Submitted Electronically
April 22, 2024

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW; 1101-A
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OAR-2023-0574

Dear Mr. Administrator,

The Private Railcar Food and Beverage Association, American Forest and Paper Association, Consumer Brands Association, Freight Rail Customer Alliance, National Coal Transportation Association, National Industrial Transportation League, and Western Coal Traffic League (otherwise referred to as "Joint Associations"), is pleased to submit these comments on the California Air Resources Board's (CARB) request for U.S. Environmental Protection Agency (EPA) authorization of its In-Use Locomotive Regulation (Regulation) in the above-referenced docket.

We urge EPA to deny CARB's request. As major transportation stakeholders and some of the largest users of freight rail, Joint Associations' members are extremely concerned that the rule is both technically and economically infeasible, and therefore inconsistent with Clean Air Act (CAA) requirements. In addition, the Regulation is clearly preempted by the ICC Termination Act, 49 U.S.C. §§ 10101 et seq (ICCTA) as the Regulation would greatly interfere with rail transportation.

The Private Railcar Food and Beverage Association (**PRFBA**) is comprised of 16 global food and beverage companies and manufacturers, headquartered in North America. These members include Frito-Lay (PepsiCo), Molson Coors Beverage Company, KraftHeinz Food Company, General Mills, Inc., McCain Foods USA, Inc., Nortera Foods/Bonduelle Americas, Tropicana Brands Group, Boardman Foods, Inc., G3 Enterprises, Inc., JD Irving/Cavendish Farms, Simplot, Lamb Weston Holdings, Inc., Univar Solutions, Land O' Lakes, Inc., National Sugar Marketing, LLC, and Leprino Foods. All are major rail shippers that rely on the railroads to produce and distribute their food and beverage products that are vital to the health and welfare of our nation and essential to feeding its citizens. Without adequate rail service, their food and beverages will not be on American store shelves.

Moreover, PRFBA members all own or lease railcars. As such, they absorb costs associated with equipment ownership, operation, and maintenance. This regulation would greatly affect the ability to fully utilize PRFBA members' rail cars. If there is a shortage of locomotives, this would result in "parking" these railcar assets which is seldom a wise financial decision. PRFBA members invest millions of dollars in rail cars.

The American Forest and Paper Association (**AF&PA**) is comprised of small, medium and large companies in rural and urban communities across the country making roughly 87% of the pulp, paper, paper-based packaging and tissue products made in the United States.

The Consumer Brands Association (**CBA**) champions the industry that makes the products you choose and the brands you trust. From household and personal care to food and beverage products, the consumer packaged goods industry plays a vital role in powering the U.S. economy, contributing $2 trillion to U.S. GDP and supporting more than 20 million American jobs.

The Freight Rail Customer Alliance (**FRCA**) is an umbrella membership organization that includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies, and their consumers. The mission of FRCA's growing coalition of industries and associations is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices.

The National Coal Transportation Association (**NCTA**), is a non-profit corporation comprised of electric utilities, coal producers, shippers of coal-related commodities, and entities that produce, repair, and manage all facets of railcar component parts and systems, as well as provide services for railcar operations. Its primary purpose is to promote the exchange of ideas, knowledge, and technology associated with the transportation and beneficial uses of coal.

Founded in 1907, the National Industrial Transportation League (**NITL**) , has been a trade association representing The Voice of the Shipper across truck, rail, intermodal, ocean, and barge. NITL members represent a wide variety of commodities and businesses, who rely on efficient, competitive, and safe marine, rail, and highway transportation systems within the United States and beyond to meet their supply chain requirements and the needs of their customers. NITL's shipper members include those who move consumer goods, manufacturers, agriculture, chemicals, steel, forest products, fuels, food and more. NITL's 200 members spend billions on freight dollars annually and employ millions of people.

The Western Coal Traffic League (**WCTL**) was founded in 1977. It is comprised of consumers of coal products produced from United States mines located west of the Mississippi River.

The CARB rule would ban most locomotives more than 23 years old starting in 2030. It would require new passenger, switch, and industrial locomotives to be zero emissions beginning in 2030 and require new line-haul locomotives to be zero emissions beginning in 2035. However, no commercially viable technology exists today for zero emission locomotives for line haul service.

The CARB rule would require dramatic advances in locomotive technology. It would also require sweeping upgrades to the nation's electrical transmission system and interconnection permitting process that we believe are infeasible by the implementation deadlines. These issues raise serious concerns that the CARB regulation violates the CAA. As discussed in EPA's February 27, 2024, Federal Register Notice (89 FR 14484), EPA has previously held that state standards and enforcement procedures are inconsistent with section 202(a) of the CAA if "there is inadequate lead time to permit the development of the necessary technology, giving appropriate consideration of the cost of compliance within that time." Following the precedent of these previous decisions, EPA should deny authorization of the CARB requirements.

The Joint Associations strongly support a uniform federal regulatory framework for the nation's freight rail network. Allowing California and other states to adopt unique rules governing locomotives would be contrary to the ICC Termination Act of 1995, which largely preempts local or state laws that have a regulatory impact on railroads. If the CARB regulations were authorized by EPA, we believe freight rail carriers and their rail customers, including the respective members of the Joint Associations, would be significantly hindered financially and operationally. The inevitable increases in transportation costs and introduction of operational inefficiencies for shippers and receivers, especially for those who are rail-dependent or captive, would also result in further inflation. For these and other reasons, we believe there is substantial merit to the claims by the Association of American Railroads and the American Short Line and Regional Rail Association in their pending legal challenge of the rules in the U.S. District Court for the Eastern District of California that all or a significant part of CARB's regulations are preempted by 49 U.S.C. §10501(b), which gives the Surface Transportation Board ("STB") exclusive jurisdiction over the operations and other activities of freight railroads in interstate commerce, and as written preempts all state and federal laws that are in conflict. The District Court affirmed the legitimacy of the railroads' preemption arguments in an order issued February 16, 2024.

