BEFORE THE

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

COMMENTS OF THE

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.

IN RESPONSE TO NOTICE OF PETITION AND REQUEST FOR PUBLIC COMMENTS

DOCKET NO. FMCSA-2018-0304

CALIFORNIA MEAL AND REST BREAK RULES;

PETITION FOR DETERMINATION OF PREEMPTION

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INTRODUCTION

The National Motor Freight Traffic Association, Inc. ("NMFTA") submits these comments in response to the October 4, 2018 notice of petition and request for comments, published by the Federal Motor Carrier Safety Administration ("FMCSA") at 83 Fed. Reg. 50142 ("Notice"). That Notice seeks input on a petition submitted by the American Trucking Associations, Inc. ("ATA") requesting a determination under 49 U.S.C. § 31141 that the meal and rest break rules adopted by California are preempted by Federal law. FMCSA seeks "comment on any issues raised in ATA's petition or otherwise relevant".

NMFTA is a nonprofit membership organization headquartered at 1001 North Fairfax Street, Suite 600, Alexandria, VA 22314, with a membership comprised of more than 500 motor carriers, the majority of whom move less-than-truckload quantities of freight (LTL) in intrastate, interstate, and foreign commerce. NMFTA represents the interests and welfare of its member carriers in judicial, regulatory and legislative proceedings that involve programs directly affecting their operations. The California meal and rest break rules not only affect the operations of NMFTA's member carriers who are domiciled in California but many other member carriers domiciled in other states and Canada who enter California while providing interstate freight transportation services.

California Industrial Welfare Commission Wage Order No. 9-2001, 8 C.C.R. § 11090 ("IWC Order No. 9"), is the regulation adapting to the "transportation industry" the State's generally-applicable meal and rest break rule at California Labor Code § 512. In brief, the California rule requires transportation industry participants to provide employees with an off-duty 30-minute break for every 5 hours worked, before the end of each 5-hour period, and a 10-minute off-duty break for every 4-hour period, as close to the middle of each such period as

possible. *See* IWC Order No. 9, ¶¶ 11-12. One rest break should fall on either side of the meal break. *See Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 531 (Cal. 2012).

California may fairly exercise its state police power by adopting working hours rules, as it has done in the California Labor Code § 512(a), at least when those rules are applied to California wage earners. *See* Cal. Labor Code § 50.5 (regulated parties are "wage earners of California"). But that authority obviously does not extend to wage earners of other sovereign states and countries. Nor does California's authority extend to wage earners operating in interstate commerce. Commerce between the states is well within the exclusive bailiwick of the Federal government.

Thus, the California meal and rest break rules, as applied specifically to the transportation industry via the regulation at IWC Order No. 9, should be deemed preempted and unenforceable by FMCSA pursuant to 49 U.S.C. § 31141. The rules not only fail to offer any additional safety benefits, but are more stringent than and incompatible with the Federal Hours-Of-Service regulations and impose an unreasonable burden on interstate commerce. Accordingly, NMFTA submits these comments in support of ATA's request for a determination that the California meal and rest break rules are preempted by Federal law, at least in the interstate transportation context.

DISCUSSION

I. The Role of 49 U.S.C. 31141 in Preempting State Trucking Regulations

When Congress largely deregulated the interstate trucking industry, it wanted to make certain that the states would not undermine federal deregulation through a patchwork of state regulations. *Dilts v. Penske*, 769 F.3d 637, 644 (9th Cir. 2014), *citing Morales v. Trans World Airlines*, 504 U.S. 374 (1992); *Yoder v. W. Express, Inc.,*181 F.Supp.3d 704, 712 (C.D.Cal. 2015). It did so by specifically prohibiting state laws or regulations related to a "price, route, or service" of any motor carrier. 49 U.S.C. § 14501(c)(1) (previously at 49 U.S.C. § 11501(h)).

