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MEMORANDUM

To: Members of the California Air Resources Board

From: Cruz Reynoso
Boochever and Bird Professor of Law

Re: **Preemption Analysis of June 2005 ARB/Railroad Memorandum of Understanding**

Date: August 30, 2005

SUMMARY OF MY CONCLUSIONS:

I have been asked to analyze and respond to the following questions:

1) Does the Air Resources Board (ARB) have the authority to incorporate into regulations the provisions found in the June 2005 Memorandum of Understanding (MOU) entitled, "ARB/Railroad Statewide Agreement: Particulate Emissions Reductions Program at California Rail Yards"?

2) If the ARB has such state authority, is that power preempted by federal statutory, regulatory or Constitutional considerations?

My conclusion, in light of the statutes and cases, is that the ARB enjoys such authority. With one small exception, which I mention in the text, the authority of the

ARB to issue regulations in conformity with the MOU is consistent with applicability of preemption; that is, preemption would not apply to such regulations.

I.

BACKGROUND

The concept of preemption has its origins in the United States Constitution, article VI, clause 2. This portion of the Constitution states that federal law is the "supreme Law of the Land" and declares that any state laws that conflict with federal laws are not valid. Another section of United States Constitution, article I, § 8, often referred to as the Commerce Clause, has been particularly important in the evolution of legislation and court discussion protecting interstate commerce from local practices which could interfere with a national legal system.

Equally important in the Constitutional scheme has been respect for the rights of States to protect the health and welfare of its citizens, including environmental protection. These traditional responsibilities of states have merited special deference. [*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996)]

Each governing power, the federal government and the states, have traditionally exercised restraint out of respect for the power each exercises. Such restraint has been deemed essential in our constitutional governmental framework. [*International Shoe, Inc. v. Washington,* 326 U.S. 310 (1945); *United States v. Lopez* (1995), 514 U.S. 551; *United States v. Morrison,* 529 U.S. 619 (2000)].

The introduction of railroads necessarily brought legislative, regulatory and decisional changes. One author notes, "In the 1820s and 1830s railroad companies were

typically sponsored by local commercial interests and municipal leaders who hoped to increase business activity and divert trade from rival cities."[1] These railroads were often within state borders, but eventually, with encouragement from the federal government, especially in the West, railways were connected and the government created a national transportation system.[2] By the late 1800's rail transportation was all-important to interstate commerce. Congress acted to protect the flow of goods and persons by exercising its power of preemption. However, as indicated, each state retained the responsibility to protect the health and welfare of its people. [*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996)]

In this duality of power, which we analyze below, several questions must be answered. What power does the state have? What power does the federal government have and how has it exercised it? What accommodations have been made by each?

In short, with respect to railroads, what power has a state like California traditionally exercised respecting environmental protections, and has any of that power been preempted? More particularly, does the State of California have the legislative and regulatory power to achieve the goals incorporated in the MOU recently entered into between the State and certain railroad companies? Asked differently, would those goals be preempted by federal law if not found in the MOU?

II.

ARB AND DISTRICTS STATUTORY AUTHORITY

[1] James W. Ely, Jr. "The Railroad System Has Burst Through State Limits: Railroads and Interstate Commerce 1830-1920" 55 Ark. L Rev. 933, 934 (2003).
[2] Maureen E. Eldredge, "Who's Driving the Train? Railroad Regulation and Local Control" 75 U. Colo. L. Rev. 549, 557-558 (2004)

In June 2005 the ARB entered an MOU with two railroad companies (referred to as "Participating Railroads" in the MOU). The principal goal of the MOU is to reduce toxic emissions from railroad locomotives. The MOU details an elaborate program through which railroads, among other actions, will reduce emissions by standardizing idling time and limiting the use of sulfur in diesel fuel.

The MOU calls for further emission reduction by agreeing that railroads operating intrastate must comply with more stringent visible emission standards. While the requirement also refers to "interstate locomotives" I assume that the standards are national standards. The reductions will be assured by a system of data gathering, monitoring and inspection. The MOU also calls for training of railroad personnel for the tasks required by the MOU. Enforcement, such as specific penalties, is also an integral part of the agreement.

The MOU details other provisions not important to the primary purpose of this memorandum. One provision calls on the parties to meet and confer respecting possible future agreements. Another provision releases the railroads from the MOU if the state or its subdivisions pass competing requirements.

Does the state, through its subdivision, the ARB, have the authority to promulgate regulations which cover the provisions of the MOU? With one possible exception, the answer is, yes. The state does have such authority.

The state authority is found in the California Health and Safety Code (H & SC). The ARB enjoys specific authority to regulate locomotive emissions. The Code mandates that "the State Boards shall...adopt standards and regulations for...locomotives..." [H & SC § 43013 (b)] Another section calls on the ARB to "[a]chieve the maximum degree of

emission reduction..." [H & SC § 43018 (a)]. Regulations pursuant to these provisions may be enforced by criminal and civil penalties. [H & SC § 42400 et seq.] Further, the code authorizes the ARB and the Districts to gather emission data. [H & SC § 40701 (g)].

