



August 20, 2015

Mr. T.F. Scott Darling, III
Chief Counsel and Acting Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Re: Docket No. FMCSA–2012–0103; Lease and Interchange of Vehicles; Motor Carriers of Passengers; Petition for Reconsideration

Dear Chief Counsel Darling:

Pursuant to 49 C.F.R. §389.35, the American Bus Association, Inc. (“ABA”) submits this petition for reconsideration of the final rule published May 27, 2015 in Docket No. FMCSA-2012-0103, Lease and Interchange of Vehicles; Passenger Carriers; 80 Fed. Reg. 30164. For the reasons set forth below, ABA believes significant elements of the final rule are unnecessary to promote public safety and are unduly burdensome on the affected motor carriers of passengers, and certain other parts of the rule require clarification.

ABA is a trade association representing the interests of over 750 intercity bus operators in North America. ABA member companies offer a variety of bus service options, including scheduled intercity service over regular routes, charter service, tour service, commuter bus service, and special operations. ABA and many of its member companies filed comments with the Federal Motor Carrier Safety Administration docket as part of this rulemaking.

Introduction

The FMCSA’s stated purpose of the final rule is “to ensure that passenger carriers cannot evade FMCSA oversight and enforcement by entering into questionable lease arrangements to operate under the authority of another carrier that exercises no actual control over these operations.” 80 Fed. Reg. at 30164. In pursuing that objective, however, the FMCSA has taken a regulatory scheme from the trucking industry and applied it to the bus industry, which has a vastly different operating structure and liability regimen. Moreover, the application of these truck regulations to the bus industry offers no additional protection to the public from illegal or unsafe bus operators. Instead, the final rule simply adds administrative costs to and reduces operational flexibility for the operations of intercity bus operators.

The FMCSA wants to identify an operating carrier in all lease or interchange transactions; that operating carrier must be (1) responsible for compliance with the Federal Motor Carrier Safety Regulations; (2) responsible to the public for any tort liability resulting from those operations; and (3) must have sufficient liability insurance as required by law to cover any tort liability. ABA agrees with these objectives. But ABA does not agree with how the final rule assigns these responsibilities between the parties to a lease or interchange transaction.

Charter Bus Service

As set out more fully in the petition for reconsideration filed in this proceeding by ABA member Capitol Bus Lines, Inc. of West Columbia, South Carolina, the final rule conflates the concepts of chartering and leasing a bus with driver. As explained by Capitol Bus Lines:

When I charter a bus from another carrier; that carrier has their own operating authority, their own US DOT number, and their own safety fitness rating from FMCSA. I do not title, tag or register their bus in any way. I do not add their bus to my insurance. I do not maintain their bus or ensure their bus has had the required inspections. I do not hire, train, or otherwise qualify their driver. I do not add their driver to my drug & alcohol testing pool. All burdens of regulatory compliance remain with that carrier. I have no control over the bus and/or driver other than to provide them with an itinerary or schedule of events from our customer.

When I lease a bus, it does come under my operating authority, my US DOT number, and my safety fitness rating. I am responsible for titling, tagging and registering that bus. I add that bus to my insurance policy. I am responsible for the maintenance and required inspections during the time of the lease. I hire, train and ensure that the driver is qualified to operate the bus. I add the driver to my drug & alcohol testing pool. All burdens of regulatory compliance are mine under a lease.

In the final rule, however, the agency makes no distinction between these two terms, and effectively makes all chartering of buses and drivers by a passenger carrier into a lease transaction. (The final rule does not contain any definition of “charter bus service” or distinguish that service from a lease.)

Frequently, charter bus operators will bid to provide service to an event that requires additional bus service capacity beyond what a single operator is able to provide. The primary bidding charter bus operator will include other charter bus companies in the bid for service, after verifying the other carriers have the required operating authority and liability insurance as required under the FMCSA regulations.¹ The secondary, or subcontracted, charter bus operators,

¹ This verification is typically handled by reference to the FMCSA’s SAFER website, which provides information on operating authority, insurance and safety fitness ratings for all motor carriers in operating interstate commerce.

are not controlled or operated by the prime contractor. Instead, they are each independent operators providing charter bus service to the customer.

