

BENJAMIN J. HORWICH (State Bar No. 249090)
JOHN F. MULLER (State Bar No. 300839)
DAVID J. FEDER (State Bar No. 302112)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, Twenty-Seventh Floor
San Francisco, California 94105
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
ben.horwich@mto.com
Attorneys for Plaintiff BNSF Railway Company

RAYMOND A. ATKINS (*pro hac vice* motion to be filed)
REBECCA K. WOOD (*pro hac vice* motion to be filed)
HANNA M. CHOUEST (*pro hac vice* motion to be filed)
TOBIAS S. LOSS-EATON (*pro hac vice* motion to be filed)
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
ratkins@sidley.com
Attorneys for Plaintiff Union Pacific Railroad Company

(additional counsel listed on signature page)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BNSF RAILWAY COMPANY and
UNION PACIFIC RAILROAD COMPANY,

Plaintiffs,

vs.

CALIFORNIA STATE BOARD OF
EQUALIZATION, DAVID J. GAU, in his
official capacity as Executive Director of the
California State Board of Equalization;
GEORGE RUNNER, FIONA MA, JEROME
HORTON, DIANE L. HARKEY, BETTY T.
YEE, in their official capacities as Board
Members of the California State Board of
Equalization; KAMALA D. HARRIS, in her
official capacity as Attorney General of
California; CALIFORNIA GOVERNOR'S
OFFICE OF EMERGENCY SERVICES;
MARK GHILARDUCCI, in his official
capacity as Director of the California
Governor's Office of Emergency Services,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. Transportation by railroad is the modern paradigm of interstate commerce. Rail is
3 the safest and most efficient mode of ground transportation, linking producers and consumers of
4 all kinds, and interconnecting with sea ports and truck terminals across the Nation. This activity is
5 so vital to the national economy that Congress—and the federal Constitution itself—have largely
6 insulated it from state interference. The federal ICC Termination Act, for example, asserts
7 exclusive federal jurisdiction over the economic relationship between railroads and their
8 customers. The Interstate Commerce Clause and the Hazardous Materials Transportation Act
9 forbid States from discriminating against interstate commerce and in favor of intrastate activity.
10 And the federal Railroad Revitalization and Regulatory Reform Act recognizes that out-of-state
11 railroads are easy prey for local tax assessors, and so forbids States from enforcing tax schemes
12 that single out railroad activity for disfavored treatment.

13 2. California has intruded on every one of these federal interests, and others too, in a
14 recently implemented law referred to here as Senate Bill 84 (“SB 84”). That law compels
15 railroads to collect from their customers and turn over to the State—under pain of civil and
16 criminal penalty—a charge on the transportation of certain hazardous materials by rail. The
17 charge is levied as a flat amount for each loaded rail car, regardless of how far it travels in the
18 State, so long as it is loaded within or crosses California’s borders. And the charge is uniquely
19 imposed on rail transportation and only rail transportation; a truck loaded with hazardous materials
20 incurs no such fee, despite presenting a far greater risk of accident. SB 84 proposes that the
21 proceeds of this scheme should fund training and equipment suitable for response to hazardous
22 material incidents associated with rail. But such training and equipment can equally serve in
23 responding to the (far more frequent) incidents involving trucks, and state officials have already
24 endorsed renting out that expensive equipment for non-rail purposes for a nominal fee.

25 3. This hazmat charge defies federal law and economic logic. If exclusive federal
26 jurisdiction over the economic relationship between railroads and their customers means anything,
27 it means that a State cannot establish the charges to be collected for rail transportation, order a
28 railroad to collect them from its customers, and depress rail revenues and customer demand in the

process. If the “dormant” Commerce Clause means anything, it bars flat charges that allow unlimited intrastate activity for the same price as admission across the state border. If the federal prohibitions on discrimination against railroads mean anything, they forbid a State from levying unique charges on rail activity that rail’s competitors—like trucks—do not have to pay. And in the end, California’s scheme will disserve the public interest, either by encouraging shippers to switch to riskier modes of transportation, or by simply discouraging interstate commerce in hazardous materials that are vital to the Nation’s industrial and agricultural economy. The SB 84 hazmat charge is unlawful and should be enjoined.

PARTIES

4. Plaintiff BNSF Railway Company (“BNSF”) is a Delaware Corporation with its principal place of business in Fort Worth, Texas. It is a common carrier by railroad engaged in interstate and intrastate commerce in numerous States, including California. BNSF is one of the largest freight railroad networks in North America. It operates a rail network of approximately 32,500 route miles in 28 States and three Canadian provinces. It has approximately 44,000 employees and 8,000 locomotives.

5. Plaintiff Union Pacific Railroad Company (“Union Pacific”) is a Delaware Corporation with its principal place of business in Omaha, Nebraska. It is a common carrier by railroad engaged in interstate and intrastate commerce in numerous States, including California. Union Pacific is the largest railroad network in the United States. It connects 23 States in the western two-thirds of the Nation by rail. In 2015, Union Pacific employed 44,500 people and operated 8,500 locomotives over 32,100 miles of track.

6. Defendant California State Board of Equalization (“Board of Equalization”) administers the State of California’s sales and use, fuel, alcohol, and tobacco taxes, and other taxes and fees. The Board of Equalization is required to administer and collect the charge imposed by SB 84 in accordance with the Fee Collection Procedures Law, Cal. Rev. & Tax. Code §§ 55040-55102. *See* Cal. Gov’t Code § 8574.36.

7. Defendant David J. Gau, being sued in his official capacity, is the Executive Director of the California State Board of Equalization. Defendant Gau resides in California.

8. Defendants Fiona Ma, George Runner, Jerome Horton, Diane L. Harkey, Betty T. Yee, being sued in their official capacities, are Board Members of the California State Board of Equalization. Defendant Ma is the Chairwoman of the Board. Defendant Yee is the State Controller of California and is ex officio a Member of the Board.

