Congress of the United States

Washington, DC 20510

November 8, 2019

The Honorable Elaine Chao
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, D.C. 20590

Dear Secretary Chao:

We strongly urge you to deny the petition submitted by the Washington Trucking Associations, Inc., (WTA) to the Federal Motor Carrier Safety Administration (FMCSA) requesting a determination that Washington state's Meal and Rest Break Rules ("Washington MRB rules") are preempted by the FMCSA hours of service (HOS) regulations under the Federal Motor Carrier Act of 1994 (MCSA).[1] WTA's request, if granted, would infringe upon the right of states to regulate wages, hours, and working conditions and is contrary to basic principles of federalism.

Congress has consistently rejected efforts to override state meal and rest rules in recent years. Multiple measures have failed to become law – including through the Fixing America's Surface Transportation (FAST) Act, various appropriations bills, and the FAA Reauthorization Act of 2018. Congress has considered at length the impacts of preemption of meal and rest break laws on truck drivers, reviewed congressional intent in enacting the motor carrier preemption statute, and thoroughly evaluated the complex operational realities of goods movement. Congress has also examined narrowly tailored statutory changes to promote uniformity of hours of service rules for drivers who operate across multiple States. The absence of a provision explicitly overruling applicable state laws strongly suggests the FMCSA is without the statutory authority to find these laws preempted under the statute. We strongly maintain that any change to preemption in this area requires a change in statute and must be left to Congress.

Our concerns regarding this issue are underscored by the FMCSA's recent decision to reverse its 2008 ruling that the California Meal and Rest Break Rules ("California MRB rules") are not preempted. In 2008, the FMCSA rejected a preemption petition filed on behalf of a group of motor carriers regarding California's MRB rules.[2] Comparing the plain, unambiguous language of the MCSA and its legislative history against the California MRB rules, the FMCSA correctly recognized that the California MRB rules were not regulations on commercial vehicles and were instead "simply one part of California's comprehensive regulations governing wages, hours and

[1] 49 U.S.C. § 31501 *et seq.*

[2] 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 (published Dec. 24, 2008).

working conditions."[3] Inexplicably, the FMCSA reversed its position last year.[4] Last year, 19 Senators and Members of Congress, including several of the undersigned, wrote a letter urging you in the strongest terms to reject the petition and are deeply disappointed in the FMCSA's final decision. The FMCSA's determination is contrary to law, the FMCSA's longstanding position on the issue, and congressional intent.[5]

As with our previous objections to the FMCSA's determination regarding California's MRB rules, granting the WTA petition would undermine protections for workers and attack the sovereign authority of states to uphold those protections. Like the special interest groups in the California petition, the WTA cannot and does not assert that the Washington MRB rules are explicitly laws "on commercial motor vehicle safety." Like the California MRB rules, the Washington MRB rules constitute legitimate exercises of state police powers to regulate wages and hours of work among all employers in the state and are not unique to trucking, much less to the transportation industry. The WTA therefore cannot satisfy the initial threshold required by the MCSA that the Washington MRB rules constitute a "State law or regulation *on commercial motor vehicle safety* [...]"[6] Accordingly, the petition should be rejected.

Our reasons for opposing a determination of preemption are outlined in the attached document. Please include this letter and the attachment in the docket containing the agency's request for comments on the WTA's petition [Docket No. FMCSA-2019-0128].

We urge you to listen to workers and worker advocates instead of favoring special interests and deny the WTA's petition. It is within the authority of Congress, not the FMCSA, to decide whether changes to the MCSA are warranted, and until Congress acts, the FMCSA must respect the sovereign rights of states to enforce their own wage and hour protections.

Sincerely,

Patty Murray
Ranking Member
Senate Committee on Health, Education, Labor, and Pensions

Peter A. DeFazio
Chair
House Committee on Transportation and Infrastructure

[3] *Id.* at 79205-79206.
[4] California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption, 83 Fed. Reg. 67470 (published Dec. 28, 2018).
[5] The California Attorney General, the California Labor Commissioner, and the International Brotherhood of Teamsters have appealed the Department's determination to the United States Court of Appeals for the Ninth Circuit.
[6] 49 U.S.C. § 31141(a) (emphasis added.).

