

Railroad Panel
Valdez / Stehly / Barr
06-1-4

**Support Materials for the CARB Board
Consideration of the 2005 Rail MOU**

**October 27, 2005
and
January 27, 2006**



EXHIBIT A

SCAQMD's Legal Memoranda Are Substantially Incorrect

SCAQMD offers legal memoranda from Seth Waxman, David Nawi, and Justice Cruz Reynoso in support of its argument that ARB could have adopted the requirements of the June 24 agreement by regulation, rather than by agreement. The three memoranda largely cover the same topics, and reach the same mistaken conclusions. They assert that ARB regulations imposing the requirements of the June 24 agreement would not have been preempted by the Clean Air Act, the ICC Termination Act, the Commerce Clause of the Constitution, or the Locomotive Boiler Inspection Act. Nawi and Justice Reynoso also argue that both ARB and individual local air districts have the authority under California law to promulgate regulations constraining railroad operations. In significant respects they misstate the applicable law. For the reasons discussed below and many additional reasons, it is clear that the requirements of the June 24 agreement could not have been adopted by ARB regulations, much less by SCAQMD regulations.

1. Federal Clean Air Act

The October 13 ARB staff report summarizes the broad federal preemption of locomotive emissions controls at p. 15. AAR agrees with the staff's analysis, as far as it goes. Going into greater detail, the EPA final locomotive rule cited by the ARB staff provides:

"(c)(1) States and any political subdivisions thereof are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives and new engines used in locomotives.

"(2) During a period equivalent in length to 133 percent of the useful life, expressed as MW-hrs (or miles where applicable), beginning at the point at which the locomotive or engine becomes new, those standards or other requirements which are preempted include, **but are not limited to**, the following: emission standards, mandatory fleet average standards, certification requirements, aftermarket equipment requirements, and nonfederal in-use testing requirements. The standards and other requirements specified in the preceding sentence are preempted whether applicable to new or other locomotives or locomotive engines." (40 CFR §85.1603; emphasis added).

Recognizing this final EPA locomotive rule, Justice Reynoso concedes that Program Element #1 of the June 24 agreement calling for the installation of anti-idling devices "affects the designs of locomotive and therefore would be preempted."

Attorney Waxman concedes that the Clean Air Act could "perhaps . . . be read to preempt" the anti-idling Program Element. He recommends avoiding preemption by changing that Element to rely on manual shut-down rather than automatic anti-idling devices. He reasons that this change would avoid preemption as a "use" restriction. Putting aside Waxman's invitation to reject the very technology that the railroads have agreed to install in the June 24 agreement, and putting aside the well-justified ARB and railroad preference for such technology,

Waxman ignores the fact that the 1990 Clean Air Act Amendments adding the broad locomotive preemption after, and supersede, the earlier "use" restriction clause in the Clean Air Act.

Nawi also concedes that Program Element #1 requiring anti-idling devices is "expressly preempted" under the Clean Air Act and the EPA rule quoted above. He "nonetheless" argues that the anti-idling device requirements might not affect locomotive design. Since locomotive builders have designed their new locomotives to include anti-idling devices, there is no need for Nawi or others to speculate. Anti-idling devices have and will continue to be integral to the design of locomotives, locomotive engines and their components, contrary to Nawi's speculation.

Nawi joins Waxman in recommending that ARB abandon the clear anti-idling technology mandate of the June 24 agreement and, instead, he recommends an "idling performance standard." Nawi's recommendation shares the fundamental flaw in Waxman's analysis noted above.

2. ICC Termination Act

A. Background

Congress has extensively regulated the nation's railroad system for over a century. See *Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives Ass'n*, 491 U.S. 490, 510 (1989); *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998). In fact, "[t]he [Interstate Commerce Act of 1887 (ICA)], * * * which, as amended, still governs federal regulation of railroads, has been recognized as 'among the most pervasive and comprehensive of federal regulatory schemes.'" *City of Auburn*, 154 F.3d at 1029 (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)).

It has long been understood that *state* regulation of the interstate rail system would, in many instances, undermine the *federal* regulatory scheme. See *Kalo Brick*, 450 U.S. at 318. Thus, the history of railroad regulation since the passage of the ICA in 1887 has been one of steady reduction of state regulatory authority. In the Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980, Congress determined to narrowly circumscribe the remaining regulatory authority of the states. See *ICC v. Texas*, 479 U.S. 450, 460-461 (1987).

In the ICC Termination Act of 1995 ("ICCTA"), Congress terminated entirely the regulatory authority of state and local governments over rail operations. ICCTA abolished the ICC and transferred a portion of its regulatory functions to the Surface Transportation Board (STB). It also made clear that states and localities were not to attempt themselves to regulate any part of the railroads' facilities or operations. As the Senate Report on the ICCTA explained:

"The railroad system in the United States is a nationwide network. The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among

the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would weaken the industry's efficiency and competitive viability.

S. Rep. No. 104-176, at 6 (1995).

Thus, former Section 10501(c), which had expressly reserved the states' power to regulate intrastate transportation, was eliminated. The express preemption provision of the Act, "Section 10501(b), was strengthened. As amended by the ICCTA, it now provides:

"The jurisdiction of the Board over—

"(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; and

"(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

"is *exclusive*. 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).

For purposes of Section 10501(b), the term "transportation" is defined broadly to include all of the related facilities and services used for that transportation. See 49 U.S.C. § 10102(9). Section 10501(b) thus makes the STB's "jurisdiction" over *all* rail transportation and rail transportation facilities—*including entirely intrastate ancillary facilities and operations over which the states formerly had regulatory authority—exclusive.*

As the courts have repeatedly observed, "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than this statutory provision. See *City of Auburn*, 154 F.3d at 1030 (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). Congress, too, has recognized the extraordinary breadth of Section 10501(b). As explained in the House Report accompanying the ICCTA:

"[Revised Section 10501] reflects the *direct and complete preemption* of State economic regulation of railroads. * * * Although States retain the police powers reserved by the

Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive."

H.R. Rep. No. 104-311, at 95-96 (1995) (emphasis added). As Congress also stressed, this broad preemption of state regulation is necessary to preserve the free flow of interstate commerce and to prevent the "balkanization" of rail regulation. *Id.*

The courts and the STB accordingly have read Section 10501(b) expansively to preempt state or local actions that would put state or local authorities in a position to interfere with the operation of any railroad transportation equipment or facilities. Among other things, they have held that Section 10501(b) preempts:

- the application of state and local *environmental and land use laws* to railroad operations or facilities (see, e.g., *City of Auburn*, 154 F.3d at 1029-31; *Green Mountain R.R. Corp. v. State of Vermont*, 404 F.3d 638, 641-645 (2d Cir. 2005); *Flynn v. Burlington Northern S.F. Corp.*, 98 F.Supp.2d 1186, 1188-89 (E.D. Wa. 2000); *North San Diego County Dev. Bd.—Pet. for Declaratory Order*, STB Fin. Dkt. No. 34111, 2002 WL 1924265 (served Aug. 21, 2002); *Joint Pet. for Declaratory Order—Boston & Maine Corp. and Town of Ayer, Ma.*, STB Fin. Dkt. No. 33971, 2001 WL 458685 (served May 1, 2001);
- the application of local *zoning and demolition laws* to railroad operations or facilities (see, e.g., *Soo Line R.R. v. City of Minneapolis*, 38 F.Supp.2d 1096 (D. Minn. 1998); *Norfolk S. Ry. v. City of Austell*, 1997 WL 1113647 (N.D. Ga. 1997); *City of Creede, Co-Petition for Declaratory Order*, STB Fin. Dkt. No. 34376, 2005 WL 1024483 (served May 3, 2005); *Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & Western Ry.*, STB Fin. Dkt. No. 33466, 1999 WL 715272 (served Sept. 10, 1999);
- the application of state or local *nuisance laws or penalties* to railroad operations or facilities (see, e.g., *Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001); *Village of Ridgefield Park v. N.Y. Susquehanna & Western Ry.*, 750 A.2d 57, 67 (N.J. 2000); *Rushing v. Kansas City S. Ry.*, 194 F.Supp.2d 493 (S.D. Miss. 2001); *CSX Transp., Inc. v. City of Plymouth*, 92 F.Supp.2d 643 (E.D. Mich. 2000), *aff'd on other grounds*, 283 F.3d 812 (6th Cir. 2002); *Town of Ayer*, 2001 WL 458685;
- the application of state or local *condemnation laws* to any part of a railroad's facilities (see, e.g., *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005); *Wisc. Central Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1014 (W.D. Wisc. 2000).

These and other cases make clear that states and localities may not apply any kind of permitting requirement to railroad operations and facilities, and may only apply generally applicable public health and safety laws (e.g., enforcement of plumbing and fire code requirements) if they do not significantly interfere with a railroad's operations or facilities. Only

if a railroad wishes to enter into a *voluntary* agreement with state or local authorities, like the June 24 agreement, has the STB found that the preemptive effect of Section 10501(b) can be avoided. See *Town of Ayer*, 2001 WL 458685, at *5.

B. Application of the ICCTA to the Requirements of the June 24 agreement

The gravamen of the three legal memoranda that SCAQMD has submitted to ARB is that, notwithstanding Section 10501(b) of the ICCTA, ARB could have imposed the requirements of June 24 agreement by involuntary regulations rather than voluntary agreement. All three legal memoranda substantially misread the law. Justice Cruz Reynoso cites part of the language from Section 10501(b) but none of the history of that provision or the extensive case law applying it. (Reynoso Memo at 6.) He relies on the general legal presumption that Congress does not intend to preempt state law to conclude in this situation that Section 10501(b) is not intended to preempt any state environmental legislation designed to protect the public health and safety. (Reynoso Memo at 7-8.)

Justice Reynoso's position is clearly incorrect, on two counts. First, as described above, a multitude of courts have held that any presumption against preemption of state law is refuted by the history and express language of Section 10501(b), which makes clear that the STB's jurisdiction is "exclusive." Second, the Supreme Court has held that the typical "assumption" of non-preemption is *not* triggered in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (emphasis added). Given the lengthy history of federal regulation of the railroad system, there is no presumption against preemption of state law in this case, contrary to Justice Reynoso's unfounded assumption. See, e.g., *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (citing *Locke*).

Unlike Justice Reynoso, Waxman and Nawi do address some of the case law applying Section 10501(b), but their selective citation of language from some of those cases does not accurately reflect the holdings of those cases. The June 24 agreement places substantial statewide compliance obligations on BNSF and UP. Waxman and Nawi suggest that the case law would permit ARB, notwithstanding Section 10501(b), to require by regulation that the railroads comply statewide with involuntary locomotive idling restrictions, special fuel requirements, special visible emissions standards and locomotive repair requirements, emissions training and compliance requirements, and a slew of research and reporting requirements. These suggestions are incorrect.

Oddly, Waxman finds support for this proposition in the STB's decisions applying the ICCTA, particularly its decision in *Cities of Auburn & Kent, Wa.—Pet. for Declaratory Order—Burlington Northern R.R.*, STB Fin. Dkt. No. 33,200, 1997 WL 362017 (served July 2, 1997), which he commends to ARB as "instructive and likely to be controlling." (Waxman Memo at 8.) In that case, having held that any and all efforts by the State of Washington or the Cities of Auburn and Kent to impose environmental restrictions on BNSF's renewed and expended operations on its Stampede Pass line and associated auxiliary facilities were preempted by Section 10501(b), the STB added that this did not mean that a railroad could claim immunity from all state and local law. A railroad could, for example, be fined under a generally applicable

anti-dumping law if it disposed of waste from a construction project improperly. 1997 WL 362017, at *5. Waxman uses this example to suggest that ARB could directly regulate a railroad's operation of its locomotives without running afoul of Section 10501(b). But that is obviously not what the STB said or meant. The STB has repeatedly held that any *direct* environmental regulation of a railroad's operations is preempted.

