



A bold voice for transportation workers

October 29, 2018

Mr. Charles Medalen
FMCSA Chief Counsel
Regulatory Affairs Division
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: California Meal and Rest Break Rules; Petition for Determination of Preemption
Docket No: FMCSA-2018-0304

Dear Mr. Medalen,

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I am pleased to respond to FMCSA's request for comments on the American Trucking Associations' (ATA) petition for federal preemption of California's Meal and Rest Break rules. TTD consists of 32 affiliate unions representing workers in all modes of transportation, including those covered by FMCSA's HOS regulations and California's rules.¹ For reasons discussed below, we urge FMCSA to reject ATA's petition.

In the notice, FMCSA solicits comment on the consideration of preemption of California's Meal and Rest Break rules. California's regulations generally require that employers must provide employees with an off-duty 30-minute break for every five hours worked, before the end of each five-hour period; and a ten-minute off-duty break for every four-hour period. This requirement applies to most employees in California, including transportation workers.

¹ Attached is a complete list of TTD's 32 affiliate unions.

Transportation Trades Department, AFL-CIO
815 16th Street NW / 4th Floor / Washington DC 20006
Tel: 202.628.9262 / Fax: 202.628.0391 / www.ttd.org
Larry I. Willis, President / Greg Regan, Secretary-Treasurer



Federal statute (49 U.S.C. 31141) grants the Secretary of Transportation the authority to review and preempt state law or regulation concerning commercial motor vehicles under certain conditions. These include when the additional or more stringent state requirement has no safety benefit, is incompatible with the Federal Regulations and/or creates an unreasonable burden on interstate commerce. (49 U.S.C. 31141(c)(4)). In its petition, ATA argues that California's regulation is subject to 31141 review, and that it further meets all the above conditions. Therefore, ATA requests that FMCSA, through the Secretary's authority, preempt California's requirements.

TTD broadly supports the rights of states to enact safety standards that provide humane working conditions for employees and reduce the risks of injuries and illness. While California's regulation applies to most employees within the state, we firmly believe that its continuing application to commercial drivers represents sound policy. We know that in many driving occupations driver fatigue is a leading cause of accidents and deaths. This is particularly evident in the over the road bus sector, where poor federal HOS enforcement and low wages, which drive operators to work second jobs during times they should be resting, combine for dangerous conditions. California's regulations take a much-needed step in mitigating this crisis among CMV operators, and improving safety outcomes for drivers, passengers and pedestrians. For this reason alone, FMCSA should reject ATA's petition.

Rejecting the petition would not represent new policy for FMCSA. ATA filed a nearly identical petition to FMCSA in 2008, which the agency rejected decisively without even wading into questions of safety or impacts to commerce. FMCSA's 2008 response stated clearly:

The petition does not satisfy the threshold requirement for preemption under 49 U.S.C. 31141(c) because the provisions at issue are not "laws and regulations on commercial motor vehicle safety," but rather laws and regulations applied generally to California employers [and that] because these rules are in no sense regulations "on commercial motor vehicle safety," they are not subject to preemption under 49 U.S.C. 31141.

In sum, because FMCSA determined that California's requirements covered employees in the state broadly, it could not be preempted as it was not explicitly a commercial motor vehicle safety regulation. This interpretation makes logical sense - Congress surely did not intend to give FMCSA the authority to preempt any law or regulation in the country that could possibly affect commercial motor vehicles, giving the federal government unprecedented power to interfere in State governance. In its current petition, ATA argues that this interpretation is incorrect, but provides no new or convincing evidence to support this claim. FMCSA's determination in 2008 should prevail in this proceeding as well.

FMCSA's assertions of its authority under 31141 since 2008 reaffirms its limited scope. In 2012, FMCSA preempted an Alabama law that mandated training requirements for the shipping of metal coils within the state.² In the same year, FMCSA also indicated it believed it had the authority to preempt New York State law regarding requirements for bus drivers.³ These cases represent the intended and limited scope of the statute - laws and regulations specific to the CMV industry.

² FMCSA-2011-0318, Alabama Metal Coil Securement Act; Petition for Determination of Preemption

³ FMCSA-2013-0353, New York Vehicle and Traffic Law, U.S. DOT/FMCSA - Response dated March 29, 2012

Even in the event that FMCSA finds that the petition does meet the threshold for consideration of preemption, ATA has failed to prove that any of the conditions for preemption are met. ATA's claim that there is no safety benefit from California's regulation is wholly without merit. Numerous studies have demonstrated the clear risks associated with fatigue in the workplace broadly. For example, the estimated annual injury incidence rate per 100 workers is 7.89 for U.S. workers who usually sleep less than five hours per day, compared with 2.27 per 100 workers among those who tend to sleep between seven and eight hours.⁴ Employees who do not get enough sleep or who are otherwise overly fatigued, and are therefore at higher risk, are too common in the commercial motor vehicle sector, for the aforementioned reasons. FMCSA itself has previously noted the fatigue mitigating benefits of rest breaks, writing in a previous regulatory proceeding that "[the studies] demonstrate that breaks reduce the risk of crashes after the break, findings that are consistent with research on the impact of breaks on accident risks in other industrial sectors" and that "[t]he inclusion of any break was found to reduce the risk of a crash".⁵ Given these facts, it is impossible to claim that California's regulations produce no safety benefits.

