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Hearing on

An Examination of the California Air Resources Board's (CARB) In Use Locomotive Regulation

Committee on Transportation and Infrastructure
Subcommittee on Railroads, Pipelines and Hazardous Materials

United States House of Representatives

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Good afternoon, Chairman Nehls, Ranking Member Wilson and members of the Subcommittee.

My name is Roger Nober, and I am here to present testimony on legal and practical concerns with the adoption of regulations promulgated by the California Air Resources Board (CARB) (hereafter the CARB regulations) and CARB's subsequent petition to the United States Environmental Protection Agency (EPA) to allow CARB to regulate locomotive emissions when such locomotives are in use in the State of California.

My Background

I am currently the Director of the GW Regulatory Studies Center housed in the Trachtenberg School of Public Policy and Public Administration at the George Washington University and a Professor of Practice at the Trachtenberg School. I have been in this position since the start of 2024. I testify today in this capacity only.[1]

Prior to joining the GW Regulatory Studies Center, I had over 30 years' professional experience in transportation, focusing on legal issues, legislation, policy and operations. From the beginning of 2007 until I retired at the end of 2022, I was the Executive Vice President for Law and Corporate Affairs at BNSF Railway Company, the nation's largest freight railroad. At BNSF, I was a Board Member of BNSF LLC and led the legal, environmental, communications, compliance, State government affairs and regulatory functions. Among my duties, my teams worked with State and local air resource agencies in California (and numerous other states) on issues ranging from locomotive emissions to permitting of new intermodal facilities. I also was a consultant for BNSF following my retirement during calendar year 2023.

Prior to joining BNSF, I served as the Chairman of the United States Surface Transportation Board (STB) from 2002 to 2006. I was confirmed by the Senate in November of 2002 and appointed by President Bush as Chairman when I was administered the oath of office. I served as STB Chairman until my departure in January of 2006. During my time as Chairman, I had the unusual circumstance of being the only Board Member for 54 weeks in 2003 and 2004. After leaving the STB I was a partner at Steptoe & Johnson in Washington DC for the balance of 2006. Prior to being confirmed as an STB Member, from June of 2001 until November of 2002 I served at the Department of Transportation, where I was the Counselor to Deputy Secretary Michael P. Jackson and the Aviation Policy Assistant to Secretary Norman Y. Mineta.

Prior to joining the Department of Transportation, I was a staff member to the Republican Members of this Committee serving in a variety of roles from 1993 until 2001. I began as a Minority Counsel on the Subcommittee on Surface Transportation in the 103rd Congress (when the full Committee was known as the Public Works and Infrastructure Committee) under Ranking Member Bud Shuster. In 1995, at the start of the 104th Congress, I became the

[1] The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. This statement reflects my own views and does not represent an official position of the GW Regulatory Studies Center or the George Washington University.

Majority Counsel for the Subcommittee on Highways and Transit of the renamed Transportation and Infrastructure Committee, which had also gained jurisdiction over freight and intercity railroads from the Energy and Commerce Committee in a 1995 House Committee reorganization under then Chairman Shuster. I subsequently became the Full Committee Chief Counsel and in that role was involved in the passage of numerous significant pieces of legislation. Most importantly for this hearing, in 1995 I was the lead House staffer on the Interstate Commerce Commission Termination Act of 1995 (ICCTA), the legislation to terminate the Interstate Commerce Commission (ICC), create the STB and significantly revise the Interstate Commerce Act (ICA) with respect to interstate rail carriers and motor carriers.

I have been an adjunct professor of law at Texas A&M University and Southern Methodist University Law Schools teaching Administrative Law, and I am teaching a course on Administrative Law at the Trachtenberg School in the Fall of 2024. I am a Member of the Advisory Boards at the Texas A&M Transportation Institute, the Northwestern University Transportation Center and the Board of Directors of the Eno Center for Transportation.

Background to Today's Hearing

As the Members of the Committee are aware, in April of 2017 CARB petitioned the EPA to open a so-called Tier 5 locomotive rulemaking – in other words asking EPA to revise locomotive emissions standards to make them more stringent. In November of 2022, the EPA responded by promising to create a working group to examine how best to address emissions from locomotives and initiate a rulemaking to examine federal preemption of State regulations governing locomotive emissions. In April of 2023, CARB adopted its in use locomotive standards (significantly revised in September 2023). In November of 2023, CARB petitioned the EPA under section 209(e) of the Clean Air Act to delegate to CARB the regulation of locomotives when in the State of California so that CARB had the legal authority to put those standards into effect under the federal Clean Air Act law (hereafter the CARB petition).

