



February 26, 2024

Ms. Sue Lawless  
Acting Deputy Administrator  
Federal Motor Carrier Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590-0001

**Re: Comments of the American Bus Association, Inc. on Petitions for Waiver of Determinations that California and Washington Meal and Rest Break Rules are Preempted by 49 U.S.C. § 31141; Docket Nos. FMCSA–2018–0304; FMCSA– 2019–0048; FMCSA–2019–0128**

Dear Acting Deputy Administrator Lawless:

The American Bus Association, Inc. (“ABA”) submits these comments to the Federal Motor Carrier Safety Administration to support denying a waiver of the agency’s determinations that the Meal and Rest Break Rules of the States of California and Washington (“MRB Rules”) are preempted for drivers of passenger-carrying motor vehicles subject to the FMCSA’s hours of service (“HOS”) regulations under 49 U.S.C. § 31141.

As set forth below, petitioners’ arguments for waiving preemption of the MRB Rules as applied to drivers of passenger-carrying vehicles subject to FMCSA’s HOS Rules fail to meet the standard of consistency with the public interest and the safe operation of commercial motor vehicles. 49 U.S.C. § 31141(d)(1).

## **I. INTEREST OF ABA AND BACKGROUND OF THE PROCEEDING**

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.

ABA regularly monitors legislation and regulations affecting the intercity bus industry, and participates in lobbying and rulemaking 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 motorcoach 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, motorcoach operators have a keen interest in promoting and preserving national uniformity in the regulation of driver hours of service.

On December 21, 2018, FMCSA granted petitions filed by the American Trucking Associations and the Specialized Carriers and Rigging Association, and determined that California's MRB rules, as applied to property-carrying CMV drivers subject to FMCSA's HOS regulations, are preempted under 49 U.S.C. § 31141 (Docket No. FMCSA-2018-0304; 83 Fed. Reg. 67470 (Dec. 28, 2018)).

On January 13, 2020, FMCSA granted a petition filed by ABA and determined that California's MRB rules, as applied to passenger-carrying CMV drivers subject to FMCSA's HOS regulations, are also preempted under 49 U.S.C. § 31141 (Docket No. FMCSA-2019-0048; 85 Fed. Reg. 3469 (Jan. 21, 2020)).

On November 27, 2020, FMCSA granted a petition filed by the Washington Trucking Associations and determined that Washington's MRB rules, as applied to property-carrying CMV drivers subject to FMCSA's HOS regulations, are preempted under 49 U.S.C. § 31141 (Docket No. FMCSA-2019-0128, 85 Fed. Reg. 73335 (Nov. 17, 2020)).

In each decision, FMCSA determined that the MRB rules are laws on CMV safety, that they are more stringent than the Federal regulations, and that they meet each of the three potential criteria for preemption under 49 U.S.C. § 31141(c)(4) and (5) (see 83 FR 67470, 85 FR 3469; 85 FR 7333).

On January 15, 2021, the U.S. Court of Appeals for the Ninth Circuit denied petitions for review challenging the first preemption decision on drivers of property carrying motor vehicles operating in California. *Int'l Bhd. of Teamsters, Local 2785 v. FMCSA*, 986 F.3d 841 (9th Cir. 2021), *cert. denied sub nom. Trescott v. Fed. Motor Carrier*, No. 20-1662, 142 S. Ct. 93 (Oct. 4, 2021).

The State of California filed a petition for review in the Ninth Circuit in March 2020 challenging the passenger carrier preemption decision, and the court has held that case in abeyance. *People of the State of Cal. ex rel. Bonta v. FMCSA*, No. 20-70706 (9th Cir.).

The State of Washington filed a petition for review in the Ninth Circuit challenging the preemption decision involving property carriers in Washington but voluntarily dismissed the case in August 2022. *State of Washington v. FMCSA*, No. 20-73730 (9th Cir.).

Now, having failed three times before the agency and once in the courts, and obtaining no relief in two other court actions, petitioners seek yet another bite at the apple under the less stringent standards of the waiver provision in 49 U.S.C. § 31141(d)(1).

## **II. CALIFORNIA AND WASHINGTON MEAL AND REST BREAK RULES**

The California MRB Rules are described in full in the ATA preemption 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 . . .”<sup>1</sup>

Similarly, under the Washington Department of Labor and Industries’ regulations in section 296–126–092 of Washington’s Administrative Code (WAC), employers must provide employees a meal period of at least 30 minutes that commences after the second hour and before the fifth hour after the shift commences (WAC 296–126–092(1) and (2)).