9. Plaintiffs are informed and believe that Defendant Ma is a resident of San Francisco, California. Defendant Ma maintains an office in San Francisco in her capacity as a Member and Chairwoman of the Board. The other Board Members reside in California.

10. Defendant Kamala D. Harris, being sued in her official capacity, is the Attorney General of the State of California. General Harris resides in California. General Harris has authority to bring suit on behalf of the Board of Equalization upon its request to enforce provisions of the Fee Collection Procedures Law.

11. Defendant California Governor's Office of Emergency Services ("Office of Emergency Services") is the agency of the State of California responsible under SB 84 for promulgating regulations to implement SB 84, including identifying the top 25 hazardous material commodities transported by rail and establishing a schedule of fees to be paid by the owners of those materials and collected by the railroad transporting the material. Cal. Gov't Code § 8574.32(a)(1).

12. Defendant Mark Ghilarducci ("Director Ghilarducci"), being sued in his official capacity, is the Director of the Office of Emergency Services. Defendant Ghilarducci resides in California.

JURISDICTION

13. SB 84 purports to designate the hazmat charge as a "fee." To the extent the hazmat charge is considered to be a fee, and is not considered to be a tax, then jurisdiction is proper under 28 U.S.C. § 1331 because this Complaint arises under the Constitution and laws of the United States, and raises substantial questions of federal law, including whether federal law preempts SB 84 and whether the hazmat charge is imposed in violation of the U.S. Constitution. In those circumstances, jurisdiction is also proper under 28 U.S.C. § 1343 for claims in this Complaint that seek to redress the deprivation, under color of State authority, of rights, privileges or immunities

1 secured by the Constitution or by federal statute, and under 28 U.S.C. § 1367 for other claims in
2 this Complaint.

3 14. In the alternative, to the extent the SB 84 hazmat charge is considered to be a tax,
4 then jurisdiction is proper under the Railroad Revitalization and Regulatory Reform Act of 1976,
5 § 306, Pub. L. No. 94-210, 90 Stat. 54 (now codified in relevant part as amended at 49 U.S.C.
6 § 11501) (the “4-R Act”). The 4-R Act confers jurisdiction on federal courts to “prevent a
7 violation” of its provisions notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341, which
8 generally prohibits federal courts from enjoining the collection of state taxes when a plain, speedy
9 and effective remedy may be had in state court. 49 U.S.C. § 11501(c).

10 15. This Court may declare the legal rights and obligations of the parties in this action
11 pursuant to 28 U.S.C. §§ 2201 and 2202 because the action presents an actual controversy within
12 the Court’s jurisdiction.

13 VENUE

14 16. Venue is proper in the Northern District of California under 28 U.S.C. § 1391(b)(1)
15 because all Defendants reside in California and Defendant Ma is a resident of the Northern District
16 of California and maintains an office in the Northern District of California in her official capacity
17 as a member and the Chair of the Board of Equalization. Venue is also proper in this judicial
18 district under 28 U.S.C. § 1391(b)(2) because a substantial part of the statewide activity to which
19 SB 84 will apply occurs in the Northern District of California, including the loading of hazardous
20 materials from industrial facilities in, *inter alia*, Contra Costa and Alameda Counties, and the
21 transfer of hazardous materials to rail at the Port of Oakland in Alameda County.

22 INTRADISTRICT ASSIGNMENT

23 17. Because this action arises in substantial part from activity conducted in Contra Costa
24 and Alameda Counties, this action should be assigned to the San Francisco Division or the
25 Oakland Division of this Court under Local Rule 3-2(d).

FEDERAL STATUTORY AND CONSTITUTIONAL BACKGROUND

Preemption Under the ICC Termination Act

18. Congress enacted the ICC Termination Act of 1995 (“ICCTA”), Pub. L. No. 104-88, 109 Stat. 803 (codified as amended at 49 U.S.C. § 10101 *et seq.*), to abolish the Interstate Commerce Commission and create its successor agency, the Surface Transportation Board (“STB”). Among other things, ICCTA broadly commits the economic relationship between rail carriers and shippers to the influence of market forces, subject to regulation at the federal level by the STB, and free from state interference. A rail carrier subject to the jurisdiction of the STB is required to establish “reasonable rates” (49 U.S.C. § 10702), and “rate” means a “rate or charge” for transportation (49 U.S.C. § 10102(7)).

19. ICCTA vests exclusive jurisdiction in the STB over “transportation by rail carriers . . . with respect to rates, classifications, rules . . . , practices, routes, services, and facilities of such carriers” and over “the construction, acquisition, operation, abandonment, or discontinuance of [tracks] or facilities.” 49 U.S.C. § 10501(b). Because the STB’s jurisdiction is exclusive, States may not legislate in these areas, which embrace regulation of the economic relationship between a rail carrier and a shipper. *City of Auburn v. United States*, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (noting Congress’s intent to occupy the entire field of economic regulation of the interstate rail transportation system). Every other court to have confronted the issue has similarly concluded that ICCTA “preempt[s] state economic regulation of railroad operations.” *See Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1293 (D. Mont. 1997); *see also, e.g., PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 219 (4th Cir. 2009); *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 806 (5th Cir. 2011); *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451 (D.C. Cir. 2010) (“[T]he core of ICCTA preemption is ‘economic regulation[.]’ ”) (collecting cases).

20. Federal courts and the STB have found certain types of state regulations of railroads to be “categorically” preempted, without any inquiry into the State’s reason for the regulation or burden on the railroad industry. In particular, States are categorically prevented from intruding into matters that are directly regulated by the Board (e.g., railroad rates and charges, services, and

1 licensing). *See 14500 Limited LLC—Pet. For Declaratory Order*, Docket No. FD 35788, slip op.
 2 at 4 (STB served June 5, 2014) (citing *City of Auburn*, 154 F.3d at 1029-31). Other state
 3 regulations may be preempted as applied—that is, if they have the effect of unreasonably
 4 burdening or interfering with rail transportation or if they single railroads out for disfavored
 5 treatment.

