



January 10, 2019

The Honorable Raymond P. Martinez
Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590-0001

**Re: Petition of the American Bus Association, Inc. for a Determination that
California Meal and Rest Break Rules are Preempted by 49 U.S.C. § 31141**

Dear Administrator Martinez:

The American Bus Association, Inc. (“ABA”) hereby petitions the Federal Motor Carrier Safety Administration¹ for a determination that the State of California Meal and Rest Break Rules (“MRB Rules”) for drivers of passenger-carrying motor vehicles subject to the FMCSA’s hours of service (“HOS”) regulations are preempted under 49 U.S.C. § 31141.

In response to petitions by the American Trucking Associations, Inc. and the Specialized Carrier and Rigging Association, the FMCSA has recently determined that the California MRB Rules are preempted under 49 U.S.C. § 31141 as applied to property-carrying commercial motor vehicle drivers covered by the FMCSA’s “HOS” regulations. Docket No. FMCSA-2018-0304; 83 Fed. Reg. 67470 (December 28, 2018) (“the ATA decision”). Although that determination by its terms does not apply to drivers of passenger-carrying commercial motor vehicles, the FMCSA said it “would consider any petition asking for a determination as to whether the MRB Rules are preempted with respect to such drivers.” *Id.*, n. 1.

As set forth below, the arguments for preempting the MRB Rules as applied to drivers of passenger-carrying vehicles subject to FMCSA’s HOS Rules are at least as compelling, if not more so, than for drivers of property-carrying vehicles.

I. PETITIONERS

ABA is a national trade association located in Washington, D.C. The association represents the interests of private operators of intercity buses that provide several types of passenger service, including regular route intercity service between fixed points on set schedules, charter service, tour service, commuter bus services, and special operations, which is scheduled service to enhance public transportation systems (such as bus service from a city to an airport), or may be connected with a special event or attraction at the destination.

¹ The Secretary of Transportation’s authority to issue preemption determinations has been delegated to FMCSA under 49 C.F.R. § 1.73(g).

ABA regularly monitors legislation and regulations affecting the intercity bus industry, and participates in lobbying and rulemakings at the federal, state and local levels. The association also participates in agency adjudications on behalf of their members' interests and represents its members in court litigation on important matters involving the bus industry. ABA filed comprehensive comments in support of preemption of the MRB Rules in Docket No. FMCSA-2018-0304.

The intercity bus industry provides over 600 million passenger trips each year; a large percentage of those trips are in interstate commerce. Many of ABA's member companies are based in California or operate into or through the state. Like motor carriers of property, intercity bus operators have a keen interest in promoting and preserving national uniformity in the regulation of driver hours of service.

II. CALIFORNIA MEAL AND REST BREAK RULES

The California MRB Rules are described in full in the ATA decision. *See* 83 Fed. Reg. 67470-71. In short, § 512(a) of the California Labor Code requires employers to provide employees with a meal break of not less than 30 minutes for every five hours worked.

Section 11090(11) of Article 9 (Transport Industry) of the California Code of Regulations restates the 30-minute meal break requirements for every five hours an employee has worked. 8 CCR 11090(11). In addition, 8 CCR 11090(12) requires every employer to "authorize and permit" all employees to take rest periods, which insofar as practicable shall be in the middle of each work period, at the rate of ten minutes net rest time per four hours or major fraction thereof. This authorized rest period time must be "counted as hours worked for which there shall be no deduction from wages." *Id.*

Further, section 226.7(b) of the California Labor Code states "[a]n employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission . . ."

III. PREEMPTION DETERMINATION FOR PROPERTY-CARRYING CMV DRIVERS

A. Standard for Making a Preemption Determination

In the ATA decision, the FMCSA determined that the California MRB Rules: (1) are State laws or regulations "on commercial motor vehicle safety," to the extent they apply to drivers of property carrying CMVs subject to the FMCSA's HOS rules; (2) the MRB Rules are additional to or more stringent than the FMCSA's HOS rules; (3) the MRB Rules have no safety benefit; (4) the MRB Rules are incompatible with the FMCSA's HOS rules; and (5) enforcement of the MRB Rules would cause an unreasonable burden on interstate commerce. 83 Fed. Reg. at 67480.

The Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, Tit. II, 98 Stat. 2832, required the U.S. Secretary of Transportation to issue or reissue regulations pertaining to commercial motor vehicle safety, and it established a mechanism by which the agency may determine whether state and local safety regulations governing interstate motor carrier operations are preempted. Regulations adopted by the Secretary with regard to commercial motor vehicle safety are "minimum" safety standards. 49 U.S.C. § 31136. States remain free to adopt their own regulations on commercial motor vehicle safety, subject to review and possible preemption by the Secretary. 49 U.S.C. §31141.

"If the Secretary decides a State law or regulation is additional to or more stringent than a regulation prescribed by the Secretary" under Section 31136, that "State law or regulation" may not be enforced if the Secretary determines that "the State law or regulation has no safety benefit"; "the State law or regulation is incompatible with the regulation prescribed by the Secretary"; or "enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce." 49 U.S.C. § 31141(c)(4). To review a State law or regulation on commercial motor vehicle safety under this section, the Secretary may initiate a regulatory proceeding on the Secretary's own initiative² or on petition of an interested person (including a State). 49 U.S.C. 31141(g); *see* 49 C.F.R. § 389.31.

Further, in considering whether a regulation imposes an unreasonable burden, the statute allows the FMCSA to consider the effect on interstate commerce of implementation of that law or regulation with the implementation of all similar laws and regulations of other States. 49 U.S.C. § 31141(c)(5).

B. The MRB Rules are Subject to Preemption Under 49 U.S.C. § 31141

The ATA decision correctly held that the MRB Rules are laws or regulations "on commercial motor vehicle safety" within the meaning of 49 U.S.C. § 31141. 83 Fed. Reg. at 67473-74. The FMCSA concluded, "Because California's MRB Rules impose the same types of restrictions on CMV driver duty and driving times as the FMCSA's HOS regulations, which were enacted pursuant to the Secretary's authority in section 31136, they are 'regulations on commercial motor vehicle safety.' Thus, the MRB Rules are 'State law[s] or regulation[s] on commercial motor vehicle safety,' and are subject to review under section 31141." *Id.* at 67473.

First, there is nothing in the language of § 31141 that limits its effect to those state or local regulations that somehow do more than merely "affect" commercial motor vehicle operations. The federal statute does not define what constitutes a state law and regulation on commercial motor vehicle safety for purposes of § 31141. But a state law that applies to commercial motor vehicle drivers and requires meal and rest breaks of fixed durations and at mandated intervals throughout the work day so as to prevent fatigue-related incidents clearly appears to be a "law or regulation on commercial motor vehicle safety." The fact that the FMCSA has promulgated regulations for commercial truck and bus drivers in 49 CFR Part 395 addressing the very hours of service and break issues encompassed in the California MRB Rules underscores that the state rules are requirements "on commercial motor vehicle safety."

The State of California also recognizes that its labor provisions applicable generally to transportation workers might be laws or regulations on commercial motor vehicle safety, as the State has exempted from its overtime rules those commercial motor vehicle drivers who are subject to the Secretary of Transportation's hours of service regulations. Cal. Code Regs., tit.8, § 11090.3(L).

² Moreover, 49 U.S.C. § 31141(b) requires a State receiving funds made available under 49 U.S.C. § 31104 that "enacts a State law or issues a regulation on commercial motor vehicle safety shall submit a copy of the law or regulation to the Secretary [of Transportation] immediately after the enactment or issuance." The purpose of this submission is to allow the FMCSA to conduct a review and preemption analysis under 49 U.S.C. §31104(c). The State of California has received funding under the Motor Carrier Safety Assistance Program, 49 U.S.C. §31104(a)(1), and other programs under that section. But ABA is not aware that the State ever submitted a copy of the MRB Rules to the FMCSA for review.

