



UNITED STATES DEPARTMENT OF TRANSPORTATION
BEFORE THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

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COMMENTS OF THE AMERICAN BUS ASSOCIATION

ON THE NPRM: LEASE AND INTERCHANGE OF VEHICLES; MOTOR CARRIERS OF PASSENGERS

NOVEMBER 19, 2013

The American Bus Association appreciates this opportunity to comment on the Federal Motor Carrier Safety Administration's (hereinafter "FMCSA" or "Agency") request for comments on the Notice of Proposed Rulemaking (NPRM) on the Lease and Interchange of Vehicles; Motor Carriers of Passengers. The NPRM was published on September 20, 2013 (Vol. 78 Federal Register 183 (pages 57822 – 57835)) and proposes the adoption of regulations governing the lease and interchange of passenger-carrying commercial motor vehicles (CMVs).

INTRODUCTION

The FMCSA proposes the adoption of the above entitled lease and interchange regulations changes to "ensure that passenger carriers cannot evade FMCSA oversight and enforcement by operating under the authority of another carrier that exercises no control over these operations" (78 Fed. Reg. 57823). The NPRM was published in the Federal Register on September 20, 2013 (78 Fed. Reg. 57822-57835). Comments on the NPRM are due to be filed to the docket by November 19, 2013. The rule would "...(1) identify the motor carrier operating a passenger-carrying CMV and responsible for compliance with the Federal Motor Carrier Safety Regulations (FMCSRs) and all other applicable Federal regulations; (2) ensure that a lessor surrenders control of the CMV for the full term of the lease or temporary exchange of CMVs and drivers; and (3) require motor carriers subject to a prohibition on operating in interstate commerce to notify FMCSA in writing before leasing or otherwise transferring control of their vehicles to other carriers" (78 Fed. Reg. 57823).

The intercity motorcoach industry is a significant segment of the nation's transportation system. The intercity motorcoach industry annually provides nearly 700 million passenger trips. The industry transports persons more than 2,700 locations, destinations and attractions and does so with very little federal subsidy. The motorcoach industry provides all manner of transportation services to the public,

including fixed-route schedule service, charter and tour, dedicated employee transportation, airport shuttle, commuter services, cruise transfers and entertainer motorcoach services.

The American Bus Association (hereinafter “ABA”) is the premier private bus and motorcoach industry trade association in North America. The ABA has existed for over 75 years. The ABA is home to some 3,800 member companies and organizations and approximately 850 bus operator companies. ABA motorcoaches or Over-the-Road Bus (OTRB) members represent 65% of all OTRBs on the road. ABA members provide all the transportation services listed above. In addition, there are ABA members that provide services to bus companies. Finally, ABA members include many tour, travel and tourist companies, convention and visitors’ bureaus (CVBs), destinations and attractions.

CONCLUSION

ABA and its members have considerable doubt about the usefulness of this proposal in deterring carriers from evading responsibility for liability in accidents. The stated purpose of the rule is “...to ensure that passenger carriers cannot evade FMCSA oversight and enforcement by operating under the authority of another carrier that exercises no actual control over these operations.” 78 Fed. Reg. at 57823. The proposal accomplishes this, in FMCSA’s view, by requiring interstate carriers of passengers by CMV that enter into lease agreements or that borrow or exchange equipment to execute written leases for each transaction (except leases in the nature of a purchase) that detail the nature of each transaction, retain copies of the lease and carry copies of the lease in all leased passenger carrying CMV. The NPRM further requires motor carriers prohibited from operating in interstate commerce to notify FMCSA in writing before leasing or otherwise transferring control of their vehicles to any other motor carriers. 78 Fed. Reg. 57826.

In ABA’s view illegal and unsafe carriers will not abide by FMCSA’s wishes. In addition, ABA respectfully submits that the NPRM lacks several provisions that are crucial to the goal of ensuring transparency in bus and motorcoach leasing transactions¹. Moreover, the NPRM as written adds significant regulatory burdens and costs to the industry². The NPRM should not be adopted by the Agency and its costs borne

¹ The NPRM goes far beyond the lease provisions heretofore required by federal regulatory agencies of motor carriers of property. See, 49 CFR Part 376 and 49 USC 14102. The trucking industry dwarfs the motorcoach industry in terms of size, number of vehicles, drivers and accidents. It is ABA’s view that the motorcoach industry’s safety record does not warrant this burdensome regulatory scheme. The motorcoach industry is the safest form of passenger surface transportation in the nation. FMCSA’s own safety data demonstrates that from 2001 through 2011, the intercity bus industry, on average, accounted for 13 percent of all buses involved in fatal crashes, and school buses and transit buses accounted for 40 percent and 34 percent respectively, of all buses involved in fatal crashes. Yet there is no provision in the NPRM for a comparable regulatory scheme for either school buses or transit buses.

