

October 29, 2018

The Honorable Raymond P. Martinez  
Federal Motor Carrier Safety Administration  
The United States Department of Transportation  
1200 New Jersey Avenue SE  
Washington, DC 20590

**Docket Number:** FMCSA-2018-0304

**RE: Comment/Petition for Determination That California Meal and Rest Break Requirements for Commercial Vehicle Drivers Are Preempted Under 49 U.S.C. § 31141**

Petitioners are the Specialized Carriers and Rigging Association (SC&RA), and we hereby petition the U.S. Department of Transportation (DOT), Federal Motor Carrier Safety Administration (FMCSA), for a declaration that certain requirements imposed by California statute (Cal. Labor Code § 512(a)), regulation (Cal. Code Regs. tit 8, § 11090), and California Industrial Welfare Commission (IWC) wage orders related to all employees working in the transportation industry (IWC Transportation Wage Order No. 9, (collectively, the “California Meal and Rest Break requirements”) are preempted to the extent that they are applied to drivers subject to the Federal Hours of Service Regulations (HOS) as set forth at 49 C.F.R. Part 395.3 (a)(3)(ii) (the “HOS regulations on rest breaks”), or further actions taken by FMCSA related to the application and/or enforcement of those regulations.

Due to the risk of irreparable harm to petitioners, in particular to interstate motor carriers operating in California, SC&RA requests that the FMCSA determine that California’s Meal and Rest Break requirements are preempted under 49 U.S.C. § 31141. The petitioners request that FMCSA exercise its authority under 49 C.F.R. Part 389 to expeditiously issue a final rule declaring California’s Meal and Rest Break requirements are preempted from being applied to drivers subject to the HOS regulations on rest breaks, and order that California, or any representative authorized under the Labor Code Private Attorneys General Act of 2004, is not authorized to legally enforce any conflicting provisions related to California’s Meal and Rest Break requirements.

The petitioners note that regulatory authority for implementation of 49 U.S.C. § 31141 vests under 49 C.F.R. Part 350 and Part 355 and regulations governing the implementation of the Motor Carrier Safety Assistance Program (MCSAP). Specifically, 49 C.F.R. 355.25 requires that: “no State shall have in effect or enforce any state law or regulation pertaining to commercial motor vehicle safety in interstate commerce which the Administrator finds to be incompatible with the provisions of the Federal Motor Carrier Safety Regulations.”

49 C.F.R. § 355.5 defines compatibility for interstate and intrastate commerce as: “Compatible or Compatibility means that State laws and regulations applicable to interstate commerce and to intrastate movement of hazardous materials **are identical** to the Federal Motor Carrier

Safety Regulations (FMCSRs) and the Hazardous Materials Regulations (HMRs) or have the same effect as the FMCSRs and that State laws applicable to intrastate commerce are either identical to, or have the same effect as, the FMCSRs or fall within the established limited variances under §§350.341, 350.343, and 350.345 of this subchapter.”

Separately, but pursuant to the same regulatory analysis, that upon a finding by the FMCSA, based upon its own initiative or upon a petition of any person, that a State law, regulation or enforcement practice pertaining to commercial motor vehicle safety, in either interstate or intrastate commerce, is incompatible with the FMCSRs or HMRs, that the FMCSA may initiate a proceeding under 49 C.F.R. §350.215 for withdrawal of eligibility for all Basic Program and Incentive Funds. The petitioners would note that FMCSA has within its discretion authority to proceed separately to seek withdrawal of California’s eligibility for Basic and Incentive MCSAP funds, and we would, at present, reserve our right to subsequently petition FMCSA to initiate a proceeding under 49 C.F.R. §350.215 for withdrawal of California’s eligibility for all Basic Program and Incentive Funds.

On September 24, 2018, the American Trucking Association (ATA petition) filed a petition for a determination that California’s Meal and Rest Break requirements for commercial motor vehicle drivers are preempted under 49 U.S.C. § 31141. The petitioners in general support the findings included in the ATA petition, however, we are filing this petition in order to emphasize the need to recognize and expound on FMCSA primacy of authority in prescribing uniform safety regulations to cover all aspects of motor vehicle safety and safety of operations. Recognition of FMCSA’s jurisdictional authority to harmonize state motor carrier safety standards with federal standards are perhaps one of the most critical authorities provided to FMCSA and help to avoid a patchwork of state-generated safety requirements.

