purposes, however, regulations in a SIP cannot be treated the same as federal laws or regulations promulgated pursuant to an express grant of authority from Congress. EPA’s approval of a SIP does not transform the SIP into federal law (although that shorthand is used by some courts), but rather the local regulations become federally enforceable. As the D.C. Circuit has explained: “[o]nce included within the SIP, a state control becomes enforceable not only by the state which is its primary regulating authority, but also by the Administrator ... and, in certain settings, by private citizens.” *National Mining Ass’n v. EPA*, 59 F.3d 1351, 1363 (1995).¹⁰ EPA has also explained that SIPs are “federally enforceable,” and has not claimed that they are “federal law” equivalent to the Clean Air Act. *See* 54 Fed. Reg. 27274 (June 28, 1989). In clarifying the scope of the term “federally enforceable,” EPA cited its own regulations at 40 C.F.R. § 52.23, which state that failure to comply with an approved regulatory provision in a SIP will cause one to be “subject to enforcement” under the Clean Air Act. Therefore, the fact that SIPs are “federally enforceable” or “subject to enforcement” under federal law does not mean that SIPs are the equivalent of federal law. Such a reading would contradict the “state-federal partnership” under the Clean Air Act. *Sierra Club v. Ind.-Ky. Elec. Corp.*, 716 F.2d 1145, 1152 (7th Cir. 1983).

¹⁰ It is worth emphasizing that idling rules in a SIP might also be enforceable by private citizens. This would open the possibility that courts would interpret the rules to allow enforcement even when EPA and the local environmental agency decline to enforce them as desired by citizens living near rail operations.

In relying on the idea that SIP provisions “have the force and effect of federal law” (CARB Supp. Comments at 2, 4), CARB relies on a series of inapposite cases that address issues such as the enforceability of SIPs in federal court or the ability of states to alter federally approved SIPs. *See, e.g., Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007) (state could not change SIP without EPA approval); *Trustees for Alaska v. Fink*, 17 F.3d 1209, 1210, n.3 (9th Cir. 1994) (SIP enforceable in federal courts); *Union Elec. Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975) (same). Those cases do not hold that a SIP becomes “federal law.” At most, the California SIP would be “federally enforceable.”

As stated, a preemption inquiry involves careful scrutiny of two conflicting federal provisions. Even if the California SIP were somehow like a “federal law,” CARB and the District are wrong in asserting that “federal harmonization analysis therefore applies to any alleged conflict with ICCTA.” CARB Supp. Comments at 2; District Supp. Comments at 5. The cases cited by CARB make clear that principles of “harmonization” apply where two federal statutes are involved. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154–55 (1976) (addressing potential conflict between two statutes) (cited in CARB Supp. Comments at 3). The cases cited by the Ninth Circuit in *Ass’n of Am. R.Rs. v. SCAQMD*, 622 F.3d at 1098 (“*Ninth Circuit Decision*”) are to the same effect: principles of harmonization apply where two federal statutes are involved. *See Joint Petition for Declaratory Order – Boston & Maine Corp. & Town of Ayer, Mass.*, Fin. Docket No. 33971, 2001 WL 458685, at *6 n.28 (S.T.B. served May 1, 2001) (harmonization of “two Federal statutes”); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (“two federal statutes at issue”); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 133–34 (1974) (harmonization of Federal Tucker Act and

Federal Rail Act); *see also Unocal Corp. v. Kaabipour*, 177 F.3d 755, 769 (9th Cir. 1999) (construction of state statute to avoid preemption by federal statute).

It is unreasonable to argue that because Congress chose to make local rules in a SIP “federally enforceable,” Congress also decided to permit those local rules to override other Congressional mandates. That interpretation would render superfluous Section 110 of the Clean Air Act, as there would be no reason for a State to provide assurances that it is “not prohibited by any provision of Federal . . . law from carrying out” any rule proposed for inclusion in the SIP. *See* 42 U.S.C. § 7410(a)(2)(E)(i).

Moreover, it is illogical to assume, without any statutory language to support the idea, that Congress would grant states broad authority to override *any* federal law, so long as the proposed regulations meet the minimum requirements of the Clean Air Act and were included in an approved SIP. CARB and the District are seeking to use this “federally enforceable” concept to override any meaningful inquiry into whether the rules are prohibited by ICCTA. But the Clean Air Act does not provide any indication that Congress intended such a sweeping result. Instead, as the AAR stated in its initial comments, “the only harmonious reading of the ICCTA and the Clean Air Act leads to the inevitable conclusion that Congress did not contemplate state and local officials using the SIP process to circumvent Federal law.” AAR Initial Comments at 12.