Waxman cites other STB decisions for the unexceptional proposition that generally applicable, nondiscriminatory state or local regulation is permissible if it does not interfere with railroad operations (Waxman Memo at 9, nn.7 & 8, and 11-12), but the facts in those cases make clear that direct environmental regulation of a railroad's operations is preempted. In *Town of Ayer*, for example, the STB rejected *all* of the involuntary requirements that would affect in any way the railroad's planned operation of the intermodal yard at issue, as well as application to the facility of the town's "noisome trade ordinance." 2001 WL 458685, at *7. Nothing in the STB's decision suggested that if the town had determined to regulate the length of time that locomotives could idle in that yard, or the fuel they could use, or the density of their smokestack emissions that the STB would not have held such requirements equally preempted. The courts' decisions applying Section 10501(b) similarly make clear that such involuntary regulatory requirements would be preempted. See, e.g., *Village of Ridgefield Park*, 750 A.2d at 67 (preempting locality's effort to enjoin alleged nuisance created by noise and air pollution from a railroad maintenance facility, including from idling locomotives); *Rushing v. Kansas City Southern Ry.*, 194 F.Supp.2d 494, 500 (rejecting nuisance complaint directed at alleged nuisance created locomotive horn blowing, noise of cars switching, and brakes screeching in rail yard); *Friberg*, 267 F.3d at 443-444 (preempting nuisance action and state "anti-blocking" law seeking to regulate amount of time trains could block grade crossing); *City of Plymouth*, 92 F.Supp.2d at 658-659 (same);

Waxman suggests that the Second Circuit's recent *Green Mountain* decision stands for the proposition that a "key precondition to preemption under the ICCTA" is that the regulatory action at issue "placed broad discretion in the hands of public officials to stop railroads literally in their tracks." (Waxman Memo at 10.) But the court in *Green Mountain* held nothing of the sort. Rather, the court agreed with the STB that preclearance permitting requirements present the easiest case— they are preempted *per se*. 404 F.2d at 644 ("[W]hat is preempted here is the permitting process itself, not the length or outcome of that process in particular cases.") The court specifically disclaimed any intention of deciding the question that other courts and the STB have reached of when nuisance actions and other kinds of regulation of ongoing rail operations are preempted. *Id.* at 643.

Waxman concludes that there is "some consensus in the case law that, despite the broad preemption language of the ICCTA, states and localities may adopt environmental regulations that do not rely on open-ended discretion, at least so long as they also do not substantially interfere with the business of railroad operations" (Waxman Memo at 10). Yet the cases he cites for that proposition (*id.* at 10 n.9) do not support it. They deal either with non-railroad operations or operations that are not integrally related to rail transportation. The case Waxman cites that is most on point, *Jones v. Union Pac. R.R.*, 79 Cal. App. 4th 1053 (2000), in fact makes clear that no "substantial interference" with railroad operations is required to trigger

Section 10501(b) preemption. There, a homeowner alleged that railroad employees engage in horn blowing and idling of locomotives *safely* for purposes of harassment. The court held that a triable issue of fact existed whether there was *any* transportation purpose for the railroad's activities. If there was any evidence that the horn blowing and locomotive idling was "in furtherance of Union Pacific's operations" or "furthered Union Pacific's economic interests," then the homeowner's claim for damages was preempted by the ICCTA. *Id.* at 1060.

Nawi makes many of the same analytical errors that Waxman does. He also mischaracterizes *Jones* as a case that holds that "ICCTA does not preclude regulation . . . of idling that is not *necessary* for railroad operations." (Nawi Memo at 17; *emphasis added*.) But *Jones* does not hold that. As the court in *Jones* and other courts and the STB have made clear, the ICCTA does not give states, localities, or private citizens the prerogative to decide what is "necessary" for rail operations. They cannot decide whether it is "necessary" for a railroad to conduct their switching operations at night, to blow horns and whistles at high levels or for long intervals, to idle locomotives for long periods, to block a road crossing for long periods, to allow rail cars to crash together during switch yard operations, to build or expand a yard in a residential neighborhood or a fueling facility over an aquifer, to operate a passing track where a highway is planned, to send hazardous materials traffic over one route rather than another, or any of the other myriad day-to-day business decisions made by railroads in order to serve their shipper customers. See, e.g., *Fritherg*, 267 F.3d at 443-444; *Village of Ridgefield Park*, 750 A.2d at 67; *Rushing*, 194 F.Supp.2d at 500; *City of Plymouth*, 92 F.Supp.2d at 658-659; *Flynn*, 98 F.Supp.2d at 1188-89; *Town of Ayer*, 2001 WL 458685; *Borough of Riverdale*, 1999 WL 715272; *CSX Transp., Inc. Pet for Declaratory Order*, STB Fin. Dkt. No. 34662, 2005 WL 584026 (served March 14, 2005). Under the ICCTA, it is the railroads' prerogative to decide how to conduct their operations in their economic interest and the economic interest of their customers. *Jones* held only that a property owner that claimed there was *no* rail transportation purpose for the horn blowing and idling at issue—that it was pure harassment—should have the opportunity to prove that claim.

Nawi, like Waxman, also leans heavily on a phrase pulled from the middle of a sentence in dictum in the Second Circuit's *Green Mountain* decision. (Nawi Memo at 17; Waxman Memo at 10.) The complete sentence, with the phrase in question italicized, reads as follows: "Electrical, plumbing and fire codes, *direct environmental regulations enacted for the protection of the public health and safety*, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption." 404 F.3d at 643. Nawi suggests that if ARB adopted regulations directly restricting railroads' locomotive operations and fueling requirements, those would be non-preempted "direct environmental regulations enacted for the protection of the public health and safety." But that ignores the rest of the sentence, which makes clear that only direct environmental regulations that are "generally applicable, non-discriminatory regulations," like electrical, plumbing, and fire codes, or a generally applicable anti-dumping ordinance like that suggested by the STB in *Cities of Auburn and Kent*, may withstand preemption. A regulation specifically directed at rail locomotive and yard operations is, by definition, neither generally applicable nor non-discriminatory. On the contrary, it constitutes that kind of specifically applicable, discriminatory regulation that is at the core of ICCTA preemption.

The bottom line is that Nawi, Waxman, and Justice Reynoso are all incorrect when they argue that ARB would not have confronted formidable preemption problems under the ICCTA if it had tried to adopt by regulation the kinds of constraints to which the railroads agreed in the June 24 agreement after much negotiation. Since passage of the ICCTA, neither the STB nor the courts have upheld regulatory efforts by a state or locality to dictate to a railroad how it may operate its locomotives or other operations. Nawi's suggestion that "none of the program elements would appear to interfere with railroad operations" (Nawi Memo at 17) ignores that the railroads will be required by the June 24 agreement to *change* their operations at many locations throughout the state or face the penalties provided in the June 24 agreement. Moreover, they will be required to incur substantial additional cost, not only under the low-sulfur fueling requirement but also under the locomotive repair requirements and the myriad research and reporting requirements created by the June 24 agreement, which they would not incur if they continued operating the railroad in their own economic interest. Had ARB attempted to impose such expensive operating changes on the railroads involuntarily by regulation, there is little doubt under the law such regulations would be held to constitute interference with railroad operations preempted by the ICCTA.

3. Other Bases for Preemption

Because most of the rail traffic affected by the June 24 agreement is interstate rail traffic, the requirements of the June 24 agreement clearly burden interstate commerce, and they do so directly. Waxman and Nawi acknowledge that the Commerce Clause of the Constitution and the federal Locomotive Boiler Inspection Act would preempt at least some of the requirements of the June 24 agreement. (Waxman Memo at 13-15; Nawi Memo at 18-19.) They suggest that other requirements of the June 24 agreement, if adopted as regulations, would be upheld against a Commerce Clause challenge as permissible "incidental effects" under the test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). They ignore the Supreme Court's later decision in *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982), emphasizing that even facially nondiscriminatory state or local regulatory action may be preempted under the Commerce Clause if, as here, it "directly regulates," as opposed to "incidentally regulating," interstate commerce. See *City of Plymouth*, 92 F.Supp.2d at 659-63 (invalidating under Commerce Clause state law regulating train operations at road intersections).

SCAQMD suggests that federal preemption could be avoided under a "market participant/municipal proprietor" theory where railroads operate in part on property owned by the state or a municipality. But this theory depends heavily on the specific facts of a particular case. The courts have made clear that where a state or locality imposes lease or land use conditions for regulatory rather than proprietary purposes, the "market participant/municipal proprietor" exception to federal preemption does not apply. See, e.g., *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 97-98 (1984) (refusing to apply market participant exception to contractual requirement that surplus timber harvested from state land be processed within state); *Western Oil and Gas Assoc. v. Cory*, 726 F.2d 1340, 1343 (9th Cir. 1984) (rejecting state's argument that its lease requirements for state-owned tidelands and submerged lands were immune from federal preemption under market participant theory); *Air Transport Assoc. v. City*

Letters of Support

Public Officials/Agencies

Congressman Gary G. Miller

**Bipartisan Letter from the California
Legislature**

City of Barstow

City of Industry

City of Roseville

San Joaquin Valley APCD

January 2006

**South Bay Latino Chamber of
Commerce**

Port of Oakland

Electro-Motive Diesel, Inc

October 2005

California Railroad Industry

Association of American Railroads

**California Association of Port
Authorities**

Port of Oakland

California Trade Coalition

**California Council for Environmental
and Economic Balance**

**Los Angeles County Economic
Development Corporation**

**Harbor Association of Industry and
Commerce**

Chris Becker & Associates

ZTR Control Systems

**National Railway Equipment
Company**

RailPower

General Electric

City of Industry

**Pacific Merchant Shipping
Association**

**Los Angeles Area Chamber of
Commerce**

Central City Association

**California Shortline Railroad
Association**

Electro-Motive Diesel, Inc

GARY G. MILLER
2nd District, California

ASSISTANT WHIP AT LARGE

COMMITTEE ON FINANCIAL SERVICES

COMMITTEE ON TRANSPORTATION
AND INFRASTRUCTURE

BUILDING A BETTER AMERICA CAUCUS
CHAIRMAN



UNITED STATES
HOUSE OF REPRESENTATIVES

October 26, 2005

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TEL: (949) 470-0484

Ms. Barbara Riordan
Interim Chair
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Riordan:

I am writing in support of the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB), the Union Pacific Railroad Company (UP), and Burlington Northern Santa Fe Railway Company (BNSF) to reduce by 20 percent, locomotive diesel emissions near rail yards. I urge ratification of this important agreement.

Over the past several years, the railroads have been a unique partner with California in their willingness to enter into enforceable and transparent agreements to reduce emissions from locomotives and rail operations. Because UP and BNSF operate in over 30 local air quality districts, one air quality standard for reducing pollution is needed on a statewide level. This MOU will help promote a consistent regulation that will prevent locomotives from having to comply with different fuel, idling, and smoke standards for each air quality district they pass through. Voluntary agreements, such as this, will help improve the environment and quality of life of all Southern California communities.