Second, as noted in ATA's petition, the FMCSA's predecessor agency took a broader view of the scope of Section 208 of the Motor Carrier Safety Act of 1984, which became the review process codified in 49 U.S.C. 31141. In outlining the parameters of the federal grant program that encourages states to adopt the Federal Motor Carrier Safety Regulations in order to create a nationwide uniform system of regulations, the Department of Transportation stated that Congress "authorized the Secretary to preempt State laws and regulations *affecting* commercial motor vehicle safety which were found to be *inconsistent with Federal laws and regulations.*" Motor Carrier Safety Assistance Program, 57 Fed. Reg. 13572, 13573 (April 16, 1992) (emphasis added).

The Motor Carrier Safety Assistance Program and the preemption regimen in § 31141 are designed to promote uniformity among federal and state regulation of commercial motor vehicle operations. Allowing a state to interpose incongruous requirements on commercial bus drivers merely because such regulations also might apply to other workers interferes with that goal of national uniformity on commercial motor vehicle safety regulation with no corresponding benefit.

Further, the FMCSA noted in its ATA decision that the California Labor Commissioner has admitted that the MRB Rules "promote driver and public safety," and thus are, in fact, laws on CMV safety. 83 Fed. Reg. at 67474.

C. FMCSA's 2008 Decision is Not an Impediment to a Preemption Determination Here

In the ATA decision, the FMCSA correctly declined to be bound by, and in fact overruled, its own prior 2008 decision in which the agency denied a petition to preempt the California meal and rest break requirements under 49 U.S.C. § 31141. There, the FMCSA ruled the petition did not satisfy the threshold requirement for preemption under 49 U.S.C. 31141(c) as the provisions at issue were not "laws and regulations on commercial motor vehicle safety," but rather laws and regulations applied generally to California employers. 73 Fed. Reg. 79204 (December 24, 2008). That matter was wrongly decided and, in any event, does not control the agency's actions in this proceeding.

In its 2008 decision FMCSA concluded the meal and rest break provisions are not "regulations on commercial motor vehicle safety" because they apply to other industries in addition to trucking. 73 Fed. Reg. at 79205. But there is nothing in the preemption language of 49 U.S.C. § 31141 that requires the state regulation to apply solely to commercial motor vehicle drivers before the Secretary may begin the preemption analysis.

The MRB Rules in question are presumably designed to limit the fatigue of transportation workers, and thereby prevent fatigue-related accidents, by designating meal and rest breaks of fixed durations at certain intervals in the work period. Other sections of the California Labor Code apply similar requirements to other industries. *See id.* at 79205-06. But that fact merely recognizes that fatigue might play a role in accidents in many industries, including transportation using commercial trucks and buses. That the relationship between worker hours and safety is not exclusive to commercial motor vehicle transportation does not in any way prohibit FMCSA from exercising its statutory authority to ensure that the state's requirements have a safety benefit, are not incompatible with the federal regulations applicable to the same activity, and do not unreasonably burden interstate commerce. 49 U.S.C. § 31141(c)(4).

Furthermore, the FMCSA's 2008 decision provided that § 31141 does not allow the preemption of other state or local regulations "merely because they have some effect on CMV

operations.” 73 Fed. Reg. at 79206. Again, this ignores the plain language and the stated intent of the federal preemption scheme as well as FMCSA’s prior interpretation of its regulatory jurisdiction.

IV. PREEMPTION ANALYSIS FOR PASSENGER-CARRYING CMV DRIVERS

The arguments for preempting the California meal and rest break rules as applied to drivers of passenger-carrying commercial motor vehicles are stronger than the arguments for preemption with regard to drivers of property-carrying CMVs because of the fact that buses carry people. Superimposed on top of the FMCSA’s driver hours of service regulations in 49 CFR Part 395, the California MRB Rules create an untenable break regimen that detracts from the safety of operations for drivers and passengers and interferes with scheduling and service.