- E. **The AAR never conceded that regulation of rail operations in an approved SIP would survive ICCTA preemption, nor did the Ninth Circuit so rule.**
 - 1. **If the idling rules were lawfully included in an approved SIP, the Board would be required to examine ICCTA and the Clean Air Act and harmonize any conflicting language.**

From the beginning of this STB proceeding, the AAR has acknowledged that the preemption analysis varies, depending on whether or not the local regulations are included in an approved SIP. To decide whether the states would be prohibited by ICCTA from implementing the idling rules if included in an approved SIP, the AAR urged the Board to consider the language of both ICCTA and the Clean Air Act. If there was a conflict between the two – if the Clean Air Act granted states the authority to regulate rail operations in certain circumstances – then the Board would need to determine whether the conflicting provisions could be harmonized in a manner that gave effect to both federal laws. Parsing through the Clean Air Act, however, it is clear that Congress never authorized states to override other federal laws simply by including those provisions in a SIP. Accordingly, AAR maintains that the specific prohibition against state and local regulation of rail operations in ICCTA will continue to prevent the state from implementing its anti-idling regulations, even if included in its SIP.

Proponents of the idling rules suggest, however, that the AAR's position here is inconsistent with the positions it took before the Ninth Circuit. *See, e.g.,* District Initial Comments at 6-7; District Supp. Comments at 7 n.16; EarthJustice Supp. Comments at 5-6.

The AAR's positions before the 9th Circuit and the Board are consistent, however. Before the Ninth Circuit, the District was arguing that these idling

regulations were required by the Clean Air Act and thus should not be preempted by ICCTA. AAR's principal response was that "[t]he District was not acting under the federal Clean Air Act when it adopted the Rules and, in any event, the District's Rules were not mandated by the federal Clean Air Act." Brief for Appellees at 27, *Ass'n of Am. R.Rs. v. SCAQMD*, No. 07-55804 (9th Cir. Sept. 15, 2008). AAR then observed that although a SIP approved by the EPA is enforceable under the Clean Air Act, components of a SIP that have *not* been approved are not enforceable. *Id.* at 24-27. The only concession made by the AAR at oral argument was that if these rules were included in a SIP – and the AAR never conceded that the rules could be part of a SIP – we would have a "harmonization question:"

I'd like to start out by addressing, Judge Rymer, the point that you were making toward the end, which is, isn't what [the District] ought to do here is to get CARB and EPA to approve these rules. And if they do, that becomes part of the SIP and it becomes federally enforceable and *then you do have a harmonization question*. And the answer to that is yes.

Order Granting Defendants' Motion to Vacate Order to Show Cause at 3, *Ass'n of Am. R.Rs. v. SCAQMD*, No. CV 06-01416-JFW (C.D. Cal. Feb. 24, 2012), ECF No. 269 ("2012 Order") (quoting Transcript of Oral Argument, 13:4-11) (emphasis added).¹¹

The "harmonization question" to which AAR counsel was referring was harmonization of any perceived conflict between the language of ICCTA and the language of the Clean Air Act. AAR could not predict the path CARB would

¹¹ See also 2012 Order at 3 ("[AAR Counsel]: They can propose a regulation, Your Honor. They can't implement it. They can propose it; CARB can adopt it; EPA can approve it. And if it's approved, that doesn't mean we still won't -- won't challenge it, because we still have this harmonization issue. But if it's approved, *at least they have the harmonization argument.*") (emphasis added) (quoting Transcript of Oral Argument, 23: 1-14).

follow to include these local idling regulations in a SIP. For example, CARB could have sought a waiver for regulations related to locomotive emissions and provided evidence that the rules were needed “to meet compelling and extraordinary conditions” and that the rules were consistent with federal standards. 42 U.S.C. § 7543(e)(2)(A)(ii). That path through the waiver process might have presented a conflict between the Congressional prohibition against local regulation of rail operations in ICCTA and the implicit Congressional grant of authority in the Clean Air Act for California to regulate locomotive emissions only when the California standards are necessary to meet compelling and extraordinary conditions and are consistent with federal standards. But AAR counsel never conceded that, if approved by EPA under whatever path chosen by CARB, the inclusion in a SIP would create a conflict with ICCTA that must be resolved by overriding ICCTA’s prohibition against state and local regulation of railroad operations.

2. “Harmonize” is not code for “no preemption” and ignoring the prohibition in ICCTA against state regulation of rail operations.