CARB and numerous commentators have discussed the many practical and technical issues in the CARB regulations in depth and I will not repeat that analysis here. I also submitted comments to EPA regarding CARB petition and would like to include those by reference here as well. https://regulatorystudies.columbian.gwu.edu/carb-regulating-use-locomotives.

In these comments, I focus on the application of the ICA to most significant portions of the CARB regulations, the legal conflict that EPA's granting of the CARB petition would create under the ICA and then review alternative approaches for lowering locomotive emissions in California.

CARB In Use Locomotive Regulation and Petition to EPA

In sum, the CARB regulations have the following components:

- A prohibition as of 2030 on the operation of locomotives older than 23 years old in the State of California, meaning any locomotive originally manufactured before 2007 unless that locomotive is in zero emissions configuration.

- Imposition of charges on certain locomotives that operate in California which do not meet zero emissions standards set forth in the regulations beginning on January 1, 2025 with the first deposits due July 1, 2026;
- A direction that those charges be deposited into a "spending account" that the payors can only use to purchase certain specified types of locomotives or zero emissions infrastructure support facilities;
- Mandates that (i) yard and switch locomotives manufactured after 2030 must operate in zero emissions configuration and (ii) road locomotives manufactured after 2035 must operate in zero emissions configuration in California;
- Setting of additional locomotive idling requirements; and
- Imposition of statewide locomotive registration and reporting requirements.

While CARB has relied upon its own findings that conforming locomotives will be available by the specified dates, CARB also appears to recognize that the technological feasibility of zero emissions linehaul locomotives is uncertain, and the CARB regulations include a provision to conduct "progress assessments" in 2027 and 2032. The results of those assessments could lead to extending the deadlines in the regulations.

The CARB petition to EPA is to delegate to California the authority to adopt the CARB regulations and regulate locomotives in California pursuant to section 209(e) of the Clean Air Act. The CARB regulations are ostensibly limited in application to California alone, but the CARB petition recognizes the potential effects of the CARB regulations on locomotive manufacturers, interstate movement of goods, and the regulatory requirements of other states. Seen as a whole, I believe these actions reveal CARB's apparent intent to create a technology-forcing set of requirements to hasten zero emission locomotive development and deployment, not just in California, but nationally.

<u>Interstate Commerce Act Preemption</u>

Based on my experiences on the Transportation and Infrastructure Committee, as Chairman of the Surface Transportation Board and as an Executive Vice President at BNSF Railway and now as a regulatory scholar, I believe that the CARB regulations that are the subject of the CARB petition are unambiguously preempted by Section 10501 of the ICA, 49 USC 10501. In this section I would like to explain why I believe this is so by first recounting the history of section 10501 and what I believe the Committee's intent was in enacting it, and then examining its application to the CARB petition and CARB regulations.

1. Background

A foundational principle of interstate commerce is the need for uniformity in operations across the fifty states. In my 31 years of experience, maintaining national uniformity through preemption of State regulation has been a longstanding bi-partisan priority of this Committee. The reasons are straightforward. Most commerce, on waterways, in surface transportation or in air cargo is interstate in nature. National rules for economic, safety and operational regulation facilitate our national system of freight movements. State regulation creates an unworkable and inefficient patchwork of rules and requirements.

As the Members of this Committee are well aware, most freight and passenger transportation economic regulations were eliminated or modified in the late 1970s and early 1980s. Those deregulatory efforts have brought American consumers and business tremendous value in the decades since; it is no exaggeration to state that America's freight transportation is the envy of the world and a significant competitive advantage for the American economy. Maintaining national economic, operating and safety standards through preemption of State regulation of interstate commerce remained core to those deregulatory efforts. When I joined the Minority staff of the Public Works and Transportation Committee in 1993, there were only a few remnants of State regulation left in transportation, but one inadvertent vestige was causing competitive harm and needed to be addressed.

By 1993, Federal aviation laws had clearly preempted State regulation of intrastate movements of *air carriers*, but the ICA, which governed movements subject to the jurisdiction of the ICC, still permitted States to economically regulate intrastate movements of *motor carriers of property* that were not part of an interstate movement. The practical effect of this discrepancy was a difference in regulation at the State level between FedEx, which originated as an air carrier but by the 1990s owned significant trucking assets, and UPS, which originated as a motor carrier but by the 1990s owned thousands of aircraft. While UPS and FedEx had very similar businesses, since FedEx was authorized as an air carrier and UPS as a motor carrier, States were preempted from regulating intrastate movements by FedEx but could regulate the same movements by UPS.