A. The MRB Rules Undermine Existing Federal Fatigue Management Rules

ABA submits that the California meal and rest break rules require drivers to take breaks that might be counterproductive to safety. Under the MRB rules, drivers are required to take periodic breaks at certain times regardless of whether the driver feels fatigued. At other times, when the driver might actually feel fatigued, the driver might feel obligated to continue the trip because of the delay already caused by taking the designated break under California law. FMCSA has determined that providing the driver with flexibility to determine when to take a break, based on the driver’s own physiology, traffic congestion, weather and other factors, will encourage safer driving practices than simply mandating a break at designated intervals. The MRB Rules act counter to this FMCSA mandate and the flexibility the FMCSA rules allow.

Motor carriers of passengers are subject to a comprehensive scheme of driver HOS regulations. The HOS requirements for passenger carriers are somewhat different from the federal driver HOS rules for motor carriers of property; *compare* 49 C.F.R. § 395.5 and 49 C.F.R. § 395.3. The main differences are fewer daily driving hours for bus drivers and greater flexibility for bus drivers to determine when and how to take rest breaks during a duty period.

In 2003, the FMCSA made a considered decision to amend the HOS requirements for drivers of property-carrying vehicles but not for passenger-carrying vehicles. 68 Fed. Reg. 22456 (April 28, 2003). Although the agency had proposed changes to HOS rules for both bus and truck drivers, the FMCSA’s final rule retained the existing requirements for bus drivers, stating: “The FMCSA is persuaded by comments that it does not have enough data to indicate a problem in the motorcoach industry segment and is not adopting any new rules for motorcoach drivers in this final rule. The FMCSA may consider the feasibility of other alternatives to reduce fatigue-related incidents and increase motorcoach driver alertness in the future.” *Id.* at 22462. The agency has never revised that conclusion or initiated a rulemaking to revise the passenger-carrying HOS rules in the intervening years.³

³ In 2013, the FMCSA issued revised regulatory guidance on the conditions to be met in order for a CMV driver to record meal and other routine stops made during the work shift as off-duty time. 78 Fed. Reg. 41852 (July 12, 2013). The guidance provides drivers may record stops as off-duty time provided: (1) the driver is relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo or passengers it may be carrying; and (2) during the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing. *Id.* at 41853. The guidance applies equally to bus and truck drivers. When bus drivers are carrying passengers and are charged with the safety of the coach, however, a bus driver is typically not relieved from duty even at a stop during the operation of a schedule.

The FMCSA's 2003 final rule recognized the functional and operational differences between the truck and bus industries, noting in particular that ABA's comments to the docket "pointed out that all intercity bus drivers are paid by the hour and run on preset schedules, thereby eliminating any incentives to violate the present HOS restrictions." *Id.* at 22461.

As a result of that rulemaking, bus drivers may only drive up to ten hours in a 15-hour duty period, 49 C.F.R. § 395.5(a), while truck drivers may drive up to 11 hours in a 14-hour duty period. 49 C.F.R. § 395.3(a)(3). Both bus and truck drivers are prohibited from driving a CMV after being on duty more than 60 hours in any 7-day period, or more than 70 hours in any 8-day period if the carrier operates every day of the week. 49 C.F.R. § 395.5(b); 49 C.F.R. § 395.3(b). Unlike truck drivers, however, a bus driver may not restart this weekly on-duty period after 34 consecutive hours off duty.

Although the FMCSA imposed a requirement for a 30-minute break after 8 hours on duty for truck drivers but not for bus drivers in 2011, 76 Fed. Reg. 81134 (December 27, 2011), this regulatory difference does not weaken the argument for preemption as applied to drivers of passenger-carrying vehicles. Passenger carrier drivers may take time off duty in the middle of a daily duty period for a rest break and extend the 15-hour window in which they may drive. *See* 49 C.F.R. § 395.5(a)(2). Unlike for truck drivers, the bus drivers' daily duty window is not an unbreakable "consecutive hours" requirement. This gives bus drivers greater flexibility to set their own driving and break schedules on a daily basis.