Proponents of these local idling regulations appear to equate “harmonize” with ignoring the prohibition in ICCTA against state regulation of rail operations. *See, e.g.*, District Supp. Comments at 3-6, 32-34; CARB Supp. Comments at 2-5; Mass. DEP Supp. Comments at 7-9; District Initial Comments at 13-27; CARB Initial Comments at 7-10.

But whenever a court or agency is called upon to “harmonize” two federal statutes, the inquiry must begin with a careful review of the relevant language of the two provisions to determine whether there is any genuine conflict between the two federal statutes. Where there is no conflict – if the Clean Air Act itself

does not authorize the state to regulate rail operations – the “harmonization” process must lead to a finding of preemption. This should be particularly true for local attempts to regulate rail operations that the Board and federal courts have found to be *facially* preempted because the pernicious nature of the regulation is clear on its face and the danger of creating a patchwork of similar regulations throughout the nation risks balkanizing the interstate rail network.

Yet in the minds of CARB and the District, “harmonize” equates with “no preemption.” The Board has never interpreted its governing statute in this fashion, nor could it. In this case, AAR has shown that there is no provision of the Clean Air Act that reveals Congressional intent to permit a state to override another Congressional prohibition against local regulation of rail operations simply because the state included the rule in its SIP. AAR submits that absent a specific federal grant of authority for states to regulate rail operations, the Board should follow the standard described in its *Grafton* decision. And, as discussed above, the *Grafton* standard is not a new formulation as suggested by CARB, but finds support in the statute, case law, and agency precedent.

In sum, the evidence in this proceeding leaves no doubt that the proposed regulations are facially preempted by ICCTA, even if included in an approved SIP. The plain language of ICCTA, which must be the touchstone for any preemption analysis, clearly prevents this kind of local regulation of rail operations. And nothing in the Clean Air Act offers a scintilla of evidence that Congress authorized states to include regulations in a SIP that are contrary to Congress’ own commandments. AAR submits that the Board should resolve this dispute by declaring that California and the District are prohibited from implementing these regulations by ICCTA, even if included in a SIP.

III. THE IDLING REGULATIONS WILL UNREASONABLY BURDEN THE INTERSTATE RAIL NETWORK AND WILL INTRODUCE SERIOUS SAFETY CONCERNS.

Even if Rules 3501 and 3502 were not facially preempted, they are nonetheless preempted because they would impose an unreasonable burden on railroads and interstate commerce, while producing few (if any) environmental benefits. *See* AAR Supp. Comments at 3, 17-21; AAR Initial Comments at 15-19, 28-29. Although they argue otherwise, the submissions of SCAQMD and the other non-railroad parties only confirm these facts.

A. The District's own evidence confirms the evidence from UP and BNSF regarding the burden of rules 3501 and 3502 on rail operations.

As AAR has described, Rules 3501 and 3502 would unreasonably burden rail operations. The record compiled before the District Court by UP and BNSF showed that the rules would, *inter alia*, substantially delay trains in the South Coast Basin (which would likely reverberate well beyond the Basin), interfere with efficient scheduling of train operations and crew dispatching, disrupt the use of yard capacity, and impair the safety of trains and employees. AAR Initial Comments at 8-9, 14-16.

The District characterizes this evidence as nothing more than “sky is falling claims” that are belied by the railroads’ own internal practices and the measures they have taken to reduce emissions from locomotives. The District contends that any burden imposed by the rules is therefore minimal, because only “limited information [must] be reported,” and any delays could be minimized with “reasonable crew management practices.” District Supp. Comments at 38-44, 50-52.

SCAQMD's own evidence, however, confirms that its rules are not the "minimalist approach" that it claims. *See id.* at 52. Even a cursory examination of the actions that Messrs. Johnson and Beall describe as the steps required to comply with Rule 3502 demonstrates their burdensome, time-consuming nature. *Johnson/Beall V.S.* at 5, 8-20.

The Johnson/Beall verified statement describes four scenarios – light locomotives, a freight train with one locomotive at the head end, a freight train with two or more locomotives at the head end, and a train with distributed power – along with a series of numerous steps that must be followed under each scenario for shutdown and restart. The shutdown procedures under each scenario involve as many as 9 separate steps, and the start-up procedures involve as many as 14 separate steps. *See id.* at 10, 13-14. Furthermore, even Messrs. Johnson and Beall estimate that it will take as long as 7 minutes to complete the shutdown sequence steps, and as long as 10 minutes to complete the start-up sequence steps, under the first three scenarios. They also acknowledge that it will take as long as 20 minutes to complete either type of sequence in the case of distributed power trains. *Id.* at 9-10, 12-13, 16-18. Even these time estimates are understated because, as Messrs. Johnson and Beall admit, some of them do not include the time required to set or release hand brakes on cars as necessary. *See id.* at 12-13, 16 n.7. Evidently recognizing the problems presented by these time estimates, SCAQMD rationalizes that "an engineer, conductor, hostler, or other qualified personnel might perform these actions" in order to minimize idling delays. *District Supp. Comments* at 39-40; *Johnson/Beall V.S.* at 8, 16.