49 U.S.C. § 31141 authorizes the Secretary of Transportation to preempt more stringent state laws or regulations on commercial motor vehicles safety (i.e., laws that affect motor carrier safety) if the Secretary also decides either that: 1) the state law or regulation has no safety benefit, or 2) the state law or regulation is incompatible with a regulation issued by the Secretary, or 3) enforcement of the state law or regulation would cause an unreasonable burden on interstate commerce.

The petitioners recognize the regulatory challenge of affirming that the State of California’s Meal and Rest Break requirements has no safety benefit, and similarly, while believing that California’s actions in enforcing its Meal and Rest Break requirements is an unreasonable burden on interstate commerce, also acknowledge the challenge of affirming it. However, the petitioners believe that there are clear legal and regulatory standards in effect requiring California to implement identical standards for rest break requirements, as implemented in the federal rest break requirements in 49 C.F.R. Part 395.3 (a)(3)(ii).

The petitioners are filing this comment as a petition because of the gravity of concern for the precedent that FMCSA must be the final arbiter of whether a state has enacted a standard or

regulation that is not identical to the federal standard and should act to preempt the conflicting state enforcement of the non-identical state standard.<sup>1</sup> As part of the exercise of its jurisdictional authority over the determination of the compatibility of state laws with federal motor carrier safety standards, the petitioners believe that FMCSA should also be willing to initiate a proceeding under 49 C.F.R. §350.215 for withdrawal of eligibility for all Basic Program and Incentive Funds for states with non-compatible state motor carrier safety laws.

The petitioners note that 49 C.F.R. § 355.25(e) authorizes the FMCSA to consolidate any action to enforce this section, provided it does not adversely affect any party to the proceeding, and accordingly would ask that the petition that we filed separately be consolidated with consideration of the ATA petition. However, as we have asked for expeditious consideration of the determination of this issue, and should the FMCSA determine that it would cause unreasonable delay, we would ask that this be considered as comment to the ATA petition.

### **1. FEDERAL PRIMACY OF FEDERAL MOTOR CARRIER SAFETY LAWS**

Congress has repeatedly taken the position that the federal government should establish a federal system of safety governing federal motor carrier safety requirements and declared an express interest in uniform regulation of commercial motor vehicle safety 49 U.S.C. § 31131(b)(2). To facilitate this interest, Congress developed complementary schemes to both prohibit states from enforcing any incompatible regulation or law on commercial motor vehicle safety in interstate commerce and limit states' authority over commercial motor vehicle safety in intrastate commerce, and by restricting funding for states that adopt incompatible safety regulations.

In the aftermath of economic deregulation of the trucking industry in 1980, issues related to safety enforcement and authority to establish a uniform system of federal safety regulation became paramount. The Motor Carrier Safety Act of 1984 (Title II of Pub. L. 98-554, 98 Stat. 2832, 2838) established federal preemption codified at 49 U.S.C § 31141 and authorized the Secretary to preempt those state laws and regulations affecting interstate commercial motor vehicle safety found to be inconsistent with federal laws and regulations, rendering inconsistent state laws and regulations unenforceable. The Act also created the Commercial Motor Vehicle Safety Regulatory Review Panel (Safety Panel) to analyze state motor carrier safety requirements and develop recommendations on how to achieve compatibility with the Federal regulations. The Safety Panel ultimately recommended that the Federal Highway Administration (FHWA) establish procedures for the continual review and analysis of the compatibility of state safety laws and regulations with federal requirements through the

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<sup>1</sup> The definition of "compatibility" includes that they have to be either identical or have the same effect as the FMCSR's. The petitioners contend that this should be interpreted to require not exactly to be identical, but almost identical in every meaningful way, so the state standard could be worded differently as long as it achieved identical requirements.

MCSAP, which the FHWA incorporated into the annual review process as a MCSAP eligibility criterion.