6 21. Congress categorically preempted States from regulating the economic relationship
 7 between a rail carrier and a shipper to protect the railroad industry from a patchwork of State and
 8 local regulations that would interfere with interstate commerce. As the Senate noted when it
 9 approved ICCTA: “The hundreds of rail carriers that comprise the railroad industry rely on a
 10 nationally uniform system of economic regulation. Subjecting rail carriers to regulatory
 11 requirements that vary among the States would greatly undermine the industry’s ability to provide
 12 the ‘seamless’ service that is essential to its shippers and would weaken the industry’s efficiency
 13 and competitive viability.” S. Rep. No. 104-176, at 6. The House similarly noted when it
 14 approved ICCTA: “Although States retain the police powers reserved by the Constitution, the
 15 Federal scheme of economic regulation and deregulation is intended to address and encompass all
 16 such regulation and to be completely exclusive. Any other construction would undermine the
 17 uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of
 18 minimal regulation for this intrinsically interstate form of transportation.” H.R. Rep. No. 104-311,
 19 at 96.

20 22. The “nationally uniform system of economic regulation” that Congress has
 21 prescribed for railroads includes a statutory common carrier obligation owed to shippers and
 22 passengers. 49 U.S.C. § 11101. As common carriers, railroads must (outside of certain well-
 23 defined exceptions) provide rail service, at a customer’s reasonable request, for the transportation
 24 of any commodities, including hazardous materials.

25 **“Dormant” Commerce Clause Limitations on State Regulation**

26 23. The Interstate Commerce Clause of the U.S. Constitution provides that “the
 27 Congress shall have the power . . . to regulate Commerce . . . among the several States.” U.S.
 28 Const. art. I, § 8, cl. 3. The promotion and protection of interstate commerce is a central function

1 of the Federal Government, and the Interstate Commerce Clause recognizes that the free flow of
 2 goods and materials throughout the nation is essential to the national economy. “Although the
 3 Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and
 4 foreign commerce,” the Supreme Court has explained it also “has long been recognized as a self-
 5 executing limitation on the power of the States to enact laws imposing substantial burdens on such
 6 commerce.” *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). This is
 7 sometimes called the “dormant” Commerce Clause.

8 24. State and local laws or regulations that discriminate against or impermissibly
 9 interfere with interstate commerce violate the Interstate Commerce Clause and are invalid. For
 10 example, a “state or local toll[]” imposed on interstate commerce must be “based on some fair
 11 approximation of [the payer’s] use or privilege for use, . . . and [be] neither discriminatory against
 12 interstate commerce nor excessive in comparison with the governmental benefit conferred.”
 13 *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972).
 14 Thus, a regulation, such as a charge imposed on activity in interstate commerce, violates the
 15 Interstate Commerce Clause if “widespread adoption of similar regulation [by other States] would
 16 impermissibly interfere with interstate trade.” *Rocky Mountain Farmers Union v. Corey*, 730 F.3d
 17 1070, 1105 (9th Cir. 2013). For example, a charge is impermissible where “imposition of a tax
 18 identical to the one in question by every other State would add [a] burden to interstate commerce
 19 that intrastate commerce would not also bear.” *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514
 20 U.S. 175, 185 (1995); *accord Am. Trucking Ass’n, Inc. v. Scheiner*, 483 U.S. 266, 286-87 (1987)
 21 (striking down state charge that “exert[ed] an inexorable hydraulic pressure on interstate
 22 businesses to ply their trade within the State that enacted the measure rather than among the
 23 several States”) (internal quotation marks omitted).

24 **Preemption Under the Hazardous Materials Transportation Act**

25 25. The federal Hazardous Materials Transportation Act (“HMTA”), Pub. L. No. 93-
 26 633, 88 Stat. 2156 (1975) (codified as amended at 49 U.S.C. § 5101 *et seq.*) was enacted to
 27 “protect against the risks to life, property, and the environment that are inherent in the
 28 transportation of hazardous material in intrastate, interstate, and foreign commerce.” 49 U.S.C.

1 § 5101. Pursuant to HMTA, the Secretary of Transportation has promulgated regulations
 2 “govern[ing] safety aspects, including security, of the transportation of hazardous material,” 49
 3 U.S.C. § 5103(b)(1)(B), including spill prevention and emergency response, and regulations
 4 specific to transportation by rail, *see generally* 49 C.F.R. pts. 172, 174.

5 26. HMTA expressly preempts state-law requirements that conflict with or obstruct
 6 federal hazardous material laws and regulations. 49 U.S.C. § 5125(a). With respect to state-
 7 imposed fees in particular, HMTA further provides that a State “may impose a fee related to
 8 transporting hazardous material only if the fee is fair and used for a purpose related to transporting
 9 hazardous material.” 49 U.S.C. § 5125(f). A fee that violates the “dormant” Commerce Clause is
 10 not “fair” under HMTA and is therefore preempted. A fee that discriminates against rail as a
 11 mode of transportation is likewise not “fair” and is preempted by HMTA.

12 27. By delegation from the Secretary of Transportation (*see* 49 C.F.R. § 1.89(j)), the
 13 Federal Railroad Administration (“FRA”) oversees rail compliance with the Hazardous Materials
 14 Regulations, 49 C.F.R. pts. 171-180 (“HMR”) that implement HMTA. FRA has discharged that
 15 responsibility by establishing requirements to ensure “the safe transportation of hazardous
 16 materials.” *See, e.g.*, Emergency Restriction/Prohibition Order, United States Dep’t of Transp.,
 17 DOT Docket No. DOT-OST-2014-0067 (May 7, 2014) (imposing notification requirements on the
 18 railroads and seeking to address “the subsequent releases of large quantities of crude oil into the
 19 environment.”). FRA, in conjunction with its sister agency, the Pipeline and Hazardous Materials
 20 Safety Administration (“PHMSA”), has also issued safety advisories, including a 2015 advisory
 21 reminding railroads of their responsibilities under the HMR to provide detailed emergency
 22 response information to emergency responders in the event of a rail accident. *Hazardous*
 23 *Materials: Emergency Response Information Requirements*, United States Dep’t of Transp.,
 24 PHMSA-2015-0099, Notice No. 15-7 (Apr. 17, 2015).