² ABA wishes to note its approval of and agreement with the cost estimates of this proposal to the private motorcoach industry included by Greyhound Lines, Inc. (GLI) in its comments to the docket filed November 12, 2013. GLI notes that the labor costs implementing this rulemaking for it alone for a single year could range from \$98,000 to almost \$200,000. ABA also notes that it would expect the costs to other, and mostly smaller motor carriers, to be similar. In addition, as GLI states in its comments: (page 3) “...Greyhound leased buses to other carries for 22,264 trips pursuant to interchange agreements.” Those costs would be borne largely by the lessee carriers.

by the industry until the ABA's recommended provision are added. To do so would unfairly burden the motorcoach industry with little increase in the safety of motorcoach transportation.

ABA contends that the Agency proposal is overly broad. It is too broad in that it applies to "all lease or interchange transactions involving a bus regardless of whether a driver is included or the length of term. The proposed passenger rule would exempt only bus leases between a motor carrier and either a bus manufacturer or dealer for a period of five years or longer. 78 Fed. Reg. 57833; proposed rule at 390.301. The proposal contains no evidentiary support in favor of including only leases between carriers and dealers or bus manufacturers and no evidence in favor of imposing a five-year term on exempt leases. Moreover, the proposal, again without support, applies to bus transactions that are intercompany transactions or customer/carrier transactions or transactions done pursuant to pooling and interlining agreements. In addition, the proposal makes no provision for notifying FMCSA compliant carriers that a carrier prohibited from operating in interstate commerce has notified the Agency of any attempt by the prohibited carrier to lease or otherwise transfer control of its equipment. Certainly, the reputable carrier would want and has a right to know of any such possible lease agreement³.

The NPRM makes no provision to exempt existing motorcoach industry plans and agreements to support motorcoach companies that may require a replacement vehicle. The NPRM makes clear that all transactions between motor carriers of passengers, however titled or envisioned by the motor carriers, will be considered as leases and therefore governed by the proposed regulations. Thus, intercorporate transfers of vehicles as well as the emergency provision of vehicles will be treated as leases even though these intercorporate transfers have been approved for many years and do not interfere with FMCSA's mission to encourage transparency in bus leasing transactions. In addition, the NPRM makes no provision to allow continuation of existing equipment and service pooling agreements heretofore approved by the United States Surface Transportation Board as well as private motorcoach companies interlining agreements which may involve bus transactions that the NPRM appears to consider as leases. Second, the proposal makes no provision for the fact that a bus "leasing" agreement may be necessary due to emergency circumstances such as a bus breakdown where passengers may be at risk. Third, the NPRM fails to define terms that are crucial to the NPRM. For example, the proposal does not define the term "control" which the carrier must relinquish under the NPRM. In addition, the proposal does not define, or even mention, the term "charter" which is how motorcoach carriers of passengers view the hiring or interchange of vehicles. Therefore, there is a substantial issue as to the relation of "charter" to "lease" and how these terms will be interpreted for purposes of the regulation.

Finally, ABA contends and submits that the proposed bus leasing regulations should at a minimum have an exemption for carriers with pooling and interlining agreements as well as an exemption for buses

³ In addition, ABA notes that FMCSA's proposal would amend Part 390 of the Federal Motor Carrier Safety Regulations (FMCSRs) so that FMCSA's State partners would be required to adopt them pursuant to the Motor Carrier Safety Assistance Program (MCSAP) (49 CFR Part 350). Thus, FMCSA's state and local partners would be required to include these lease requirements in their annual enforcement plans. 78 Fed. Reg. 57826. ABA has for many years noted that only a handful of states had adequate bus inspection programs. ABA is frankly skeptical that adding requirements to the MCSAP program without first ensuring that all states have adequate bus inspection programs will yield superior enforcement efforts by FMCSA's State and local partners.

“leased” or hired in emergency situations. These comments include language to correct the deficiencies in the proposal and the ABA commends these changes to the Agency.