In looking at a bus driver's schedule in practice, a scheduled service driver often will take multiple breaks during intermediate stops along a schedule. These will occur whenever practical, such as when all passengers disembark for a food or restroom break. The driver could then take an off-duty break at the terminal location, before starting a different set of scheduled pick-ups/drop-offs on a new schedule, all within the cycle of a normal duty period.

Likewise, a charter or commuter bus driver might transport the passengers to a destination and then take an off-duty break while the passengers sightsee, attend an event, or complete their work schedule. The driver will then pick up the same passengers and return them to the point of origin during the same duty period. Interposing the California meal and rest break rules on top of this scheme, however, eliminates that regulatory flexibility and requires the driver to stop the bus and log off duty several additional times at certain intervals each day regardless of the driver's break schedule or actual level of fatigue.⁴ The MRB Rules are thus stricter than, and interfere with, the more flexible approach embodied in the federal HOS rules for passenger carriers, warranting preemption.

⁴ Bus drivers and passenger carriers are also subject to the requirement in 49 C.F.R. § 392.3 stating, "No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle."

B. The MRB Rules Also Conflict with Driver Attendance Needs

Under the California MRB rules, when the bus driver logs off duty to take the required meal or rest breaks, the driver must be “relieved of all duty” for the break period, unless the “nature of the work prevents an employee from being relieved of all duty,” and the employee enters into a revocable written agreement to remain on duty. Calif. Wage Order 9 § 11(C). This is simply not feasible for typical intercity bus operations. Drivers cannot leave the bus, the passengers and their baggage and other belongings for ten or 30 minutes several times each day, abdicating all responsibility for the safety or security of the passengers or property on the bus.

Instead, to be fully compliant drivers must locate a parking space which is safe for the driver, passengers and the coach, park the coach, turn off the engine, allow the passengers at their option to unload from the vehicle, and reload and account for the passengers who might have left the vehicle, and then restart the vehicle. This means a ten-minute break might now take at least 20-30 minutes to complete. If there is a passenger with a disability who requires the use of the wheelchair lift, and that passenger wishes to de-board during the break, the driver will need to assist, and the time required will likely be doubled.

DOT’s own regulations for passenger service under the Americans with Disability Act state, “Whenever an [over-the-road bus] makes an intermediate or rest stop, a passenger with a disability, including an individual using a wheelchair, shall be permitted to leave and return to the bus on the same basis as other passengers.” 49 CFR § 37.201(a). That provision continues: “The operator shall ensure that assistance is provided to passengers with disabilities as needed to enable the passenger to get on and off the bus at the stop (*e.g.*, operate the lift and provide assistance with securement; provide other boarding assistance if needed, as in the case of a wheelchair user who has transferred to a vehicle seat because other wheelchair users occupied all securement locations).” *Id.*

Moreover, the ADA regulations provide that “If an OTRB equipped with an inaccessible restroom is making an express run of three hours or more without a rest stop, and a passenger with a disability who is unable to use the inaccessible restroom requests an unscheduled rest stop, the operator shall make a good faith effort to accommodate the request.” 49 CFR § 37.201(c). Bus operators have already incorporated these intermediate and rest stops into their schedules as required in the ADA rules but drivers are not relieved of duty at these stops.