Second, contrary to the arguments of the District, the 2014 DOT report cited by SCAQMD does not show that "measures to curtail idling of unattended locomotives as required by Rule 3502 do not pose an unreasonable burden on

railroad operations,” as SCAQMD contends. *See* District Supp. Comments at 41-42; *see also id.* at 23. The DOT report plainly repudiates the notion of imposing regulatory requirements on the railroads to take such actions; instead, the report emphasizes public/private partnerships and other cooperative, voluntary measures for improving air quality.¹² The report also makes clear that railroads have installed anti-idling devices on only *some* of their locomotives, and as only one of the types of actions they have taken to reduce emissions.¹³ Finally, the report makes clear that installation of anti-idling devices on locomotives is an expensive, complex process: “The AESS requires sophisticated control hardware and software for shutdown prevention and smooth locomotive restart in all weather.”¹⁴ Thus, SCAQMD’s argument that the railroads’ installation of anti-idling devices on *some* of their locomotives, means that they will not find it burdensome to comply with its rules is an unsupported leap of faith.

SCAQMD’s evidence confirms the evidence presented by UP and BNSF in this proceeding. The railroads’ evidence, for example, refutes the District’s

¹² *See* USDOT and FRA, *Best Practices and Strategies for Improving Rail Energy Efficiency*, No. DOT/FRA/ORD-14-02, at 9, 71-74 (Jan. 2014), <http://ntl.bts.gov/lib/51000/51000/51097/DOT-VNTSC-FRA-13-02.pdf> (“DOT Report”).

¹³ The AAR white paper cited in the DOT report, and relied upon by SCAQMD, similarly makes clear that reduced idling (and the installation of “stop-start” idling technology) is only one of “a variety of means to cut fuel consumption and greenhouse gas emissions.” *See* AAR, “Freight Railroads Help Reduce Greenhouse Gas Emissions,” at 2-3 (July 2012), <https://www.aar.org/keyissues/Documents/Background-Papers/Freight-RR-Help-Reduce-Emissions.pdf>; District Supp. Comments at 42.

¹⁴ DOT Report at 42. The report also rejects SCAQMD’s suggestion that its rules are a panacea for locomotive emissions, stating: “It is clear that each individual [rail systems energy efficiency] opportunity ... offers only incremental [energy efficiency] and fuel saving benefits. However, bundling of [such] options (*e.g.*, idling reduction through both Automated Stop-Start devices and improved scheduling optimization software) offers synergistic higher gains.” *Id.* at 71. Nor does the report recommend the use of time limitations on idling; it makes only a passing reference to Amtrak’s practice of shutting down its locomotives within 1 hour of arrival and departure. *Id.* at 65.

assertion that the “limited information required to be reported [by the rules] already is collected and stored automatically by on-board locomotive event recorders.” See District Supp. Comments at 38; *id.* at 50; BNSF Supp. Comments at 20 (Mar. 28, 2014). The evidence showed that railroads do not already keep track of how long a locomotive idles, or of each occurrence of idling (which can be frequent each day on each train the railroads operate). UP Supp. Comments, Hunt Aff. at 3 (Mar. 28, 2014). Moreover, the evidence showed that locomotive event recorders do not capture the information that would be required by Rule 3501, but only record when a locomotive physically stops moving; they do not capture when a locomotive is shut down (as opposed to when it is running). BNSF Supp. Comments, Reilly V.S. at 11. Finally, the data that can be obtained from the recorders is not “stored automatically” and permanently; only stopping the locomotive to download the data will ensure that all of the data is captured, because railroads such as UP have no overall system for retaining event recorder data longer than 5 days. *Id.*; UP Supp. Comments, Iden Aff. at 8.

