Fisher Broyles

Paul Beard II
Partner
paul.beard@fisherbroyles.com
Direct: 818-216-3988
4470 W. Sunset Blvd., Suite 93165
Los Angeles, CA 90027
www.FisherBroyles.com

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VIA ONLINE SUBMISSION

Members of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: CSLRA's Comments To the Proposed In-Use Locomotive Regulation

Dear Members of the Board:

On behalf of the California Short Line Railroad Association ("CSLRA"), we submit these comments to the proposed In-Use Locomotive Regulation ("Regulation") proposed by your staff ("Staff").

We join, in full, the comments of the American Short Line and Regional Railroad Association and the Association of American Railroads, and incorporate by reference said comments into this letter. The purpose of these comments is to highlight additional concerns specific to CSLRA's members. As explained below, the Regulation threatens to financially devastate the State's short line railroads—a vital part of California's transportation infrastructure—and is vulnerable to legal challenge.

BACKGROUND

Founded in 1993, CSLRA is a nonprofit, membership-based association that represents the interests of California short line railroad companies, as well as their vendors and suppliers. Among other things, CSLRA advocates for its members' legal and economic interests before rulemaking agencies, the Legislature, and the courts. Of the twenty-four (24) short line railroads currently operating in the State of California, nineteen (19) are represented by CSLRA.

COMMENTS

A. The Regulation's Devastating Economic Impacts

The expenditures required by the proposed Regulation will lead to the insolvency of many of CSLRA's member railroads. Contrary to CARB Staff's estimates contained in the Standard Regulatory Impact Assessment (SRIA), CSLRA believes that the Spending Account deposit requirements contained in the Regulation will, by themselves, consume 80% or more of the annual net income of many of CSLRA's member railroads. Not only are the required new locomotives hugely expensive capital items for a small business, but zero-emission ("ZE") batter locomotives also may be required in greater numbers than the locomotives they are replacing. Since they are required to spend idle hours every day while recharging, they cannot work continuously and another locomotive must take their place while they recharge.

In addition, the purchase requirements are additive to other substantial new expenses, including: GPS tracking equipment for every locomotive to comply with the Regulation's reporting requirements ($45,000/locomotive to install plus $200/locomotive/month to operate); monthly maintenance costs per locomotive that in CSLRA's experience are 2x to 3x higher for a Tier 4 than a low Tier unit; periodic overhaul costs per locomotive that are about 2.9x greater for a Tier 4 unit than a low Tier unit; infrastructure costs for ZE locomotives which can easily exceed $500,000 per station for battery charging stations and supporting utility work (new substations) or mobile hydrogen refueling stations; and pending Air District regulations under the headings of Indirect Source Rules and locomotive shop exhaust capture equipment. In its 2021 Short Line Rail Improvement Plan, Caltrans summed up the Cost problem as follows (p.12): "…these new regulations could risk significantly destabilizing the state's short line railroad industry, which already operates on relatively small profit margins." In this environment, even the 3-year "small business hardship extension" described in the SRIA will not keep many California short lines from having to close.

To expand on CSLRA's concerns about the adequacy of the small-business hardship extension, consider that the SRIA (p. 95) postulates a notional small-business short line that has three pre-Tier 0 locomotives, burns 10,000 gallons of fuel per locomotive annually, and has annual gross revenue of $1.3 million. If we use these numbers in the spending account funding formula provided by CARB staff, we get a required annual spending account contribution of $646,269 for calendar year 2023 for this notional small railroad. If we further assume that this small railroad is very well run and has an operating ratio of 75% (meaning that 75% of gross revenue is required to pay employee wages, fuel costs, debt service on equipment/buildings/land, conduct basic track maintenance, etc.), this small business has $325,000 in annual income left over after spending $975,000 to operate and maintain the railroad. They would be $321,269 short on their required spending account contribution for 2023 and would have zero profit. Recall that there are other expenses associated with the regulation (discussed above) that will only dig this financial hole deeper. A "hardship delay" of three years will not make this situation workable.