The MCSAP was authorized as a grant program two years earlier in the Surface Transportation Assistance Act of 1982 (STAA) (secs. 401–404, Pub L. 97–424, 96 Stat. 2097, 2154) and reauthorized in the Commercial Motor Vehicle Safety Act of 1986 (sec. 12014, Pub. L. 99–570, 100 Stat. 3207, 3207–186), and again in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (secs. 4001–4004, Pub. L. 102–240, 105 Stat. 1914). The original authorization contained the eligibility requirements for financial assistance, including the requirement to adopt and enforce safety regulations compatible with the FMCSRs and HMRs.

Because of dissatisfaction with state enforcement of federal motor carrier standards, Congress in the Transportation Equity Act for the 21st Century (TEA–21), Pub. L. 105– 178, 112 Stat. 107 (1998) took further steps to strengthen administration of the MCSAP program to incorporate performance standards for state motor carrier plans, and the compatibility requirements to tighten them to require states to adopt any new FMCSR’s within three years of adoption, and other conforming changes to strengthen oversight of compatibility requirements.

Of particular note in the TEA-21 regulatory process, were the comments filed by the State of California acknowledging the need to implement identical standards as those implemented pursuant to the FMCSRs or HMRs, but specifically proposed that FMCSA, who had succeeded FHWA in the interim period between the ANPRM and the final rule as a result of the passage of the Motor Carrier Safety Improvement Act of 1999 (MCSIA), (Pub. L. 106-159, 113. Stat. 1748, December 9, 1999), provide authority for additional variances from the Federal Tolerance Guidelines that at the discretion of FMCSA could be applied to state intrastate safety regulations. and have those apply to interstate movements.

In response to California’s comments, FMCSA said in part:

“California’s request would undermine the congressional intent and purpose of the MCSAP to ensure uniformity of regulations and enforcement among the States. Since the inception of the program, the agency has required each State to enforce uniform motor carrier safety and hazardous materials regulations for both interstate and intrastate motor carriers and drivers. Safety standards in one State must be compatible with the requirements in another State in order to foster a uniform national safety environment.”<sup>2</sup>

Petitioner’s contend that the legislative record illustrates that Congress provided authority for FMCSA, to preempt more stringent state laws and regulations on motor carrier safety if the Secretary also decides either that: 1) the state law or regulation has no safety benefit, or 2) the state law or regulation is incompatible with a regulation issued by the Secretary, or 3) enforcement of the state law or regulation would cause an unreasonable burden on interstate

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<sup>2</sup> Motor Carrier Safety Assistance Program, 65 Fed. Reg. 15098 (March 21, 2000) (emphasis added).

commerce. Petitioners contend that Congress intentionally and continually increased requirements mandating that states must comply with MCSAP compatibility requirements, adding requirements for performance-based plans, annual certification of compliance, and a system of penalizing non-compliance, and those requirements in turn mandate that state laws and regulations have to be identical to, or have the same effect, as the FMCSRs and HMRs. These requirements provided the underpinning to foster a uniform national safety environment administered and determined by the FMCSA.

## **2. CALIFORNIA MEAL AND REST BREAK REQUIREMENTS AND EFFORTS TO SECURE FEDERAL COMPATABILITY**

Under California law, within the transportation industry, an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.<sup>3</sup>

Ordinarily, the employee must be “relieved of all duty” for the period, unless “the nature of the work prevents an employee from being relieved of all duty,” and the employee enters into a written agreement to remain on duty, which he or she may revoke at any time.<sup>4</sup>

California law also provides that, within the transportation industry, every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.<sup>5</sup>

In short, California generally requires employers in the transportation industry to 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, in the middle of each such period if possible. Commercial drivers covered by collective bargaining agreements that meet certain statutorily enumerated criteria, however, are not subject to the meal period requirement.<sup>6</sup> The application of California’s Meal and Rest Break requirements

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<sup>3</sup> Cal. Lab. Code § 512(a). See also Industrial Wage Commission (IWC) Wage Order No. 9 § 11(A)–(B), codified at Cal. Code Regs. Tit. 8, § 11090 (Wage Order 9) (establishing break rules “in the transportation industry”).

<sup>4</sup> Wage Order 9 § 11(C).

<sup>5</sup> Wage Order 9 § 12(A).

