

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DOCKET NO. EPA-HQ-OAR-2023-0574
CALIFORNIA'S SECTION 209(E) AUTHORIZATION REQUEST
FOR ITS IN-USE LOCOMOTIVE REGULATION

COMMENT OF THE SURFACE TRANSPORTATION BOARD

The Surface Transportation Board (STB or Board), through its Office of the General Counsel, respectfully submits the following comments on the notice of opportunity for public hearing and comment (Notice) published by the Environmental Protection Agency (EPA) on February 27, 2024, in the above-referenced docket. The purpose of this comment is to explain the Board's jurisdiction over interstate rail transportation and how the broad preemption provision in the Interstate Commerce Act (as amended), 49 U.S.C. § 10501(b), could impact the EPA's decision in this docket.

BACKGROUND

As explained in the Notice, on April 27, 2023, the California Air Resources Board (CARB) adopted an "In-Use Locomotive Regulation" (Regulation). The Regulation includes the following components:

- An "In-Use Locomotive Operational Requirement" under which locomotives of a certain age that do not meet particular emission standards will be banned in California beginning January 1, 2030, while locomotives with engine build dates of 2030 or later must operate in zero-emission configuration within California.
- A "Spending Account" requirement, under which locomotive operators must deposit funds into a trust account based on their locomotive emissions, with use of the funds restricted to the acquisition of low or zero emission locomotive engines and similar expenditures.
- An "Idling Requirements" section under which, among other things, locomotive operators must maintain Automatic Engine Stop Start (AESS) systems, replace or repair malfunctioning systems, and manually shut off engines when an AESS system is not working.¹
- Certain registration, reporting, and recordkeeping requirements, with locomotive operators required to report all information necessary to establish compliance with

¹ EPA regulation requires the installation of AESS devices on "new" (including remanufactured) locomotives. 49 C.F.R. § 1033.115(g).

the provisions described above, and data on the quantity of locomotive emissions occurring in California.

On November 7, 2023, CARB requested that EPA authorize the state of California to adopt and enforce the Regulation pursuant to § 209(e)(2) of the Clean Air Act (CAA). See 42 U.S.C. § 7543(e)(2). That provision provides that EPA “shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions” from non-new locomotives or non-new engines used in locomotives,² if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. Moreover, “[n]o such authorization shall be granted” if EPA finds that (i) the determination of California is arbitrary and capricious; (ii) California does not need such standards to meet compelling and extraordinary conditions; or (iii) the California standards and accompanying enforcement procedures are not consistent with § 209 of the CAA.

Separately, on June 16, 2023, the Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) filed a complaint in the United States District Court for the Eastern District of California seeking a declaration that the Regulation is invalid in its entirety and a permanent injunction barring its enforcement. See First Am. Compl. 33, AAR v. Randolph, No. 2:23-cv-01154 (E.D. Cal. Oct. 13, 2023). AAR and ASLRRA contend, among other things, that the Regulation is preempted by 49 U.S.C. § 10501, the broad preemption provision enacted in the ICC Termination Act of 1995 (ICCTA).³ Id. at 25-28. Although no aspects of this litigation are pending before the Board, as the federal agency responsible for implementing the Interstate Commerce Act, the Board frequently addresses ICCTA preemption issues through declaratory orders issued pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321.

The Interstate Commerce Act, 49 U.S.C. §§ 10101-16106, is one of the “most pervasive and comprehensive of federal regulatory schemes,” and embodies Congress’s recognition of the “need to regulate railroad operations at the federal level.” Ore. Coast Scenic R.R. v. Ore. Dep’t of State Lands, 841 F.3d 1069, 1074-75 (9th Cir. 2016); City of Auburn v. U.S., 154 F.3d 1025, 1029 (9th Cir. 1998). Broadly, it gives the Board jurisdiction over domestic rail transportation taking place as part of the interstate rail network. 49 U.S.C. § 10501(a)(2); see also Ore. Coast Scenic R.R., 841 F.3d at 1074-76. As relevant here, transportation between places in the same state is within the Board’s jurisdiction so long as that transportation is related to interstate commerce. Ore. Coast Scenic R.R., 841 F.3d at 1075. The Board’s jurisdiction over “transportation by rail carriers” is “exclusive,” 49 U.S.C. § 10501(b), and “transportation” is

² Section 209(e)(1) of the CAA expressly prohibits California and other states from adopting or attempting to enforce any standard or other requirement relating to the control of emissions from new locomotives or new engines used in locomotives. 42 U.S.C. § 7543(e)(1).

³ On February 16, 2024, the court granted in part and denied in part a motion to dismiss AAR’s and ASLRRA’s complaint. See AAR v. Randolph, No. 2:23-cv-01154, 2024 WL 664359 (E.D. Cal. Feb. 16, 2024).

defined expansively to encompass “a locomotive, car, . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail” as well as “services related to that movement,” 49 U.S.C. § 10102(9).