25 **Preemption Under the Railroad Revitalization and Regulatory Reform Act of 1976**

26 28. The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-
 27 210, 90 Stat. 31 (now codified as amended in scattered sections of Title 49), was enacted to, *inter*
 28 *alia*, further the financial stability of the railway system of the United States. Congress recognized

1 that one threat to the economic viability of the railway system was States' discriminatory taxation
 2 of railroads and rail activity. "[R]ailroads are easy prey for State and local tax assessors in that
 3 they are nonvoting, often nonresident, targets for local taxation, who cannot easily remove
 4 themselves from the locality." *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 336
 5 (1994) (internal quotation marks and citation omitted). To remove the "temptation to excessively
 6 tax" railroads "to subsidize general welfare spending," the 4-R Act prohibits state and local tax
 7 schemes that discriminate against railroads. *W. Air Lines, Inc. v. Bd. of Equalization of S.D.*, 480
 8 U.S. 123, 131 (1987). Such schemes are diverse, and thus "the nomenclature provided to the
 9 [state] charge at issue is not material" to the question whether the charge is a tax in substance
 10 under federal law. *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000).
 11 Instead, courts look to the nature and purpose of the charge, the entity paying the charge, and the
 12 organ of government imposing the charge, to determine if it is a tax. As relevant here, under 49
 13 U.S.C. § 11501(b) a State "may not" impose certain discriminatory property taxes or "[i]mpose
 14 another tax that discriminates against a rail carrier." "It is now well established that a showing
 15 that the railroads have been targeted [for taxation] is enough to prove discrimination" under this
 16 provision. *Kansas City S. Ry. Co. v. Koeller*, 653 F.3d 496, 510 (7th Cir. 2011).

17 **THE PREEMPTED STATE STATUTES AND REGULATIONS**

18 **Senate Bill 84 and Its Implementing Regulations**

19 29. SB 84 was signed into law on June 24, 2015, adding Article 3.9, entitled "Regional
 20 Railroad Accident Preparedness and Immediate Response," to the California Emergency Services
 21 Act. SB 84 imposes a charge on the transportation by rail in California of 25 hazardous materials
 22 (as identified in regulations adopted by the Office of Emergency Services). Cal. Gov't Code
 23 § 8574.32(a)(1). The SB 84 hazmat charge (in an amount set by regulation) is assessed upon each
 24 rail car loaded with any quantity of hazardous material (aside from residues in emptied cars). Cal.
 25 Gov't Code § 8574.32(b)(1); Cal. Code Regs. tit. 19, § 2704(d). SB 84 singles out and targets
 26 railroads because the charge it imposes applies only to transportation by rail. No comparable
 27 alternative charge is imposed on the transportation of hazardous materials by other modes of
 28 transportation.

1 30. The hazmat charge is nominally imposed on the owner of the hazardous material,
 2 but SB 84 and its implementing regulations establish a scheme under which the railroad carrying
 3 the hazardous materials must collect the charge from the owner or the person paying the freight
 4 charges and remit it quarterly to defendant Board of Equalization, in accordance with California's
 5 Fee Collection Procedures Law. Cal. Gov't Code § 8574.32(b)(2); Cal. Code Regs. tit. 19,
 6 §§ 2701, 2704. Indeed, SB 84 states that "[t]he fee shall be paid to the board by the person
 7 operating the train containing the rail car"—that is, by the railroad—"based on the number of
 8 loaded hazardous material rail cars transported within the state." Cal. Gov't Code
 9 § 8574.32(b)(2).

10 31. The hazmat charge has been set by regulation. Cal. Code Regs. tit. 19, § 2704(b). It
 11 applies to rail cars containing the following substances: acetonitrile, certain alcohols, anhydrous
 12 ammonia, ammonium hydroxide, calcium hypochlorite, chlorine, certain corrosive liquids, diesel
 13 fuel, environmentally hazardous substances, ethanol, gasoline, hydrogen peroxide, liquefied
 14 petroleum gas, liquefied gas, methanol, methyl ethyl ketone, nitric acid, petroleum crude oil,
 15 phenol, phosphoric acid, potassium hydroxide, propylene, sodium hydroxide, sulfuric acid,
 16 toluene, and vinyl acetate. Cal. Code Regs. tit. 19, § 2701(b).

17 32. The Board of Equalization is charged with administering and collecting the hazmat
 18 charge, and it "may prescribe, adopt, and enforce regulations relating to the administration and
 19 enforcement of" SB 84. Cal. Gov't Code §§ 8574.36, 8574.42. Railroads that "transport[]
 20 hazardous materials by rail car shall register with the [B]oard" pursuant to the Revenue and
 21 Taxation Code. Cal. Gov't Code § 8574.34. A registered railroad must remit to the Board the
 22 hazmat charge of \$45 "per loaded rail car containing any quantity of the hazardous material
 23 commodities" listed by regulation "which is transported by rail in California." Cal. Code Regs. tit.
 24 19, § 2704(b). The hazmat charge is to be imposed when a rail car either is loaded with its cargo
 25 (if the trip originates inside California) or enters California (if it originates elsewhere). In either
 26 case, the railroad must collect the charge. Cal. Gov't Code § 8574.32(b). A railroad must also
 27 collect the hazmat charge for intermodal cargo containers—that is, containers that are moved
 28 through multiple modes of transportation, such as trucking, rail, or ocean carrier, *see* Cal. Code

1 Regs. tit. 19, § 2700(d)—if the owner of the freight containing the hazardous material commodity
 2 has not already been charged under SB 84. Cal. Code Regs. tit. 19, § 2702.