<sup>6</sup> Cal. Lab. Code § 512(e), (f)(2).

tend to regulatorily dominate since California authorizes under its Private Attorney's General Act ("PAGA") that private attorneys are eligible to sue in civil actions for penalties on behalf of themselves, employees, and the State, and penalties. Carriers facing potential conflicting requirements on rest breaks are forced to comply with California's requirements because of the imposition of penalties.

On July 8, 2008, a collection of motor carriers filed a petition (Penske 2008 petition) with FMCSA to declare that California's Meal and Rest Break requirements should be preempted to the extent that they were subject to Federal HOS regulations.<sup>7</sup> It should be noted that at the time of the petition, that FMCSA had not promulgated a rule governing when a commercial motor vehicle driver was required to take a rest break, however, the basis was that the California requirements were more stringent, and generally incompatible with Federal HOS requirements.

Surprisingly, the Agency determined on a preliminary determination that the petition did not satisfy the threshold requirements for relief under 49 U.S.C. § 31141 and rested its conclusion on the ground that the meal and rest break rules at issue were not "on commercial motor vehicle safety" for purposes of Section 31141 because they "cover far more than the trucking industry," and "are not even unique to transportation." *Id.* at 79205. Clearly, the Agency made little effort to consider whether California's Meal and Rest Break requirements were a law or regulation affecting/on motor carrier safety, and then to consider the other requirements mandated under Section 31141. Rather the FMCSA relied on a rather cursory analysis of where and how the regulation was housed in California law and regulation.

The petitioners concur with the position taken in the ATA petition:

"But nothing in the language Congress employed in Section 31141 suggests that it applies only to State laws or regulations that cover the trucking industry alone, or that it categorically excludes laws that also affect other industries. By elevating form over substance in this manner, the Agency "created an utterly irrational loophole," because when it comes to federal preemption of State law, "there is little reason why state impairment of a federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." Morales v. TWA, 504 U.S. 374, 386 (1992)."

### **3. FEDERAL REQUIREMENTS ESTABLISHED FOR REST BREAKS AND CALIFORNIA'S UNSUCCESSFUL EFFORTS TO ACHIEVE COMPATIBILITY WITH FEDERAL LAW**

In 2011, under the general authority of the Motor Carrier Act of 1935 and the Motor Carrier Safety Act of 1984, after considering more than 20,000 comments the FMCSA revised the federal HOS regulations to limit the use of the 34-hour restart provision, and most importantly, to the issue in question in this petition, also included a provision that

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<sup>7</sup> See Petition for Preemption of California Regulations on Meal Breaks and Rest Breaks for Commercial Motor Vehicle Drivers; Rejection for Failure to Meet Threshold Requirement, 73 Fed. Reg. 79204 (Dec. 24, 2008).

allows truckers to drive if they have had a break of at least 30 minutes, at a time of their choosing, sometime within the previous 8 hours.

The regulation now codified as part of the FMCRS at 49 C.F.R. §395(a)(3)(ii) and California's Meal and Rest Break requirements are clearly on its face more stringent than the federal rest break requirements mandated in 49 C.F.R. §395(a)(3)(ii).

In the aftermath of the implementation of the federal rule on rest breaks, FMCSA successfully defended the rule from legal challenges from the American Trucking Association indicating that the rule did not provide adequate flexibility to safely allow for the industry to address fatigue, and from the other side from Public Citizen and the Truck Safety Coalition that the rule did not go far enough in prescribing regulatory requirements to combat driver fatigue. Additionally, the Commercial Vehicle Safety Alliance ("CVSA") filed a petition on November 4, 2015 requesting that FMCSA delete the 30-minute rest break requirement mandated, because of the difficulty of enforcing the regulation, which FMCSA denied on August 9, 2016.

The end result of this series of actions is the clear position and determination that FMCSA has taken, that a 30-minute rest break before the commencement of an eight hour of drive time is a FMCSR regulation. This is a safety regulation that unquestionably conflicts with California's Meal and Rest Break requirements mandating a 30-minute rest break every five hours, and the requirement that the employee must be "relieved of all duty" for the rest break period.

While California had previously challenged FMCSA to provide more flexibility to operate in the aftermath of changes to MCSAP as a result of the Transportation Equity Act for the 21st Century (TEA-21), which had been denied by FMCSA, it has never really challenged that they are subject to the requirement to ensure that state laws and regulations on motor carrier safety were identical to, or had the same effect, as the FMCSR's.