The definition of a lease in the final rule, 49 C.F.R. §390.5, is “a contract or arrangement in which a motor carrier grants the use of a passenger-carrying commercial motor vehicle to another motor carrier, with or without a driver, for a specified period for the transportation of passengers, in exchange for compensation.” 80 Fed. Reg. at 30178. In the case of a combined bid for charter service, though, the secondary charter bus operator does not grant the use of its vehicles and drivers to the primary contractor. Rather, longstanding industry practice is that all of the charter bus operators are separately and individually offering the service of their vehicles and drivers directly to the customer under a single contract.²

Nevertheless, the final rule will now make this transaction into a lease of all subcontractors’ buses and drivers by the prime contractor.

When a passenger carrier hires or charters (i.e., contracts for) the services of another passenger carrier to help perform a contract, it has leased vehicles and services from that carrier. In these circumstances, a lease must be prepared and receipts exchanged in compliance with this rule to indicate that the prime contractor is responsible for the lessor’s (i.e., subcontractor’s) regulatory compliance. A copy of the lease or written agreement must be on the vehicle obtained from the subcontracted lessor, and the hiring passenger carrier’s legal name and USDOT number must be marked on the vehicle as prescribed in 49 CFR 390.21. While the prime contractor (i.e., the lessee carrier) may require the subcontractor to comply with all applicable provisions of the FMCSRs and to indemnify it for any civil penalties assessed for violations of those provisions by the subcontracted lessor, FMCSA and its State partners will hold both the prime contractor and its subcontractor responsible for completion of the lease described in this final rule.

In this situation described above, the lessee carrier is fully responsible for the regulatory compliance of the lessor carrier and must mark the vehicles leased from the lessor with the information required by 49 CFR 390.21(f).

80 Fed. Reg. at 30169.

This means, under the final rule, the primary charter contractor is now operating the service offered by all of the secondary charter operators to this charter customer. The primary contractor must now ensure compliance with all of the Federal Motor Carrier Safety Regulations by any and all subcontractors during the term of the charter service for the customer.

Before providing the service, the prime contractor would have to complete driver and vehicle leases for all of the equipment and drivers who will be involved in providing the charter

² For example, in a multi-operator coordinated move, the buses are individually dispatched by their own companies for the day’s work. Similarly, their maintenance and inspections are provided by and fixes made under the supervision of the dispatching operator.

service under the terms required in the new 49 C.F.R. §390.303. For larger events, this could involve hundreds of buses and drivers.

The prime contractor must also obtain the certifications required for each “leased” driver under 49 C.F.R. §391.65, for drivers furnished by other motor carriers, as to those drivers’ qualifications to operate a commercial motor vehicle and the validity of their medical examiner’s certificates.

The prime contractor must include those drivers in its drug and alcohol testing program, or verify the drivers are in a program that meets the requirements of 49 C.F.R. Part 382. The prime contractor must also manage the “leased” drivers’ compliance with the hours of service regulations in 49 C.F.R. Part 395.

Additionally, any violations of the Federal Motor Carrier Safety Regulations, any traffic violations, and any crashes incurred by the subcontracting bus operators or their drivers during the provision of charter bus service to the customer would be ascribed to the Safety Management System scores of the prime charter contractor.

Most important, the required lease terms must provide that the prime contractor (“lessee”) must “assume complete responsibility for the operation of the passenger-carrying commercial motor vehicle” while it is providing the contracted charter service. 49 C.F.R. §390.303(b)(4). This changes liability to third parties in tort from the subcontractor to the prime contractor, and might preempt state tort or insurance law in determining which entity is liable to the public for damages.

By imposing this new liability requirement, the FMCSA has taken the rule from truck leasing, developed in case law from the Interstate Commerce Commission, and applied it to the passenger carrier industry. See 49 C.F.R §376.12 (c) (“The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.”)

But in many instances the longstanding practice in the bus industry is for liability to follow the driver, not the vehicle. For example, on a pooling interchange, it is common practice for the carriers to exchange drivers at an intermediate point, and each driver then operates the other carrier’s motorcoach back to the driver’s point of origin. When this occurs, the driver’s employer is the operator of the vehicle owned by the other company but operated by the driver. By contractual arrangement, liability to third parties in tort follows the driver, and his/her employer would be considered the operating carrier in the event of litigation resulting from any accident.