In addition, Washington’s MRB rules provide for a 10-minute rest period “for each four hours of working time” and must occur no later than the end of the third working hour (WAC 296–126–092(4)). The rest period must be scheduled as near as possible to the midpoint of the 4 hours of working time, and no employee may be required to work more than 3 consecutive hours without a rest period. *See* 88 Fed. Reg. at 89011.

## **III. PREEMPTION DETERMINATION FOR PASSENGER-CARRYING CMV DRIVERS**

### **A. Standard for Making a Preemption Determination**

In both the preemption decisions involving property carriers, and in the decision on the ABA petition involving preemption for passenger carriers, the FMCSA determined that the California and Washington MRB Rules: (1) are State laws or regulations “on commercial motor

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<sup>1</sup> Petitioners’ assertions that the California MRB requirements are absolutely necessary to promote employee health and the safety of motor carrier operations are undermined by the alternative compliance method of an employer who fails to provide a meal break instead paying a driver one hour of pay at the employee’s regular rate of compensation for each workday that the meal period is not provided. *See* Section 11(D) of IWC Order 9-2001, cited at pp.4-5 of California petition. If the meal break was critical for safety, it could not be replaced by an hour of wages.

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; 85 Fed. Reg. at 3469; 85 Fed. Reg. at 7333.

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 initiative<sup>2</sup> 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. Standard for Making a Waiver Determination**

Pursuant to 49 U.S.C. § 31141(d), FMCSA may grant a waiver of an FMCSA preemption decision. Under this provision, “[a] person (including a State) may petition the Secretary for a waiver of a decision of the Secretary that a State law or regulation may not be enforced under

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<sup>2</sup> 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 States of California and Washington have 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 either State ever submitted a copy of the MRB Rules to the FMCSA for review. Nor has the agency addressed this failure in any of its preemption determination proceedings on MRB rules.

this section.” Further, “[t]he Secretary shall grant the waiver, as expeditiously as possible, if the person demonstrates to the satisfaction of the Secretary that the waiver is consistent with the public interest and the safe operation of commercial motor vehicles” *Id.* at §31141(d)(1).

In the ABA preemption determination, the FMCSA recognized the safety protections afforded by the HOS requirements. The agency stated, “the Federal HOS rules for passenger-carrying CMVs have long imposed drive time limits for drivers. While the HOS rules do not include a mandated 30-minute rest period, they regulate how long a driver may operate a passenger-carrying CMV before an off-duty period is required. The Federal regulations also prohibit drivers from operating CMVs when fatigued, and thus require drivers to take any additional breaks necessary to prohibit fatigued driving and prohibit employers from coercing drivers into operating a CMV during these required breaks.” 85 Fed. Reg. at 3473. The agency found both the HOS and MRB rules impose requirements for off-duty periods. Therefore, the agency determined that, because the HOS and MRB rules cover the same subject matter, the MRB rules, as applied to drivers of passenger-carrying CMVs, are laws on CMV safety. *Id.*

Moreover, the FMCSA determined that the California MRB rules as applied to drivers of passenger-carrying CMVs have no safety benefits beyond those provided by the Federal HOS regulations. *Id.* at 3475 (Emphasis supplied.) The FMCSA found that the regulatory HOS framework as applied to passenger carrier drivers is appropriate because it “provides the flexibility needed for passenger carrier operations while still prohibiting a driver from operating a CMV when too fatigued to safely do so.” *Id.* Further, the FMCSA categorically stated, “Interposing the MRB rules on top of the Agency’s framework eliminates the regulatory flexibilities provided and requires the driver to stop the bus and log off duty at fixed intervals each day regardless of the driver’s break schedule or actual level of fatigue.” *Id.*

Thus, in making a preemption decision on the ABA petition, the FMCSA has already determined that enforcing the California MRB rules on drivers of passenger-carrying CMVs “provide[s] no safety benefit beyond the safety benefit already provided by the Federal regulatory framework for passenger-carrying CMVs.” *Id.* The agency cannot now go back and hold that the imposition of the California and Washington MRB rules promotes some additional safety margin for motor carrier operations without revisiting its analysis and reaching the opposite conclusion.