More than 50 trains travel through my district each day, with rail traffic expected to increase to 135 per day by the year 2020. While the use of Southern California rail corridors is critical to facilitating economic growth, it is important that communities and the railroads work together to reduce the negative impact of increased rail traffic. I am pleased that this agreement will phase out non-essential idling and encourage the installation of idling reduction devices on all California based locomotives, while promoting the use of low-sulfur fuel. These provisions will help ensure Southern California's communities do not continue to bear the brunt of increased trade at the ports.

I commend CARB for creating an innovative opportunity to join in a public-private partnership to improve air quality in Southern California. I look forward to working with you to ensure this important agreement can be implemented at the benefit of our local communities.

Sincerely,

GARY G. MILLER
Member of Congress

CALIFORNIA LEGISLATURE

STATE CAPITOL
SACRAMENTO, CALIFORNIA
95814

October 20, 2005

Barbara Riordan
Interim Chair, California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Riordan:

We the undersigned members of the legislature are writing to support the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and the Union Pacific Railroad Company and BNSF Railway Company and to urge ratification of this agreement at the upcoming CARB meeting on October 27th. While we agree the public process was not ideal, on balance, it is worth ratifying this MOU now to achieve 20 percent reductions in emissions from railyards.

The very nature of negotiating public/private agreements does not lend itself to a public setting. However, given the recent public outcry stemming from this agreement, the ARB Board's recent resolution has struck a happy medium; all future agreements will be publicly noticed and ratified by the Board, allowing opportunity for public input.

While some have argued that the termination clause is overly broad, this clause allows the railroads to have consistent, statewide regulation. A myriad of fuel standards, idling standards, and smoke enforcement standards in several Air Districts that all applied to a single locomotive as it moved through the state would preclude efficient operations. This arrangement could cause more containers to be moved via trucks - adding to congestion on our roads and increasing air pollution.

Several interests have questioned CARB's conclusion that the MOU was required because its elements are federally preempted and the State and local governments lack regulatory jurisdiction over railroads. The question of jurisdiction would have delayed other state and local initiatives to reduce railroad emissions (including proposed legislation) for several years while the courts further defined federal and state roles in regulating railroads. The next three years will see tangible air quality benefits achieved across the state - not a lengthy courtroom battle. These real benefits outweigh the legal questions and achieve the goal many across the state are striving for: cleaner air now.

We support the CARB/Rail MOU. Process aside, this MOU achieves real reductions over the next three years and avoids lengthy legal challenges. The most affected communities will benefit from the implementation of this MOU. On balance, it is the most effective and fastest method to help clean the air around rail yards. Additionally, voluntary agreements, such as the CARB/Rail MOU, are an important tool federally preempted industries and the State can use to quickly achieve significant environmental and community benefits.

Given the federal laws, the ARB is the appropriate agency to address these issues and we urge you to ratify this agreement at the upcoming October 27th hearing.

Regards,

Dick Ackerson

Van Tran

Ardra Strickland

Ray Haynes

Small Hunted

JSJ

~~John~~

Lloyd Levin

Sharon Runner

R. Alquist

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Michael N. Vin

Chris DeVoe

Bob Haff

George G. Plant

Lynne Ravakere

Taylor R

Barbara S. Matthews

Allan

Alana

Mimi Walters

Doug J. Mullen

Mark Wyland

Joe Cots

cc: Catherine Witherspoon
Terry Tamminen
Dennis Albani

From the Desk of LAWRENCE E. DALE

220 E. Mt. View Street, Barstow, CA 92311

760-255-5103/760-256-4472 (fax)

January 27, 2006

Robert F. Sawyer
Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Dr. Sawyer:

I'm writing to support the Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company. As Mayor of the City of Barstow, I have worked with BNSF railroad over the past five years on a variety of projects. I have found them to be good corporate citizens, as well as cooperative and trustworthy partners. The staff's January 13, 2006 staff report clearly demonstrates the benefits of the MOU and I urge the Board to leave the agreement in place at your hearing today.

Specifically, over the past six months the railroads have accomplished the following:

- Submitted study plans for health risk assessments at designated yards
- Limited nonessential locomotive idling to 60 minutes and installed or ordered required idling devices
- Provided an update on the diesel particulate filter technology and pilot program
- Provided 1-800 numbers to communities to report idling or smoking locomotives
- Conducted trainings to inform staff how to implement the new anti-idling and visible emission requirements
- Provided Visible Emission and Idling Coordinators at each designated rail yard
- Conducted early reviews of possible short term action to reduce emission at designation rail yards
- Held or scheduled community meetings over 50% of the designated yards to discuss early actions to reduce emissions
- Drafted program review and inspection protocols
- Announced plans to acquire over 70 new low-emission switch locomotives for operation in the Los Angeles Basin in 2006 and 2007. This represents 50% of the low HP units

currently in use in the basin and in combination with local other locomotive emission strategies already in place provide over a 90% reduction in NOx and diesel PM emissions compared to the units already in place.

The termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations. Staff and the railroads have fulfilled the CARB Board's October request and have clarified the termination clause to ensure all parties understand this important part of the MOU.

The CARB Board should leave the MOU in effect as it achieves 20% reduction in locomotive PM emissions statewide that could not be required by any other regulatory agency in California and establishes a community based process to review further reductions. The City of Barstow has one of the designated yards in our City. I feel that the agreement is good for our city and will be an asset to Barstow's residents. As direct beneficiaries of this agreement, I look forward to working with CARB on implementing this innovative agreement.

Regards,

LAWRENCE E. DALE
Mayor, City of Barstow



CITY OF INDUSTRY

Incorporated June 18, 1957

October 27, 2005

Ms. Barbara Riordan
Interim Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Riordan:

City of Industry (City) supports the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company.

ARB staff has shown initiative and leadership by collaboratively addressing goods movement issues and creating a statewide solution to reduce rail yard emissions by 20 percent over the next three years. The railroads are a key component of the California economy and this agreement achieves important reductions in air emissions, without harming rail's economic competitiveness. Additionally, given federal laws that preempt state and local authority over railroads, a voluntary public/private agreement was the quickest method to achieve these important emission reductions and avoid costly and protracted litigation.

The City views voluntary agreements, such as the CARB/Rail MOU as an important way for federally preempted industries and the State to achieve mutually beneficial goals. Without this key tool, the state will not be able to negotiate tangible environmental and social improvements.

Lastly, the termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations that could potentially discourage the use of rail by creating barriers to efficient operations.

Ms. Barbara Riordan

October 27, 2005

Page Two

As you know, rail is the most environmentally sound way to move goods and is a key component of the goods movement system the within California and thorough out the nation. The City supports the ARBs efforts to ensure efficient, environmentally sound transportation of goods.

Sincerely,



David Perez
Mayor

DP:MN:og

City Council

311 Vernon Street
Roseville, California 95678-2649

October 26, 2005

Barbara Riordan,
Interim Chair
California Air Resources Board
1001 I Street
Sacramento, CA 95814

SUBJECT: Statewide and Local Emission Reduction Efforts

Dear Ms. Riordan:

On behalf of the City of Roseville, I am pleased to offer support for collaborative efforts between Union Pacific Railroad and government entities, to reduce emissions at rail yards.

As you know, Roseville is a rapidly growing city, with residences and businesses already in close proximity to the J.R. Davis Rail Yard. Recent development has added to the number of residents living and conducting business and recreational activities near the rail yard. With the increasing population, and as information has become available through resources such as the ARB Rail Yard Study, concerns about potential health risks from diesel emissions have been brought to the forefront.

The City commends the leading role that Union Pacific Railroad has taken to team with the Placer County Air Pollution Control District to address locomotive emissions via implementation of mitigation and air monitoring programs to address public health risks. In its agreement with the APCD, U.P. has committed to:

- reducing diesel particulate emissions by a minimum of 10% over the next three years (for a total reduction of twenty-five percent since the year 2000);
- identifying specific control measures, and reporting annually on the progress;
- contributing \$150,000 for grants for diesel particulate emission reduction in the Roseville area; and
- working with the APCD to develop and implement a monitoring plan to evaluate diesel exhaust in the Roseville railyard (this effort is already in progress).

The City will continue to support these, and similar efforts to reduce emissions at the railyard, that will ultimately improve the quality of life for the residents of Roseville, as well as surrounding areas.

Sincerely,



Gina Garbolino
Mayor



San Joaquin Valley Air Pollution Control District

GOVERNING BOARD

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David L. Crow
Executive Director
Air Pollution Control Officer

Northern Region Office
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Central Region Office
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Fresno, CA 93726-0244
1559 239-6000
FAX 1559 239-6061

Southern Region Office
7700 N. Second, Suite 275
Bakersfield, CA 93311-2173
8661 326-0900
FAX 8661 326-0983

www.valleyair.org

January 24, 2006

Dr. Robert Sawyer
Chair, California Air Resources Board
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

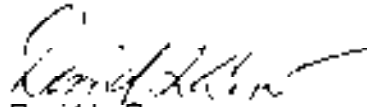
Dear Dr. Sawyer:

The San Joaquin Valley Air Basin (Valley) faces significant air quality challenges that require the timely reduction of emissions from all sources in order to protect the health and welfare of Valley residents and to achieve the state and federal ambient air quality standards. The pollution reduction agreement that the Air Resources Board (ARB) entered into with the Union Pacific Railroad (UP) and the Burlington Northern and Santa Fe Railway (BNSF) provides necessary and timely emission reductions from locomotives. Given the uncertainty of the authority of state and local agencies to regulate locomotives, a regulatory approach would likely result in the emissions reductions being uncertain, and at a minimum, result in significant delays in implementation due to legal challenges.

The San Joaquin Valley Air Pollution Control District (District) raised a number of concerns with the initial pollution reduction agreement. Our concerns included District participation in the enforcement of the Visible Emission Reduction and Repair Program, District participation in the Assessment of Toxic Air Contaminants from Designated California Rail Yards and the potential for conducting additional analysis on other rail facilities, and finally the potential for the unnecessary triggering of the Release from Obligation provision of the agreement. In our review of the clarifications to the agreement, continuing discussions with ARB and the impacted railroads, and a review of a Draft Implementation Protocol with BNSF and UP the District is satisfied that our concerns have been addressed and the District supports the Pollution Reduction Agreement.

Emission reductions from federal sources continue to be important in the Valley. If ARB chooses not to pursue emissions reductions from railroads through a voluntary agreement, or if the voluntary agreement is invalidated through the Release from Obligation provision, the District would support the establishment of a broad based coalition to seek necessary authority to pursue additional reductions from locomotives through a regulatory process.

Sincerely,



David L. Crow
Executive Director/APCO

CC: Catherine Witherspoon, Executive Officer
California Air Resources Board

SJVAPCD Governing Board



South Bay Latino Chamber of Commerce

California Non-Profit Corporation

P.O. Box 452391

Los Angeles, CA 90045

(310) 676-2568

January 20, 2006

Robert F. Sawyer
Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

RE: CARB MOU with BNSF and UP

Dear Dr. Sawyer:

The South Bay Latino Chamber of Commerce (SBLCC), currently with over 300 members throughout the greater Los Angeles region, wishes to express its support for the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company.

SBLCC believes the economic and health impacts of this MOU will improve the quality of life for thousands of residents and businesses in the greater Los Angeles region. SBLCC recognizes that the MOU will reduce particulate emissions from rail yards throughout California by approximately 20 percent over the next three years.