To further these goals, Congress, in ICCTA, included an expansive preemption provision, expressly providing that “the remedies provided under [49 U.S.C. §§ 10101-11908] 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). The core purpose of § 10501(b) is to ensure the free flow of interstate commerce, including by preventing a patchwork of differing regulations across states. Elam v. Kan. City S. Ry., 635 F.3d 796, 804 (5th Cir. 2011) (a purpose of ICCTA was to create a “[f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation”); Fayus Enters. v. BNSF Ry., 602 F.3d 444, 452 (D.C. Cir. 2010) (ICCTA reflected a Congressional effort to prevent the “balkanization” of railroad-related laws); U.S. EPA—Pet. for Declaratory Order (EPA Dec. Order), FD 35803, slip op. at 7 (STB served Dec. 30, 2014) (“The courts and the Board have emphasized the importance of national uniformity in laws governing rail transportation when interpreting § 10501(b).”) As explained in ICCTA’s legislative history, subjecting the national rail network to varying state regulations “would greatly undermine the industry’s ability to provide the ‘seamless’ service that is essential to its shippers,” and would weaken the rail industry’s “efficiency and competitive viability.” S. Rep. 104-176, at 6 (1995).

More specifically, § 10501(b) preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation. N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007). State or local laws affecting rail transportation can be categorically preempted or preempted “as applied.” EPA Dec. Order, FD 35803, slip op. at 7. Categorical preemption under ICCTA precludes state regulation regardless of its practical effect because the “focus is the act of regulation itself, not the effect of the state regulation in a specific factual situation.” Delaware v. STB, 859 F.3d 16, 19 (D.C. Cir. 2017) (citation omitted). Two broad categories of state and local actions have been found to be categorically preempted “regardless of the context or rationale for the action”: (1) state or local permitting or preclearance requirements that could be used to deny a railroad the ability to conduct some part of its operations or proceed with activities that the Board has authorized; and (2) state or local regulation of matters that are directly regulated by the Board. CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 3 (STB served May 3, 2005). State or local laws that are not categorically preempted still may be preempted “as applied” if they would have “the effect of unreasonably burdening or interfering with rail transportation.” Delaware, 859 F.3d at 19.

With respect to other federal laws, if an “apparent conflict” exists between ICCTA and another federal law, then efforts must be made to “harmonize the two laws” by “giving effect to both laws if possible.” Assoc. of Am. R.Rs. v. S. Coast Air. Quality Mgmt. Dist., 622 F.3d 1094, 1097 (9th Cir. 2010). However, if there is a “positive repugnancy” or an “irreconcilable conflict” between federal laws, the question becomes whether the later-enacted statute repealed the earlier-enacted statute to the extent of the conflict. Matsushita Elec. Indus. v. Epstein, 516 U.S. 367, 381 (1996); Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976).

The Board has previously addressed possible preemption of regulations under both the CAA and the Clean Water Act (CWA), and it has discretion to issue a declaratory order to terminate controversies or resolve uncertainties. See 5 U.S.C. § 554(e); 49 U.S.C. § 1321. In EPA Dec. Order, the Board stated that two rules concerning railroad locomotive idling proposed by California’s South Coast Air Quality Management District would likely be preempted by 49 U.S.C. § 10501(b), even if EPA incorporated those rules into California’s State Implementation Plan under the CAA. FD 35803, slip op. at 8-10 (STB served Dec. 30, 2014).⁴ The Board reasoned that “allowing states and localities to create a variety of complex regulations governing how an instrument of interstate commerce is operated, equipped, or kept track of (even if federalized under the CAA) would directly conflict with the goal of uniform national regulation of rail transportation.” Id. at 10. And, in Association of American Railroads—Petition for Declaratory Order (AAR Dec. Order), the Board stated that the CWA’s National Pollutant Discharge Elimination System (NPDES) permitting program and discharge prohibition would likely be preempted by § 10501(b) if applied to discharges incidental to the operation of rail cars in transit.⁵ FD 36369, slip op. at 1 (STB served Dec. 30, 2020). The Board also reasoned that “if individual states (and the EPA in those jurisdictions in which it administers the NPDES program) were to apply the NPDES permitting program to discharges from the incidental operation of rail cars in transit, it would likely result in a patchwork of differing regulations that cannot be harmonized with § 10501(b) and therefore would likely be preempted.” Id. at 10; see also id. at 13-14 (stating that ICCTA was “arguably the more specific statutory provision,” and that, to the extent the NPDES permitting program was “incompatible with the purpose” of ICCTA, the later-enacted statute (ICCTA) should “be given effect”).

DISCUSSION & RECOMMENDATIONS

The Regulation enacted by CARB directly targets rail transportation,⁶ and thus gives rise to the patchwork concerns that have led both courts and the Board to find certain state laws preempted under ICCTA. See, e.g., AAR, 622 F.3d at 1098 (finding idling requirements that “apply exclusively and directly to railroad activity, requiring the railroads to reduce emissions and to provide . . . specific reports,” to be preempted under ICCTA); City of Auburn, 154 F.3d at 1030-32 (finding that ICCTA preempted application of state and local environmental permitting

⁴ The Board provided guidance on ICCTA preemption but declined to issue a declaratory order in that proceeding as it determined that a definitive ruling would be premature due to outstanding questions regarding whether EPA would in fact incorporate the relevant proposed rules into California’s SIP. Id. at 6.