However, the statute contained several carve-outs including one preserving the "safety regulatory authority of a state with respect to motor vehicles." 49 U.S.C. § 14501(c)(2). This carve-out was included to prevent the protections afforded interstate trucking from improperly restricting the legitimate state police power over safety, provided the state laws and regulations are genuinely responsive to safety concerns. *City of Columbus v. Ours Garage & Wrecker Serv*., 536 U.S. 424, 439, 442 (2002) ("*Ours Garage*"); *see also United Motorcoach Ass'n v. City of Austin*, 851 F.3d 489, 494 (5th Cir. 2017); *Am. Trucking Ass'ns v. City of Los Angeles*, 660 F.3d 384, 403 (9th Cir. 2011).

Yet Congress also wanted to ensure that safety-motivated state laws and regulations could be preempted when they conflict with the purposes and objectives of federal law. Specifically, as explained by the Supreme Court, the statutory provision that ATA relies upon for its preemption argument, 49 U.S.C. § 31141, "affords the Secretary of Transportation a means to prevent the safety exception from overwhelming the lawmakers' deregulatory purpose." *Ours Garage, supra*, 536 U.S. at 441; *Am. Trucking Assn's v. City of Los Angeles*, 559 F.3d 1046, 1054 (9th Cir. 2009).

Directly applicable to the present petition, it did so by authorizing the Secretary of Transportation to void any state law or regulation on "commercial motor vehicle safety" ("CMV") that is more stringent than Federal regulations on the same subject if it fails to provide a safety benefit, is incompatible with Federal law or regulation, or imposes an unreasonable burden on interstate commerce. 49 U.S.C. § 31141(c)(4). Under this authority, "the Secretary can invalidate local safety regulations upon finding that their content or multiplicity threatens to clog the avenues of commerce." *Ours Garage, supra*, 536 U.S. at 441-442.

II. The California Meal/Rest Break Rule is "On Commercial Motor Vehicle Safety"

As a threshold matter, when addressing a petition seeking a preemption determination pursuant to 49 U.S.C. § 31141, the FMCSA must determine whether the challenged state law or regulation pertains to CMV safety. The safety connection is explored in great detail in ATA's petition, at pages 3 through 11. NMFTA will not repeat those well-supported arguments here, but adopts them by reference. Additional reasons for finding a CMV safety connection are discussed below.

While the California Labor Code meal and rest break provision, set out at § 512 of the Code, is a rule that is generally applicable to California employers, the IWC Order No. 9 is directed more narrowly to the "transportation industry", expressly including movements by "highway". The fact that the Order also applies to other modes of transportation[1] does not, by any common-sense interpretation of Section 31141, remove it from the category of rules applicable to CMVs that are reviewable by FMCSA. There is nothing indicating that the State law or regulation under review must relate "exclusively" or "solely" to CMV safety. Any such limitation is totally absent from the preemption language. Moreover, the statute should be given its plain meaning, which would incorporate state regulations such as IWC Order No. 9, which expressly includes CMVs moving on the highways within its scope.

It is also apparent that meal and rest break rules are CMV "safety" rules. The Federal Hours-of-Service ("HOS") rules were adopted in 1937 to address safety concerns in a rapidly growing motor carrier industry. In 1995, in the ICC Termination Act at Section 408, Congress required the FHWA to address fatigue-related motor carrier safety issues. *See* 49 U.S.C. § 31136 note. It accomplished this, in large part, through what is still an ongoing rewrite by FMCSA of

[1] Order 9-2001 applies to "any industry, business, or establishment, operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations and services in connection therewith…"

the HOS and related federal motor carrier safety regulations, in an attempt to reduce the likelihood of fatigue-related crashes. Incorporated into this regulatory rewrite are provisions requiring drivers to take a 30-minute break within an 8-hour driving period. 49 C.F.R. § 395.3(a)(3). Additionally, drivers are instructed to take breaks whenever they are fatigued, ill, or otherwise unable to safely operate the CMV. 49 C.F.R. § 392.3.