Voluntary agreements, such as the CARB/Rail MOU, are the best vehicles to achieve mutually beneficial results with federally preempted industries. As an advocate for small and medium size businesses throughout the Los Angeles region, SBLCC recognizes that rail is the most efficient and environmentally sound component of the goods movement system in California and throughout the nation.

SBLCC further believes that the termination clause is vital to ensure consistent statewide regulation and to avoid a multitude of regulations that may potentially create barriers and inefficiencies in rail and throughout the goods movement system.

SBLCC commends CARB for their leadership in ensuring the efficient and environmentally sound transportation of goods throughout California.

Sincerely,

Mr. Candy Saez
President & CEO

Mr. Candy Saez
President/CEO

Mr. Juan Vega
Chairman of the Board

Mr. Ramiro De La Cruz
Vice President

Board Members

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Mr. Daniel Morales
Ms. Margaret Hernandez
Ms. Julia Wickham - PRC
Ms. Esther Espinoza - PRC
Mr. Trini Martinez, Esq.

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Javier Acevedo
Mayor Commissioner
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CA State Assembly Member
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Mayor Gardena
Hon. Alex Padilla
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Water Board

Founding Board Members

Mr. Pamela Corrao
SVP
Mike Masera
SVP
Ms. Monica Cardona
KTLA Channel 5



PORT OF OAKLAND

January 26, 2006

GERALD M. (Jerry) SERVENTI
Director of Engineering

Tel: (510) 627-1200
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E-mail: gserventi@portofoakland.com

Dr. Robert F. Sawyer
Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Dr. Sawyer:

On behalf of the Port of Oakland, I would like to reiterate our support for the Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company. The staff's January 13, 2006 staff report clearly demonstrates the benefits of the MOU and the Port urges the Board to leave the agreement in place at your hearing today.

Specifically, over the past six months the railroads have accomplished the following:

- Submitted study plans for health risk assessments at designated yards
- Limited nonessential locomotive idling to 60 minutes and installed or ordered required idling devices
- Provided an update on the diesel particulate filter technology and pilot program
- Provided 1-800 numbers to communities to report idling or smoking locomotives
- Conducted trainings to inform staff how to implement the new anti-idling and visible emission requirements
- Provided Visible Emission and Idling Coordinators at each designated rail yard
- Conducted early reviews of possible short term action to reduce emission at designated rail yards
- Held or scheduled community meetings at over 50% of the designated yards to discuss early actions to reduce emissions
- Drafted program review and inspection protocols

The CARB Board should leave the MOU in effect as it achieves 20% reduction in locomotive PM emissions statewide that could not be required by any other regulatory agency in California and establishes a community based process to review further reductions. Both railroads move freight into and out of near dock yards in the heart of the Port facilities. Union Pacific's Railport-Oakland yard is a designated yard under the MOU. As direct beneficiaries of this agreement, the Port looks forward to working with CARB and the railroads to implement this innovative agreement.

Sincerely,

Gerald M. Serventi
Director of Engineering

530 Water Street ■ Jack London Square ■ P.O. Box 2064 ■ Oakland, California 94604-2064
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ELECTRO MOTIVE

9101 West 55th Street
LaGrange, IL 60525 USA

Tel: 708.387.5623
Fax: 708-387-3723
martha.lenz@emddiesels.com

January 27, 2006

Dr. Robert E. Sawyer
Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Dr. Sawyer:

Electro-Motive Diesel, Inc. (EMD) supports the railyard Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) with Union Pacific Railroad Company and BNSF Railway Company. We strongly urge the Board to support the continued implementation of the MOU at the hearing on Friday, January 27, 2006.

The Class 1 railroads operating in California have demonstrated their commitment to reducing emissions statewide and nationally. Specifically, the railroads have:

- Purchased from EMD in 2005 115 line-haul freight locomotives conforming to EPA Tier 2 emissions standards, and have ordered an additional 170 to be delivered in 2006.
- Increased the use of low-sulfur fuel in California.
- Submitted study plans for health risk assessments at designated yards.
- Limited nonessential locomotive idling to 60 minutes and installed or ordered required idling devices.
- Decided to continue the diesel particulate filter technology and pilot program and provided an update.
- Provided 1-800 numbers to communities to report idling or smoking locomotives.
- Conducted training sessions to inform staff how to implement the new anti-idling and visible emission requirements.
- Provided Visible Emission and Idling Coordinators at each designated rail yard.
- Conducted early reviews of possible short-term action to reduce emission at designated rail yards.
- Held or scheduled community meetings concerning over 50% of the designated yards to discuss early actions to reduce emissions.
- Drafted program review and inspection protocols.
- Announced plans to acquire over 70 new low-emission switch locomotives for operation in the Los Angeles basin in 2006 and 2007. These will replace 50 per cent of the low horsepower units in the basin and in combination with other

locomotive emissions strategies already in place will provide a more than 90 per cent reduction in nitrogen oxides and diesel particulate emissions.

Electro-Motive has supported our railroad customers in these emissions reductions, and will continue to do so. Our efforts include:

- The commitment of significant resources to emissions reduction. We have developed locomotive engines to meet EPA Tier 0, Tier 1, and most recently Tier 2 standards. Our development efforts continue in anticipation of future standard Tiers.
- Active engagement with EPA Assessment and Standards Division in development of the next Tiers of standards.
- Investigation of re-engining possibilities of existing low-powered switching and branch line locomotives with engines meeting Tier 2 standards, in support of customer requirements.

Electro-Motive views voluntary agreements, such as the CARB/Rail MOU as an important way for federally preempted industries and the State to achieve mutually beneficial goals. Without this key tool, the state will not be able to negotiate tangible environmental and social improvements.

Additionally, the termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations that could potentially discourage the use of rail, currently the most environmentally friendly way to move freight, by creating barriers to efficient operations. Staff and the railroads have fulfilled the Air Resources Board's October request and have clarified the termination clause to ensure all parties understand this important part of the MOU.

Rail is a key component of the goods movement system within California and throughout the nation. Electro-Motive supports CARB's efforts to ensure efficient, environmentally sound transportation of goods. We encourage your Board to continue implementing the agreement.

Regards,

Martha A. Lenz
Director, Engine and Engine Systems Design
Electro-Motive Diesel, Inc.

cc: Lori Andreoni - California Air Resources Board
Lanny Schmid - UPRR
Darcy Wheelles - California Environmental Associates

THE CALIFORNIA RAILROAD INDUSTRY

October 27, 2005

Barbara Riordan
Interim Chair
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Riordan:

RE: Comments on the 2005 CARB/Rail MOU

Thank you for the opportunity to present our views regarding the Memorandum of Understanding between the Air Resources Board, the BNSF Railway and the Union Pacific Railroad Company that became effective on June 30, 2005. The railroads together have voluntarily committed to spend about \$30 million over the next three years to carry out the provisions of the MOU. This MOU, together with the 1998 South Coast Fleet Average MOU, remains at the forefront of innovative public/private partnerships in the nation.

Below, we touch upon several issues that we believe are essential to understanding the public health and environmental benefits of the MOU.

Overview

- This MOU is a voluntary agreement between the parties that brings about a 20% reduction over the next three years in particulate emissions from rail yards throughout California.
- The 2005 MOU invites, for the first time, all stakeholders to come together to discuss longer-term emissions reductions technologies that might be applied to locomotives in the future.
- The MOU addresses federally preempted sources. The only way the State could address preempted subjects was through this voluntary agreement that was achieved by the CARB/Railroad negotiations.

The reductions achieved by the MOU are larger and occur sooner than could have been required by any California state, local regulatory, or legislative body. By using a cooperative approach, California has avoided implementation delays due to disputes

over the State and District's legal authority. By adopting a uniform statewide approach, California has also avoided a patchwork of controls that would drive goods movement away from rail and onto the highways.

- Since the 1998 MOU, the railroads have been a unique partner with California in our willingness to enter into enforceable and transparent agreements with the Air Resources Board to accelerate reductions from locomotives and rail operations. ARB's actions have been publicly reviewed and approved by EPA under three Administrations.

Specific MOU Outcomes

- 500-600 captive (intrastate) locomotives will be fit with automatic shutdown devices. This is in addition to the 2,700 interstate units already equipped with these devices. BNSF and UPRR are purchasing new locomotives for use in California that incorporate these devices in their design. By 2010, virtually all locomotives operating in California will be equipped with such devices. We are not aware of any other source category that has volunteered to install – or has been required to install – automatic shut-down devices to minimize idling of all units based in California. In fact, the railroads have committed to have all locomotives that are equipped with automatic shut down devices, not just those captive in California, to limit their idling time to 15 minutes.
- By January 2007, at least 80% of all fuel pumped in California will be low-sulfur fuel. This provision will achieve reductions six years earlier than required by federal regulation.
- At least 99% of all locomotives will comply with stringent smoke regulations. This performance-based requirement is far more stringent than any other mobile source category has committed to achieve.
- At 15 major rail yards throughout California, the railroads will provide a detailed emission inventory for the health risk assessments that will be developed by CARB. This process is premised on the successful program that CARB conducted at UP's Roseville facility. No other transportation or distribution source category has committed to carry out ARB-approved risk assessments at all of their major facilities in California and to explore how risks can best be reduced from these distribution centers.
- These HRAs will be carried out with early and broad community participation. In fact, we believe there is more meaningful public participation provided by the 2005 MOU than would be required by the South Coast Air Quality Management District's recent Regulation 3503.

- The ARB staff will convene meetings at least two times a year with representatives of the railroads, local air districts, and community groups, to discuss options for long-term reductions from locomotives, especially reductions that might come about from the U.S. Environmental Protection Agency's rulemaking for Tier 3 emissions standards. No other mobile source in California has committed to such a broad-based community dialogue.

Eligibility for Moyer Funds to Carry Out Provisions of the MOU

Some parties have expressed concern that under the MOU the railroads could apply for Moyer funds to install automatic idling devices. For the record, the railroads have no intention to apply for Moyer funds for this purpose. We do believe, however, projects that would accelerate the health and environmental benefits by the use of innovative technologies, such as Green Goats or Generator Set Switchers, should be eligible for consideration for Moyer funds. Several local Districts already have considered and approved Moyer funds to expedite the benefits from such emerging technologies.

Limited Release Clause

Section 11(c) of the MOU contains a provision titled "Release from Obligations of this Agreement." The SCAQMD and others have called this provision a "poison pill" and have called for the removal of this clause from the MOU. This clause cannot and should not be removed for several reasons.

The Release clause was negotiated as a reasonable compromise to broader preemptive action by the ARB. The purpose of the Release clause is clearly stated in the first sentence:

"The parties agree that the Participating Railroads shall not be required to comply with more than one agreement, regulation, statute or other requirement to meet the same goal of any Program Element contained in this Agreement. . . ."

A single, uniform statewide MOU provides statewide benefits while avoiding duplicative, multiple, and conflicting requirements.

The ARB is the only entity that can provide statewide regulations—local air districts cannot ensure the necessary consistency. The 2005 MOU requirements were agreed to by the railroads because they could be complied within the context of a nationwide railroad system regulated nationally. Local air district regulations would undermine the 2005 MOU's premise and an efficient railroad network.

Letter to Barbara Riordan
Comments on CARB/Rail MOU
October 27, 2005

Conclusion

Both railroads appreciate the opportunity to provide comments on the 2005 statewide rail yard MOU. Taken together, compliance with the elements of this new, innovative MOU will provide immediate reductions of particulate matter for people who live near and adjacent to railyards throughout California.