3 33. SB 84 regulates the maximum lawful amount a railroad can collect from its
 4 customers to offset the administrative costs of collecting and remitting the hazmat charge to 5% of
 5 the hazmat charge. Cal. Gov't Code § 8574.32(b)(4)(B). This amount is separate from and “in
 6 addition to” the hazmat charge. “No portion of the [charge itself] is to be retained or withheld.”
 7 Cal. Code Regs. tit. 19, § 2706.

8 34. SB 84 requires each railroad that collects the hazmat charge to prepare and file a
 9 quarterly “return” with the Board, “together with a remittance payable to the [B]oard for the
 10 [charge] amount due for that period.” Cal. Gov't Code § 8574.38; *see also* Cal. Gov't Code
 11 § 8574.32(b)(2). Payment of the hazmat charge by the owner of the hazardous material to the
 12 railroad operating the train containing the rail car is sufficient to relieve the owner from further
 13 liability for the charge. Cal. Gov't Code § 8574.32(b)(4)(A). Any charge collected from a
 14 hazardous materials owner that has not been remitted to the Board of Equalization is deemed a
 15 debt owed to the State by the railroad required to collect and remit that charge. Cal. Gov't Code
 16 § 8574.32(b)(3).

17 35. The imposition of the SB 84 hazmat charge is imminent. By statute, the charge
 18 must take effect, at the latest, within six months of defendant Director Ghilarducci establishing a
 19 schedule of fees. Cal. Gov't Code § 8574.32(b)(1). On June 20, 2016, emergency regulations
 20 were finalized to establish the schedule of fees. Thus, the latest the charge may take effect is
 21 December 20, 2016. The Defendants, however, have stated their intention to implement the
 22 charge sooner. Under the regulations, the Office of Emergency Services must provide the Board
 23 of Equalization a list of railroads that should receive a notice that they must register under SB 84
 24 and the Fee Collection Procedures Law—and the charge becomes effective when the railroad in
 25 turn receives notice from the Board of Equalization. Cal. Code Regs. tit. 19, § 2704(a). The
 26 Board has stated that it “anticipates that it will give notice to the railroads by October 1, 2016” and
 27 “anticipates that it will then send returns to the railroads on approximately December 29, 2016, for
 28 the quarter beginning October 1 and ending December 31[, 2016].” Letter from Robert E.

1 Asperger, Deputy Attorney General to the Honorable Christopher E. Krueger in *Cal. Taxpayers*
 2 *Ass'n v. Cal. Governor's Office of Emergency Servs.* (Sacramento Cnty. Super. Ct.) (June 27,
 3 2016). By law, therefore, Plaintiffs will be required to begin keeping records and collecting the
 4 hazmat charge on or about October 1, 2016.

5 36. The SB 84 hazmat charges (and any interest or penalties) are deposited in the
 6 Regional Railroad Accident Preparedness and Immediate Response Fund in the State Treasury
 7 (the "Fund"), which SB 84 creates. Cal. Gov't Code § 8574.44. For the 2016 and 2017 calendar
 8 years, defendant Director Ghilarducci has authority to collect up to \$20 million for deposit into the
 9 Fund; for the 2018 calendar year and each year after, he has authority to collect up to \$10 million
 10 for deposit into the Fund. Cal. Gov't Code § 8574.44(g). To remain within these caps, the statute
 11 and regulations envision a scheme under which the hazmat charge will drop to \$0 once the annual
 12 limit has been reached, and excess payments will be refunded, until the charge is restored to the
 13 full \$45-per-car amount on January 1 of the next calendar year. Cal. Code Regs. tit. 19,
 14 §§ 2704(c), 2705; Cal. Gov't Code § 8574.32(d).

15 37. SB 84 provides no assurance that the collected hazmat charges will be used in a
 16 manner related to hazardous materials safety or to rail transportation. SB 84 does not itself
 17 appropriate monies deposited in the Fund, but instead relies on the Legislature to appropriate those
 18 monies in future budgets. Cal. Gov't Code § 8574.44(e) & (g)(1)-(2). It envisions that the Fund
 19 will be used, subject to appropriation by the Legislature, *first*, to pay certain administrative
 20 expenses, Cal. Gov't Code § 8574.44(b) and (d); *second*, to reimburse the California High-Cost
 21 Fund-B Administrative Committee Fund for monies previously loaned to the Fund to pay for
 22 activities of defendant Office of Emergency Services, Cal. Gov't Code § 8574.44(e) & (g)(1); and
 23 *third*, by defendant Director Ghilarducci "to pay for [specified] purposes related to the
 24 transportation of hazardous materials," Cal. Gov't Code § 8574.44(e). California's Budget Act of
 25 2016 appropriates \$9,987,000 from the Fund "to pay for administrative costs associated with
 26 railroad tank car hazardous material activities" by the Office of Emergency Services, and
 27 \$579,000 to support defendant State Board of Equalization. SB 826 (June 27, 2016), Items 0690-
 28 001-3260 and 0860-001-3260.

38. Although the purposes specified under section 8574.44(e) nominally relate to development of response capabilities that *could* be used in the event of a hazardous material incident involving a railroad, the use of the Fund under section 8574.44(e) is not limited to activities that would be of exclusive, or even primary, benefit to rail. For example, the Fund may be used to pay for hazardous material incident response training and planning that would be beneficial to those responding to a hazardous material incident involving a truck. No provision of SB 84 provides for reimbursement of training or planning expenses when those preparations are used to respond to a non-rail hazmat incident. Likewise, state and local agencies are permitted to use the equipment funded by the rail-specific hazmat charge for non-railroad purposes, with any reimbursement to be governed by a state fire service and rescue emergency mutual aid plan developed and adopted by defendant Office of Emergency Services. Cal. Gov't Code §§ 8574.44(i), 8619.5. In particular, the Office of Emergency Services has provided that local agencies may use response vehicles purchased using money loaned to the Fund and repayable, upon appropriation by the Legislature, out of funds raised through the SB 84 hazmat charge. Those vehicles include capabilities that would not be useful in responding to a hazardous materials incident involving rail. Plaintiffs are informed and believe that those vehicles were purchased at a cost of approximately \$1 million per vehicle. But the Office of Emergency Services has provided that they may be used for non-rail activities at a nominal rate of just \$160 per hour merely to cover maintenance costs.