Just as the federal HOS rules are safety based, state rules covering the same subject are safety based. Indeed, the meal and rest break rules have a "direct connection to worker health and safety" as the risk of work-related accidents due to stress and fatigue are "of unquestionable importance to employees operating dangerous motor vehicles." *Dilts v. Penske Logistics*, 819 F. Supp. 2d 1109, 1123 (S.D.Cal. 2011). Parties supporting California's rules have, in the past opposed excluding drivers whose hours are regulated by federal HOS rules from the break rules, stating that "[d]enying breaks to commercial drivers would not only endanger the health of those workers, it would increase the risk to the public, who must share the roads with drivers who would be required to work long hours without the right to stop when they need to eat or rest." *See* AB 2530, *Meal periods: transportation workers*, Bill Analysis (April 9, 2008). In short, it would have an adverse effect on safety.

III. California's Meal/Rest Break Rule is More Stringent Than Federal HOS Rules

In evaluating state laws and regulations pertaining to CMV safety, 49 U.S.C. § 31141(c) distinguishes between rules that are less stringent, have the same effect as, or are more stringent than a regulation prescribed by FMCSA under 49 U.S.C. § 31136. Section 31136, which requires DOT to prescribe regulations on commercial motor vehicle safety, is one source of statutory authority for the Federal HOS regulations. The California meal and rest break rule being challenged here is far more stringent than the Federal regulations addressing the same subject.

As noted above, the Federal HOS rules require at least one mandatory 30-minute break in an 8-hour work period. Drivers are encouraged to take additional breaks as needed. The California rule, by contrast, in a much more precise and exacting manner requires one 30-minute break for every 5 hours worked, and a 10-minute break near the middle of each 4 hours worked. As interpreted, those shorter breaks should fall on either side of the meal break. *See Brinker, supra*. The California legislature has simply assumed that this greater number of rigidly-timed breaks are appropriate and optimal for all drivers. Thus, a driver is required in the course of an allowed 11 hours of driving, within 14 hours on-duty, to take 5 mandatory breaks under the California rule as compared to only 1 mandatory break under the Federal rule, with other breaks as needed within the driver's discretion.

Because the California rule is more stringent that the Federal HOS rule, it is preempted and not enforceable if it (A) has no safety benefit; (B) is incompatible with the Federal regulation; or (C) enforcement of State provision would impose an unreasonable burden on interstate commerce. As set forth by ATA at pages 11 through 12 of its petition, which is incorporated by reference, and as discussed more fully below, the California meal and rest break provision fails on all 3 bases.

(A) <u>The California Rule Has No Safety Benefit</u>.

The fixed breaks mandated by California IWC Order No. 9 are problematic because they are based upon one-size-fits-all assumptions about fatigue, assumptions that were developed for traditional work settings and schedules used by most California businesses. In that work setting an 8-hour shift is considered "a day's work," and employees work 5 of those shifts for a total of 40 hours per week. *See* Cal. Labor Code § 510(a); IWC Order No. 9, ¶ 3. Those workers also get paid at specified overtime rates for any hours beyond 8 hours in one day or 40 hours in one week. *Id*. This model, however, does not apply to CMV truck drivers. Under the Federal HOS

rules, CMV drivers are allowed to drive 11 hours within a 14-hour window, and they can drive 60 or 70 hours in 7 and 8 day periods respectively, provided that they take 10 hours off-duty between each driving period. *See* 49 CFR § 395.3. Moreover, the vast majority of CMV drivers of medium and large trucks (weighing more than 10,000 pounds) are exempt from overtime pay requirements under both Federal and California law. *See* Fair Labor Standards Act, 29 U.S.C. § 213(b)(1); IWC Order No. 9, ¶ 3(L).

While on the road, CMV drivers must adjust their driving schedules to accommodate many external factors, such as shipper and receiver loading dock hours; customer-imposed delivery schedules; road, traffic, and weather conditions; and the need to refuel or perform other vehicle maintenance. These factors influence the level of actual drowsiness and fatigue felt by a particular driver, and the resulting need for a break to continue safely operating, as much if not more than the sheer number of hours worked. Natural circadian rhythms also play a role in determining when a break would be most appropriate and effective. This unique work environment is not readily amenable to the fixed break schedule required by California's meal and rest break rules that don't let drivers respond to actual fatigue related to driving conditions, the very factors that should be the primary determinant of break times. By forcing drivers into a formulaic break schedule, the California rule discourages them from taking the breaks at the times they are truly needed to ensure highway safety.