Thus, far from being “less rigorous than” the railroads’ own recordkeeping practices and FRA requirements (District Supp. Comments at 38), the requirements of Rule 3501 would impose a significant burden on the railroads. UP Supp. Comments, Hunt Aff. at 3-4 & Iden Aff. at 6-7. Employees in the yard might need to take 20 minutes at the end of their shift merely to input the data for the electronic reporting required by the rule. In addition, the crews would be required to make the report for each “idling event” for each locomotive on the train. The additional time necessary to generate electronic records would be particularly burdensome for locomotives in the rail yard, where yard and line-haul locomotives are moved by hostlers and maintenance personnel who are not assigned to a particular locomotive during a shift. As a result, employee

productivity would decrease, operations would be severely impacted, and capacity utilization would be reduced. BNSF Supp. Comments at 20 & Reilly V.S. at 11-12. The delays caused by the recordkeeping requirements would be felt system-wide because each delay has the potential to have a ripple effect, slowing traffic on other trains operating on the lines leading to the Los Angeles Basin and resulting in congestion outside of Southern California as well. BNSF Supp. Comments at 4, 19; UP Initial Comments at 27 & n.2 (Feb. 14, 2014) (citing Brazytis Dec. at 7-8, 10-14, 24).

Rule 3502 is also plainly burdensome. BNSF's witness testified that although BNSF has increased its use of anti-idling devices, a number of BNSF locomotives operating in Southern California do *not* have such technology. Moreover, BNSF, like other railroads, does not control the technology of the "run-through" locomotives (owned by other railroads) that BNSF often uses. BNSF Supp. Comments, Reilly V.S. at 17. Similarly, UP has shown that although it has installed idle controls on some of its locomotives, it would be unduly burdensome to require UP to install such devices on its entire fleet and to modify the time that a locomotive is allowed to idle according to the requirements of each and every jurisdiction through which the locomotive passes. UP Supp. Comments, Iden Aff. at 5.

AAR has also previously shown that the danger of a patchwork of local regulation is illustrated by the safety concerns expressed by the FRA, whose views should be given substantial weight because Congress has charged FRA with protecting the safe operation of locomotives. AAR Supp. Comments at 8-10; AAR Initial Comments at 27. In response, the District challenges the impartiality of the FRA, claiming that FRA's September 27 letter to EPA is "not an objective assessment." District Supp. Comments at 40-41. This is nonsense. FRA's letter

makes clear that its concerns are based solely on the provisions of Rules 3501 and 3502, not on “various unidentified materials.” *Id.* In any event, as the District acknowledges, the District had the opportunity to submit its views disputing FRA’s letter, and did so in a four-page letter to the EPA (accompanied by 10 pages of attachments) in November 2013.¹⁵ Five months have passed since the District’s submission, and FRA has given no indication that it has changed its views. Clearly, in impugning FRA’s impartiality, the District is simply attempting to divert the attention of the EPA and the Board from the legitimate safety concerns raised by FRA.

In view of the totality of this evidence, EarthJustice is flatly wrong when it asserts that the railroads simply “rely on hyperbole” in describing the burdens that the rules would impose and have “not undertaken a careful analysis of articulating exactly how these rules burden their operations.” EarthJustice Supp. Comments at 6. Tellingly, EarthJustice presented no evidence contradicting that presented by the railroads.

B. The Board cannot, and should not, draw any inference regarding the burden of the SCAQMD’s rules from the voluntary 2005 agreement between the western railroads and CARB.

As AAR has explained, the 1998 and 2005 agreements (memoranda of understanding, or “MOUs”) that BNSF and UP made with CARB demonstrate the railroad industry’s concern for, and commitment to, protecting the environment, including the air quality in the South Coast Air Basin.¹⁶ SCAQMD, however, argues that the railroads’ willingness to comply with the 2005 MOU’s

¹⁵ See District Supp. Comments at 40-41 & n.75-78; Letter from Barbara Baird, Chief Deputy Counsel, SCAQMD, to Jared Blumenfeld, Regional Administrator, EPA Region IX (Nov. 14, 2013) (contained in EPA Petition, Attachment 2013-11-14).

¹⁶ See also EarthJustice Supp. Comments at 3 (1998 and 2005 agreements reflect railroads’ “recognition of the unique challenges faced by the South Coast Air Basin”).

standard regarding anti-idling devices “is an admission that it would not interfere with interstate commerce or unduly burden railroad operations.”

District Supp. Comments at 42-43.

However, the provisions of the 2005 MOU are significantly different from the Rules. Those differences further illustrate why the requirements of the rules would be unduly burdensome on the railroads.