California Fee Collection Procedures Law

39. Under SB 84, defendant Board of Equalization must collect and administer the SB 84 hazmat charge in accordance with the Fee Collection Procedures Law. Cal. Gov't Code § 8574.36. The Fee Collection Procedures Law requires certain persons (here, the railroads) to submit returns and remit payments as required under the underlying law (here, SB 84).

40. If Plaintiffs do not comply with the Fee Collection Procedures Law by keeping the necessary records and collecting and remitting the SB 84 hazmat charge, they will be subject to civil and criminal sanctions. For example, Plaintiffs could be subject to criminal sanction in a prosecution brought by defendant Attorney General Harris if they do not keep the records

1 necessary to make the returns prescribed by defendant Board of Equalization. Cal. Rev. & Tax.
 2 Code § 55362. Likewise, Plaintiffs could face criminal sanctions if they failed to file a return
 3 reporting on hazardous material shipments. Cal. Rev. & Tax. Code § 55361.

4 41. Other sanctions would apply if Plaintiffs do not collect the SB 84 hazmat charge
 5 from their customers and remit it to the Board of Equalization. For example, any person who fails
 6 to pay any charge within the time required by SB 84 must pay a penalty of 10% of the charge
 7 along with interest. Cal. Rev. & Tax. Code § 55042. Failing to pay the amount that is due and
 8 payable creates a perfected and enforceable state tax lien, Cal. Rev. & Tax. Code § 55141, which
 9 would allow the Board of Equalization to issue a warrant for the enforcement of the lien and seize
 10 railroad property and sell it at public auction, Cal. Rev. & Tax. Code § 55181. The Board of
 11 Equalization may also bring a legal action to collect any deficiency in the charge required to be
 12 paid. Or, upon the Board's request, the Attorney General, named as a defendant here, "shall bring
 13 the action." Cal. Rev. & Tax. Code § 55121.

14 **THE EFFECT OF SB 84 ON PLAINTIFFS' RAIL OPERATIONS**

15 42. Plaintiffs carry in interstate commerce each of the hazardous materials referred to
 16 above (*see supra*, ¶ 31).

17 43. During calendar year 2015, BNSF transported to, from, or in California in excess of
 18 100,000 rail cars and intermodal containers containing one or more of the top 25 hazardous
 19 materials listed above. The shippers of these commodities included more than 40 agricultural
 20 commodities shippers, more than 150 shippers of industrial products, and many more shippers of
 21 consumer products that would qualify as top-25 hazardous materials. Based on historical
 22 experience, Union Pacific anticipates that more than 77,000 units that it carries would be subject
 23 to the hazmat charge each year, and that the hazmat charge would affect approximately 200 Union
 24 Pacific customers.

25 44. Railroad operations are targeted and singled out by the SB 84 hazmat charge
 26 because it applies only to rail transportation of hazardous materials, and not to any other activity
 27 or mode of transportation, and no comparable charge is imposed on the transportation of
 28 hazardous materials by other means.

1 45. Plaintiffs are in competition with other modes of transportation (motor carriers,
2 water carriers, and pipelines) for the carriage of hazardous materials. In this competitive market,
3 the prices Plaintiffs charge to shippers are generally influenced by the price and nature of the
4 competitive services offered by other carriers. Because no comparable hazmat charge is imposed
5 on the services offered by other carriers, shippers will (correctly) perceive the SB 84 hazmat
6 charge as uniquely increasing their cost of transportation by rail.

7 46. Some of those shippers of hazardous materials have no ready alternative to rail
8 transportation—whether because of operational considerations favoring pickup or delivery by rail,
9 because of the long inland distances involved (for which rail enjoys significant efficiency
10 advantages over motor carriers), because of the unacceptably great hazard posed by transporting
11 certain hazardous materials long distances by truck, or otherwise. Such shippers will experience
12 the SB 84 hazmat charge as a direct increase in their cost of transportation, and Plaintiffs
13 anticipate that some such shippers will determine that certain shipments are simply uneconomical,
14 or will engage in less commerce in hazardous materials in California, thus using less of Plaintiffs’
15 transportation services.

16 47. Other shippers of hazardous materials are extremely sensitive to price, and they can
17 and do use alternative modes of transportation (e.g., truck or water transport instead of rail
18 transport) in response to changes in their cost of transportation. For example, a sufficient increase
19 in the cost of rail transportation through California would prompt shippers importing hazardous
20 materials by sea to avoid California ports so as to avoid inland rail legs in California. To remain
21 competitive for the business of such shippers, Plaintiffs will be forced in many circumstances to
22 lower the price they charge, effectively offsetting and absorbing some or all of the SB 84 hazmat
23 charge. In other circumstances, where the price increase caused by the SB 84 hazmat charge
24 makes carriage by rail uncompetitive, Plaintiffs will lose business to other modes of
25 transportation.

26 48. In short, the hazmat charge leaves Plaintiffs with two options, both of which would
27 come between them and their customers and cause lasting harm: first, lower their prices and
28 absorb the charge themselves, which will entail substantial lost profits for as long as the charge is

1 in place; or second, pass some or all of the charge along to their hazardous material customers,
2 which will necessarily prompt those customers to scale back their shipping operations or transfer
3 their business to other, more affordable modes of transportation. In either case, railroads will lose
4 profits and stand at a clear competitive disadvantage to other forms of transportation, including
5 trucking.