The fixed break schedule is also premised upon ready availability of facilities for taking the required breaks. In this regard, IWC Order No. 9, ¶ 13(B), provides as follows: "Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours." Since CMV drivers are most often on the road during the work day, their employers cannot possibly provide them with such resting facilities. Moreover, as discussed by ATA in considerable detail (petition at pages 8 through 11), there is a serious

truck parking shortage on the national highway system that makes it impossible for a driver to just pull over at the designated time or sometimes even to find a safe spot to do so. The shortage is especially critical in California, which has one of the greatest shortages in the nation. *See* C. Rodier et al., *Commercial Vehicle Parking in California: Exploratory Evaluation of the Problem and Solutions*, UCB-ITS-PRR-2010-4, p.4 (March 2010); S. Flegler et al., *Study of Adequacy of Commercial Truck Parking Facilities—Final Technical Report*, FHWA-RD-01-158, p.33 & Table 17 (March 2002) (California ranks first in parking shortage when public and privately-owned parking facilities are considered). When combined with a fixed break schedule, this means that CMV drivers in California have to park more often on highway shoulders and ramps, locations presenting a safety hazard both to the driver and to other highway users.

Consequently, when applied to the unique work environment of CMV drivers, the California meal and rest break rules do not provide the anticipated safety benefits. To the contrary, they have an adverse effect on highway safety and, accordingly, are preempted by Federal law and unenforceable by the State of California with respect to these employees.

(B) The California Meal/Break Rule, as Applied to The Transportation Industry, is Incompatible with the Federal HOS Rules

The California meal and rest break rules are also incompatible with applicable Federal HOS rules addressing the same subject. When addressing the adoption and enforcement of state laws and regulations pertaining to CMV safety that are compatible with the Federal Motor Carrier Safety Regulations ("FMCSRs"), which include the HOS regulations, FMCSA defined compatible or compatibility as follows:

> *Compatible* or *Compatibility* means that State laws and regulations applicable to interstate commerce and to intrastate movement of hazardous materials are identical to the FMCSRs and the HMRs or have the same effect as the FMCSRs; …

See 49 C.F.R. §§ 355.1, 355.5. The California meal and rest break rules are not identical to the

HOS rules, nor do they have the same effect. To the contrary, by removing the break flexibility intentionally afforded by the Federal HOS rules, the California rules stand as an obstacle to achieving the full safety purposes and objectives of Congress. They force CMV drivers to take mandatory breaks when not needed, sometimes at unsafe parking locations. They discourage CMV drivers from taking breaks when they are needed due to fatigue or any other cause as favored by the Federal HOS rules. They take away from the time included in the 14-hour duty block for performing non-driving tasks. For all these reasons, they are incompatible with the Federal HOS rules, preempted by Federal law, and unenforceable by California insofar as they are applied to interstate CMV drivers.

(C) The California Meal/Rest Break Rule Imposes an Unreasonable Burden on Interstate Commerce

The Department of Industrial Relations, established by the California Labor Code, was created to address the needs "of the wage earners of California." *See* Cal. Labor Code § 50.5. Even though IWC Order No. 9 by its terms (at ¶ 1) is broadly applicable "to all persons employed in the transportation industry", it must be interpreted in a manner that is consistent with the designated authority conferred upon the Department by the California legislature. Accordingly, it can only be applied to California wage earners.

However, the vast majority of NMFTA's member carriers operate in interstate as well as intrastate commerce. They typically pick up shipments in a local area served by one of the carrier's terminals, then consolidate those shipments into loads for large trucks operated by CMV drivers who make the long linehaul runs to other terminals that are most often located in other states. The CMV drivers reside in all states scattered throughout the country and are not, for the most part, California wage earners, any more than they are wage earners in the many other states they may pass through while en route.