The Ninth Circuit Court of Appeals (Court) in *Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist. (AAR)*, 622 F.3d 1094 (2010), has already held that idling rules and related reporting requirements that "apply exclusively and directly to railroad activity" were "plainly" preempted by the ICCTA. 622 F.3d at 1098. The Court explained that the ICCTA and STB precedent preserve a potential role for state and local environmental regulators, but it is limited: (1) state and local agencies may promulgate "EPA-approved statewide plans" under the CAA, which are sometimes "possible to harmonize with ICCTA," or (2) state and local regulators may "enforce their generally applicable regulations in a way that does not unreasonably burden railroad activity." *Id.* Here, no "EPA-approved" Statewide Implementation Plan is at issue. The provisions of the "In-Use *Locomotive* Regulation," Cal. Code Regs., tit. 13, § 2478 (emphasis added), are not "generally applicable regulations," *AAR*, 622 F.3d at 1098. Thus, under *AAR*, categorical preemption cannot be avoided merely because the Regulation is intended to address air pollution. As in *AAR*, the provisions here apply "exclusively and directly to railroad activity" and "have the effect of managing or governing rail transportation." 622 F.3d at 1098 (quotation marks omitted); *see also Delaware v. STB,* 859 F.3d 16, 22 (D.C. Cir. 2017) (*Del.*) (upholding the STB's determination that locomotive idling rules were categorically preempted because the law directly and exclusively "regulates rail transportation by prohibiting locomotives from idling in certain places at certain times").

In applying ICCTA categorical preemption, courts ask if the specific "statutes or regulations" at issue target railroad operations. *Del.*, 859 F.3d at 19, 22. Thus, in *AAR*, the Court held that "rules" imposing idling and reporting requirements "plainly" were not of "general applicability," 622 F.3d at 1098, even though the South Coast "regulated numerous sources of pollution" other than locomotives.

The ICCTA preempts state laws "with respect to *the regulation* of rail transportation," 49 U.S.C. § 10501(b)(2) (emphasis added), and courts have reasoned that when laws of general applicability are enforced against railroads—e.g., "standard building, fire, and electrical codes"—the incidental impact on railroads is different than direct regulation. But there is nothing remote or incidental about the Regulation's effect on rail transportation. The provisions at issue apply "exclusively and directly to railroad activity" and govern how railroad operators must engage in railroad transportation in California. *AAR*, 622 F.3d at 1098.

Allowing this Regulation would subvert the ICCTA's core objective of "national uniformity in laws governing rail transportation." The STB has explained that non-federal rules regulating locomotive idling and imposing reporting obligations would "directly interfere" with the purpose of the ICCTA by subjecting railroads "to fluctuating rules as they cross state lines." *U.S. EPA, Petition for Declaratory Order,* No. FD 35803, 2014 WL 7392860, at *6, *8 (S.T.B. Dec. 29, 2014) (describing locomotive idling rules adopted or considered by other states). If ICCTA categorical preemption evaporated whenever a state imposed supposedly analogous regulations on another industry, the railroad regulatory scheme would devolve into a balkanized system of state-by-state regulations—precisely what Congress sought to avoid by prioritizing "the uniformity of Federal standards." H.R. Rep. No. 104-311, at 96 (1995).

In addition to the significant legal issues here, compliance costs and supply chain reliability are at stake for rail shippers and their customers across the country. Rail carries about 40 percent of long-distance freight in the U.S. While this regulation is ostensibly imposed within California, the impact of this costly and burdensome regulation will be felt nation-wide. It is estimated that railroads will need to deposit up to $800 million per year in a "Spending Account" for purchase and testing of zero-emission equipment that does not exist or is viable. This compliance cost alone is estimated to increase costs to customers by $14 billion for just one Class I railroad. These costs of course will be passed on to customers, including those respective members of the Joint Associations.

Further, the Joint Associations are concerned that the "Spending Account" provisions of the rule would impose significant financial burdens on railroads, which may be untenable for some short line railroads. If these carriers are unable to continue operations, it could create additional supply chain disruptions and negatively impact large segments of the economy, including manufacturers, farmers, and energy producers. Short line railroads handle 20 percent of rail cars at origin and destination and are a critical link for manufacturers and other businesses to access the national rail network. Short line railroads in California and railroads in other states that could subsequently adopt the California standards cannot absorb the costs to upgrade locomotive fleets and other compliance costs associated with this regulation, potentially leaving customers along any routes that go out of service without access to this mode of transportation. At worst, investments in other critical network upgrades or projects benefiting the environment will be diverted in order to pay for compliance with this regulation.

In addition to the compliance costs, this standard threatens rail reliability by forcing adoption of unproven technology to power locomotives. Since the COVID-19 pandemic, the nation has seen the mess resulting from, and costs associated with, supply chain delays and disruptions.

Voluntarily introducing unproven and potentially unreliable technology into this critical portion of the transportation sector is inviting future costly and time-wasting supply chain disruptions that can be entirely avoided by rejecting CARB's authorization request.

The Joint Associations strongly oppose EPA granting CARB's request. We urge EPA to carefully consider the feasibility of the CARB rule as well as its potential impacts on freight shippers that rely on rail service to deliver essential products throughout the nation.

Thank you for your consideration of our comments.

Sincerely,

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Private Railcar Food and Beverage Association

Julie Landry
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