Sincerely,

Kirk Marckwald
on behalf of the California Railroad Industry

cc: Catherine Witherspoon



ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564

Michael J. Rusk
Associate General Counsel

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E-Mail: mrusk@aar.org

October 27, 2005

Privileged and Confidential

Ms. Barbara Riordan, Interim Chairman
Members of the California Air Resources Board
Ms. Catherine Witherspoon, Executive Officer
1001 I Street
P.O. Box 2815
Sacramento, CA 95812-2815

Re: **Public Meeting to Consider Public Comment on the ARB/Railroad Statewide Agreement for a Particulate Emissions Reduction Program at California Rail Yards, Entered Into on June 24, 2005, and to Take Action as Appropriate -- Air Resources Board Agenda Item 05-9-1 -- October 27, 2005**

Dear Ms. Riordan, Members of the ARB and Ms. Witherspoon:

The Association of American Railroads (AAR) represents the major North American railroads, which account for the vast majority of rail mileage, employees, and revenue in Canada, Mexico, and the United States. The AAR supports the ARB Staff Recommendation on page ES-12 of the October 13, 2005 staff report.

The June 24, 2005 statewide agreement makes real progress towards reducing emissions from rail yards throughout California. It directly responds to community concerns about yard operations statewide and provides an innovative, unique framework for working cooperatively with communities and local districts throughout the state. It could only have been accomplished as a result of a progressive partnership between the ARB and our major California members, the Union Pacific Railroad Company and the BNSF Railway Company. It reflects the UPRR's and BNSF's continuing and substantial commitment to invest in clean air for California communities.

As the state observed in recent goods movement initiatives, rail is the most environmentally friendly method of transporting freight. Over the past several years, both the UPRR and BNSF have made significant progress in modifying their California operations to reduce emissions. The June 24 agreement with ARB will build upon this progress - including what we are learning from the risk assessment process that UPRR and BNSF are currently undertaking - to maintain the railroads' role as an environmental leader in the transportation industry.

Reductions of the magnitude provided in the June 24 agreement will certainly be costly and difficult to achieve. A patchwork of local or state regulations throughout California would interfere with railroad operations at the same time encouraging time-consuming and costly litigation. The June 24 agreement establishes a consistent and uniform statewide program.

It is unfortunate that the South Coast AQMD opposes the June 24 agreement. It is important to remember that the California freight railroads and the ARB staff fashioned the June 24 agreement to achieve reductions statewide while avoiding a modal shift to on-road and on-highway transport and rerouting of trains through even more communities. The state understands and respects the interests of these communities throughout California.

To be clear:

1. **Federal law preempts the kinds of measures in the June 24 agreement and SCAQMD regulations.**

Both ARB staff and the railroads have exchanged views about the applicable federal laws and have agreed that disputes about the scope of federal preemption are not productive. The June 24 agreement is designed to avoid such disputes and a lengthy resolution through litigation.

By contrast, SCAQMD commissioned three legal memoranda as part of its comments to the ARB concerning the June 24 agreement. AAR has reviewed those memoranda prepared by former Justice Cruz Reynoso, Seth Waxman and David Nawi. The AAR submits that SCAQMD's three legal memoranda are substantially incorrect and inconsistent. For the record, attached in Exhibit A is a brief outline of several reasons why they are incorrect. These three memoranda contain many errors.

For any agency to adopt regulations based on SCAQMD's legal analyses can substantially harm California's air quality programs. In one recent example, SCAQMD's decisively lost the EMA case involving its in fleet rules in the U.S. Supreme Court (*see Engine Mfrs Ass'n v. South Coast Air Quality Mgmt. Dist.*,

541 U.S. 246 (2004)). That 8-1 opinion clearly recognized and affirmed the intent of Congress to establish a national program governing emissions from mobile sources including trucks, buses, and cars. Since the preemption contained in the federal Clean Air Act is even stronger for locomotives than for trucks, buses, and cars, the SCAQMD rail regulatory program creates continuing legal uncertainty at best.

SCAQMD did not ask Justice Reynoso, Wauman, or Nawi to address the legality of the even more disruptive permitting and operational requirements that SCAQMD has started to impose on the railroads through district regulation. Given the weakness of their legal argument that ARB could have adopted the requirements of the June 24 agreement by regulation, there is no credible argument that the further involuntary regulatory constraints that SCAQMD has proposed could avoid federal preemption. ARB should reject SCAQMD's suggestion that ARB withdraw from the June 24 agreement in order to permit SCAQMD to apply its own requirements, which cannot withstand scrutiny under federal law.

2. The railroads cannot agree both to a statewide rail yard program and to local controls.

The October 13 ARB staff report correctly concludes that the railroads would not have entered the June 24 agreement that could obligate them to two overlapping and inconsistent methods of control. Given the number of Program Elements in the June 24 agreement, the number of rail yards, and the number of local districts and other interested agencies, the number of potentially overlapping requirements is potentially much larger than two. It's more like two hundred. It's obvious that transport by rail would be disrupted if railroads were ever subject to such a patchwork of local controls.

The railroads made serious concessions in the June 24 agreement, just as they did in the 1998 MOU that has provided and continues to provide significant emissions benefits to the SCAQMD and the state. From the railroads' standpoint, there is no point in their making such concessions if the state, a local air district or other local agencies can make an end run around the June 24 agreement by adopting additional or parallel regulatory requirements. That is why both the 1998 MOU and the June 24 agreement contain release clauses permitting the railroads to withdraw from those agreements if another authority adopts or attempts to enforce requirements on the same subject.

SCAQMD complains in its comments that the release clause will preclude its efforts to adopt its own rules about railroad operations, including locomotive idling, and will inhibit its desire to prosecute local "nuisance" cases against railroads. But SCAQMD's own efforts to restrict the railroads' operations, whether through rules directly restricting those operations or through penalties imposed in "nuisance" prosecutions, are clearly preempted by federal law, and also impermissibly infringe on ARB's jurisdiction as a matter of state law. If SCAQMD is precluded by the release provision from making such rogue regulatory efforts, that is just as it should be. All SCAQMD loses is the opportunity to engage in litigation about its overreaching regulatory efforts, while the state gains important concessions that it could not have obtained without the railroads' innovative and voluntary agreement.

3. AAR and its members oppose a local patchwork of rail yard or railroad regulation throughout California.

AAR and its members opposed the SCAQMD's recent adoption of Rule 3503 "Emissions Inventory and Diesel Related Risk Assessment for Rail Yards" and oppose SCAQMD's entire Regulation XXXV package of rail yard and locomotive regulations. The SCAQMD rules interfere with major elements are covered by the June 24 statewide agreement with ARB. The SCAQMD ruling package is not only preempted but is also technically deficient, extreme, infeasible, and wasteful. The railroads participated fully in the SCAQMD rulemaking process and will continue to do so to attempt to enlist their cooperation in the statewide program established in the June 24 agreement.

If local districts, like SCAQMD, and other local agencies were to be free to pass such regulations, we would be left with a patchwork quilt of local laws that could make it impossible to ship goods by rail from where they are produced or imported to where they are needed or exported. The adverse effect on the national, interstate rail network, on the national and California economies and especially on the Ports of Los Angeles, Long Beach, San Diego and Oakland would be severe both environmentally and economically.

* * * *

For all these reasons, the AAR supports the June 24 agreement and urges the ARB Board to ratify it.

The AAR also supports the other ARB staff recommendations, namely:

Ms. Barbara Riordan, Chair
Members of the California Air Resources Board
Ms. Catherine Witherspoon, Executive Officer
October 27, 2005
Page 5

- The railroads are ready and willing to work with the ARB staff to clarify terms in the June 24 agreement.
- The railroads support reports to the ARB Board periodically on progress in implementing the program elements of the June 24 agreement.
- The railroads support an assessment of the efforts to work with communities, local and districts, and other interested stakeholders.

AAR and its members are committed to successfully implementing the June 24 agreement. On behalf of our members, we respectfully request the ARB Board to direct the ARB staff to continue to implement the June 24 agreement

Very truly yours,

Michael J. Rush ^{NE}

Michael J. Rush, Esq.

cc: Mark Stehly (BNSF)
Lanny Schmid (UPRR)
Russell Light, Esq. (BNSF)
David Young, Esq. (UPRR)
Michael R. Barr, Esq. (Pillsbury, Winthrop, Shaw Pittman)
Kirk Marckwald

of San Francisco, 992 F.Supp. 1149, 1178 (rejecting application of market participant theory where locality used contract requirements to pursue regulatory goals).

SCHOTT & LITES

A D V O C A T E S

1530 14th Street • Sacramento, CA 95814
916.444.7188 • Fax 916.444.8947Philip H. Schott
Tim Scholt
Jim Lites
Lisa Bernal
Shawdi Palamaki

October 24, 2005

Barbara Riordan
Interim Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

RE: Memorandum of Understanding (MOU): Railroads: SUPPORT

Dear Ms. Riordan:

On behalf of the California Association of Port Authorities, we are pleased to support the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company. CAPA is comprised of the state's eleven publicly-owned, deep water commercial ports. We would like to commend ARB for its leadership in addressing the complicated issues surrounding goods movement and trade in California. We believe this agreement will improve the goods movement systems and facilitate trade in California by reducing air emission around rail yards, without sacrificing rail efficiency. Additionally, this cooperative agreement has allowed California to avoid unnecessary delays due to legal challenges regarding the State's legal authority.

The MOU will reduce particulate emissions from rail yards throughout California by approximately 20 percent over the next three years. The air emission reductions achieved by the agreement are larger and will be implemented faster than any proposed regulatory requirement or legislation.

CAPA views voluntary agreements, such as the CARB/Rail MOU as an important way for federally preempted industries and the State and to achieve mutually beneficial goals. Without this key tool, the state will not be able to negotiate tangible environmental and social improvements.

Lastly, the termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations that could potentially discourage the use of rail by creating barriers to efficient operations.

As you know, rail is the most environmentally sound way to move goods onshore and is a key component of the goods movement system the within California and thorough out the nation. CAPA supports the ARB's efforts to ensure efficient, environmentally sound transportation of goods. We encourage your Board to ratify the agreement, without amendments, at the upcoming October 27th hearing.

Thank you again for this opportunity to support this innovative MOU.

Sincerely,
adi Palamaki



PORT OF OAKLAND

October 27, 2005

Ms. Barbara Riordan
Interim Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

RE: PORT OF OAKLAND (PORT) COMMENTS TO MEMO OF UNDERSTANDING (MOU) ENTERED BY CALIFORNIA AIR RESOURCES BOARD (CARB) AND UNION PACIFIC RAILROAD COMPANY AND BNSF RAILWAY COMPANY

Dear Ms. Riordan:

The Port of Oakland (Port) appreciates this opportunity to comment on the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company. The Port supports this statewide approach to reduce emissions from major rail yards and we ask the Board to support staff's recommendations and uphold the MOU at today's meeting.

Rail is the most environmentally sound way to move goods over land and is a key component of the goods movement system the within California and for the nation. This initiative will improve rail's environmental performance while maintaining its operating efficiencies.