Maria Cantwell
Ranking Member
Senate Committee on Commerce, Science, Transportation

Eleanor Holmes Norton
Chair
Subcommittee on Highways and and Transit
House Committee on Transportation and Infrastructure

Kamala D. Harris
United States Senator

Adam Smith
Member of Congress

Richard Blumenthal
United States Senator

Derek Kilmer
Member of Congress

Edward J. Markey
United States Senator

Denny Heck
Member of Congress

Suzan DelBene
Member of Congress

Rick Larsen
Member of Congress

Kim Schrier, M.D.
Member of Congress

Pramila Jayapal
Member of Congress

The FMCSA Should Reject the Washington Trucking Associations' Petition for Preemption of Washington's Meal and Rest Break Rules

In Response to FMCSA Request for Comment
[Docket No. FMCSA-2019-0128]

The Washington Trucking Associations, Inc., (WTA) has filed a Petition ("WTA Petition") for Determination that the Washington Meal and Rest Break rules ("Washington MRB rules") are preempted by the Motor Carrier Safety Act of 1994 (MCSA).[7] This comment is submitted in response to the FMCSA's Notice of the WTA Petition.[8]

Congress empowered the Secretary to address preemption of state laws "on commercial motor vehicle safety."[9] The Secretary's preemption authority does not extend to laws beyond that narrow scope. The plain language of the Washington MRB rules demonstrates that they do not constitute laws to be addressed under the MCSA. Instead, they are ordinary wage and hour laws. The Secretary is therefore without congressional authority to preempt the Washington MRB rules. Any such act would be contrary to congressional intent and the language of the MCSA.

1. **Meal and Rest Breaks Constitute Valid Exercises of the States' Authority to Regulate Labor Through Wage and Hour Laws.**

One of the cardinal principles of state sovereignty is the right to establish labor standards.[10] The Washington MRB rules are set forth in Section 296-126-092 of the Washington Administrative Code (WAC).[11] The Washington MRB rules set forth a comprehensive framework providing for breaks at certain intervals. The Ninth Circuit has examined these laws for what they are: laws of general applicability governing wages and hours.[12] The Washington MRB rules contain no references to commercial motor vehicle operators, much less a reference to commercial motor vehicle safety. Instead, the rules apply to any and all workplaces within the state of Washington, just as any other provision of the WAC would apply. Section 296-126-001 provides that the rules contained within Title 296 are applicable to all employers and employees as defined by the Revised Code of Washington.[13] Indeed, Chapter 296-126 contains a myriad of other rules governing nearly all workplaces within Washington state. It is, therefore, indisputable that the Washington MRB rules are wage and hour laws of general applicability with neither, in any way, explicitly speaking to commercial motor vehicles or constituting laws on commercial motor vehicle safety.

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[7] 49 U.S.C. § 31100 *et seq.*
[8] 84 Fed. Reg. 54266 (published Oct. 9, 2019).
[9] See 49 U.S.C. § 31141.
[10] See *Metropolitan Life Insurance Co. v. Mass.*, 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as '"to the protection of the lives, limbs, health, comfort, and quiet of all persons."' *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L.Ed. 394 (1873), quoting *Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140, 149 (1855)."), and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) ("Furthermore, pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State.").
[11] Wash. Admin. Code § 296-126-092.
[12] *Alvarez v. IBP, Inc.*, 339 F.3d 894, 913-914 (9th Cir. 2003), *aff'd in part, rev'd in part, and remanded* 546 U.S. 21 (2005).
[13] WAC § 296-126-001.

2. The FMCSA's Preemption Authority is Limited to Laws "On Commercial Motor Vehicle Safety."

Congress limited the Secretary's preemption power in several ways. Section 31131 of the MCSA explicitly declares the purposes and congressional findings of the MCSA specifically in terms of health and safety.[14] In turn, Section 31141 explicitly defines the scope of its preemption authority as relating to those state laws or regulations "on commercial motor vehicle safety."[15] The Supreme Court has described this preemption authority as having the power to, "invalidate local *safety regulations* upon finding that their content or multiplicity threatens to clog the avenues of commerce."[16] The explicit focus on safety laws narrows the type of law which Congress intended the Secretary to address.

In addition, the use of the word "on" is of particular importance and is more than mere semantics. Congress did not choose to afford the Secretary authority to preempt those laws "relating to" or "as applied to" commercial motor vehicle safety. For example, the preemption authority under the Federal Aviation Administration Authorization Act (FAAA Act) speaks to laws "related to" certain subjects.[17] Similarly, in the context of the Airline Deregulation Act (ADA), the Supreme Court wrote at length on the significance of the phrase "relating to" in interpreting the scope of that law's broad preemption effect.[18] Accordingly, by using the word "on," Congress further narrowed the field of state laws at issue.