- The 2005 MOU provides that the parties will develop a mutually acceptable compliance reporting and inspection protocol, and requires the railroads to record certain data for tests and inspections for visible emissions. BNSF Initial Comments, Ex. 2 at 7, 13 (Feb. 14, 2014) (“2005 MOU”). By contrast, the recordkeeping and reporting requirements of Rule 3501 are far more demanding, requiring the railroads to record each “idling event” with detailed data and to make periodic reports of such events. AAR Initial Comments at 16; AAR Supp. Comments at 18.
- The 2005 MOU requires UP and BNSF to exert their best efforts to limit non-essential idling of locomotives not equipped with automatic idling-reduction devices, and limits non-essential idling of such locomotives to 60 consecutive minutes. 2005 MOU at 3. By contrast, Rule 3502 requires that locomotive idling for certain purposes be limited to 30 minutes, unless the locomotive is equipped with an anti-idling device set for 15 minutes or less. SCAQMD Rule 3502(d).
- The 2005 MOU requires UP and BNSF to install automatic idling-reduction devices on more than 99 percent of “intrastate locomotives based in California” within a 3-year period. 2005 MOU at 2. Rule 3502, on the other hand, requires that any locomotive “operating in the District” must be equipped with anti-idling devices by August 3, 2006 (six months after the rule was adopted) if the locomotive is to be exempt from the 30-minute limitation. Rules 3502(b), (d).
- Although the 2005 MOU requires that automatic idling-reduction devices be designed to limit locomotive idling to no more than 15 consecutive minutes, the 15-minute requirement does not apply if the engine characteristics of a particular locomotive model will not allow a 15-minute shut-down cycle without excessive component failures; in such circumstances, the devices must reduce locomotive idling “by the maximum amount that is feasible.” 2005 MOU at 3. Rule 3502, however, contains no such exception. Rule 3502(j).

- The 2005 MOU also exempts railroads from the requirements of limiting non-essential idling and the 15-minute standard for idling-reduction devices when it is essential for a locomotive to idle “to ensure an adequate supply of air for air brakes or for some other safety purpose, to prevent the freezing of engine coolant, to ensure that locomotive cab temperatures in an occupied cab remain within federally required guidelines, and to engage in necessary maintenance activities.” 2005 MOU at 3. Rule 3502’s exemptions, however, are far more limited. *See* Rule 3502(j).

In short, Rules 3501 and 3502 impose substantial burdens on railroads that are not imposed by the provisions of the 2005 MOU.¹⁷ Thus, the railroads’ willingness to enter into the MOU is no indication of the effects of the dramatically different Rules 3501 and 3502 on them or on interstate commerce.

More fundamentally, drawing any inference of the burden on interstate rail operations from a *voluntary* agreement would have disastrous public policy implications. This Board has repeatedly declared that it is in the public interest for parties to enter into voluntary agreements, as an alternative to litigation. If another jurisdiction (the District) were allowed to use a voluntary agreement with a third party (CARB) as a basis for imposing more burdensome mandatory requirements, railroads would be discouraged from entering into any voluntary

¹⁷ The case on which SCAQMD relies, *Township of Woodbridge, NJ v. Consolidated Rail Corp., Inc.*, 5 S.T.B. 336 (2000), lends no support to its position that the 2005 MOU constitutes an admission by the railroads that Rules 3501 and 3502 would not interfere with interstate commerce or unduly burden railroad operations. *See* District Supp. Comments at 43. *Township of Woodbridge* involved the enforceability and validity of two contracts between Conrail and a single township, in which Conrail agreed to curtail the idling of locomotives and the switching of rail cars at a particular location in the township between 10 a.m. and 6 p.m. The Board held that the voluntary agreements “must be seen as reflecting the carrier’s own determination and admission that *the agreements* would not unreasonably interfere with interstate commerce.” *Id.* at 340 (emphasis added). The Board did not find that the agreements constituted an admission by the carrier that, if it was required to abide by these idling and switching restrictions on a system-wide or nationwide basis, such a requirement would not interfere with interstate commerce.

agreements with local officials. That would be a terrible disservice to the industry and the multitude of local officials who work collaboratively with the railroads on a day-to-day basis throughout the Nation.

C. The Board cannot dismiss the railroads' concerns about the creation of a patchwork of conflicting regulations as speculative.

The AAR has shown that allowing the SCAQMD's rules to take effect could lead to a patchwork of local regulation of railroad operations that Congress expressly sought to prevent. See AAR Supp. Comments at 4-12; AAR Initial Comments at 16. The District, Mass. DEP, and CARB, however, argue that concerns about a patchwork of regulation are "overblown" and "speculation," relying principally on the fact that "only" three jurisdictions have adopted locomotive idling regulations. District Supp. Comments at 44-47; CARB Supp. Comments at 6; Mass. DEP Supp. Comments at 9.