⁵ As with EPA Dec. Order, the Board provided guidance on ICCTA preemption but declined to issue a declaratory order on the ground that such a definitive ruling would be premature. AAR Dec. Order, FD 36369, slip op. at 10.

⁶ Certain components, such as the In-Use Operational Requirement, could be viewed as analogous to state preclearance requirements, which, under Board and court precedent, are categorically preempted.

laws to rail line acquisition); Delaware, 859 F.3d at 22 (finding that anti-idling rule “impermissibly target[ed] rail transportation and railroad operations” and was preempted under ICCTA); see also EPA Dec Order & AAR Dec Order.

A preemption analysis under ICCTA may be informed by what aspects of the Regulation require and receive authorization under § 209(e)(2). See Engine Mfrs. Assoc. v. EPA, 88 F.3d 1075, 1090, 1093-94 (9th Cir. 1996) (upholding EPA’s interpretation that states may adopt certain in-use regulations for nonroad sources under § 209(d) without EPA authorization under § 209(e)). Any such aspect of the Regulation not needing or receiving EPA authorization would only have the “force and effect of state law.” AAR, 622 F.3d at 1098. By directly managing or governing rail transportation, it appears likely that any such provisions would be found to be preempted under ICCTA based on court and Board precedent. Id. For this reason, and because the authorization issue has been raised in the litigation referenced above, it would be beneficial for EPA to specify whether there are any aspects of the Regulation that do not require authorization under § 209(e)(2).

There also appears to be an open question in the litigation brought by AAR and ASLRRRA as to whether those aspects of the Regulation that both require and receive authorization under § 209(e)(2) would “have the force and effect of federal law,” thereby creating a potential conflict with ICCTA.⁷ See AAR, 622 F.3d at 1098. If so, any such conflict would raise substantial and complex questions regarding whether the laws may be reconciled, or whether ICCTA impliedly repealed the earlier statute to the extent of the conflict. See, e.g., CWA Dec. Order, FD 36369, at 13-14. Although the Board recognizes that EPA has historically viewed possible preemption under another Federal statute as “outside the scope of review of California authorization requests under § 209(e)(2),”⁸ where there is potential conflict between two laws, courts and agencies endeavor to harmonize the two laws to give each effect, if possible. AAR, 622 F.3d at 1097. EPA consideration of ICCTA and the Congressional goals it advances when assessing the Regulation under § 209(e)(2) would be consistent with that precedent.

For example, as explained in EPA’s Notice for this proceeding, EPA must consider whether the Regulation’s standards or enforcement procedures are an attempt to regulate emissions from new locomotives or new engines used in locomotives. Cal. State Nonroad Engine Pollution Control Standards, 89 Fed. Reg. 14484-01, 14486 (EPA Feb. 27, 2024) (Notice of opportunity for public hearing and comment).⁹ Moreover, EPA will consider whether “there

⁷ EPA has previously suggested that state emission controls that are not preempted under the CAA—like those authorized under § 209(e)(2)—may nevertheless “violate the Commerce Clause of the U.S. Constitution by imposing an undue burden on interstate commerce.” See Emission Standards for Locomotives & Locomotive Engines, 63 Fed. Reg. 18978, 18994 (April 16, 1998) (Final Rule).

⁸ Cal. State Nonroad Engine Pollution Control Standards, 78 Fed. Reg. 58090-01, 58120 (EPA Sept. 20, 2013) (Notice of decision).

⁹ See also Locomotive & Locomotive Engines, Preemption of State and Local Regulations, 88 Fed. Reg. 77004, 77007-08 (EPA Nov. 8, 2023) (Final Rule) (“Any State

is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time.” Cal. State Nonroad Engine Pollution Control Standards, 89 Fed. Reg. at 14486. To the extent authorization under § 209(e)(2) would give the Regulation or parts of it the “force and effect of federal law,” EPA should consider interpreting and applying the CAA narrowly when making these determinations and erring on the side of finding CAA preemption should it have doubts as to the Regulation’s technical feasibility or whether aspects of it attempt to regulate the control of emissions from new locomotives or otherwise run afoul of or not qualify for authorization under § 209(e). This may be particularly important given the Regulation’s potential impact and breadth, which appears to go well beyond the examples that EPA envisioned California might propose for authorization under § 209(e)(2). See Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3, 88 Fed. Reg. 25926-01, 26095 (EPA April 27, 2023). Although there may yet be substantial and complex questions about whether § 10501(b) of ICCTA and § 209(e)(2) of the CAA can be reconciled, an approach along these lines would reflect an attempt to harmonize the statutes, consistent with the precedent discussed above, and would acknowledge the backdrop that Congress established through ICCTA for regulation of the national rail network.

CONCLUSION

Given the potentially highly significant impact that the Regulation may have on interstate rail transportation, the Board appreciates the opportunity to submit this comment.

Respectfully submitted,

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authorization application that includes locomotive emission regulations would be subject to consideration of whether such regulations significantly affect the design or manufacture of a new locomotive or new engine used in a locomotive . . .”).