Similarly, when a motorcoach operator subcontracts with another charter carrier for charter service, the subcontractor’s driver operates his employer’s vehicle, and that company is responsible for all regulatory compliance (for the driver and vehicle) and for liability to third persons under tort law. This is how insurance carriers evaluate risk to underwrite policies in the

motorcoach industry; by amending the liability scheme, the FMCSA jeopardizes the financial stability of the insurance coverage protecting carriers and the public.

This transfer of liability for the purposes of regulatory compliance and under tort law, to the prime contractor, will make it effectively impossible for smaller carriers to contract to provide charter bus service for events that require more capacity than their companies can provide. The vast majority of charter bus operators operate fewer than 20 motorcoaches. For large events such as golf tournaments, festivals or conventions, it is not unusual for the prime contractor to be responsible for hundreds of motorcoaches and drivers from other companies. Under the final rule, a typical small charter bus company interested in bidding on such contracts will now be overwhelmed by the administrative costs and obligations of meeting those requirements, and not able to bid on contracts for such events.

Moreover, there is no compelling reason for the FMCSA to interfere with longstanding industry practices in this manner, in order to protect the public or the chartering party. Currently, in a contract for charter bus service to a large event, both the prime contractor and any subcontractors are “operating carriers.” They each have operating authority, liability insurance, and the obligation to comply with the Federal Motor Carrier Safety Regulations, the Americans with Disabilities Act and all applicable traffic and safety laws. Each motor carrier is individually responsible to the customer and to the public to provide safe and legal charter bus service.³

Further, there is no reason for the FMCSA to change the liability scheme for the bus industry in this proceeding. The agency’s interest is merely to ensure bus operations comply with safety regulations and there will be adequate amounts of financial responsibility to compensate any injured third parties. It is not the government’s interest to determine which party in a transaction has those responsibilities; the government should only be concerned that the public is protected.

As long as the chartering party is notified that the subcontractors are also providing the charter bus service to the event, and each company’s buses are properly marked, the transaction is no different than if the customer had chartered two or more bus companies separately. There is no government interest at stake requiring the FMCSA to insert itself into to this transaction to modify the parties’ obligations for regulatory compliance, liability insurance or tort liability. These interests are already adequately met under the current practices.⁴

³ The Federal Transit Administration takes the approach in subcontracted transit service between private operators. *See* 49 C.F.R. §37.23(d): “A private entity that provides fixed route or demand responsive transportation service under contract or other arrangement (including, but not limited to, a grant, sub-grant, or cooperative agreement) with another private entity shall be governed, for purposes of the transportation service involved, by the provisions of this part applicable to the other entity.”

⁴ Thus, ABA asks that joint charter service contractors be treated essentially the same under this lease and interchange rule as participants in a revenue pool or commonly owned and controlled carriers. Each carrier would be responsible for its own operations and for compliance with insurance and other regulatory requirements.

Moreover, this approach would create inefficiencies. Event organizers would have to execute multiple, independent contracts to meet their charter service needs, or, alternatively, deal with brokers or other intermediaries to arrange for charter bus service to large events.

Peak Period Extra Sections

Likewise, on peak travel dates many scheduled service carriers will secure additional buses from other bus operators to meet the enhanced demand for bus service. These situations might include the Thanksgiving and Christmas holidays, the last day of a college term, and similar occasions where many additional passengers will use the carrier's intercity service. On these days, scheduled service operators often must arrange to lease additional equipment, with or without a driver and often at the last minute, to meet the increased number of passengers.

The final rule would require those scheduled operators to cover the leased or chartered buses under the liability insurance policy of the scheduled service operator. Insurance carriers have indicated, however, that they are unwilling or unable to cover the additional drivers and vehicles under the "operating" carrier's policy.

Moreover, all of the concerns stated above for charter carriers regarding the lessee's need to verify regulatory compliance for these drivers and vehicles also apply in the peak demand scenario as well. As a result of these new requirements, many passengers, including students, military personnel and the elderly, will be unable to use intercity bus service at the holidays and other peak travel times.