The proposed Regulation also penalizes "early adopter" short lines that have upgraded their locomotive fleets in the cause of cleaner air. Under the proposed Regulation, companies that upgraded their locomotives over the last 20 years will have the 23-year locomotive life rule applied to their units retroactively. Using an example from a CSLRA member railroad, Tier 3 locomotives purchased in 2010 at a cost of $1.6 Million each will have to be replaced by 2033. In addition, The Carl Moyer Program, one of the primary financial tools that has enabled the progress to date in getting short line locomotives to Tier 3 or better, will cease to be available to short lines if the proposed Regulation is enacted. As the Carl Moyer Program Guide, Section 2 General Criteria, Subsection A, states: "Carl Moyer Program Guide, Section 2 General Criteria, Subsection A: "Covered emission reductions obtained through Moyer Program projects must not be required by any federal, State or local rule or regulation, memorandum of agreement, memorandum of understanding, settlement agreement, mitigation requirement, or other legal mandate."

Requiring California short lines to tie up the majority of their net income in locomotive "spending accounts" will also prevent these businesses from investing in other improvements that affect quality of rail service, environmental performance and safety, as well as the long term viability of the railroad. Without adequate funds, improvements such as track and bridge upgrades and improvements to highway grade crossings will be skipped, and the associated gains in efficiency, some of which lead to lower criteria pollutant and GHG output, will not occur.

Besides great expense, there is also significant technological risk in the purchase of ZE yard switcher or road switcher locomotives that are untested and may not reliably preform the same functions as their diesel counterparts. CSLRA-member short lines, on their own initiative, are already involved in pilot projects to build and demonstrate battery-electric and hydrogen-electric locomotives. From these projects and from monitoring ZE locomotive developments generally CSLRA is finding that delivery and testing of prototype units is taking 2 to 3 years or more from the time that funding is secured. Whether for battery electric or hydrogen electric propulsion, scaling up batteries to deliver 2 to 8 Mwh of power without overheating or other reliability issues, is difficult. The proposed Regulation demands that short lines make near-term purchases of very expensive locomotives that may not perform adequately, causing service failure for short line customers.

Having California short lines go out of business will have a number of serious consequences, including: loss of well-paying blue collar jobs with benefits not just at the railroad, but at railroad vendors/suppliers; loss of jobs at railroad customer facilities, some of which must close or re-locate because without access to rail transportation their delivered cost per ton is no longer competitive in their national markets; and modal diversion of freight to truck by railroad customers who are able to continue operating without rail transportation. Modal diversion to truck will in turn stress road networks and subject Californians to roadway congestion, greater road and bridge wear, higher highway accident/death rates, and ironically, at least over the next 20 years, greater air pollution because of the modal shift. Class 1 railroads will not step in and "rescue" short line trackage because in most cases the Class 1s know they can't operate the short line routes profitably, having spun them off to short line operators years ago for that very reason. On a cost-effectiveness basis, all of this damage to California jobs and the California supply chain is not justified in order to eliminate an emissions source (short line locomotives) that contributes only 2% of the PM2.5 and NOx produced by locomotives in California.

Because of the great economic harm it would cause while in pursuit of a very small reduction in the criteria pollutant and GHG profile of the state's transportation sector, if this Regulation is adopted, California short line railroads should be exempted from it.

B. The Regulation's Legal Deficiencies

1. The Recordkeeping and Reporting Requirements of Sections 2478.4(a), 2478.8, 2478.10, and 2478.15 Likely Violate Various Legal Principles

Section 2478.4(a) of the Regulation requires, beginning retroactively on January 1, 2022, Locomotive Operators to "track activity in MWhs for each locomotive operating in California on an annual basis from January 1 to December 31" and "report the activity as described in section 2478.8.

Under section 2478.8, beginning April 1, 2023—and every April 1 thereafter—every Locomotive Operator must provide a report about all the locomotives it operates in California, including fuel usage, total megawatt-hours operated, and amounts and uses of Spending Account funds.