COMMENTS

As a preliminary matter ABA believes that the NPRM incorrectly relies on two fatal accidents by illegal bus operators as the sole evidentiary basis for the proposition that bus operators in compliance with FMCSA regulations must be saddled with an extensive new regulatory regime in order to atone for the misdeeds of admittedly a few illegal operators. The NPRM’s synopsis (78 Fed. Reg. 57825 – 57826) of the Rollover Crash near Victoria, Texas, in 2008 and a crash in Sherman, Texas, that same year may be cited as evidence of one overriding fact: The carriers involved in those accidents were illegally operating in interstate commerce. In the crash in Victoria, the carrier was “...unable to obtain the insurance that would have enabled him to receive FMCSA operating authority to transport passengers.” In the crash in Sherman, the bus operators were out of service and should have not been engaged in transportation. We note this because in our view no amount of lease documentation would have prevented these accidents. Only banning these carriers from interstate commerce by, for example, impounding their buses, which the ABA has called for, would have prevented these deaths and injuries. Indeed, in MAP-21 Congress provided FMCSA with the authority to begin a rulemaking on impounding buses. In summary, ABA contends that the NPRM’s conclusion that based on these two accidents “the passenger-carrying CMV leasing and marking issues...demonstrate a clear nexus between safety and the identification of a motor carrier operating any passenger-carrying CMV...” 78 Fed. Reg. 57826 is plainly wrong.

It is ABA’s considered opinion that the bus leasing proposal will not be as helpful as the Agency appears to believe in the goal of ridding the industry of the motor carriers the FMCSA most needs to eliminate: illegal or unsatisfactory carriers who prey on people seeking the cheapest alternative transportation. FMCSA’s mission, bringing these illegal and unsafe carriers to heel, is laudable and ABA supports that goal. However, in advancing this proposal FMCSA seems to discount the fact that unscrupulous motor carriers of passengers will continue to evade FMCSA regulations when it can and break regulations when it is profitable to do so. For example, by providing “leases” to law enforcement personnel with information that can’t be verified or is false. What this proposal will do is to burden legal and safe carriers, slow the provision of transportation services to the public, and provide no comparable safety benefit in relation to the burdens and costs of the NPRM.

Lease and hiring of passenger carrying vehicles

A major drawback of the agency’s NPRM is the failure of FMCSA to recognize that the motorcoach industry distinguishes between the “lease” of a bus and the “hiring” of a bus by a motor carrier. The proposal states that it “...require(s) interstate carriers of passengers by CMV that enter into rental or lease agreements (except leases in the nature of a purchase) or that borrow or temporarily exchange CMVs with or without compensation, to execute a written lease...” (78 Fed. Reg. 57826). This blanket provision is echoed by the proposal’s detailing of 49 CFR 390.303 which “requires a written lease or interchange document, or a written agreement covering some less formal temporary transfer, such as a handshake or other casual form of obtaining a passenger-carrying CMV” 78 Fed. Reg. 57827. The

proposal admits of no exception for granting or obtaining leasing privileges between two motor carriers of passengers. However, for the motorcoach industry there is a difference in the transactions.

For ABA members the former transaction, a “lease,” can take place when Carrier A wishes to lease a bus from Carrier B to take on additional service that it has booked and does not have the equipment to complete the transportation. However, the latter transaction, known in the motorcoach industry as a “hiring” of a bus by one motor carrier from another, is generally accomplished when the motorcoach is needed in an emergency.

The NPRM lacks any recognition that a bus may be needed in an emergency situation, such as a breakdown on a highway on route, at a destination or at a departure point to finish the transportation service that Carrier A has been contracted to complete. In such situations, there may be passengers stranded by the side of the road, at a casino or at an airport. Carrier A may then call another operator in the area for help in taking the passengers to their destination or to meet another transportation provider. These arrangements may be formal or informal, between affiliated carriers or strangers, written or oral. In this situation it is easy to visualize how impossible the agency proposal is to implement as a practical matter.

Carrier A did not anticipate a breakdown and so would not necessarily have a lease agreement covering the lease of a bus from Carrier B. Indeed, the two carriers may have no prior contact or connection. Likewise, Carrier B did not anticipate leasing a vehicle to Carrier A and also would not have a lease available for execution. In addition, if the lessee carrier is from a different area of the country it would be unlikely to have any lease agreement with any carrier in the lessor’s region of the nation. Just how is the proposed lessee supposed to engage or hire a suitable replacement for his out-of-service vehicle?