Revenue and Operating Pooling Arrangements

In the final rule, the FMCSA attempted to modify the leasing requirements for bus operators that are party to a revenue pooling agreement approved by the Surface Transportation Board under 49 U.S.C. §14302. The final rule does not require bus companies that are parties to revenue pooling agreements to exchange lease documents or receipts with their pooling partners.

But as noted in the petition for reconsideration filed in this proceeding by Greyhound Lines, Inc., this exemption from the lease and receipt requirements should be extended to operating pools as well as revenue pooling arrangements. The reasons for exempting revenue pools from the lease and receipt requirements are equally applicable to operating pools. The carrier operating on any particular route is easily identified by enforcement officials and members of the public. ABA concurs with Greyhound's statement that "[a]pplication of the receipt and lease requirements to [an operating] pool on a daily basis would produce a mountain of paperwork for no reason or benefit."

Furthermore, even with the relief granted by the final rule, parties to pooling agreements will still need to keep in their vehicles information on: the number and date of the STB decision approving the pool and the names of the pool members, as well as a list of all of the routes covered by the pooling agreement, the carrier or carriers authorized to operate on each route or portion of a route, and all points of origin, destination or interchange. In addition, parties to

pooling agreements must mark their vehicles with the name of the operating carrier as required by 49 C.F.R. §390.21(f). *See* 49 C.F.R. §390.301(b)(3).⁵

Parties to a pooling agreement reviewed and approved by the STB, which like the FMCSA is an agency of the U.S. Department of Transportation, are not engaging in these transactions to “evade FMCSA and enforcement by entering into questionable lease arrangements to operate under the authority of another carrier that exercises no actual control over these operations.” 80 Fed. Reg. at 30164. Pooling of vehicles, drivers and revenues affords the participating carriers flexibility to offer combined services and routes the individual carriers might not be able to offer on competitive terms. Each carrier subject to an approved pooling agreement remains subject to ongoing oversight by the STB as well as the FMCSA.

Thus, the only question for the FMCSA is how to identify carriers subject to an approved pooling agreement so it does not appear they might be circumventing the leasing regulations when they operate the vehicles of another pooling partner. ABA believes a roadside inspector should be able to determine readily when a carrier is operating a vehicle pursuant to an approved pooling agreement, and that this can be accomplished through alternative means.

ABA recommends the FMCSA amend the final rule to allow the use of the driver’s record of duty status to identify the carrier operating the service. 49 C.F.R. §395.8(d)(4) already requires the driver to identify the carrier providing the service; this document, whether in paper or electronic form, is required on the vehicle under current regulations, and is accessible to roadside enforcement personnel. This carrier information, along with the information from the document referencing the pooling agreement (the number and date of the STB decision approving the pool and the names of the pool members, a list of all of the routes covered by the pooling agreement, the carrier or carriers authorized to operate on each route or portion of a route, and all points of origin, destination or interchange) will be sufficient to identify the carrier as a participant in an approved pooling agreement on the route in question.

By using these documents to identify the carrier as a participant in an approved pool, the FMCSA would no longer need to require the pool participants to amend the identification markings on their vehicles each time a vehicle is transferred from one pool partner to another. In the final rule, the FMCSA referenced Adirondack Trailways’ comments to the docket that it has “tens of thousands” of vehicle interchanges with pooling partners each year, and Greyhound Lines noted it “operated 8,089 trips with buses leased on an interchange basis from its pool or interline partners.” 80 Fed. Reg. 30167.

Requiring a carrier to change its bus markings each time a bus is interchanged under a pooling arrangement is an unnecessary administrative burden and cost to the carriers, as well as a potential delay to their passengers. The markings provide no additional information beyond that provided in the documents to be carried on the vehicle; the enforcement officials will be able to identify each carrier operating under a pooling agreement at a roadside inspection.

⁵ These requirements will apply in both revenue pools and operating pools whenever a driver from one company is operating a vehicle for another pooling partner.