The danger of a patchwork of regulation, however, is real precisely because other jurisdictions have adopted such regulations. *Cf. Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960) (rejecting appellant's argument that other local governments might impose different requirements because "it has pointed to none"); *Pac. Merc. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1181 (9th Cir. 2011) (no other State had adopted, or was likely to adopt, similar requirements). Indeed, legislation calling for the adoption of idling restrictions on locomotives has been introduced in Maine, Michigan, and New Hampshire.¹⁸ Moreover, contrary to SCAQMD's argument, the Massachusetts

¹⁸ See, e.g., Michigan H.B. No. 4499, 97th Legislature, Reg. Sess. of 2013, at § 6909(9) (introduced Apr. 9, 2013) (providing that within 18 months of effective date of legislation, Department of Environmental Quality must promulgate rules, based on study of idling, requiring locomotives operating within State "to eliminate nonessential idling to the extent such regulation is not preempted by Federal law"); New Hampshire H.B. No. 508, 1st Year of 163d Sess. of Gen. Court, at § 2 (introduced Mar. 20, 2013)

rule is significantly different from Rule 3502. *See* District Supp. Comments at 46; AAR Supp. Comments at 7-8 (contrasting Massachusetts and SCAQMD rules). Rhode Island’s rule also differs substantially from those of Massachusetts and the District. Unlike the two other jurisdictions, Rhode Island simply prohibits “the unnecessary idling of non-road diesel engines,” without imposing a specific time limit.¹⁹ Furthermore, Rhode Island’s exceptions to its idling requirement differ from those in the Massachusetts and SCAQMD rules.²⁰

SCAQMD, CARB, and Mass. DEP appear to assume that only three jurisdictions have adopted idling rules because other jurisdictions have no need to adopt them. That assumption is sheer speculation. It is equally plausible that other jurisdictions have not adopted locomotive idling regulations because they believe, correctly, that such regulations are preempted by ICCTA.

D. The Board cannot rely on the public review process to guard against a patchwork of conflicting regulations.

SCAQMD, CARB, and Mass. DEP argue that inclusion of the rules into the SIP will not lead to a “patchwork” of local regulations because any such rules

(prohibiting “unnecessary and foreseeable idling” for longer than 30 minutes if “the location where a locomotive idles is less than 1000 feet from any residential area, school, nursing home, day care, hospital, or other sensitive receptor”); Maine S.P. No. 17, 126th Maine Legislature, 1st Reg. Sess. (introduced Jan. 15, 2013) (prohibiting operation of diesel-powered locomotives in a manner that causes or contributes to air pollution in the State and prohibiting “the unnecessary idling of diesel-powered locomotives for longer than 30 minutes,” except where idling is essential to proper repair of locomotives and idling does not cause or contribute to air pollution in the State).

¹⁹ *See* Rhode Island Air Pollution Control Regulation No. 45 – Rhode Island Diesel Engine Anti-Idling Program, at 3 (Rule 45.4).

²⁰ For example, Rhode Island exempts locomotives and other “non-road diesel engines” from the idling requirement when idling is required for maintenance, servicing, repairing, or diagnostic purposes, or if the idling is required as part of a State or Federal inspection to verify that the engine is in good working order. *Id.* at 3 (Rule 45.5.4). These exemptions are not identical to those of Massachusetts and SCAQMD. *See* AAR Supp. Comments at 7-8.

must survive the rulemaking and approval processes of the State agency and the EPA, where interested parties are given ample opportunity to participate. District Supp. Comments at 45-46; CARB Supp. Comments at 6-7; Mass. DEP Supp. Comments at 9. Furthermore, they argue, the participation of railroads and other parties in EPA proceedings “likely will result in a look at the regulations of other states to ensure that there will not be a patchwork of regulations.” Mass. DEP Supp. Comments at 9. *See also* CARB Supp. Comments at 6-7 (“careful EPA scrutiny as part of the harmonization analysis will further reduce [the] likelihood” of a patchwork of regulation because “EPA is free to require SIP revisions, or to approve SIPs conditionally pending modifications in order to better harmonize any proposed rules”). SCAQMD also speculates that other states will have an incentive to adopt its rules “to ensure that the state’s new rules also would be accepted by EPA.” District Supp. Comments at 46.

These arguments are without merit. First, relying on the rulemaking process at the State level is relying on the proverbial fox to guard the hen house. States and localities focus on their own concerns, not on national considerations. ICCTA preemption exists precisely because local authorities can be counted on to elevate local concerns over the national interest in a robust rail industry.

Second, reliance on the EPA process will similarly afford no protection against a patchwork of regulation. The Board, not the EPA, is the agency entrusted by Congress to regulate rail operations. The Board (an independent regulatory agency) cannot shift its regulatory responsibilities to EPA, which is an executive agency with an entirely different mission and operating under an entirely different statute – the Clean Air Act.