Further, during the MRB mandated “breaks” it is unreasonable to assume that the driver may simply disavow any responsibility for the passengers, their belongings or the coach. At stops passengers frequently want access to baggage loaded under the passenger compartment; the driver must provide this access. Or the passengers might have questions for the driver regarding schedules, routing, amenities, or itineraries for the trip. An “off duty” driver is not allowed to respond to any of these service requests until the designated break time is over.⁵

⁵ Moreover, during summer or winter months it is often necessary to leave the engine running to allow passengers remaining on board to have access to air conditioning or heating. But California law generally prohibits engine idling by any diesel-fueled commercial motor vehicle for longer than five minutes at any one location. *See* Cal. Code Regs., tit. 13, § 2485. Some jurisdictions have even more restrictive ordinances against engine idling. *See* City of Sacramento Code 10.36.090: “It is unlawful and a misdemeanor for any person driving or in charge of a motor vehicle to permit it to stand unattended in any public place, or any used or new car lot, or private or public parking lot, without first stopping the engine, locking the ignition and removing the ignition key from the vehicle.” Thus, it is often impossible to comply simultaneously with the break requirements, idling limits, and passenger needs for comfort and safety. Complying with these anti-

Nor is it possible for carriers and drivers to waive the mandated breaks based on the nature of the job requirements. A written agreement between driver and employer may be rescinded by the driver at any time under California law; such an “agreement” is therefore not binding on the driver and affords no certainty to the carrier that it is complying with the meal and rest break rules.

Similarly, the Pipeline and Hazardous Materials Safety Administration found that the California meal and rest break requirements are preempted under 49 U.S.C. § 5125(a)(1) with respect to the drivers of motor vehicles which contain a Division 1.1, 1.2, or 1.3 explosive material, and which are subject to the attendance requirement of 49 CFR § 397.5(a), because it is not possible to simultaneously comply with that requirement and the California requirements. 83 Fed. Reg. 48961, 47968 (September 21, 2018). PHMSA rejected an argument that the carriers could comply with both the California requirements and the federal attendance rules by seeking an exemption from the State agency, noting, “If it is only possible for a motor carrier to simultaneously comply with a federal requirement and a State requirement if it obtains an exemption from the State requirement, then it is not actually possible to simultaneously comply with both requirements.” *Id.*

Although the PHMSA preemption determination was based on a different federal statute, the same concerns regarding a bus driver’s overriding need to attend to the vehicle and the passengers are present here.

California’s MRB rules impose the same types of restrictions on CMV driver duty and driving times as the FMCSA’s HOS regulations; however, the timing requirements for meal and rest breaks under the MRB rules remove the flexibility allowed under the federal HOS regulations, thus making the MRB rules incompatible with the federal HOS regulations. The MRB rules also decrease drivers’ available duty time as compared to the federal HOS regulations, demonstrating that the MRB Rules are inconsistent with the federal rules. Preemption is warranted on these grounds.

C. Lack of Adequate Parking Also Makes the MRB Rules Untenable

ABA agrees with the analysis in the ATA decision relating to the effect of the California MRB rules on parking of commercial motor vehicles. *See* 83 Fed. Reg. at 67476-77. The lack of adequate parking for commercial vehicles is well-documented, and ABA endorses the FMCSA’s conclusion that “the increase in required stops to comply with the MRB Rules, when the driver may not be fatigued, will exacerbate the problem of drivers parking at unsafe locations.” *Id.* at 67477.

For intercity buses, however, the problem of locating adequate parking is exacerbated because drivers are transporting up to 55 passengers on a standard motorcoach (and up to 81 passengers on a double-decker coach). It is simply not possible for the driver to park the vehicle on the side of a highway, or on an exit or entrance ramp, to meet the meal or rest break requirements. The safety of the passengers must be paramount in determining where and when to park the vehicle.

Bus drivers face an even more difficult task than truck drivers to find a parking space and safely park the vehicle several times each day in order to comply with the California requirements while ensuring that the passengers are safely accommodated as well.

idling statutes by turning off the engine and the driver logging off duty also interferes with FMCSA’s requirement that a “carrier shall maintain a reasonable temperature on each bus (except in commuter service).” 49 CFR § 374.313(a).