Specifically, the MOU will:

- Limit non essential idling by installing idling reduction devices on intrastate locomotives over the next three years.
- Ensure that 99 percent of all locomotives operating in California pass smoke inspections, as well as quickly identify and repair smoking locomotives.
- Require that at least 80 percent of the fuel used in California by January 1, 2007 is low sulfur fuel—six year earlier than required by federal law.
- Conduct health risk assessments at 17 rail yards across the state and use these studies to identify additional measures to reduce air emissions.

86718.v1

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Telephone: (510) 627-1100 ■ Facsimile: (510) 627-1826 ■ Web Page: www.portofoakland.com

Letter Barbara Riordan
Re: Port of Oakland (Port) Comments to Memo
of Understanding (MOU) Entered by
California Air Resources Board (CARB)
and Union Pacific Railroad Company and
BNSF Railway Company

October 26, 2005

Page 2

Under the MOU, Union Pacific's Oakland rail yard is included as one of the 17 designated yards in the State that will be subject to a Health Risk Assessment that will include input from the Port, CARB, Bay Area AQMD staff, local residents, and Union Pacific Railroad. The Oakland area, including the Port, will greatly benefit from this process and potential for reduced rail yard emissions.

The Port supports voluntary agreements, such as the CARB/Rail MOU, as a means for federally preempted industries and the State keep to achieve mutually beneficial goals. The Port sees this MOU as an important starting point in reducing emissions and anticipates that the longer term MOU requirements to discuss changes in railroad operations with local air districts and stakeholders will lead to additional emission reductions in the Oakland area.

The CARB staff has shown great leadership by collaboratively addressing goods movement issues and creating a statewide solution to reduce rail yard emissions by 20 percent over the next three years. The railroads are an important component of both the Bay Area and the California economies and this agreement achieves important reductions in air emissions, without harming rail's economic competitiveness. Again, the Port supports this first step to ensure that the necessary movement of goods is accomplished with a minimum impact to the environment. We look forward to continuing our collaboration with the CARB and encourage your Board to support staff's recommendations and to uphold the agreement at today's hearing.

Sincerely,



Roberta L. Reinstein
Environment & Safety Manager

cc: Jerry Serventi, Director of Engineering, Port of Oakland
Wilson Lacy, Director of Maritime, Port of Oakland
Jerry Bridges, Executive Director, Port of Oakland



The California Trade Coalition

A Coalition Working to Keep California Competitive in a Global Economy

October 24, 2005

American Chemistry Council

APL Ltd.

Associated General
Contractors of California

California Association
of Port Authorities

California Business
Properties Association

California Business
Roundtable

California Chamber
of Commerce

California Manufacturers
& Technology Association

California Nevada Cement
Manufacturers Council

California Raisin Industry

California Racetrack
Association

Consumer Electronics
Association

Grocery Manufacturers of
America

Industrial Environmental
Association

International Council
of Cruise Lines

International Council
of Shopping Centers

Nelson Navigation Company
Hawaii Inc.

Pacific Merchant
Shipping Association

Retail Industry Leaders
Association

Society of the
Plastics Industry

SSA Marine

Western Home
Painting Association

Western States
Petroleum Association

Barbara Riordan
Interim Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

RE: Memorandum of Understanding (MOU); Railroads: SUPPORT

Dear Ms. Riordan:

California Trade Coalition (CalTrade) is pleased to support the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company. CalTrade would like to commend ARB for its leadership in addressing the complicated issues surrounding goods movement and trade in California. We believe this agreement will improve the goods movement systems and facilitate trade in California by reducing air emission around rail yards, without sacrificing rail efficiency. Additionally, this cooperative agreement has allowed California to avoid unnecessary delays due to legal challenges regarding the State's legal authority.

The MOU will reduce particulate emissions from rail yards throughout California by approximately 20 percent over the next three years. The air emission reductions achieved by the agreement are larger and will be implemented faster than any proposed regulatory requirement or legislation.

CalTrade views voluntary agreements, such as the CARB/Rail MOU as an important way for federally preempted industries and the State and to achieve mutually beneficial goals. Without this key tool, the state will not be able to negotiate tangible environmental and social improvements.

Lastly, the termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations that could potentially discourage the use of rail by creating barriers to efficient operations.

As you know, rail is the most environmentally sound way to move goods onshore and is a key component of the goods movement system the within California and thorough out the nation. CalTrade supports the ARBs efforts to ensure efficient, environmentally sound transportation of goods. We encourage your Board to ratify the agreement, without amendments, at the upcoming October 27th hearing.

Thank you again for this opportunity to support this innovative MOU.

Regards,
The California Trade Coalition



**California Council for
Environmental and
Economic Balance**

100 Spear Street, Suite 805, San Francisco, CA 94105

VIA ELECTRONIC MAIL

October 25, 2005

Clerk of The Board
Air Resources Board
1001 I Street
Sacramento, CA 95814

RE: LETTER IN SUPPORT OF THE ARB/RAILROAD MOU

Dear Members of the Air Resources Board:

The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit organization of business, labor and community leaders that seeks to achieve the State's environmental goals in a manner consistent with a sound economy. We have reviewed the second ARB/Railroad Statewide Agreement establishing a particulate emission reduction program at California rail yards entered into June 24, 2005. We have concluded that this agreement is in the best interests of the State and its residents and should be affirmed by the full Air Resources Board.

CCEEB has historically supported voluntary efforts by businesses to improve air quality. The June 24th agreement will result in substantial reductions of emissions that are not otherwise required by Federal or State law or regulation and would not otherwise occur in the absence of the agreement.

This is the second MOU between railroads and the ARB. The first agreement on locomotives signed in 1998 will ultimately result in a 67% reduction of emissions in the South Coast from this source. Through the provisions of the current MOU, the signatory railroads are implementing significant reductions in locomotive emissions in dozens of local communities across the state.

The June 24th Memorandum of Agreement provides certainty for emission reductions from sources CCEEB believes to be specifically exempted from State and local air quality regulation by Federal law. While some articulate a view that individual communities or districts may have the authority to institute their own regulatory schemes over rail yard activity, this belief is disputed by many and is at best uncertain.

in outcome. Pursuing this view is fraught with the threat of lawsuits and delay. Even in the unlikely event that the legal system ultimately was to affirm State and/or local jurisdiction, implementation would likely be challenged and the emission reductions garnered by this agreement further delayed for a lengthy period of time. Those parties who desire local rather than Federal authority over the railroads should pursue this by changing Federal law rather than deferring real emission reductions while waiting for resolution of a lengthy and highly uncertain legal process.

This agreement, when implemented, will result in health risk assessments at 17 rail yards across the state, using a consistent methodology that will lead to specific risk reduction measures. It will accelerate implementation of ultra low sulfur diesel fuel in California by six years. Its limitations on non-essential idling and required repair of locomotives with excessive smoke will add to the benefit of neighboring communities.

Some have questioned the process used by the Air Resources Board staff to negotiate the agreement. CCEEB believes that the Air Resources Board took appropriate action in their July 21, 2005 public Board hearing when a new process was approved to address issues of public awareness and input as well as clarifying the appropriate role for the Board and the staff when negotiating future agreements.

Others have questioned the release clause embedded in the agreement allowing the railroads to opt out of their responsibility to implement a specific program element under the statewide agreement in the event of a local rule or regulation that overlaps a program element in the statewide agreement (other elements of the agreement would stay in force). There is perceived and real value in having a single regulatory system over railroads operating in California. CCEEB believes the release clause explicitly recognizes this value and it is an integral part of the total package negotiated by the Air Resources Board staff and the railroads. It should be viewed neither as a precedent for future agreements nor as something that can be surgically removed while leaving the rest of the agreement in place.

Rather than rescind the Agreement as some request, CCEEB urges that you affirm and not roll back these enforceable reductions. The Agreement contains provisions for further reductions and CCEEB urges that the board maintain its commitment to these provisions and aggressively pursue improvements as they become available.

Sincerely,



Victor Weisser
President



HARBOR ASSOCIATION OF INDUSTRY & COMMERCE

P.O. BOX 4250 • Sanland, CA 91041

Phone: 818-951-6088 • Fax: 818-353-5976

Website: www.harborassociation.com • E-mail: info@harborassn.com

October 26, 2005

Honorable Chair & Members
California Air Resources Board
1001 I Street, PO Box 2815
Sacramento CA 95812

RE: Support for Private, Voluntary Agreements

The Harbor Association of Industry and Commerce (HAIC) is one of the most effective and respected industrial associations in the South Bay and Harbor areas of Southern California. Its mission is to provide a collective voice for the harbor business community on important issues pertaining to economic, environmental and public policy; provide a forum for industry to speak out on governmental, energy and environmental issues that directly affect membership; facilitate foreign and domestic commerce through the ports of our harbor benefiting the economic welfare of our region; participate in public hearings and meetings on behalf of its membership, reflecting membership views and to disseminate information to the membership on issues, projects and developments that are of importance to them.

The HAIC strongly supports voluntary and incentive based pollution reduction agreements such as the MOUs between the ARB and the BNSF and Union Pacific railroads. By using a cooperative approach, government can achieve more immediate benefits to the public than through that of a rule making process or legislative remedy.

Given the preemptions found in the Clean Air Act, only through voluntary agreements can State and local government effectively reduce mobile air emissions. Although some may advocate using other means, protracted litigation and political opposition makes those means far from certain in achieving air emission reductions.

Additionally, it is important to remember that the goal of an agreement is quantifiable air emission reductions, not public participation. Although we believe that the public has a right to be notified, and to make comment upon such agreements, the important negotiations of these agreements can only be decided between the agency, and the affected industry.

Lastly, we support the reduction of air emissions in California and believe that the greatest reduction and improvement to air quality will be achieved only through the continued partnership between government and business. We believe that voluntary, private agreements are the necessary framework for that partnership.

Sincerely,

A handwritten signature in dark ink, appearing to read "Gwen Butterfield".

Gwen Butterfield
President



LAEDC

*Economic Vitality,
Trade & Jobs*

October 26, 2005

Barbara Riordan
Interim Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Riordan,

We are writing to express our support of the ARB/Railroad Statewide Agreement in reducing particulate emissions from rail yards. Reducing pollution and improving our quality of life should be a goal of every California business and community in the State. Your agency deserves recognition for its foresight in bringing the two railroads to the table to agree to a voluntarily reduction of rail yard pollution. Thank you for your leadership.

I would also like to share with you our positive experiences with the railroads. We worked closely with them and the 5-County Transportation Commissions in Southern California to address a public private partnership that would solve many of the goods movement challenges facing our communities in Southern California. BNSF and UP were always willing to work to address pollution problems in partnership with the 5-County Transportation Commissions to find funding solutions for the needed environmental and goods movement projects identified. One of our final products was the "West Coast National Freight Gateway" study and it is available on our website. The win-win is when businesses rather than government identify and pursue environmental solutions.

We are ready and willing to work with your agency on encouraging other business leaders to work with you on improving our precious air quality. It is a key to our economic vitality and we support the recommendation to stand by this agreement.

Again, congratulations and please keep up the good work you are doing to improve our quality of life in California.