The Penske 2008 petition describes:

"California's legislature expressly requires that California's hours of service regulations be "consistent" with the HOS Regulations.<sup>8</sup> In fact, the analysis accompanying a bill adopted by California in 2006 expressly acknowledges concern over the fact that California had yet to conform to regulations adopted by the FMCSA as required under the MCSAP.<sup>9</sup> Specifically, the analysis acknowledged the potential adverse effect the failure to conform

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<sup>8</sup> Cal. Vehicle Code 34501.2(a).

<sup>9</sup> Assembly Bill Analysis of A.B. 3011, 2006 Assembly. (Cal. 2006) available at:

[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=200520060AB3011](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200520060AB3011) (updated reference on October 24, 2018).

could have on the funding of the Department of California Highway Patrol (“CHP”). “If California fails to comply, this could potentially result in the loss of MCSAP funds, which directly support the [CHP’S] commercial vehicle enforcement program.”

Further, California Vehicle Code § 34503 which provides express authority for CHP to regulate all aspects of motor carrier safety:

“It is the legislative intention in enacting this division that the rules and regulations adopted by the Department of the California Highway Patrol pursuant to this division shall apply uniformly throughout the State of California, and no state agency, city, city and county, county, or other political subdivision of this State, including, but not limited to, a chartered city, city and county, or county, shall adopt or enforce any ordinance or regulation which is inconsistent with the rules and regulations adopted by the department pursuant to this division.”

Current California motor carrier safety regulations administered by CHP implement adherence to the federal HOS, including compliance with federal rest break regulations codified at 49 C.F.R. §395(a)(3)(ii).

So, in summation, California understands that they are required to adhere to requirements to ensure all laws and regulations affecting motor carrier safety are identical to the FMCSRs, and they understand that they can lose access to federal MCSAP funds for not being compatible to the FMCSRs, and they have taken steps to comply with this requirement in regard to California’s motor carrier safety regulations. However, they have failed to amend California’s Meal and Rest Break requirements to comply with federal standards on rest breaks and are failing to comply with their own state legislative intentions codified in California Vehicle Code § 34503 that CHP motor carrier safety regulations be complied with by all state agencies on a uniform basis.

**4. FAILURE TO REQUIRE CALIFORNIA WILL JEOPARDIZE EXISTING FEDERAL SAFETY DETERMINATIONS BY FMCSA, AND OPEN THE DOOR TO UNDERMINE UNIFORMITY OF FEDERAL SYSTEM OF MOTOR CARRIERS SAFETY**

Failure to declare that California’s Meal and Rest Break requirements are more stringent than FMCSRs and are incompatible with federal regulation would have a far reaching effect on FMCSA’s authority to regulate trucking safety and threaten steps that had been taken legislatively over the past thirty years to establish a national uniform system of motor carrier safety. The petitioners contend that failure to preempt California’s Meal and Rest Break requirements also jeopardizes the future role in FMCSA’s decisional authority over motor carrier safety policy, and implementation of a uniform system of regulation.



For instance, in 2014, the Specialized Carriers and Rigging Association (SC&RA) filed a petition with the FMCSA that over-size/overweight carriers (OS/OW) operating under the authority of special state permits should be exempted from the application of the federal rest break requirements of 49 C.F.R. §395(a)(3)(ii). SC&RA argued that carriage of OS/OW cargoes was different from some of the requirements important to traditional interstate commercial motor vehicle operators, with state authorities permitting: carriage requirements, dictating trip planning, engineering, and employing specialized protections, such as escort vehicles. SC&RA argued that fatigue was not as much of an issue because of the specialized pre-planned nature of the transport, and that parking over-sized trucking was difficult, and posed potentially higher risk to the travelling public.

FMCSA evaluated the safety argument proposed by SC&RA and agreed that imposition of the federal rest break requirement was not justified from a safety perspective, and that parking OS/OW vehicles might in fact be more of a risk to the travelling public, and granted the exemption in 2015<sup>10</sup>: exempting OS/OW carriers operating under a special state permit from the requirements for a temporary two-year period. FMCSA adopted a similar exemption for drivers of mobile cranes in 2016.