In 1994 Congress closed that inadvertent regulatory loophole by passing H.R. 2739, the Federal Aviation Administration Authorization Act of 1994 (PL 103-305). While ostensibly legislation to reauthorize aviation programs, it is best known as one of the final surface transportation deregulation legislative acts. Section 601 of that act amended 49 USC 14501 (then codified at 49 USC 11501) to create a new subsection (h), which broadly preempted State regulation of *prices, routes and services* (emphasis added) of intrastate movements of motor carriers of property.

A complication arose to this effort. In H.R. 2739, Congress intended to model the preemption provision it was enacting of State motor carriers of property on the broad preemption of State regulation of air carriers in 49 USC 41713, which as passed preempted State regulation of air carrier *rates, routes and services* (emphasis added). The rates, routes and services clause of section 41713 had been broadly interpreted by Courts, including the Supreme Court. However, in drafting section 601 of the FAA Authorization Act, the Committee discovered that the critical language of section 41713 preemption, *rates,* routes and services had been amended in a technical corrections act by the Law Revision Council to a different (the current) formulation, *prices*, routes and services. The Conference Report on H.R. 2735 clarified Congress' intent that the different language of the two provisions had the same meaning and force of law.

2. ICC Termination Act of 1995

In the 1994 midterm elections, Republicans became the majority party in both the House and Senate in the 104th Congress and a legislative priority of the new majorities was the elimination of the ICC. While eliminating federal agencies was a provision of the so-called 'Contract for America," efforts to specifically eliminate the ICC predated it. In the Democratic led 103rd Congress, there had been a bipartisan effort among several members of the House (led by the unusual bi-partisan coalition of Congressmen Frank, DeLay and Kasich) to eliminate the ICC, but those efforts lacked leadership support. Another consequence of the 1994 midterm election was a reorganization of Committees in the House in the 104th Congress, where the Public Works and Transportation Committee was renamed the Committee on Transportation and Infrastructure and was, as indicated above, given jurisdiction over railroads from the Energy and Commerce Committee (as well as Coast Guard and Merchant Marine from the Resources Committee). Thus in 1995 this Committee began the bipartisan task of eliminating the ICC, which involved revising the entire ICA and creating the STB.

In the yearlong process of drafting and passing the ICCTA, this Committee and the Senate Commerce Committee very deliberately revised and expanded the ICA preemption provision in 49 USC 10501(b) to be as broad as possible, both because of their fundamental belief in the importance of preemption of State regulation of interstate commerce, and to avoid a repeat of the Committees' 1994 experience with the scope and then-changed language of the aviation (and modeled thereafter trucking) preemption provisions, which had just happened a few months prior.

In pertinent part, section 10501(b)(1) as enacted reads:

> (b) 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 the facilities of such carriers....
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> * * *
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation *are exclusive and preempt the remedies provided under Federal or State law.* (emphasis added)

As indicated above, section 10501 as enacted was purposely broadened from prior preemption provisions both in reaction to the issues raised in 1994 and to forestall any need to modify and clarify the provision in the future. Notably for this hearing, the revised section 10501 specifically preempted other remedies that could be applicable to rail carriers under other *federal* laws and not just State laws.

Over time, section 10501 has been recognized to be extremely broad, and as a result applied using a rule of reason (since read literally it would preempt every other law potentially even health and safety laws such as building codes!). In my experience, the pertinent analysis is for

the STB or a reviewing Court to examine the intent and effect of the other State or federal law, evaluate whether that law would be subject to 10501 and determine whether the intent and effect of such law or regulation is contrary to 10501. Importantly when the effect of section 10501 is evaluated with respect to another federal law, the STB and Courts evaluate the two laws to see if they are in conflict, and before determining the other federal law is preempted, attempt to harmonize the statutes (or regulation promulgated thereunder).

The CARB Regulations are Preempted by The Interstate Commerce Act

In my view, the CARB regulations are unequivocally preempted by section 10501 of the ICA. I come to this conclusion when considering the following:

- The plain language of section 10501 and its clear and unambiguous intent to prevent State regulation of rail carriers operating in interstate commerce;
- The fact that CARB has petitioned the EPA to open a Tier 5 locomotive standard proceeding, and while EPA chose not to open such a proceeding, it is studying the issue;
- The broad intent and scope of the CARB regulations and that they explicitly apply to equipment entering California as part of an interstate movement and not just equipment local to California;
- The practical infeasibility of creating a California-only locomotive fleet for movements in interstate commerce means the CARB regulations' standards would become *de facto* national standards;
- The attempt by CARB to influence equipment manufacture through the CARB regulations' definition of in use;
- The infeasibility of zero emissions technology in the timeframes anticipated by the CARB regulations and the uncertainty created by the two progress evaluations.
- The economic impact of, and the penalty-like nature of the spending account provisions proposed; and
- The impossibility of small railroads' compliance with the requirements.