#### **IV. PETITIONERS HAVE FAILED TO MEET THE STANDARD FOR WAIVER OF THE PREEMPTION DETERMINATION FOR PASSENGER-CARRYING CMV DRIVERS**

The FMCSA is now considering waiver petitions filed by the International Brotherhood of Teamsters; the Truck Safety Coalition, Citizens for Reliable and Safe Highways and Parents Against Tired Truckers; William B. Trescott; and the State of California. 88 Fed. Reg. 89010 (December 26, 2023). None of these petitions offer any compelling reason to overturn the reasoned decisions of the FMCSA in the granting preemption of MRB rules for drivers of either passenger or property-carrying CMVs, and they should all be denied.

**A. The Petitioners Offer No Evidence that Fatigue-Related Bus Crashes Have Increased in Frequency or Severity Without Imposition of MRB Rules on Bus Drivers**

The petitioners offer nothing more than conclusory statements and speculation without providing any data to support their requests for waiver of the MRB preemption determinations. If the preemption of MRB would have a detrimental effect on the safety of motorcoach operations, there should be ample evidence to support that assertion. But despite having several years of experience under the preemption determinations for both passenger and property carrying vehicles, petitioners are unable to show any increase in the frequency or severity of fatigue-related crashes that may be properly attributed to the lack of MRB rules.

The preemption determination for passenger carriers has been in effect for over four years, since January 21, 2020. The initial preemption determination for property carriers has been in effect for over five years, since December 26, 2018. Yet in this intervening time the petitioners cannot cite any crash data that connects the lack of MRB enforcement to more frequent or more severe motorcoach or truck crashes.

For example, the State of California argued as follows:

In 2021 alone, there were a total of 523,796 reported accidents involving large trucks in the United States, resulting in 154,993 persons injured and 5,788 fatalities. Nat. Highway Traffic Safety Admin., U.S. Dep't of Transp., *Traffic Safety Facts: 2021 Data 2* (2023). California saw 341 fatalities related to large bus or truck crashes in 2016 and 383 fatalities in 2017. Fed. Motor Carrier Safety Admin., U.S. Dep't of Transp., *2019 Pocket Guide to Large Truck and Bus Statistics* 37 (2020). In 2019, after the FMCSA preempted the MRB rules as to cargo-carrying trucks, this increased to 429 fatalities in large bus or truck crashes. Fed. Motor Carrier Safety Admin., U.S. Dep't of Transp., *2022 Pocket Guide to Large Truck and Bus Statistics* 36 (2022).

California petition, at 9.

But simply asserting there was an increase from 341 fatalities involving large truck and bus crashes in 2016 to 429 fatalities in large truck and bus crashes in 2019 fails to make petitioner's case. First, this fatality data ignores that preemption of MRB rules for passenger carriers did not go into effect until January 2020, so any increase in fatalities in bus crashes (which are not separately set out in California's petition) in this time frame could not be attributable to preemption of the MRB rules for passenger carriers. Nor does the fatality data for bus crashes differentiate between local transit buses and over-the-road motorcoaches.

Moreover, despite asserting that in a 2019 handbook, the California Department of Motor Vehicles noted that at least 15 percent of all heavy truck accidents involve fatigue, *id.* at 9, the California petition failed to show that the purported increase in truck fatalities since that time were fatigue-related.

Second, the crash fatality data does not differentiate between the results for carriers operating in intrastate commerce, who have always been subject to the California MRB rules, and carriers operating in interstate commerce, who are now subject to the Federal HOS rules and not the

California MRB requirements. This data would be critical in justifying a waiver of the MRB preemption determinations, but the State offers nothing in this regard.

Third, the data offers no evidence of fault or causation. The State of California assumes without support that all truck and bus crash fatalities were the fault of the CMV drivers and that fatigue played a role in each crash. In the majority of cases, crashes between a CMV and a private passenger vehicle are caused by the private passenger vehicle driver.<sup>3</sup> The petition fails to account for why any fatal crashes occurred which driver was at fault. Also, the petition does not consider any other potential crash causes that would not be mitigated by enforcement of MRB rules.

The Teamsters petition argued that multiple studies show that “increasing the number of rest breaks beyond one (an increase that the California and Washington MRB laws provide for) does have a positive safety impact by reducing the likelihood of a crash for property-carrying drivers.” Teamsters petition, at 4. But that study does not include drivers of passenger-carrying vehicles, so it is not applicable to the bus industry.

Additionally, the Teamsters petition fails to consider the differences in truck and bus operations. As noted by FMCSA in the passenger-carrier preemption determination, “the Agency made the affirmative decision in 2003 not to subject drivers of passenger-carrying CMVs to the same HOS rules as property-carriers because of operational considerations that distinguish bus drivers from truck drivers with respect to fatigue. See 68 FR 22456, 22462 (Apr. 28, 2003).” 85 Fed. Reg. at 3474.