Further, while some percentage of NMFTA's member carriers are domiciled in California, the majority are not. Equally important, no matter where the carriers are located, their linehaul drivers may spend only a portion of their working hours in any week or often even on any given day driving in the State of California. It should therefore be obvious that it imposes a substantial burden on a carrier's interstate operations if their drivers have to comply with unique meal and rest break rules in every one of the states their trucks may happen to pass through. Indeed, FMCSA is instructed, in determining whether the burden on interstate commerce is unreasonable, to consider the combined effect on interstate commerce if similar provisions are adopted by other States. *See* 49 U.S.C. § 31141(c)(5). While ATA's petition and these comments focus on the California rules because of the size of that State's economy, we would note in this regard, that 21 states have varying meal break requirements and 9 have their own rest break requirements, clearly the type of "patchwork" of regulations that 49 U.S.C. § 31141 was intended to prevent.

Beyond the burden of complying with changing state requirements in the course of a single freight movement, as emphasized by ATA in its petition at page 7, the California rules could take about 80 minutes more away from a driver's productive time on a daily basis than would the Federal HOS regulations. This not only includes the time mandated for breaks, but the time spent diverting from the most efficient routes and schedules to search for a safe, accessible parking spot. While that may not sound like an unreasonable burden standing alone, when multiplied by the number of CMV drivers that go into and out of California on a daily basis, seven days a week, the impact on interstate commerce is indeed substantial and unreasonable.

In determining whether the burden imposed on interstate commerce by California's meal and rest break rules is "unreasonable", cases applying the Commerce Clause of the U.S. Constitution (Article 1, Section 8, Clause 3) to challenges to State laws or regulations are

instructive. Under the Commerce Clause, states cannot unduly burden interstate commerce, even absent federal legislative preemption. To determine whether a burden is too great, when as here a State law or regulation attempts to even-handedly effectuate a legitimate state interest, and the effect on interstate commerce is incidental, the Supreme Court has typically looked to see whether the burden in excessive in relation to the putative local benefits. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). It is a question of degree. *Id*. Such a balancing test has often resulted in invalidation of state laws as applied to the interstate transportation. For example, in *Kassel v. Consolidated Freightways Corp*. 450 U.S. 662, 679 (1981), the Court invalidated an Iowa law banning double trailers from certain highways, because the negative impact on interstate commerce was substantial and the alleged safety reasons for enacting the statute were unproven. *See also, Southern Pacific Co. v Arizona*, 325 U.S. 761 (1945) (striking down state law banning trains containing more than 70 cars from crossing state); *Bibb v. Navajo Freight Lines Inc.*, 359 U.S. 520 (1959) (striking down state law requiring trucks to have rear fender mudguards instead of straight mudguards allowed in 45 other states).

FMCSA should use a similar balancing test to evaluate the burden on interstate commerce presented by the application of IWC Order No. 9 to interstate trucking. As discussed above, when applied in this industry, the California meal and rest break rule imposes a heavy burden on interstate commerce. To summarize, drivers who spend many of their working hours outside of California, and who are subject to the Federal HOS break rules while driving, are required to switch to a different set of rules when they enter California (as well as other states with unique rules). Moreover, compliance with rules mandating breaks at specified times might well require them to diverge from the more efficient routes and schedules they might otherwise follow, to take breaks at unsafe locations along the highway, and to avoid breaks when needed

due to fatigue or other causes.[2] Clearly this is a substantial burden on interstate operations that far outweighs any local benefits in terms of employee health and safety. Indeed, as noted above, the California rules could actually have an adverse impact on driver safety by eliminating their flexibility to take breaks when needed. Accordingly, FMCSA should exercise its authority under 49 U.S.C. § 31141 here to preempt California's meal and rest break regulations and find them unenforceable because "their content or multiplicity threatens to clog the avenues of commerce." *Ours Garage, supra*, 356 U.S. at 441-442.

IV. Conclusion

For the reasons set out by ATA in its September 24, 2018 petition, as supplemented by these supporting comments, FMCSA should issue a determination pursuant to 49 U.S.C. § 31141, that California's IWC Order No. 9 is preempted to the extent that it is applied to motor carrier operations in interstate commerce.

Respectfully submitted,

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[2] NMFTA has not been able, in the short time allotted by FMCSA for comments on the ATA petition, to collect data from its members evidencing the impact the California rules have had on their operations. However, the Association would be glad to work with FMCSA to gather such information should the agency feel it would be helpful in rendering a decision on this petition.