Sincerely,



Lee Harrington
President and CEO

Los Angeles County Economic Development Corporation



WORLD TRADE CENTER ADDRESSING
LOS ANGELES - LONG BEACH

350 South Figueroa St., Suite 172
Los Angeles, California 90071 USA
t: 213.690.1506 f: 213.690.1878
info@wtrc.com

One World Trade Center, Suite 285
Long Beach, California 90801 USA
t: 562.485.7078 c: 562.485.7071
info@wtrc.com



3040 Saturn Street, Suite 203, Brea, CA 92821 - Phone: 714.577.5819 - Fax: 714.577.5822

October 26, 2005

Mr. Erik White
California Air Resources Board
1001 I Street
Sacramento, CA 95814

**Re: CARB/Rail Memorandum of Understanding (MOU) with
BNSF Railway and Union Pacific**

Dear Mr. White:

I am writing in support of the staff recommendation regarding the above referenced matter to: 1) continue implementing the agreement, 2) clarify terms in the agreements, and 3) report back to the Board on progress to implement the agreement within 6 months.

We are a transportation planning and management group and over the last several years have worked on many projects with the BNSF and UP Railroads and have found that they too are concerned about the environment, particularly air quality. We understand that the MOU provides for the following assurances:

- ✓ This is a voluntary agreement between the parties that brings about a 20% reduction in particulate emissions from rail yards throughout California over the next three years. For the first time, it invites all stakeholders to the table to discuss longer-term emissions reductions technologies.
- ✓ The reductions achieved by the agreement are greater and quicker than could have been required by any California regulatory or legislative body. By using a cooperative approach, California has also avoided implementation delays due to disagreements over the State's legal authority.
- ✓ The MOU addresses federally preempted sources. The only way the State could address preempted subjects was through a voluntary agreement arrived at by CARB/Railroad negotiations. You cannot negotiate voluntary agreements through a rulemaking-type process.

- ✓ The termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations.
- ✓ 500-600 captive (intrastate) locomotives will be fit with automatic shutdown devices. This in addition to the 2,700 Interstate units already equipped with these devices. All new locomotives are equipped with these devices.
- ✓ At least 80% of all fuel placed in units in California will be low-sulfur - 6 yrs earlier than required by federal regulation.
- ✓ At least 99% of all units will comply with stringent smoke regulations - a much higher compliance rate than any other mobile source.
- ✓ Health risk assessments with community participation will be carried out at 16 major rail yards throughout California, based on the successful program that CARB conducted at UP's Roseville facility.

Again, we strongly support the staff recommendation as presented.

Sincerely,

Christopher Becker,
President, CBA Inc.



8030 County Highway 101 East • Shakopee, Minnesota 55379 • 952-885-8122
955 Green Valley Road • London, Ontario N6W 1B4 • 519-452-1233

October 27, 2005

Barbara Riordan
Interim Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Riordan:

ZTR Control Systems would like to take this opportunity to express our support for the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB), Union Pacific Railroad Company and BNSF Railway Company. We strongly urge the Board to uphold the MOU at your meeting.

ZTR Control Systems has been a manufacturer of control systems for the railroad industry since 1987. One of our products is SmartStart®, an automatic engine idle reduction device for locomotives. Our core business customers are in North America where we work with the railroads to improve the performance of their locomotives. In the past, there has been a patchwork of a few small local demonstration projects to implement locomotive automated idle reduction. The MOU, with its definitive action plan to reduce emissions, is well thought out and consistent for the entire state. It is our hope that it will prove to be a model to be used across the entire United States.

Specifically, the MOU will:

- Limit non essential idling by installing idling reduction devices on Class I intrastate locomotives over the next three years.
- Ensure that 99 percent of all Class I locomotives operating in California pass smoke inspections, as well as quickly identify and repair smoking locomotives.
- Require at least 80 percent of the fuel used by Class I locomotives in California by January 1, 2007 is low sulfur fuel—six year earlier than required by federal law.
- Conduct health risk assessments at 17 Class I yards across the state and use these studies to identify additional measures to reduce air emissions.

The MOU is stimulating the installation of automatic stop start devices in California. For example, 6 Union Pacific Railway locomotives have had idle reduction systems installed and we anticipate the installation of approximately 24 more automatic stop start retrofit devices by year end. As the MOU



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955 Green Valley Road • London, Ontario N6M 1E4 • 519-452-1233

continues to gain momentum, additional units will be retrofit, resulting in reduced locomotive emissions that will benefit communities around rail yards.

ZTR Control Systems views voluntary agreements, such as the CARB/Rail MOU as an important way for federally preempted industries and the State and to achieve mutually beneficial goals. Without this key tool, the state will not be able to negotiate tangible environmental and social improvements.

Additionally, the termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations that could potentially discourage the use of rail by creating barriers to efficient operations.

Rail is the most environmentally sound way to move goods and is a key component of the goods movement system within California and thorough out the nation. ZTR Control Systems supports CARB's efforts to ensure efficient, environmentally sound transportation of goods. We encourage your Board to support staff's recommendations to continue implementing the agreement at your hearing.

Regards,

Peter Trenc
Peter Trenc
Account Manager
ZTR Control Systems

NATIONAL RAILWAY EQUIPMENT CO.



CUSTOMER SERVICES' ORGANIZATION

TELEPHONE: 949.492.9980

FAX: 949.492.9982

SAN CLEMENTE, CALIFORNIA 92672

October 27, 2005

Barbara Riordan
Interim Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Riordan:

National Railway Equipment Company (NREC), supports the Memorandum of Understanding (MOU) recently entered into between California Air Resources Board (CARB) and the two Class I railroads, Union Pacific Railroad and the BNSF Railway Company. It will promote the development of new technology, such as ours, earlier than would have otherwise occurred.

NREC, headquartered in Mt. Vernon, IL, is a privately owned company that provides products and services to the global rail transportation industry. Two of the largest American railroads, Union Pacific and the BNSF, are among that global rail customer network.

As a supplier to both companies, NREC works closely with both railroad's mechanical and engineering departments to develop new products and technologies to improve overall performance of the railroad's locomotive fleet. Over many years, NREC has worked closely with both the UP and the BNSF developing new components, including idle-limiting installations, and most recently, a new Low Emission Switching locomotive, now under test on the UPRR.

While NREC is working diligently to make improvements in rail yard switching locomotive emission technology to meet the latest air standards, it applauds the two Class I railroads' decision to voluntarily offer to meet those standards well in advance of the required timetable.

The MOU will:

- Limit non-essential idling on Class I railroad locomotives.
- Ensure that 99% of all Class I locomotives operating in California pass smoke inspections, and accelerates all smoking locomotive repairs.
- Require 80% of fuel used by Class I railroad locomotives in California to burn low sulfur fuel by January 1, 2007. This is six years in advance of the requirement by federal law.
- Conduct health risk assessments with community involvement at 17 major rail yards throughout California, similar to the successful program that CARB conducted at UP's Roseville facility.

With this voluntary agreement worked out between both Class I railroads and CARB, an estimated 20% reduction in particulate matter (PM) emissions from rail yards throughout the state will be met over the next three years. Other emission constituents will also receive attention with longer-term emission reduction technologies being developed through the dialogue between the parties to the MOU.

The reductions achieved through this cooperative approach and voluntary agreement, are larger and sooner than could have been made by any state regulatory or legislative body due to the delays that may occur over establishing the State's legal authority.

NREC believes that a voluntary, pro-active approach, the MOU, represents the best, and most timely, course to mitigate the existing emissions from railroad locomotives and railroad operations.

In closing, rail is the most environmentally sound way to move goods and is vital to the state of California and the nation. NREC supports CARB's efforts to ensure the efficient and environmentally sound transportation of these goods, while at the same time maintaining the on-going emission reductions as set forth in the MOU and beyond.

On behalf of NREC, we encourage your Board to support staff's recommendations to continue implementing the agreement at today's meeting.

Regards,



Dave Davies

Senior Executive Manager

NREC-Pacific/Southwest Region



Hybrid Technologies Corp.

October 27, 2005

Barbara Riordan
Interim Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Riordan:

Railpower Hybrid Technologies Corp supports the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company. We strongly urge the Board to uphold the MOU at today's meeting.

Specifically, the MOU will:

- Limit non essential idling by installing idling reduction devices on Class 1 intrastate locomotives over the next three years.
- Ensure that 99 percent of all Class 1 locomotives operating in California pass smoke inspections, as well as quickly identify and repair smoking locomotives.
- Require at least 80 percent of the fuel used by Class 1 locomotives in California by January 1, 2007 is low sulfur fuel—six year earlier than required by federal law.
- Conduct health risk assessments at 17 Class 1 yards across the state and use these studies to identify additional measures to reduce air emissions.

Railpower views voluntary agreements, such as the CARB/Rail MOU as an important way for federally preempted industries and the State and to achieve mutually beneficial goals. Without this key tool, the state will not be able to negotiate tangible environmental and social improvements.

Additionally, the termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations that could potentially discourage the use of rail by creating barriers to efficient operations.

Rail is the most environmentally sound way to move goods and is a key component of the goods movement system the within California and throughout the nation. Railpower supports CARB's efforts to ensure efficient, environmentally sound transportation of goods. We encourage your Board to support staff's recommendations to continue implementing the agreement at tonight's hearing.

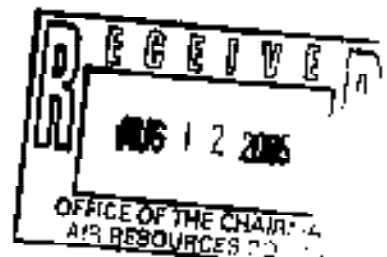
Regards,

A handwritten signature in black ink, appearing to read "Gary Eelman", with a stylized flourish at the end.

Gary Eelman
Executive Vice President & General Manager
Railpower Hybrid Technologies Corp

PMSA

U. I. C. C.
2005
letter



August 10, 2005

Cindy Tuck, Chair
California Air Resources Board
1001 I Street, PO Box 2815
Sacramento, CA 95812

XC: Board Members 05-9-1
Chairman CEW 9/22/05
TJ MHS
KT Legal (RC/MT) SSD

RE: Pollution Reduction Agreement (MOU) Between ARB and the Railroads

Dear Chair Tuck,

On behalf of the Pacific Merchant Shipping Association, thank you for the opportunity to comment on the historic Pollution Reduction Agreement reached by the Board with the Union Pacific and Burlington Northern Santa Fe railroads. We support the current agreement as well as the use of a MOU concept to achieve real air emissions reductions from mobile, non-state regulated sources.

The reductions achieved by the agreement are larger and sooner than could have been required by any California regulatory or legislative body. By using a cooperative approach, California has also avoided implementation delays due to disagreements over the State's legal authority.

Because this MOU addresses federally preempted sources, the only way the State could address preempted subjects was through a voluntary agreement arrived at by direct negotiations between CARB and the railroads. You cannot negotiate voluntary agreements through a rulemaking-type process or with non-signatory stakeholders at the negotiating table.

We applaud both your agreement itself and the creative motivation to reduce emissions through a non-traditional, voluntary public-private partnership that you have undertaken.

Sincerely,

T. L. Garrett
Vice President





GE Infrastructure
Rail

David B. Tucker
Vice-President

2901 East Lake Road
Erie PA 16531
USA

T 814 876-5577
F 201-477 6894

October 27, 2005

Barbara Riordan
Interim Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms Riordan:

I want to take a moment to inform you about several initiatives that Union Pacific Railroad Company and BNSF Railway Company are undertaking in partnership with General Electric.

Both of these railroads have aggressively embraced a number of new technologies, from cleaner-burning locomotives to software and hardware solutions that reduce emissions, improve fuel efficiency and reduce unnecessary idling in California. For example, all new locomotives are equipped with Auto Engine Start Stop (AESS), which reduces idling emissions and is especially helpful around rail yards.