In fact, the FMCSA commissioned a report in 2012 intended to help the agency identify, by exploring the evidence (via literature review), motorcoach drivers’ risk for crash as a result of acute fatigue and given the differences between motorcoach and interstate truck drivers. *Evidence Report, Fatigue and Motorcoach/Bus Driver Safety; MANILA Consulting Group, Inc.*, presented to the FMCSA, December 2012. This report failed to establish that additional rest breaks for motorcoach drivers would reduce fatigue-related crashes.

The report noted that there were no studies distinguishing healthy versus non-healthy drivers, and no fatigue studies specific to motorcoach drivers. Instead, the evidence came primarily from studies of truck drivers and some transit bus drivers. There was some evidence from other CMV drivers that longer driving hours (after 5-6 hours to 8-11 hours) increases incidence of crash. But the strength of evidence was only moderate, and it does not take into account that bus drivers, unlike truck drivers, typically may take breaks on their own schedule during their duty periods.

The study evidence also suggests crash incidence is generally highest during overnight and early morning hours and increases somewhat in the afternoon. But these time-of-day findings would not be affected by enforcement of MRB rules, which require breaks after certain periods on duty and are unrelated to the time of day.

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<sup>3</sup> The FMCSA’s July 2007 Large Truck Causation Study, Publication No. FMCSA-RRA-07-017, found that the critical reason for a crash between a truck and a passenger car was assigned to the car driver in 56 percent of cases.

Finally, the arguments for preempting the California meal and rest break rules as applied to drivers of passenger-carrying CMVs 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.

## **B. The MRB Rules Undermine Existing Federal Fatigue Management Rules**

The California and Washington MRB 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 or Washington 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.<sup>4</sup>

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<sup>4</sup> 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 pickups/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.<sup>5</sup> 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.

## **B. The MRB Rules Also Conflict with Driver Attendance Needs**

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<sup>5</sup> 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."

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 onboard 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.<sup>6</sup>

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<sup>6</sup> 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

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 (PHMSA) 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.

The California and Washington 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

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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-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).

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 and comfort 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.

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 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 upon 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. Requirements for Additional Breaks Increase Stress**

Rather than providing relief for motorcoach drivers, requiring drivers to find a safe and adequate place to park the vehicle several times a day and manage the passenger demands will place additional stress on the driver and likely affect driver wellness in a negative way. First, there would be increased stress for the driver since managing additional regulations would not be visible or supported by the Electronic Logging Device. Instead, the responsibility for compliance would be solely on the driver; this chronic daily requirement would have a negative cumulative effect on a driver’s health. For drivers that operate regularly in multiple states with differing MRB requirements, this regulatory overload is exacerbated each time a state line is crossed.

Second, the incremental meal and rest breaks would extend the driver’s workday and thus reduce the driver’s home time and work life balance. Moreover, drivers might feel like they have to rush to make up the time putting undue pressure on the driver.

Moreover, since the drivers would not be able to leave the motorcoach unattended or would not have a safe place to exit the vehicle, they will most likely end up just sitting in their truck for an extended amount of time. There would be additional personal health issues caused from sitting for long periods of time, which may cause back pain, muscle stiffness, poor circulation and an increase in blood clots.

Also, there would be increased congestion and additional collision risk with other vehicles entering and exiting roadways as lane changes/merging create hazardous driving conditions. Finally, drivers will end up having to take breaks in retail parking lots or public places that create more closed quarter maneuvering and pedestrian traffic, thus increasing the stress and risk for collisions.

Further, additional meal and rest breaks would increase stress on the environment from vehicle emissions and greenhouse gases as drivers increase idle time and out of route miles to find safe and adequate parking.

All of these considerations tend to override any marginal safety benefit from additional meal or rest breaks for motorcoach drivers.

#### **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.4<sup>th</sup> 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.4<sup>th</sup> 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.4<sup>th</sup> 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 preemption 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).

The burden of 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 and Washington meal and rest break requirements have no safety benefit that is not already realized under the FMCSA’s HOS regulations. Thus, the petitions to waive preemption of those requirements would adversely affect the safety of motorcoach operations and would therefore not be in the public interest. The MRB Rules therefore must remain preempted under 49 U.S.C. § 31141 as applied to drivers of commercial motor passenger vehicles subject to the federal HOS Rules, and the petitions for waiver must be denied.

Respectfully submitted,



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