Under section 2478.10, by April 1, 2023, every locomotive operator must complete a one-time registration with CARB for each locomotive operated in California. Further, under the same section, locomotive changes must be promptly reported to CARB.

Finally, section 2478.15 dictates the form of a railroad's submittals of records and other information to CARB.

Together, these requirements impose substantial reporting obligations on railroads. It is likely they violate a number of legal principles.

First, many California short lines, while operating intrastate, are nevertheless part of the interstate rail system, participate in interstate commerce, and therefore are within the exclusive jurisdiction of the federal Surface Transportation Board ("STB"). For short lines within the STB's exclusive jurisdiction, the reporting requirements are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010). As the Ninth Circuit has held with respect to ICCTA-preemption, "ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation." *Ass'n of Am. R.R.*, 622 F.3d at 1097. As the STB noted in 2014, "allowing states and localities to create a variety of complex regulations governing how an instrument of interstate commerce is operated, equipped, or kept track of (even if federalized under the CAA) would directly conflict with the goal of uniform national regulation of rail transportation." 2014 STB LEXIS 335 (Dec. 29, 2014). The reporting requirements contained in the proposed Regulation have the effect of managing or governing federally regulated railroad transportation, which is within the STB's exclusive jurisdiction.

Second, the reporting requirements imposed on federally regulated railroads likely violate the Dormant Commerce Clause. As noted by the Supreme Court, a state regulation that even incidentally burdens interstate commerce is invalid if it is "clearly excessive in relation to [its] putative local benefits." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.* (1994) 511 U.S. 93, 99. Again, many short lines, including some CSLRA members, are part of the interstate rail system and, while their lines may be intrastate, they play an essential role in facilitating the transport of freight across state lines. The Regulation's reporting requirements are excessive—in terms of the costs and impediments they impose on interstate transportation—in relation to their local benefits. As a consequence, and independent of federal preemption, the Regulation raises serious Dormant Commerce Clause concerns.

2. Funding Requirements—Section 2478.4(b) and Section 2478.7

Section 2478.4(b) requires, starting July 1, 2023, every Locomotive Operators operating nonexempt locomotives in California to establish a "Spending Account," defined in section 2478.3(26) as a "trust, where all funds, including any interest or capital gains earned[,] are solely dedicated to compliance with" the draft Regulation. The account must be "held in the name of the Responsible Official"—a government actor—"for each railroad." Funds, including interest and capital gains made thereon, can be used *only* to promote CARB's objective of reducing air emissions through the purchase, lease, piloting, or demonstration of certain locomotive technologies.

Other funding provisions require Locomotive Operators to annually add funds to their Spending Accounts according to one of any number of formulas. The provisions create a complex scheme for calculating funds required and credits awarded. The provisions also authorize the California Department of Finance to audit a Spending Account on CARB's behalf at any time.

Section 2478.7 outlines an "Alternative Spending Plan" for applicants who qualify. Requirements include a substantial reporting obligation concerning operations and emissions.

The above requirements also conflict with ICCTA preemption and the Dormant Commerce Clause. Among other things, they unduly burden both the operations of short lines with the STB's exclusive jurisdiction *and* interstate commerce.

3. In-Use Life Limit—Section 2478.5

Section 2478.5 eliminates the use of locomotives of a certain vintage. Beginning January 1, 2030, all locomotives with a locomotive engine build date prior to 2007 shall not operate in California. Subsequently, any locomotive 23 years or older shall not operate in California. An otherwise unlawful locomotive may continue to operate *if* (1) its primary NOX and PM emissions are proven to be as clean as the Cleanest Available Locomotive, or (2) it hasn't exceeded a total of 89,2000 MWhs of operation since its original engine build date.

For federally regulated railroads, the same preemption and Dormant Commerce Clause objections described above apply here and for the same reasons. The forced disuse of locomotives of a certain vintage constitutes a substantial management of railroad operations and likely results in significant burdens on interstate commerce.