The issue of adequate parking is exacerbated by the problems of congestion in California urban areas. *See, e.g., "L.A.'s traffic congestion is world's worst for sixth straight year, study says;"* Los Angeles Times, February 6, 2018; citing a study by INRIX, a company that specializes in car services and transportation analytics. Bus operators schedule their runs, or create charter or tour itineraries, based on normal or average travel times. These plans are often disrupted when overbearing traffic, vehicle crashes, or other incidents interfere with typical operations.

In short, it is virtually impossible for an intercity bus operator to anticipate all of the potential service disruptions and delays that might occur on a daily basis in California traffic. This makes scheduling driver breaks of the sort mandated by the MRB Rules into an itinerary, and actually allowing the driver to take all of these breaks as required by California law, extremely difficult in the most favorable circumstances.

D. Service Requirements and Delays

Bus operators also have several federal regulatory service and security requirements that freight carriers do not face. 49 CFR Part 374, Subpart C. For example, 49 CFR § 374.311(a) provides that passenger carriers "shall establish schedules that can be reasonably met, including connections at junction points, to serve adequately all points." § 374.311(c) requires that a carrier "shall mitigate, to the extent possible, any passenger inconvenience it causes by disrupting travel plans."

Additionally, intercity bus companies providing scheduled service typically offer interline connections with other motor carriers through the National Bus Traffic Association and also with Amtrak. They have designated and agreed times at which the services will meet, and passengers will transfer from one carrier to another.

Charter and tour bus operators, while typically not interlining with other carriers, also have dedicated schedules and service obligations to their passengers. They frequently must meet time constraints to deliver their passengers to a scheduled athletic contest, an artistic performance, or other timed event.

Requiring the driver to take ten minutes breaks every four hours or portion thereof, and 30-minute meal breaks every five hours or portion thereof, while accounting for traffic, weather, passenger rest stop needs and other disruptions, makes it inconceivable that a carrier could reliably meet the requirements of these service obligations.

The PHMSA preemption determination reached a similar conclusion for motor carriers of hazardous materials. In finding that compliance with the California meal and rest break rules creates "unnecessary delays" and therefore makes it impossible to comply with 49 CFR § 177.800(d), PHMSA stated:

California requires that drivers be given a 30-minute meal break every five hours, as well as an additional 10-minute rest break every four hours. For example, in the course of an 11-hour shift, California will often require drivers to pull over and take a break at least four separate times. As many of the commenters point out, the amount of delay caused by these multiple required stops far exceeds the sum of the required break times. The commenters

cite factors such as more stops, the shortage of parking and safe havens, deviations from routes, congested traffic conditions, and forfeiting a place in line to take mandated breaks. For example, the inability of driver of a commercial motor vehicle to “just pull over” in order to take one of the state-mandated breaks generally results in additional time spent looking for safe parking and significant deviations from the carrier’s intended route. These delays may result in the driver missing a delivery and thus negatively impacting the scheduling of subsequent pickups and deliveries and causing even more delays. Under our standards, cumulative delays of this type cannot be considered “minimal.”

83 Fed. Reg. at 47966.

E. Security Regulatory Issues

Mandating breaks at designated times at any point in a trip also presents regulatory issues with other FMCSA requirements specific to motor carriers of passengers. For passenger security, § 374.309(a) states that “[a]ll terminals and stations must provide adequate security for passengers and their attendants and be regularly patrolled.” A “station” is defined to mean “a facility, other than a terminal, operated by or for a carrier to accommodate passengers. 49 CFR § 374.303(e). Thus, any facility used by a passenger carrier to meet the California meal and rest break standards must provide adequate security and be regularly patrolled.

Yet this obligation to provide adequate security, while difficult to meet under normal scheduling requirements, becomes impossible when the California meal and rest break rules are imposed. Because of traffic and the other interruptions discussed above, buses sometimes must stop in parking lots or a variety of other locations for the driver to take the required rest break. It is not feasible to provide any reasonable guarantee of passenger security at these “facilities” under these circumstances.

