



BUILDING AMERICA®

Dan Donohoue
Air Resources Board
1001 I Street
PO Box 2815
Sacramento, CA 95812

March 14, 2012

Re: Comments on Modifications to the Proposed Amendments to the Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets, and Facilities Where TRUs Operate (“TRU Rule”)

Dear Mr. Donohoue:

BNSF Railway Company and the Union Pacific Railroad Company (the Railroads) appreciate the opportunity to comment on the proposed amendments to the TRU Rule and to continue to work with you and your staff to resolve several outstanding issues. As you know, the Railroads have participated in the development of the TRU Rule, monitored ARB’s implementation activities since its adoption, and taken the steps necessary to ensure that their owned or leased TRUs are in compliance with the TRU Rule.¹

The Railroads appreciate that ARB staff recognizes sector-specific flexibility may be necessary for the Railroads– and that the ARB staff re-affirmed this position during its presentation to the Board on October 21, 2011 when it stated:

“... staff has been in discussion with ag product shippers and railroads to develop approaches that recognize the need for sector-specific flexibility. We believe that there is sufficient flexibility in the Rule to make these adjustments but would propose 15-day changes, if necessary.”

The Railroads believe that the current Rule language, as amended by the first 15-day changes, does not provide sufficient clarity to address issues related to the transport of TRUs by rail carriers. While some of these concerns may be resolved through a combination of compliance

¹ As indicated in a letter to ARB on January 8, 2008, the Railroads have been and are continuing to implement these programs voluntarily, notwithstanding the preemptive effect of the federal Interstate Commerce Commission Termination Act, the Clean Air Act, and/or the Commerce Clause of the United States Constitution. This letter is incorporated by reference.

guidance and/or clarifications in the Final Statement of Reasons, we believe that others can only be addressed in a second 15-day change notice.

The Railroads believe there are four issues that need to be clarified and resolved:

1. The Railroads moving TRUs owned by third parties² to or through California;
2. The Railroads moving non-operating³, non-compliant, Railroad-owned TRUs through California;
3. The Railroads moving non-operating, non-compliant, Railroad-owned TRUs to a location within California for the exclusive purpose of retrofitting the units to comply with the TRU Rule; and
4. Clarification as to the applicability of certain terms in the TRU Rule to the Railroads.

Issue 1: The Railroads moving TRUs owned by third parties to or through California

The TRU Rule or other guidance must clarify that the Railroads can move third party TRUs to and/or through California, regardless of their compliance status. The Railroads do not own these third party TRUs, and do not control their configuration (make and model year), maintenance level, operating conditions/levels, fuel type, or whether or not they comply with state regulations such as the TRU Rule. However, given the wording of the Rule's definition of "operate", one could interpret the necessary actions taken by the Railroads to safely and efficiently transport our customers' TRUs as covered by the Rule's definition of "operate"; thus unintentionally creating a compliance obligation for the Railroads. These necessary actions taken by the Railroads to transport TRUs should not be interpreted as "operating" a TRU under the Rule, and the Rule should be revised so that the Railroads have no compliance obligations for third party TRUs.

Railroads are uniquely tasked with transporting third party TRUs. Once these TRUs are under our control, we work with our customers to ensure that they are transported properly – and this may include monitoring, and occasionally repairing or re-fueling the TRU while in transit. It is important to keep in mind that transit times for third party TRUs can range from 3 to 30 days, so monitoring, repair, and refueling services are essential. Our customers can either perform these services themselves (the customer self monitors the units through GPS systems and hires repair/refueling contractors that are certified to work within railyards or on Railroad owned

² We use the term "third party" or "third parties" to mean a party other than a Railroad Company.

³ For our discussion in issues 2 and 3, operate means to be in action, to act, or work. We are not adopting the current definition of "operate" in the draft Rule.

property), or they may hire the Railroads to perform these services. If the Railroads are hired to monitor, repair, and/or refuel a TRU, this work is also performed by third party contractors.⁴

Under the proposed revisions to the Rule, the Railroads believe that the definition of “operate” is too broad, and unintentionally creates a compliance obligation where one clearly should not exist. Monitoring, repairing, and/or refueling a TRU on behalf of the owner to ensure the safe transit of perishable goods should not create a new, and significant, compliance obligation for the Railroads. As stated earlier, the Railroads work hard to ensure that their own TRUs comply with the Rule. The compliance obligation of the third party TRU owners/operators should not be shifted to the Railroads simply because the Railroads are hired to perform necessary functions.

