



A bold voice for transportation workers

June 10, 2019

Tracy M. White
Enforcement and Litigation Division
FMCSA Office of Chief Counsel
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-2019-0048**

Dear Mr. White,

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I am pleased to respond to FMCSA's request for comments on the American Bus Associations' (ABA) petition for federal preemption of California's Meal and Rest Break rules. TTD consists of 33 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 ABA's petition.

In the notice, FMCSA solicits comment on 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 33 affiliate unions.



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 vehicle safety only under certain conditions. The FMCSA may preempt a state law or regulation on commercial motor vehicle safety that is additional or more stringent than the federal rule only if the state law 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, ABA requests that FMCSA preempt California's requirements.

TTD is aware that in FMCSA's recent decision on a petition from the American Trucking Association, the agency overturned years of precedent in choosing to drastically redefine laws or regulations "on commercial motor vehicle safety" within the context of its preemption authority. As TTD stated in its comments to that docket, we disagree strongly with FMCSA's new interpretation of the statute and its decision to strip rest break employment protections from thousands of property-carrying commercial drivers within the state of California. We continue to be deeply disappointed with the decision of the federal government to overrule states' rights to provide humane working conditions for the workers in their state.

However, we also firmly believe that ABA's petition is fundamentally dissimilar from the request FMCSA previously granted. This is particularly evident when considering the safety benefits prong of 31141. Unlike property carrying drivers who receive a federally mandated 30-minute rest break, motor coach drivers are provided no rest breaks by federal statute or regulation within the drive time window. As such, a motorcoach driver in California has no guaranteed time to rest except for the time provided by the State's meal and rest break rules.

While it is regrettable that FMCSA and Congress have previously chosen not to act to provide more robust fatigue protections, we strenuously object to any claim that driver fatigue is a non-issue in this sector. The NTSB has found that 36 percent of motorcoach crash fatalities can be directly linked to driver fatigue, and FMCSA-convened focus groups have produced compelling information on driver fatigue.² Beyond the government's own data, a wealth of literature and research clearly demonstrates the safety benefits of rest breaks across industrial sectors broadly and in driving dependent occupations, a point the agency makes in its 2011 Hours of Service (HOS) rulemaking.³

Fatigue in the motorcoach sector is also deeply exacerbated by the loophole in the Fair Labor Standards Act which exempts motorcoach drivers from receiving overtime benefits. In practice, this results in unscrupulous companies paying operators low wages on top of demanding shifts. This drives these workers to seek additional employment during times that HOS regulations envision that they are resting. While it is beyond the scope of FMCSA's authority to address this

² <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3503431/>

³ FMCSA states that "[studies] demonstrate that breaks reduce the risk of crashes... 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". Hours of Service of Drivers Final Rule, 76 FR 81134

problem, it is well within California's authority to mitigate its ill-effects. The agency should not interfere with the ability of States to take action to rectify problems that Congress or the agency has ignored.

We also reject ABA's characterization of the current ability of drivers to take breaks, which is at best naïve and at worst deliberately misleading. Claiming that there is "greater flexibility for bus drivers to determine when and how to take rest breaks during a duty period" implies that motorcoach drivers are free to take breaks as they choose, and that the federal government has some role in preserving this flexibility. In reality, a driver's ability to take a break will be dictated by their employer. It is wishful thinking to believe that all motorcoach companies are good actors that allow their employees to take rest breaks as they need them. Our workers and the FMCSA cannot rely on the altruism of profit-driven employers to ensure safe operations.

Even if the agency is unconvinced by the clear safety benefits of California's rule, ABA has entirely failed to describe how California meal and rest breaks are incompatible with federal regulation. The petitioner demonstrates that California's Meal and Rest Breaks *may* differ from the way it would prefer breaks to be available to drivers or the way its members conduct operations. However, FMCSA's statutory authority does not direct it to consider if State law is inconsistent with the business practices of trade association's members, yet ABA repeatedly invokes this argument. For example, the petitioners write that California's rule will cause difficulties when a driver chooses to take a break:

"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".

ABA's references to assisting passengers on breaks are not statutory or regulatory mandates, but directives on how their member motorcoach companies expect their employees to perform. While TTD unions' members pride themselves on delivering quality customer service, a business need to do so cannot undermine or override employment protections or safety requirements. The petition seeks to coningle actual statutory requirements with industry norms, an inexplicable position FMCSA must reject.

We also urge FMCSA to reject ABA's attempt to misapply existing regulations on terminal facilities at 49 CFR § 374.309 to support its claims. The petitioner claims that FMCSA's requirements for a terminal, "facilities which a motor carrier makes available to passengers of a motor vehicle" (49 CFR § 374.113) would include anywhere a driver may take a break with passengers aboard. Therefore, it would be impossible for a driver to take California's meal and rest breaks with customers on the bus. As anyone who has ridden a long-distance motorcoach service such as Greyhound can attest, drivers frequently stop in locations like Interstate Rest Areas that are not controlled, secured or made available by the motorcoach company, for the comfort and

convenience of passengers. At no point previously have these locations been defined as terminals under existing law or regulation, and there is no logical reason to adopt this interpretation now. ABA's characterization of 49 CFR § 374.309 is clearly unsound.

Finally, while ABA makes the claim that "the cost of compliance with the meal and rest break rules are staggering" it provides absolutely no empirical evidence for this statement and relies entirely on conjecture. The petitioner even goes as far as to suggest that the rule is so burdensome as to eliminate the affordable nature of intercity motorcoach transportation. It would be irresponsible for FMCSA to accept the petitioner's arguments as they relate to demonstrating a burden on interstate commerce when the petitioner has provided the agency and commenters no data or information to review beyond anecdotal and hypothetical examples.

For these reasons we urge FMCSA to reject ABA's petition to preempt California's meal and rest break requirements. ABA has failed to meet the requirements to induce federal preemption and there is no reason to abrogate California's ability to promote health and employment protections for passenger carrying drivers within its borders. We thank FMCSA for the opportunity to comment on this petition, and look forward to working with the agency in the future.

Sincerely,



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 Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
United Mine Workers of America (UMWA)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service
Workers International Union (USW)

These 33 labor organizations are members of and represented by the TTD