The petitioner has also not made a compelling case that California's rules are incompatible with federal law or regulation. ATA correctly notes that the Agency has defined compatible to mean state laws that are identical to the FMCSRs and the HMRs *or* have the same effect as the FMCSRs (49 CFR 355.5).⁶ However, ATA incorrectly interprets this language to mean that any law or regulation that does not operate via an identical mechanism as an FMCSR is invalid. This would suggest a prohibition on States from creating requirements that are more stringent than any item on which FMCSA has previously ruled. This cannot be the case, given the "same effect" flexibility in 355.5 and the similar description in 31141(c)(2).

For example, FMCSA currently prevents commercial drivers from consuming alcohol to excess and driving. States surely have the right to promulgate regulations that also seek to have the same effect of curtailing drunk driving, even if they do so in a manner that is not identical to the FMCSRs. Similarly, in a bid to avoid fatigued driving, states have the authority to produce rest break regulations in addition to federal hours of service requirements. California's requirements supplement federal regulation, but do not require that a driver violate them. As such, there is no evidence that they are incompatible with federal standards.

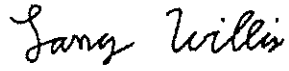
Finally, ATA claims that California's requirements place an unreasonable burden on interstate commerce. However, ATA is unable to actually demonstrate this. Other than a "back of the napkin" speculation on lost productivity, the petition simply invokes the theoretical specter of damage to interstate shipping without evidence. Further, Section 31141 does not prohibit state requirements that place some level of burden on commerce, only burdens which are unreasonable. Given the dire consequences for fatigued driving and fatigued work broadly, there is no evidence that California's commitment to safety for workers within its borders places an unreasonable burden on commerce.

⁴ Lombardi, D.A., Folkard, S., Willetts, J.L., & Smith, G.S., (2010). Daily sleep, weekly working hours, and risk of work-related injury: US National Health Interview Survey (2004-2008)

⁵ Hours of Service of Drivers Final Rule, 76 FR 81134

For the reasons discussed above, we urge FMCSA to reject ATA's petition to preempt California's meal and rest break requirements. TTD and its affiliate unions believe strongly in robust safety and health protections for all employees, and the rights of states to provide these protections to workers. We thank FMCSA for the opportunity to comment on this petition, and look forward to working with the agency on safety issues in the future.

Sincerely,

A handwritten signature in cursive script that reads "Larry I. Willis".

Larry I. Willis
President



Transportation Trades Department, AFL-CIO
A bold voice for transportation workers

TTD MEMBER UNIONS

Air Line Pilots Association (**ALPA**)
Amalgamated Transit Union (**ATU**)
American Federation of Government Employees (**AFGE**)
American Federation of State, County and Municipal Employees (**AFSCME**)
American Federation of Teachers (**AFT**)
Association of Flight Attendants-CWA (**AFA-CWA**)
American Train Dispatchers Association (**ATDA**)
Brotherhood of Railroad Signalmen (**BRS**)
Communications Workers of America (**CWA**)
International Association of Fire Fighters (**IAFF**)
International Association of Machinists and Aerospace Workers (**IAM**)
International Brotherhood of Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers (**IBB**)
International Brotherhood of Electrical Workers (**IBEW**)
International Longshoremen's Association (**ILA**)
International Organization of Masters, Mates & Pilots, ILA (**MM&P**)
International Union of Operating Engineers (**IUOE**)
Laborers' International Union of North America (**LIUNA**)
Marine Engineers' Beneficial Association (**MEBA**)
National Air Traffic Controllers Association (**NATCA**)
National Association of Letter Carriers (**NALC**)
National Conference of Firemen and Oilers, SEIU (**NCFO, SEIU**)
National Federation of Public and Private Employees (**NFOPAPE**)
Office and Professional Employees International Union (**OPEIU**)
Professional Aviation Safety Specialists (**PASS**)
Sailors' Union of the Pacific (**SUP**)
Sheet Metal, Air, Rail and Transportation Workers (**SMART**)
SMART-Transportation Division
Transportation Communications Union/ IAM (**TCU**)
Transport Workers Union of America (**TWU**)
UNITE HERE!
United Mine Workers of America (**UMWA**)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service
Workers International Union (**USW**)

These 32 labor organizations are members of and represented by the TTD