6 49. Plaintiffs will also be required to expend considerable resources to implement SB
7 84's mandate that they collect the hazmat charge from their customers to be turned over to the
8 Board of Equalization. Because neither BNSF nor Union Pacific is required to collect any similar
9 charges in California or other any other State, their existing systems and processes for tracking and
10 collecting freight charges do not currently satisfy the requirements of the state statute and
11 regulations. Rather, both BNSF and Union Pacific will need to invest in modifying their
12 information technology systems and will need to commit staffing resources to collect and remit
13 the charge and prepare the quarterly returns required by the Board of Equalization.

14 50. The cost and burden to Plaintiffs of adapting their businesses to collect the hazmat
15 charge are not mitigated by the provision of SB 84 and its implementing regulations that regulate
16 the maximum lawful amount that a railroad can collect from its customers to offset administrative
17 expenses at no more than 5% of the SB 84 hazmat charge. Purporting to authorize Plaintiffs to
18 charge an additional fee in an already competitive market does not compensate Plaintiffs for the
19 burden of collecting that charge. To the contrary, it merely compounds the problems created by
20 the hazmat charge itself (discussed above, *supra*, ¶¶ 44-48) by further increasing the costs
21 imposed on Plaintiffs' customers.

22 51. In light of the foregoing, without relief from this Court, Plaintiffs will be injured
23 because (1) the imposition of the hazmat charge will improperly interfere with the economic
24 relationship between Plaintiffs and their customers; (2) Plaintiffs will lose revenue and profits
25 when the imposition of the SB 84 hazmat charge forces them to lower their prices, cede business
26 to other modes of transportation that are not burdened with a similar charge, or lose business
27 because transportation becomes uneconomical for shippers; and (3) Plaintiffs must begin to
28 commit resources to keep required records and redesign their recordkeeping systems to comply

1 with SB 84's requirements. SB 84 and its implementing regulations will be the direct cause of
2 these injuries because they create the requirements that interfere with the economic relationship
3 between rail carriers and shippers. Conversely, a favorable decision from this Court would redress
4 Plaintiffs' imminent injuries by removing SB 84's discriminatory burden on the relationship
5 between rail carriers and shippers, and restoring the free play of market forces envisioned by
6 federal law.

7 **NECESSITY FOR EQUITABLE RELIEF**

8 52. Because the emergency regulations are operative, absent relief from this Court,
9 Plaintiffs must prepare to comply with the new regulatory scheme or they will imminently face
10 significant penalties as authorized by the Fee Collection Procedures Law. Because of the work
11 that would be required to implement SB 84's requirements in Plaintiffs' internal systems,
12 Plaintiffs will be forced to take action even in advance of the already-looming October 1, 2016
13 date on which they expect to be notified to register with defendant Board of Equalization. And
14 then, when Plaintiffs receive that notice, they will be required to damage their relationships with
15 their customers by collecting a charge that makes their transportation service less economically
16 competitive.

17 53. A judgment on the lawfulness of the SB 84 hazmat charge would terminate and
18 afford relief from the uncertainty, cost, disruption, conflict, and controversy created by the
19 imminent requirement to collect and remit that charge, and would prevent a similar controversy
20 from arising in the future.

21 54. The matter involves important questions of federal law and a ruling in this case will
22 have significant impact on the national system of rail transportation. It is thus of critical
23 importance to the rail industry and the public at large.

24 55. Plaintiffs will suffer irreparable harm if the enforcement of SB 84 and its
25 implementing regulations are not enjoined because they immediately would have to alter their
26 relationships with their customers, business practices, freight charge structures, and record-
27 keeping systems, in order to satisfy SB 84's demands. Moreover, Plaintiffs have no adequate
28 remedy at law for the injuries that would occur if SB 84 were allowed to go into effect because the

57. The public interest would also be served by enjoining SB 84 and its regulations,
because the economy, safety, and efficiency of interstate rail service would be protected.

**The SB 84 Hazmat Charge Is Preempted by ICCTA and
Therefore Violates the Supremacy Clause
(against all Defendants)**

59. SB 84 and the Fee Collections Procedure Law impermissibly regulate the economic relationship between rail carriers and shippers, and, moreover, do so by imposing an unreasonable and discriminatory burden on transportation by rail. Accordingly, the SB 84 hazmat charge is preempted under 49 U.S.C. § 10501(b) and the Supremacy Clause of the United States Constitution.

COUNT II

The SB 84 Hazmat Charge Violates the Interstate Commerce Clause and Therefore Deprives Plaintiffs of Rights Privileges, or Immunities Under 42 U.S.C. § 1983 (against Defendants Gau, Runner, Ma, Horton, Harkey, Yee, Harris, and Ghilarducci)

60. Plaintiffs reallege and incorporate by reference Paragraphs 1-59.

61. Because it reflects a flat charge on all rail cars with hazardous materials that enter California, the SB 84 hazmat charge disrupts the flow of interstate commerce in hazardous materials and discriminates against interstate rail carriers of hazardous materials. Because the hazmat charge under SB 84 will be collected exclusively from rail customers, but diverted to fund hazardous material training and response capabilities that are likely to be used far more often by others who do not pay the fee (such as motor carriers), the amount collected by Plaintiffs and remitted to the Board of Equalization will not be based on a fair approximation of Plaintiffs' use of the training and equipment funded by the hazmat charge. Moreover, if adopted by every State, SB 84's flat fee would discourage interstate commerce in hazardous materials by rail because interstate transportation would be subject to a multiplicity of processes and fees that would not be imposed on intrastate activity. Accordingly, the Interstate Commerce Clause forbids the SB 84 hazmat charge.

62. A State law that regulates a person in violation of the "dormant" Commerce Clause deprives that person of "rights, privileges, or immunities secured by the Constitution" within the meaning of 42 U.S.C. § 1983. *Dennis v. Higgins*, 498 U.S. 439 (1991).