Further, § 374.311(e) provides that “[e]ach carrier shall inspect periodically all rest stops it uses to ensure that they are clean.” If a driver is required to stop several times a day to take meal or rest breaks, at varying times and at varying locations, the carrier is simply not able to inspect, or even predict with any certainty, where those breaks will occur.

F. Compliance Costs Create an Unreasonable Burden on Interstate Commerce

The cost of compliance with the meal and rest break rules are staggering. Nor are these costs hypothetical. The FMCSA noted in the ATA decision, “It is indisputable that the MRB Rules decrease each driver’s available duty hours, . . . , as compared to the Federal HOS regulations.” 83 Fed. Reg. at 67479. Moreover, the costs are also not limited to carriers that are based in California.

The California MRB Rules presumably apply to a passenger carrier immediately when the bus crosses the state line into California. Although no California court has ruled on this exact point, the California Supreme Court has ruled that the California overtime rules in § 510 of the Labor Code apply to out-of-state employees while they are working in California. *Sullivan v. Oracle Corp.*, 51 Cal.4th 1191, 127 Cal. Rptr.3d 185, 254 P.3d 237 (2011). *See also, Booher v. Jetblue Airways Corp.*, 2017 WL 6343470 (N.D. Cal. Dec. 12, 2017) (plaintiff nonresident flight attendants were granted summary judgment and allowed to seek overtime payments under California law for days worked in California).

The *Sullivan* court held that “California’s overtime laws apply by their terms to all employment in the state, without reference to the employee’s place of residence.” 51 Cal.4th at 1197. In finding no distinction between resident and visiting nonresident employees, the court in *Sullivan* stated, “The legislature knows how to create exceptions for nonresidents when that is its intent.” 51 Cal.4th at 1197.

In fact, the California legislature has created an exception in its overtime rules for commercial motor vehicle drivers who are subject to the Secretary of Transportation’s hours of service regulations. 8 CCR 11090.3(L). But because there is no similar exception in the California meal and rest break rules for federally-regulated drivers, whether they reside in California or not, under this reasoning one may assume that the California legislature did not intend to exclude any such drivers from the requirements.

Thus, every time a bus enters California from another state, the rules change. The driver must automatically calculate the time since the last break and adjust the schedule accordingly. If every state had meal and rest break requirements that varied at each border, particularly in the Eastern United States where a driver might cross several states in a single day, it would truly be impossible to meet all of the disparate but mandatory break obligations.

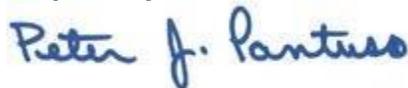
As the agency noted in the ATA decision, at present some 20 States in addition to California regulate meal and rest break requirements for employees to varying degrees. 83 Fed. Reg. at 67479. Complying with each of these regulatory schemes absolutely presents an unreasonable burden on interstate commerce as contemplated in 49 U.S.C. § 31141(c)(4)(C) and (c)(5).

Complying with the multiplicity of state rest break rules would cause a substantial increase in driver costs and would negatively impact the affordability of tickets and disrupt efficient scheduling and connections for passengers. Employee wages and benefits are already the second largest cost for motorcoach operators, behind only the cost of motorcoaches. See “2017 Top 50 Motorcoach Survey,” Metro Magazine (February 6, 2017). Requiring additional driving time and/or drivers would change the fundamental nature of bus service. Buses would no longer offer the most affordable source of intercity passenger transportation.

V. CONCLUSION

For these reasons, ABA asserts the California meal and rest break requirements have no safety benefit that is not already realized under the FMCSA’s HOS regulations, are incompatible with the federal driver HOS requirements, and create an unreasonable burden on interstate commerce. The MRB Rules therefore must be preempted under 49 U.S.C. § 31141 as applied to drivers of commercial motor passenger vehicles subject to the federal HOS Rules.

Respectfully submitted,



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