Union Pacific and BNSF currently have more than 400 GE Evolution Series locomotives in their fleets. Both railroads were early adopters of this technology, taking delivery more than 18 months ahead of the EPA Tier II requirement. By the end of 2006, the two railroads will have more than 850 Evolution locomotives in active operation.

By investing more than \$1.6 billion in GE technology, these two railroads have demonstrated their commitment to improving emissions in California and across the United States. In addition, both railroads are helping GE to develop a hybrid locomotive and to explore new ways to make reductions beyond mandated emissions requirements.

GE and its customers, including UPRR and BNSF, continue to invest in the research and development of new technologies, ensuring that rail continues to be the most environmentally sound way to move goods within California and throughout the nation.

Sincerely,

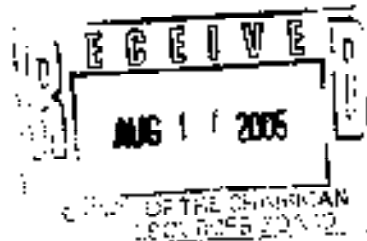
David B. Tucker
Vice-President
GE Infrastructure
Rail

XC: Board Members 05-9-1
 Chairman CEW 8/22/05
 TJ MHS
 KT Legal (RC/MT) SSD



Los Angeles Area
 Chamber of Commerce

August 15, 2005



Ms. Cindy Tuck
 Chair
 California Air Resource Board
 1001 "T" Street
 Sacramento, CA 95814

Re: CARB MOU with Railroad Companies.

Dear Ms. Tuck:

On Behalf of the Los Angeles Area Chamber of Commerce, I am writing in support of the recent Memorandum of Understanding (MOU) entered into by the California Air Resource Board (CARB) and Union Pacific Railroad Company. This MOU will further improve rail's environmental benefits and improve public health as well as the quality of life for people living near rail yards.

The LA Area Chamber of Commerce recognizes that, from an environmental and energy efficiency perspective, rail is the provider of choice for the goods movement sector of our economy. There are lower emissions of NOx and PM per ton of freight moved than the other available alternatives. This efficiency is important to California's goods movement system. Additionally, the MOU process is a vital tool for the state and federally preempted industries to negotiate agreements that result in tangible environmental and social improvements.

Overall Comments

- This is a voluntary agreement between the parties that brings about a 20 percent reduction in particulate emissions from rail yards throughout California over the next three years and are *larger and sooner* than could have been required by any California regulatory or legislative body.
- By using a cooperative approach, California has also avoided implementation delays due to disagreements over the state's legal authority.
- Under MOU-and for the first time-all stakeholders are invited to the table to discuss long-term emissions reductions technologies, which will benefit their communities.
- The MOU addressed federally preempted sources. The only way the State could address preempted subjects was through a voluntary agreement arrived at by CARB/Railroad negotiations. Voluntary agreements cannot be negotiated through a rulemaking-type process.
- The termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations.

13

August 15, 2005
Page Two

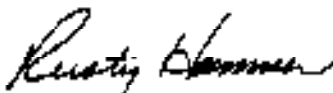
- Over the past several years, the railroads have been a unique partner with California in their willingness to enter into enforceable and transparent agreements with the Air Resources Board to accelerate reductions from locomotives and rail operations. CARB's action have publicly reviewed and approved by EPA under two Administrations.

Claims that the MOU is a "Pulson Pike"

- First does it make sense for the 30 or so air district in the state to have different standards? With 43 percent the nation's imports now entering through L.A. County and being distributed through multiple air districts, it seems only practical that the state enter into an agreement with industry that is constantly moving through its multiple jurisdictions.
- Just think of the logistics quagmire of each district having its own standards on clean fuel, idling, smoke enforcement standards in several districts all applying to same locomotives? Not only would enforcement of different rules be next to impossible, the added costs of rail would lead to more trucks on the road, which as previously stated, creates more emissions than trains.
- Under existing law (including the Federal Clean Air Act, the Federal Railroad Safety Act, the Federal Interstate Commerce Commission Termination Act and many other laws), there is already a uniform federal system of equipment and operational requirements for railroads. The courts have determined that a relatively broad federal preemption exist to prevent a patchwork of local controls. Federal agencies have adopted major broad railroad and locomotive regulatory programs under controlling federal legislation.
- At the state level in California, the California legislature and CARB have acted to clearly indicate that the subject of this agreement have become exclusively matters of state concern and should be regulated as such.

Thank you again for this opportunity to support this innovative MOU, which will improve air quality for millions of Californians as the railway companies invest in cleaner technologies on an accelerated timetable.

Sincerely,



Russell J. Hammer
President & CEO



• 916/471-1100
• 916/471-1101
• 916/471-1102

• 916/471-1103
• 916/471-1104
• 916/471-1105

• 916/471-1106

XC: Board Members 05-9-1
Chairman CEW 10/27/05
TJ MHS
KT Legal (RC/MT) SSD

September 1, 2005



Cathy Luck
Chair
California Air Resources Board
100 J Street
Sacramento, CA 95814

Dear Ms. Luck:

Established in 1924, Central City Association (CCA) is L.A.'s premier business advocacy association whose 450 members employ over 300,000 people in the L.A. Region. CCA is in support the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company.

This MOU will improve the economic health and quality of life for residents who live near rail yards not just in the City or County of Los Angeles, but also statewide.

CCA would like to emphasize the following:

- The MOU will reduce particulate emissions from rail yards throughout California by approximately 20 percent over the next five years. The most affected communities will benefit from the implementation of this MOU and the reductions are larger and will be implemented faster than any proposed regulatory requirement or legislation.
- Voluntary agreements, such as the CARB-Rail MOU, are tools the State and federally-primed agencies can use to achieve mutually beneficial goals. Without this key tool, the state will not be able to negotiate these significant environmental and social benefits.
- The termination clause is essential to ensure consistent statewide regulation and to avoid a myriad of regulations that could unnecessarily discourage the use of rail as a creating barriers to efficient operations. As you know, rail is the most environmentally sound way to move goods and is a key component of the goods movement system throughout California and throughout the nation. This agreement will improve the goods movement system in California by reducing air emissions around rail yards without sacrificing rail efficiency.

(18)

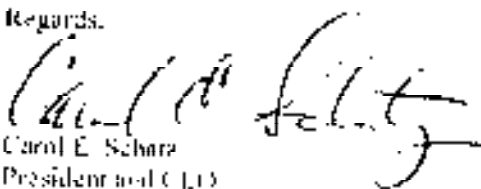
CCA Support of MOU

Page 2

ARB has shown leadership in addressing the complicated issues surrounding goods movement in California. Additionally, this cooperative agreement will achieve these air quality benefits quickly and avoid unnecessary delays due to legal challenges regarding the State's legal authority.

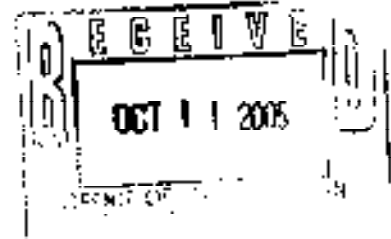
CCA supports the ARB's efforts to ensure efficient, environmentally sound transportation of goods. We encourage your Board to ratify the agreement, without amendments, at the September 22nd CARB meeting.

Regards,



Carol E. Schara
President and CEO

XC: Board Members 05-9-1
Chairman CEW 10/27/05
TJ MHS
KT Legal (RC/MT) SSD



CALIFORNIA SHORTLINE RAILROAD ASSOCIATION

October 7, 2005

Barbara Riordan
Interim Chairperson
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Dear Ms. Riordan:

The California Short Line Railroad Association (CSLRA) supports the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company, the two Class I Railroads operating in the State of California. We strongly urge the Board to uphold the MOU at today's meeting.

Specifically, the MOU will:

- Limit non essential idling by installing idling reduction devices on Class I Railroad intrastate locomotives over the next three years.
- Ensure that 99 percent of all Class I Railroad locomotives operating in California pass smoke inspections, as well as quickly identify and repair smoking locomotives.
- Require at least 80 percent of the fuel used by Class I Railroad locomotives in California by January 1, 2007 is low sulfur fuel, six year earlier than required by federal law.
- Conduct health risk assessments at 17 Class I Railroad yards across the state and use these studies to identify additional measures to reduce air emissions.

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- Evaluate other technologies that may further reduce emissions from locomotives and rail yard activities.

CSLRA views voluntary agreements such as the CARB/Rail MOU as an important way for federally preempted industries and the State and to achieve mutually beneficial goals. Without this key tool, the state will not be able to negotiate tangible environmental and social improvements.

Short line railroads have smaller fleets of locomotives, reflective of our smaller operational needs and subsequently smaller revenue base. As technology for the Class I railroads is developed, perfected, and implemented on a large scale, it becomes economically feasible for short line railroads to implement these technologies, as well, over time.

Lastly, the termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations that could potentially discourage the use of rail by creating barriers to efficient operations. If we are to have a national transportation system, we need to have one nation-wide set of standards.

As you know, rail is the most environmentally sound way to move goods and is a key component of the goods movement system the within California and thorough out the nation. CSLRA supports CARB's efforts to ensure efficient, environmentally sound transportation of goods. We encourage your Board to uphold the agreement, without amendments, at today's hearing.

Regards,



John L Cockle
President, CSLRA

Cc: Wayne Horiuchi, Union Pacific RR
Lanny Schmid, Union Pacific RR
Juan Acosta, BNSF Railway

ELECTRO-MOTIVE

9301 West 55th Street
LaGrange, IL 60525 USA

Tel: 708.387.5623
Fax: 708-387-3723
martha.lenz@emdiesels.com

October 28, 2005

Ms. Barbara Riordan
Interim Chairman
California Air Resources Board
1001 J Street
Sacramento, CA 95814

Dear Ms. Riordan:

Electro-Motive Diesel, Inc. supports the recent Memorandum of Understanding (MOU) entered into by the California Air Resources Board (CARB) and Union Pacific Railroad Company and BNSF Railway Company. We strongly urge the Board to uphold the MOU presented at Thursday's meeting.

Specifically, the MOU will:

- Limit non-essential idling by installing idling reduction devices on intrastate locomotives operated by Class I railroads over the next three years.
- Ensure that 99 percent of all locomotives operated in California by Class I railroads pass smoke inspections, as well as quickly identify and repair smoking locomotives.
- Require at least 80 percent of the fuel used by locomotives on Class I railroads in California by January 1, 2007 to be low sulfur fuel—six years earlier than required by federal law.
- Conduct health risk assessments at 17 Class I railroad yards across the state and use these studies to identify additional measures to reduce air emissions.

Electro-Motive views voluntary agreements, such as the CARB/Rail MOU as an important way for federally preempted industries and the State and to achieve mutually beneficial goals. Without this key tool, the state will not be able to negotiate tangible environmental and social improvements.

Additionally, the termination clause is essential to ensure consistent statewide regulation and to avoid a patchwork of regulations that could potentially discourage the use of rail by creating barriers to efficient operations.

Electro-Motive Diesel, Inc
9301 West 55th Street
LaGrange, IL 60525 USA

Rail is the most environmentally sound way to move goods and is a key component of the goods movement system the within California and throughout the nation. Electro-Motive supports CARB's efforts to ensure efficient, environmentally sound transportation of goods. We encourage your Board to support staff's recommendations to continue

Martha A. Lenz
Director, Engine and Engine Systems Design
Electro-Motive Diesel, Inc.