COUNT III

The SB 84 Hazmat Charge Violates the Interstate Commerce Clause (against all Defendants)

63. Plaintiffs reallege and incorporate by reference Paragraphs 1-62.

64. The Interstate Commerce Clause forbids the SB 84 hazmat charge. *See supra*, ¶ 61.

COUNT IV

The SB 84 Hazmat Charge Is Preempted by HMTA and Therefore Violates the Supremacy Clause (against all Defendants)

65. Plaintiffs reallege and incorporate by reference Paragraphs 1-64.

66. The SB 84 hazmat charge is not “fair” under 49 U.S.C. § 5125(f) because it violates the “dormant” Commerce Clause and because it discriminates against transportation of hazardous materials by rail. Accordingly, the SB 84 hazmat charge is preempted by 49 U.S.C. § 5125(f).

COUNT V

The SB 84 Hazmat Charge Is Preempted by the 4-R Act and Therefore Violates the Supremacy Clause (against all Defendants)

67. Plaintiffs reallege and incorporate by reference Paragraphs 1-57, but plead in the alternative to the allegations of Paragraphs 58-66.

68. Plaintiffs are “rail carrier[s] providing transportation subject to the jurisdiction of the [Surface Transportation] Board.” 49 U.S.C. § 11501(b)(4).

69. For purposes of this count only, and without prejudice to Plaintiffs’ claims under Counts I-IV, although the SB 84 hazmat charge is styled as a “fee,” it is in substance a “another tax” within the meaning of 49 U.S.C. § 11501(b)(4). It is imposed by the Legislature, administered and collected by the Board of Equalization, and raises revenue for the general welfare. Accordingly, the hazmat charge is “another tax” within the meaning of the 4-R Act.

70. SB 84 impermissibly discriminates against railroads because it singles out and targets railroads alone for taxation. It imposes a charge that applies to hazardous material transportation only when a rail carrier is involved. The charge does not apply to any other industry or mode of transportation. No comparable alternative charge is imposed on transportation of the same materials by other modes of transportation. The charge therefore results in discrimination against rail carriers, including Plaintiffs. Accordingly, the SB 84 hazmat charge is preempted by 49 U.S.C. § 11501(b)(4).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that Defendants’ imposition or collection of the hazmat charge imposed under SB 84 is preempted by ICCTA.

2. Declare that Defendants’ imposition or collection of the hazmat charge imposed under SB 84 violates the Interstate Commerce Clause.

1 3. Declare that Defendants' imposition or collection of the fee imposed under SB 84 is
2 preempted by HMTA.

3 4. Declare that Defendants' imposition or collection of the tax imposed under SB 84 is
4 preempted by the 4-R Act.

5 5. Declare that the statutes and regulations imposing the hazmat charge and providing
6 for the collection, reporting, and remittance of the charge are invalid and unenforceable.

7 6. Preliminarily and permanently enjoin Defendants; their officers, agents, servants,
8 employees, and attorneys; and other persons who are in active concert or participation with them
9 from further implementing or enforcing the hazardous material charge provisions of SB 84, the
10 Fee Collections Procedures Law, and SB 84's implementing regulations, including from taking
11 any of the following actions in connection with the transportation of hazardous materials by rail in
12 California:

- 13 • establishing forms, procedures, and implementing regulations on the part of the
14 Board of Equalization, as provided in Cal. Gov't Code §§ 8574.28 and 8574.42;
- 15 • giving notice to register with the Board of Equalization, as provided in Cal. Gov't
16 Code § 8574.34;
- 17 • imposing the hazmat charge on the transportation of certain hazardous materials, as
18 provided in Cal. Gov't Code § 8574.32(a)(1) & (b)(1) and Cal. Code Regs. tit. 19,
19 § 2704(d);
- 20 • requiring collection of the hazmat charge, and remittance of the charges quarterly
21 to the Board of Equalization along with a return, as provided in Cal. Gov't Code
22 §§ 8574.32(b) and 8574.38 and Cal. Code. Regs. tit. 19, §§ 2701, 2704; and
- 23 • bringing any action, or requesting the Attorney General to bring any action under
24 Cal. Rev. & Tax. Code § 55121, to collect a hazmat charge, or to enforce any
25 recordkeeping or reporting provisions under SB 84 or the Fee Collection
26 Procedures Law.

27 7. Award Plaintiffs costs and expenses in this action, including reasonable attorneys',
28 accountants', and experts' fees under 42 U.S.C. § 1988 and any other applicable statute or rule.

8. Award Plaintiffs other relief that is just and proper.

DATED: July 29, 2016

MUNGER, TOLLES & OLSON LLP
BENJAMIN J. HORWICH
JOHN F. MULLER
DAVID J. FEDER

By: /s/ Benjamin J. Horwich

BENJAMIN J. HORWICH*

Attorneys for Plaintiff BNSF Railway Company

SIDLEY AUSTIN LLP
RAYMOND A. ATKINS
(*pro hac vice* motion to be filed)
REBECCA K. WOOD
(*pro hac vice* motion to be filed)
HANNA M. CHOUEST
(*pro hac vice* motion to be filed)
TOBIAS S. LOSS-EATON
(*pro hac vice* motion to be filed)

CAROL LYNN THOMPSON (State Bar No. 148079)
SIDLEY AUSTIN LLP
555 California Street
Suite 2000
San Francisco, California 94104
Telephone: (415) 772-1291
Facsimile: (415) 772-7400
cthompson@sidley.com

MELISSA B. HAGAN (State Bar No. 297408)
(application for admission pending)
Senior Counsel - Environmental Law &
National Environmental Counsel
UNION PACIFIC RAILROAD COMPANY
13181 Crossroads Parkway North, Suite 500
City of Industry, California 91746
Telephone: (562) 566-4609
Facsimile: (402) 501-2401
mbhagan@up.com

By: /s/ Carol Lynn Thompson

CAROL LYNN THOMPSON

Attorneys for Plaintiff Union Pacific Railroad Company

* I attest that the concurrence in the filing of this document has been obtained from the other signatory.