Moreover, the NPRM directs that the lease would have to be “signed by the owner of the passenger-carrying CMV and the motor carrier obtaining the use of the CMV, or by their authorized agents” (78 Fed. Reg. 57827). Again, in the circumstances of an emergency bus hire, it is difficult, if not impossible, to ensure that the owners of the lessee and lessor would be available to sign any written lease or that a designated agent would also be available. In fact, even in non-emergency situations it may be difficult to find an owner to sign the required lease.

Exception for affiliated carrier transactions

FMCSA has and will continue to hear from passenger carrying motor carrier companies that are comprised of affiliated or subsidiary companies. These affiliated carriers will request that the proposal include an exemption from proposed Section 390.303 for leases between affiliated companies. ABA supports the provision of such an exemption. As noted above and in the comments filed by Greyhound Lines Inc. and Coach USA, Inc., these situations are common among passenger-carrying motor carrier companies. For example, during operations in peak traffic periods, a carrier may need to add extra sections to fulfill higher-than-normal traffic volume. In these cases, the provider of service will normally lease buses from affiliated companies. As noted by Coach USA, Inc. and Greyhound Lines, Inc. in their comments, in such situations attempting to comply with the proposed regulations would create an enormous burden on the carrier for no useful purpose. In addition, the issue also arises in cases in

which operators which are affiliated to other carriers or companies use these companies to interchange drivers from one operating company to another. For example, while all the drivers may be employees of a parent company each driver could be paid by varying operating companies and assigned to different passenger-carrying motor carriers. In each of these situations, buses are often provided or needed on short notice. Complying with the lease requirements of the NPRM would be, at least, impracticable.

Exception for emergencies is required

ABA believes that an exemption for emergency situations is warranted in the proposal. We suggest the following:

“The rules in this subpart shall not apply to a motor carrier operating a passenger-carrying commercial motor vehicle of another motor carrier under any contract, agreement or transaction for a period of less than 30 days and resulting from a mechanical breakdown or accident while a passenger-carrying commercial motor vehicle was en-route.”

This exemption would provide the private motorcoach industry with a limited short-term exemption without administrative burdens which would aid the passengers in need of a replacement vehicle while not jeopardizing the FMCSA’s objective of ensuring that carriers do not evade the safety regulations by leasing from other carriers.

A second flaw in the proposal is the lack of any exception for intercorporate vehicle transactions. For example, a bus holding company may own several buses and lease them daily, weekly, or for any other period of time, to subsidiary or affiliated companies. As ABA understands FMCSA’s proposal, each lease transaction would be subject to these requirements, greatly complicating what is normally a routine transaction. As FMCSA will no doubt hear from ABA members with commonly controlled carriers, these companies interchange buses on a regular basis every day. 49 CFR 376 reveals that motor carriers of property enjoy a limited exception to the leasing regulations for intercorporate vehicle transactions. 49 CFR 376.22 (d) allows authorized carriers under common ownership and control to transfer equipment without complying with some requirements of the federal leasing regulations. The proposed regulations do not appear to consider this in the analysis or in the regulations.

As an alternative to this part of the proposed rule, ABA recommends taking a page from the truck leasing rules. The present truck leasing regulations do not apply to trucks leased without a driver from a “person principally engaged in such a business.” 49 CFR 376.21(c). Again, such an exemption would aid the industry in maintaining normal operations while not at all interfering with the FMCSA’s goal of ensuring transparency in bus leasing transactions.

Interference with carrier and industry relationships

A third drawback to the proposal, if adopted, is the certainty that implementing it will interfere with ongoing motorcoach industry arrangements that protect motor carrier passengers. Certain motorcoach organizations provide for regional assistance to other members of the organization as needed. Such agreements may be formal or informal, written or oral. Allowing these agreements to continue is not

contemplated in the proposed rule. By its terms, the NPRM would require a written lease between any Carrier A who experiences a breakdown on the highway and any Carrier B who comes to Carrier A's aid regardless of any prior arrangement (emphasis supplied). This situation persists as long as the carriers are motor carriers of passengers.