We request that ARB clarify through rule language that the Railroads do not “operate” third party TRUs transported by rail. We recommend that ARB issue a second 15-day notice change and add the following sentence to the end of the definition of “operator”:

"A Rail Carrier is not the operator of any TRU or TRU gen set that is owned by a different person, party or entity."

Issue 2: The Railroads moving non-operating, non-compliant, Railroad-owned TRUs through California

It is critical for unimpeded rail operations and for the efficient operation of interstate commerce, that the Railroads can move non-compliant, non-operating, Railroad-owned TRUs through California. However, ARB’s proposed October revision to the definition of “operate” makes it impossible for the Railroads to do so.

The proposed amendments to the TRU Rule specify that “no owner/operator shall **operate** a TRU or TRU gen set in California unless it meets [specified] in-use emission category performance standards” (2477.5(a) – emphasis added). Under the October proposed amendments, any TRU that passes through California, regardless of whether or not the TRU engine is running, is deemed by ARB to **operate** in California. See definition of “operate”, as amended in October, below:

“Operate” means to start, cause to function, program the temperature controller, select an operating program or otherwise control, fuel, monitor to assure proper operation, or keep in operation. A TRU that is operational (e.g. capable of being operated) shall be considered to operate if it is in California. (2477.4(a)(67)[Underlined text shows ARB’s October proposed change to the definition.]

⁴ In emergency situations - such as derailments, or unexpected lengthy delays such as re-routing due to weather or floods, for example – the Railroads may take actions on third party TRUs, as necessary, to ensure safe train operations or to protect customer cargo.

The effect of the proposed change to the definition of operate is that all TRUs in California must meet the in-use emission performance standards, regardless of whether or not the TRU engine is running.

The Railroads have critical business processes supported by computer programs, trackside monitors, GPS technology, and other sophisticated systems in place to ensure that all Railroad-owned TRUs that are running in California comply with the performance standards of the TRU Rule. Furthermore, these same systems and business processes ensure that non-compliant Railroad-owned TRUs do not run (are turned off) in California.

The Railroads request that ARB amend the Rule in a second 15-day change notice and revise the definition of “operate” as follows:

“... A Carrier or Motor Carrier TRU that is operational (e.g. capable of being operated) shall be considered to operate if it is in California.”

Issue 3: The Railroads moving non-operating, non-compliant, Railroad-owned TRUs to a location within California for the exclusive purpose of retrofitting the units to comply with the TRU Rule

The same systems and business processes described in Issue 2 above ensure that a TRU is turned off when it is brought to California to be retrofit to comply with the TRU Rule. The Railroads believe that if the definition of “operator” is changed as suggested in Issue 2, then this issue is also satisfactorily resolved.

Furthermore, the Railroads are willing to provide advanced written notification to ARB (three business days in advance) that it will bring a non-running, non-compliant TRU into California to be retrofit to satisfy the Rule.

Issue 4: Clarification as to the applicability of certain terms in the TRU Rule to the Railroads

The Railroads ask that ARB confirm in writing that the following definitions **do not apply** to Railroads:

- “Broker” (e.g., the Railroads are not Brokers);
- “Freight Broker” (e.g., the Railroads are not Freight Brokers);
- “Carrier” (e.g., the Railroads are not Carriers);
- “Motor Carrier” (e.g., the Railroads are not Motor Carriers);

- “Dispatch” (e.g., the Railroads do not Dispatch freight or cargo);
- “Facility” (e.g., the Railroads do not own or operate Facilities);
- “Freight Forwarder” (e.g., the Railroads are not Freight Forwarders);,
- “Receiver” (e.g., the Railroads are not Receivers);
- “California-Based Receiver” (e.g., the Railroads are not California-Based Receivers);
- “Shipper” (e.g., the Railroads are not Shippers); and
- “California-Based Shipper” (e.g., the Railroads are not California-Based Shippers).

We look forward to continuing to discuss these issues as the staff considers what changes to propose as a part of the second 15-day change process. If you have any questions, please call me any time.

Please contact me at 415-421-4213 x 12 if you have any questions.

Sincerely yours,



Kirk Marckwald
Principal, California Environmental Associates
On behalf of Union Pacific Railroad Company and BNSF Railway Company

cc:

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