It is difficult for a carrier to use magnetized marking placards on a motorcoach, as the vehicle bodies are primarily made of fiberglass. Moreover, changing the bus markings simply becomes a regulatory trap for carriers, who must change the signs hundreds of times each day and night, often in remote locations, or face citations and fines. At times the vehicle or driver may be interchanged multiple times within a single route. Eliminating the bus marking provision for pooled carriers will alleviate this concern without compromising safety or the ability of the FMCSA and the States to enforce safety regulations.

Commonly Owned and Controlled Companies

The final rule also provided partial relief for carriers under common ownership and control. Those carriers are not required to execute leases or provide receipts when a vehicle is exchanged between such affiliated carriers. The FMCSA recognized that “such a requirement would add nothing to these carriers’ standard business practices and impose unnecessary paperwork,” as it is “likely that all of the ‘family’ members are operating according to the same administrative procedures and safety standards.” 80 Fed. Reg. at 30168.

But as with carriers operating under pooling agreements, the final rule requires certain documents to assist in identifying vehicles that are interchanged among commonly owned and controlled carriers. The carriers must keep on each vehicle a summary document listing all members of the corporate family, their USDOT numbers, business addresses and contact telephone numbers. In addition, each driver must have a “trip sheet” identifying the operating carrier, the trip (by charter number, run number, or some other identifier), the vehicle (by at least the last six digits of the VIN), and the date of the trip. 80 Fed. Reg. at 30169; 49 C.F.R. §390.301(b)(2).

ABA requests clarification as to whether the “summary” document must be a single document and whether it could be maintained and produced upon inspection or request in an electronic format (possibly one that could be sent to the e-logging device or enforcement official upon request). As carriers adopt new technology for tracking drivers’ hours of service and other operational metrics, most information will be available at the roadside in a downloadable electronic format.

ABA asserts the information in the summary document, along with the driver’s record of duty status and the VIN, as contained on the vehicle registration, will adequately identify the operating carrier. There is no need for an additional trip sheet, which would have to be prepared separately for each trip and would create a significant and unnecessary administrative cost on the carriers with no additional safety benefit.

As with pooling operations, there is no reason for motorcoaches operated by carriers under common ownership and control to be re-marked each time a different but affiliated carrier operates the vehicle. Once again, the markings provide no additional information beyond that provided in the documents to be carried on the vehicle; the enforcement officials will be able to identify each carrier operating under common ownership or control at a roadside inspection.

Emergency Exception

The final rule provides an exception allowing a bus operator to postpone the execution of a written lease agreement for a replacement vehicle for up to 48 hours after the time the lessee takes exclusive possession and control of the vehicle. Under the new 49 C.F.R. §390.303(a)(2), this exception would be available “[w]hen an event occurs while passengers are on a passenger-carrying commercial motor vehicle (e.g., a crash, the vehicle is disabled, the driver is ill) that requires a motor carrier immediately to obtain a replacement vehicle from another motor carrier . . .”

The exception is helpful, but sometimes events requiring a replacement vehicle might occur when there are no passengers on a vehicle. There might be a last minute maintenance or mechanical issue, or driver illness, that arises late in the evening or during the night (such as on a multi-day charter or tour trip), or just prior to picking up a group for a charter or scheduled service run. Similarly, when Amtrak or airline service is suspended or disrupted and buses are needed to transport stranded passengers, a bus operator contracted to provide the rescue service might need to obtain additional drivers and vehicles from other carriers to meet the demand. In this event, the rescuing carrier would need to obtain additional or replacement vehicles immediately and deadhead those vehicles to the service origin point, even though no passengers are on the vehicle at the time of the event requiring the replacement. ABA requests the FMCSA modify the final rule to eliminate the unnecessary requirement for passengers to be on the bus as a condition of this exception.

Conclusion

For these reasons, ABA requests that the FMCSA revise the final rule as indicated above, or alternatively, to withdraw the final rule and conduct a series of discussions with interested stakeholders to develop a replacement rule that will meet the stated objectives of subjecting all passenger motor carrier operations to FMCSA enforcement and oversight without jeopardizing operating flexibility.

Respectfully submitted,

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President & CEO
American Bus Association, Inc.