The policy decision by FMCSA is a prudent, considered safety decision, and is effective throughout the United States, except California. The application of California's Meal and Rest Break requirements mean that despite the actions of the FMCSA in granting an exemption from FMCSRs based on a decision that an exemption provide a higher level of safety, OS/OW carriers in California face the risk that should they comply with federal safety regulations and decisions on exemptions based on safety, that they could be separately sued under California law for complying with federal standards.

Only FMCSA can act to protect carriers from being sued from complying with their FMCSA safety regulations, and should they not take this step, it will diminish FMCSA future authority to dictate federal motor carrier safety policy.

Petitioners would note that the Western State Trucking Association, did just recently, in fact, petition FMCSA under 49 U.S.C. § 31141 to preempt California's Meal and Rest Break requirements from carriers carrying OS/OW cargo under special state permit in order to help remedy this discrepancy, and that this in part, is the crux of the basis of the petitioner's decision to petition FMCSA.

The Pipeline and Hazardous Materials Safety Administration (PHMSA), a sister agency to FMCSA, considered a similar petition on federal preemption by the National Tank and Truck Car Council (NTTC). Specifically, NTTC had applied to PHMSA for a determination as to whether the Federal Hazardous Material Transportation Law, 49 U.S.C. 5101 et

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<sup>10</sup> See Application for Exemption: Hours of Service of Drivers: Specialized Carriers & Rigging Association (SC & RA), 80 Fed. Reg. 34957 (June 18, 2015).

seq., preempts California's Meal and Rest Break requirements, as applied to the transportation of hazardous materials. While the preemption language included in Federal Hazardous Material Transportation Law is not identical to that prescribed by FMCSA, generally, it requires the same sort of consistency review to determine whether compliance with a state standard creates an obstacle to, or renders it impossible, to comply with a federal standard.

The primary arguments advanced by the NTTC were related to the potential conflicts between the application of California's Meal and Rest Break requirements requiring a driver to be "relieved of all duty", and requirements included in the HMRs, and in HMR security plans required of carriers, that a driver be in attendance to trucks carrying hazmat.

PHMSA found that:

"California's Meal and Rest Break requirements caused an unnecessary delay in the transportation of hazardous materials and are therefore preempted with respect to all drivers of motor vehicles that are transporting hazardous materials. The agency also finds that the California meal and rest break requirements are preempted with respect to drivers of motor vehicles that are transporting Division 1.1, 1.2, or 1.3 explosive material and are subject to the attendance requirements of 49 CFR 397.5(a), because it is not possible for a motor carrier employer's driver to comply with the off-duty requirement of the California rule and the federal attendance requirement. Finally, the California meal and rest break requirements are preempted as to motor carriers who are required to file a security plan under 49 CFR 172.800, and who have filed security plans requiring constant attendance of hazardous materials."<sup>11</sup>

While this decision resolves the issue of conflict between California's Meal and Rest Break requirements and Federal HMR's and certain carriers carrying placarded hazmat and certain explosives, the application of California's Meal and Rest Break requirements still remains applicable to carriers transporting fuels and other flammable products. The petitioners would note and contend that California's Meal and Rest Break requirements mandating driver's to be "relieved of all duties" is more stringent than federal rest break requirements which do not require a driver to be completely divorced from all responsibility.

Petitioners would also point out that California's obligation mandating driver's to be "relieved of all duties" poses issues for other categories of carriers using drivers

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<sup>11</sup> See Notice of Administrative Determination of Preemption, Hazardous Materials: California Meal and Rest Break Requirements, National Tank Truck Carriers, Inc. (NTTC), 83 Fed. Reg. 47961 (September 21, 2018).

required to comply with federal HOS, where companies may actually desire drivers to be in sight of their commercial trucks or commercial passenger vehicles, such as a bus. While under federal regulation a driver could be in line of sight to guard against potential security breaches, California's more restrictive requirements would seemingly eliminate this option.<sup>12</sup>

#### **5. APPLICATION OF 49 U.S.C. § 31141(C)(4)(B) AND CALIFORNIA'S MEAL AND REST BREAK REQUIREMENTS**

The petitioners are determined to file this as a separate petition, because of the importance of our concern in acknowledging FMCSA's primacy in the application of regulatory oversight of trucking safety, and because 49 C.F.R. § 355.25(e) authorizes the FMCSA to consolidate any action to enforce this section, provided it does not adversely impact any party to the proceeding. However, we have also filed this document to be considered as a comment to the ATA petition, should it be determined that the consolidation of a petition adversely impacts any party, or should it overly delay consideration of the noticed ATA petition.