Third, the suggestion that EPA will “harmonize” various states’ anti-idling regulations, or conduct a comparative analysis of such regulations, is

baseless. EPA's role in reviewing a SIP is to ensure that the regulations in the SIP meet the minimum requirements of the Clean Air Act, not to avoid a patchwork of different state regulations of air emissions. SCAQMD, CARB, and Mass. DEP do not explain why, if two localities wish to adopt different idling regulations, EPA would engage in a comparative analysis of different SIPs' rules. After all, States are given a wide range of flexibility in determining how they will comply with the Clean Air Act. *See Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 86-87 (1975) ("Congress, consistent with its declaration that '[e]ach State shall have the primary responsibility for assuring air quality' within its boundaries, § 107(a), left to the States considerable latitude in determining specifically how the standards would be met").

E. CARB's 2008 statement that the District's idling rules will have no discernible environmental benefit remains equally true today.

Although CARB has suggested that the District's rules are "an important part of [the District's] strategy for meeting" air quality standards, and "are needed to protect the public health and welfare,"²¹ its statements are directly contrary to its decision less than five years ago rejecting a request to adopt the rules because they would *not* provide any significant environmental benefits. In July 2008, CARB stated:

Still other requested regulations are likely to achieve little, if any, emission reductions. These measures include the proposed 30-minute idling requirements of South Coast Air Quality Management District's (SCAQMD) Rule 3502, retrofitting of older switchers and in-use testing for compliance with federal standards. These measures are not likely to achieve significant reductions because of actions that have already been taken by the railroads under the 1998 and 2005 memoranda of understanding, or, as in the case of in-use emissions

²¹ *See* CARB Supp. Comments at 6; CARB Initial Comments at 7.

testing, because of the comprehensiveness of the federal testing program.²²

CARB was correct then, and nothing has changed to warrant any change in its conclusions. Leaving aside CARB's unexplained change in position, EPA has explained that "[g]iven the inherent interstate nature of the railroad industry, EPA believes that a strong federal program that addresses manufacturing, remanufacturing and in-use compliance best achieves the necessary emissions reductions."²³ It observed further that "[s]ince EPA has established such a strong federal program, *there is little that any state could do to further reduce locomotive emissions.*"²⁴ There is no reason for the STB to ignore CARB's original position (that was not made for litigation purposes) or EPA's conclusion that there is little any state can do to further reduce locomotive emissions in light of EPA's strong federal program.

CONCLUSION

The Board is faced with an issue of first impression. The Board has never been called upon to find ICCTA preemption of a State regulation of rail operating in an approved SIP. The regulations at issue in this case are clearly an attempt to directly regulate rail operations and are therefore facially preempted by ICCTA. *District Court Opinion*, 2007 WL 2439499, at *7 (the rules "directly regulate rail operations such as idling"); *Ninth Circuit Opinion*, 622 F.3d at 1098

²² Letter from James N. Goldstene, Executive Officer, CARB, to Penny Newman, Executive Director, Center for Community Action and Environmental Justice (July 23, 2008), reprinted in *California Regulatory Notice Register*, Vol. No. 34-Z, at 1490 (Aug. 22, 2008) (emphasis added).

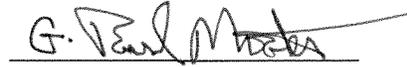
²³ EPA Office of Mobile Sources, *Federal Preemption of State and Local Control of Locomotives*, EPA420-F-97-050, at 3 (Dec. 1997) (attached as Attachment B to AAR Initial Comments).

²⁴ *Id.* (emphasis added).

(finding the rules preempted by ICCTA because they “may reasonably be said to have the effect of managing or governing rail transportation.”).

AAR submits that the inclusion of these rules in a SIP does not change the result. The weight of all the statutory indicia of Congressional intent point to a single, reasonable interpretation: Congress did not permit states to regulate rail operations and burden the interstate rail network with this kind of direct regulation of rail operations, even if those forbidden regulations were part of a SIP. Accordingly, the STB should declare that ICCTA would prevent California from implementing these idling regulations, even if included in a SIP.

Respectfully submitted,



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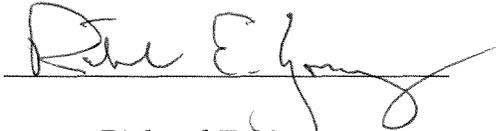
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April 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2014, I have served true and correct copies of the foregoing by First Class Mail or more expeditious means on all parties of record in this proceeding.


Richard E. Young