Moreover, the requirement effectively destroys an otherwise lawful use of property, potentially resulting in a taking. Whether a regulation effects a taking is assessed under the balancing test set forth in the United States Supreme Court's decision in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104. Courts weigh three factors: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr v. Wisconsin* (2017) 137 S.Ct. 1933.

Here, section 2478.5 of the proposed Regulation risks taking property without payment of just compensation. Railroads make substantial investments in the purchase of locomotives, with the reasonable expectation that said locomotives will be in operation and use for the locomotives' full life. A regulation that cuts short that life and forces railroads to discard otherwise-useful locomotives may go too far and effectively destroy a property interest in those locomotives. A court would weigh various factors to determine whether the regulation effects a regulatory taking, including the economic impact of the regulation on the railroad and the extent to which the regulation undermines reasonable investment backed expectations. *Penn Central*, 438 U.S. 104. These factors would seem to weigh in favor of finding a compensable taking.

4. Idling Requirements—Section 2578.6

This section strictly limits, with few exceptions, the duration of idling of AESS equipped main locomotive engines. This section also mandates the functionality of such engines and bars any interference therewith.

For short lines within the STB's exclusive jurisdiction, this requirement is likely ICCTA-preempted. It is a blatant attempt to "manage[] or [g]overn rail transportation"—in a targeted fashion—in a way that invades the exclusive jurisdiction of the STB. *Ass'n of Am. R.R.*, 622 F.3d at 1097. Further, for those same federally regulated railroads, the requirement also likely burdens interstate commerce in a way that violates the Dormant Commerce Clause (even without ICCTA).

Finally, the rule may violate the APA's prohibition on duplicative regulation, as the EPA has a rule requiring locomotives to "be equipped with automatic engine stop/start" devices that "shut off the main locomotive engine(s) after 30 minutes of idling (or less)." 40 C.F.R. 1033.115(g).

5. Requirements re: the Sale, Rental, or Leasing of Locomotives—Section 2478.14

This section provides: "No person shall sell, rent, or lease a new or used locomotive for operation in the State of California that does not meet all the requirements of this regulation." This section also contains certain labeling and disclosure requirements for locomotives subject to the draft Regulation.

To the extent it applies to STB-regulated railroads, Section 2478.14 implicates ICCTA-preemption because it purports to manage or govern rail transportation by managing the acquisition and use of locomotives. *Ass'n of Am. R.R.*, 622 F.3d at 1097. The regulation also implicates the Dormant Commerce Clause because it imposes a substantial burden on interstate commerce by limiting the ability of railroads to freely access otherwise-operational locomotives for conducting interstate transportation, without cumbersome labeling and disclosure requirements.

6. Non-Compliance and Penalties—Section 2478.16

Among other things, this section allows CARB a "right of entry" to any facility for the purpose of inspecting locomotives subject to the draft Regulation and their records, apparently without notice.

This rule runs afoul of the Fourth Amendment's prohibition on unreasonable administrative searches. As the Supreme Court recently explained: "[A]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *City of Los Angeles v. Patel,* 576 U.S. 409, 420 (2015). Section 2478.16 authorizes CARB to inspect a railroad's private facilities, without the railroad's consent, without a demonstration of exigent circumstances, and without any pre-compliance review before a neutral decisionmaker. Thus, the inspection requirement likely is unconstitutional under the Fourth Amendment.

CONCLUSION

If adopted, the Regulation will impose severe economic burdens on the State's short line railroads, with downstream negative consequences for employees, vendors, and consumers. Many short lines will go out of business. Further, the Regulation contains provisions that are legally deficient and susceptible to challenge.

For all these reasons, CSLRA requests that, if the Regulation is adopted, an exemption be created for the 24 short lines in this State. An exemption will ensure that this key part of California's transportation infrastructure will be preserved.

Very truly yours,

Paul Beard II
Counsel for California Short Line Railroad Association