The definition of carriers subject to the lease provisions of the NPRM highlights additional drawbacks of the NPRM. First, ABA understands the proposed rules to apply only when a passenger-carrying commercial motor vehicle is not being operated by the motorcoach's owner but is being operated by another motorcoach company. Thus, it appears that if the proposed lessor or lessee is a transit agency, no lease documentation is required. As a result, an illegal carrier could engage in a lease transaction with the transit agency and not be within the ambit of the NPRM. Such a result is not in concert with the aims of the NPRM. Moreover, the proposal's broad reach leaves important issues unresolved. For example, if motorcoach company A receives twenty buses from motorcoach company B so that company A may fulfill a charter, is company B a lessor, a broker or a chartering party? The proposal would seem to include this transaction as a lease. However, there is no third party to complicate the transaction and, even more importantly, due to the fact that in motorcoach carriers' insurance policies liability follows the vehicle, there is no debate as to which party is responsible for the bus and has liability for the motorcoach. The proposed rules would seem to apply to this class of transactions, but there is considerable doubt that the proposed rules should apply here. Finally, there is no definition of the "control" that a motor carrier must relinquish in order to come within the ambit of the proposed regulations. For example, if a carrier transfers a bus to a second carrier with a driver employed by the first carrier, has the first carrier relinquished control? There is no discussion of this issue and its ramifications to either carrier.

Interference with carrier pooling agreements

A further drawback of the NPRM is the absence of a mechanism for allowing motor carriers of passengers to continue offering leasing options to other motor carriers through the use of pooling agreements. Under 49 USC 14302(b), an agreement to pool or divide services and earnings may be approved if the carrier participants assent and if the United States Surface Transportation Board finds that the agreement will be in the interest of better service to the public or of economy of operations and will not unreasonably restrain competition. See Surface Transportation Board (STB) Decision No. MC-F-20906, *Capital Motor Lines, Et. Al. – Pooling – Greyhound Lines, Inc.* (September 17, 1997). Pooling agreements also have been accepted in order to allow motor carriers of passengers the ability to accept passengers from disabled buses in the event of a breakdown. See STB Decision Docket No. MC-F-20915, *Suburban Transit Corp., Et Al. – Pooling – American Limousine Service, Inc.* (February 27, 1998).

Motor carrier pooling agreements are within the regulatory purview of the United States Surface Transportation Board, the successor agency to the Interstate Commerce Commission. See *ICC Termination Act of 1995, Pub. L 104-88, 109 Stat 803 (December 29, 1995)*. The proposal in the NPRM does not reference the STB, Section 14302 or any provision of the ICC Termination Act. Thus, there is a substantial issue as to whether and how any pooling agreement can be viewed or interpreted in

connection with the NPRM. In sum, the question is whether an STB-approved pooling agreement will pass muster with the FMCSA's leasing regulation, is separate from it or has no applicability to the FMCSA's proposal. In ABA's view the Agency must discuss and offer its conclusion about the interpretation of and continued viability of STB approved-pooling agreements in light of FMCSA's proposal.

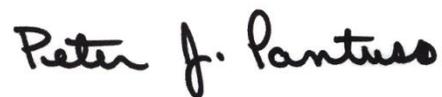
Unnecessary interference with carrier "interline and interchange" agreements

Similarly, the Agency proposal is flawed with respect to interline and interchange agreements between carriers. Proposed subsection 49 CFR 390.5(2) provides that an interchange means: "The act of providing a passenger-carrying commercial motor vehicle by one motor carrier of passengers to another such carrier, at a point which both carriers are authorized to serve, with which to continue a through movement." 78 Fed Reg. 57833. ABA contends that interlining is not the scenario in which carriers attempt to evade the safety regulations or public liability that the FMCSA is concerned about. It is already clear at the point of vehicle exchange which carrier is operating the vehicle and, if there is an accident, both carriers will be sued in any event. However, the use of the interlining definition in relation to the proposal will ensure that the FMCSA has some protection in that interchange partners will each have authority over the route, and will offer a through ticket movement.

Finally, while ABA concedes that transit agencies and school bus operators are outside the FMCSA's regulatory authority, ABA must object to the one-sided nature of this proposal. As stated above, it is the responsible, well-managed and FMCSA-compliant motor carriers of passengers alone that bear the burden of this proposal. Illegal bus operators will not be deterred by a provision requiring them to notify the Agency when leasing buses. In addition, again referencing FMCSA data, transit buses and school buses have more accidents than the private motorcoach industry, yet neither is included in the proposal. It is only the private motorcoach industry, the safest surface transportation passenger mode, that is subject to the proposal.

For all the above detailed reasons the American Bus Association contends that the NPRM should not advance at least until the FMCSA has resolved the issues and questions raised by ABA's comments on this proposal.

Respectfully submitted,



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