Failure to declare that California's Meal and Rest Break requirements are more stringent than FMCSR's and are incompatible with federal regulation would have far reaching effect on FMCSA's authority to regulate trucking safety and threaten steps that had been taken legislatively over the past thirty years to establish a national uniform system of motor carrier safety. The petitioners contend that failure to preempt California's Meal and Rest Break requirements also jeopardizes the future role of FMCSA's decisional authority in motor carrier safety policy, and implementation of a uniform system of regulation. Congress has repeatedly taken steps to provide the Department of Transportation with all the authority they need to ensure uniformity of motor carrier safety regulation.

49 U.S.C. § 31141, and the MCSAP requirements mandating that state motor carrier safety plans require imposition of an annual certification that state motor carrier regulations are compatible with those that are implemented in the FMCSRs and establishes a process to institute proceeding to withdraw state MCSAP funding for violating compatibility requirements, provides plenary jurisdictional authority over state motor carrier regulations. The petitioners would note, that the FMCSA has authority to order a state law to be preempted, as well as taking action under MCSAP regulations to withdraw MCSAP funding for finding a state law or regulation to be incompatible to the FMCSRs.

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<sup>12</sup> It should be noted that the California Meal and Rest Break requirements do provide a system of providing an exemption from this requirement, but for a description of why this is not sufficient a ground to lead to the conclusion that it does not conflict with federal requirements see, *id.* at 47967-8.

Regulations issued under 49 C.F.R. Part 350 and Part 355 cover implementation of the federal preemption of Section 31141, as well as administering requirements related to MCSAP funding and the requirement that states have motor carrier safety regulations compatible with those issued by the FMCSA. 49 C.F.R. § 355.5 defines “compatibility” to require state regulations to be “either identical or have the same effect” as the FMCSR’s. The petitioners contend that this definition should be interpreted to require state laws or regulations are not required to be exactly identical, but almost identical in every meaningful way, so the state standard could be worded differently as long as it achieved identical requirements.

Specifically, with respect to California’s Meal and Rest Break requirements and their consideration under 49 U.S.C. § 31141, the petitioners contend that preemption should occur, under the provisions of Section 31141(c)(4), if a state law or regulation is more stringent and the Secretary decides any of the three following: A) the state law has no safety benefit, B) that the State law or regulation is incompatible with the regulation prescribed by the Secretary, or C) enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce.

Clearly, the California Meal and Rest Break rest break requirements are more stringent than those imposed in 49 C.F.R. Part 395.3 (a)(3)(ii). California requires a 30-minute rest break every five hours and requires an employee to be “relieved of all duties”, and the federal regulation requires a rest break before commencing an eight hour of driving time and is silent on requirements to be “relieved of all duties”.

So, the next question would be whether the Secretary decides that any one of the three requirements in (A)-(C) had been met. The question of whether California’s Meal and Rest Break requirements has no safety benefit, and whether enforcement of the law would cause an undue burden on interstate commerce are very subjective determinations. However, the decision that the Secretary needs to make with respect to Section 31141(c)(4)(B) is not subjective, it only requires an assessment of whether a state law or regulation is more stringent than a federal FMCSR, and if so, if it is whether or not it “is identical or has the same effect” as a FMCSR.

The petitioners would contend that clearly California’s Meal and Rest Break requirements are both more stringent, and not identical to the FMCSRs rest break requirement. For this reason, we believe that FMCSA should preempt the application and enforcement of California’s Meal and Rest Break conflicting rest break requirements, and also consider whether it should be necessary to separately consider to initiate a proceeding under 49 C.F.R. §350.215 for withdrawal of eligibility for all Basic Program and Incentive Funds.

**Submitted by:**

Carl Bentzel & Mike Joyce on behalf of SC&RA