The Code also grants authority to District Boards (subject to the ARB) to enforce both state and federal laws pertaining to emissions. Section 40001 of the Health and Safety Code states that "[d]istricts shall adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall *enforce all applicable provisions of state and federal law.*" [emphasis added]. With respect to local District Boards, "[t]he Legislature finds and declares that local and regional authorities have the primary responsibility for control of air pollution from *all sources*, other than emissions from motor vehicles." [emphasis added]. [H & SC 40000].

Local air quality districts have jurisdiction over locomotives. However, it is not clear what the District Boards can do in the light of the restriction found in H & SC § 40702. This statute states, "No order, rule, or regulation of any district shall, however, specify the design of equipment, type of construction, or particular method to be used in reducing the release of air contaminants from railroad locomotives."

I emphasize, however, that the statutory restriction on District Boards do not apply to the ARB which does have such authority.

III.

PREEMPTION

If such authority does lie with the ARB, is any such authority preempted by the federal government?

The Constitutional provisions, in my view would not preempt local regulation. Generally, the Commerce Clause, aside from providing Congressional authority to act in matters pertaining to interstate commerce, prohibits discrimination against out-of-state economic interests. Such issues, in my view, are not present.

The real issue has to do with legislation, the railroad statutes and the Clean Air Act. The principal railroad statute is the Interstate Commerce Commission Termination Act, (ICCTA) which expressly preempts remedies provided in federal and local courts. [49 U.S.C.S. 10510 (b)] The purpose is not to have a local law or practices conflict with federal law. [*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 471-472 (1996)]

The ICCTA grants exclusive jurisdiction to the federal government over railroad transportation and "construction, acquisition, operation, abandonment and discontinuance..." those powers are "exclusive" and "preempt" other federal or state laws. [49 U.S.C § 10501(b)].

The second piece of federal legislation involved is the federal Clean Air Act [42 U.S.C.A. § 7401 et seq.] which preempts any requirement relating to the "control of emission" from new or used locomotives [42 U.S.C.A. § 7543 (e)(i), 40 C.F.R. § 85.1602 (1998); 63 Fed. Reg. 18,978 (1998)]. If such powers are broad and often exclusive what is left for the state? A great deal. Thus, for example, with respect to the Clean Air Act, the D.C. Circuit has ruled in favor of the "[r]eservation of states' rights to impose in-use regulations found in § 209 (d)." [*Engine Manufactureres Association v. U.S. Environmental Protection Agency and Carol M. Browner, U.S. Environmental Protection*

Agency, respondents Hertz Equipment Rental Corp. and Intersoll-Rand, Interenors 88 F.3d 1075, 1094] The Court supports its conclusion by a footnote which quotes two senators who spoke after the senate had amended preemption provision found in the house bill. Senator Chafee said that the states "[c]an continue to require existing and in-use non-road engines to reduce emissions by setting fuel requirements, operational conditions or limits on the use of such equipment." [*Engine* 88 F.3d 1075, 1094 footnote 58] Senator Baucus, similarly, explained that, "States also fully retain existing authority to regulate emission from all types of existing or in-use non-road engines..." [*Engine* 88 F.3d 1075, 1094 footnote 58]

The courts have been sure footed in ruling that "The States traditionally have had great latitude under their police powers to legislate as 'to the protection of the lives, limbs, health, comfort, and quiet of all persons.' " [*Metropolitan Life Ins. Co. v. Massachusetts* 471 U.S. 724, 756 (1985) - quoting from Slaughter-House Cases, 16 Wall. 36, 62, 21 L.Ed. 394 (1873) additional internal quotes omitted] The Supreme Court has held that "[i]t is impossible to ignore its overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest." [*Medtronic*, 518 U.S. 470, 471-472] Indeed, the Supreme Court also noted the "considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" [*DeBuono v. NYSAL-ELA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) - quoting from *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* 514 U.S. 645, 654 (1996)]

Federal regulations have recognized that when states exercise traditional police power, the preemptive effect of federal statutes is narrowly construed. [*Medtronic,* 518

U.S. 470, 485] This is consistent with the respect due state interests. Accordingly, the federal regulations have not preempted standards (1) primarily directed at intrastate activity, where (2) manufacturers and distributors are not "effectively impacted." [62 Fed. Reg. at 6327]

Thus, not all state and local laws are preempted. [*Jones v. Rath Packing Company et al.* 430 U.S. 519, 525] Specifically, the Supreme Court has confirmed that state environmental legislation designed directly to protect the health and safety of its citizens is not generally preempted. [*Medtronic,* 518 U.S. 470, 485]

The MOU provisions deal principally with instate regulations that do not effectively impact the design or production of locomotive engines. Accordingly, the state regulation will not be preempted. Thus, I conclude that the MOU provisions do not affect interstate commerce and are therefore subject to state regulation.

There is one possible exception. The MOU calls upon the Participating Railroads to install anti-idling devices. It seems to me that this affects the designs of locomotives and therefore would be preempted.

IV.

CONCLUSION

Courts have differed on the applicability of preemption, depending on the facts of each case. With respect to the issues at hand, my conclusion is that the ARB can, by regulation, promulgate most of the goals found in the MOU.