Similarly, when examining the CARB petition to the EPA, I do not see how the CARB regulations could take effect in a manner that would not conflict with the plain wording and longstanding intent and application of the ICA and as a result would be facially preempted. I also believe that, were the EPA to grant the CARB petition under 209(e) and delegate to California the ability to regulate locomotives in use in California, the CARB regulations could not be harmonized with the ICA and would be preempted.

Importantly, as a matter of statutory construction, section 10501 is the later enactment of federal law. The amendments to the Clean Air Act cited by CARB as the underlying authority for their petition to EPA *predate* the ICCTA. This means that when Congress passed the ICCTA and its included preemption provision, Congress was aware of the cited provisions of the Clean Air Act when it preempted "remedies provided under federal .... law" 49 USC 10501.

The EPA is the Proper Agency to Set Locomotive Emissions Standards for a National System

While I understand that many Members of the Committee may believe that locomotive emissions can and should be further curtailed, particularly in California, there are effective and importantly, non-preempted ways for the EPA and CARB to do so – EPA can open a Tier 5 locomotive rulemaking and CARB can continue its efforts to reach voluntary agreements with freight railroads operating in California.

First, EPA is the proper agency to set locomotive standards at a national level consistent with the needs of an interoperable national system. Even with the preemption provisions of the ICA, the EPA has had the ability to set national locomotive emissions standards and has undertaken a number of rulemakings in the past to do so. The most current emissions standards, Tier 4, were set by the EPA. As has been indicated many times in comments to EPA in their proceeding on CARB's request, CARB did petition the EPA to open a Tier 5 proceeding to set new standards and while EPA has not opened such a proceeding, it still has the ability to do so. While such a proceeding may take time, the fact that it would be time consuming to consider national implications of its standard setting illustrates the complex and evolving nature of locomotive manufacture and technological limits.

Second, CARB could return to a cooperative posture with the freight rail industry and make real improvements in air quality for its citizens through voluntary agreements, which have been highly effective in reducing locomotive emissions in California. In the past, California State and local air quality agencies had accepted that they did not have the legal authority to set locomotive emissions standards and sought to work cooperatively with railroads. When a local California air quality agency, the South Coast Air Quality Management District (SCAQMD), did adopt locomotive idling restrictions some years ago they were ruled to be preempted. CARB negotiated voluntary locomotive fleet agreements with the major western freight railroads, Union Pacific and BNSF Railway, which produced real local benefits to California residents and at the same time allowed the freight railroads to effectively operate national networks. Emissions in California have improved significantly as a result of those agreements and could again.

Regulatory Process Concerns With CARB Proposal

In addition to the substantive concerns raised above regarding the conflict of the CARB regulations with the ICA, I would also highlight several reasons why I am concerned about this situation as a matter of regulatory policy.

First, the CARB regulations are *technology forcing,* as they require railroads to adopt technology that does not yet commercially exist, by a future date certain with the aim of spurring technology innovation and adoption. While it may be well-meaning, as a general matter adopting technology forcing regulation raises the question of whether an agency is improperly requiring the adoption of equipment which is neither technologically nor economically feasible. CARB tries to preemptively address this reality by including periodic, future "progress reviews" to evaluate the state of zero emissions technology. Looked at another way, CARB effectively acknowledges the current infeasibility of the equipment it is requiring. Yet this kind of process

– legally requiring the deployment of technology that is not yet available and providing for a discretionary waiver of that requirement if meeting the requirement by the adoption date become infeasible – is the wrong way to encourage the adoption of new technology. Rather than focusing on realistic and tangible improvements, this type of regulation encourages strong opposition and in my opinion is a deterrent to the adoption of new technology.

Second, CARB is, obviously, a *California State agency,* and in adopting regulations CARB is only required to evaluate effects *in the State of California*, even when, as here, the clear impact of its action is nationwide. EPA, by contrast, is a national regulatory agency and must consider the *nationwide* effects of its actions and evaluate and respond to all comments. Considering the full effects of regulatory actions is the proper way to regulate national industries.

Finally, if adopted and enforced, the CARB regulations would likely *increase* emissions and pollutants in other jurisdictions by diverting cargo to other locations and through mode shift to trucks. Neither is in the national interest but could in theory meet California's desired goals. National policymakers should not let California regulators take steps to reduce emissions in California by increasing them elsewhere without consideration of those effects.

Conclusion

For the reasons I have discussed in this testimony, I believe the CARB regulations and CARB proposal are preempted by section 10501 of the ICA. While recognizing that decreasing emissions from locomotives is a laudable goal, I ask the Committee to remember that there are better and more effective ways to do so than improperly delegating the ability to regulate locomotive emissions standards to one state.

I look forward to answering any questions you might have.