However, Congress went a step further. The MCSA explicitly provides the analytical framework governing whether a law is preempted. Under Section 31141, state laws are not immediately preempted. Instead, if the law is indeed "on commercial motor vehicle safety," the Secretary must then make additional findings.[19] If the state law falls below the federal standard then it may not be enforced.[20] Alternatively, state laws equal to or greater than federal protections may still be enforceable.[21] Taken together, the text of Section 31141 is full of evidence that Congress unambiguously intended to endow the FMCSA with a limited scope of authority to be exercised primarily where a law fell below the federal standard and to be utilized with great caution where the law afforded the same or greater protection.

To that end, the FMCSA and its predecessor, the Federal Highway Administration (FHWA), have applied Section 31141 to preempt laws that more clearly related to the states' efforts to regulate safe operation of commercial vehicles. For example, the FHWA applied Section 31141 to preempt a Mississippi state law providing certain exemptions from regulation of vehicles engaged in hauling for agriculture, logging, and gravel.[22] In so doing, the FHWA found that, "Congress did not choose to wholly occupy the field."[23] Similarly, the FMCSA preempted an

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[14] 49 U.S.C. § 31131.
[15] 49 U.S.C. § 31141(a).
[16] *City of Columbus v. Our Garage and Wrecker Service, Inc.*, 536 U.S. 424, 441-442 (2002) (emphasis added.).
[17] 49 U.S.C. § 14501(c)(1).
[18] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).
[19] 49 U.S.C. § 31141(c).
[20] 49 U.S.C. § 31141(c)(3).
[21] 49 U.S.C. § 31141(c)(2), (4), and (5).
[22] 60 Fed. Reg. 47421 (published Sept. 12, 1995).
[23] *Id.*

Alabama law regulating transporting metal coils originating in or moving through Alabama.[24] In finding the law preempted, the FMCSA specifically noted that the law was grounded in the state's safety concerns.[25] In a further recognition of this limited authority, the FMCSA provided through regulation that, "Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated."[26]

In fact, it was not until 2008 that the FMCSA was presented the question at issue here: whether state MRB rules of general applicability were preempted by Section 31141.[27] The FMCSA applied the plain, unambiguous language of Section 31141's requirement that the Secretary's preemption authority extends to those laws "on commercial motor vehicle safety" and found that the California MRB rules were not "on commercial motor vehicle safety" and did not "meet the threshold requirement for consideration."[28] The FMCSA found that the California MRB rules were not unique to the trucking industry and instead applied broadly across the manufacturing industry. Most critically, the FMCSA rejected the contention that the MCSA empowered the FMCSA to preempt laws not only "on commercial safety," but also "any state law or regulation that regulates or affects any matters within the agency's broad Congressional grant of authority."[29] The FMCSA found that there was no support for that interpretation of the MCSA in either the text of the MCSA or its legislative history and that such an interpretation would be contrary to its own regulatory requirement that commercial motor vehicles must be operated in accordance with the laws of the jurisdiction in which they operate. A law merely having some effect on drivers was insufficient.

However, the FMCSA inexplicably reversed course last year and found that the California MRB rules were preempted.[30] The decision did not refute its previous finding that the California MRB rules were facially not laws "on commercial vehicle safety." Instead, the FMCSA concluded that because it has rulemaking authority to promulgate regulations on hours of service, all state wage and hour laws are preempted as applied to commercial motor vehicles.[31]

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[24] 78 Fed. Reg. 14403 (published March 5, 2013).
[25] *Id.* at 14404.
[26] 49 C.F.R. § 392.2.
[27] 78 Fed. Reg. 79204 (published Dec. 24, 2008).
[28] *Id.* at 79205.
[29] *Id.* at 79206.
[30] 83 Fed. Reg. 67470 (published Dec. 28, 2018).
[31] The FMCSA's decision to adopt this path is deeply troubling. In addition to the FMCSA's unpersuasive assertion that it has discovered a new power to grant itself despite no change in the underlying text of the MCSA, the decision to address state MRB rules through an "as applied" basis is problematic. The Ninth Circuit has explicitly held in the context of preemption of California's MRB rules under the FAAA Act that, "We recently noted that it was an 'open issue' 'whether a federal law can ever preempt state law on an 'as applied' basis, that is, whether it is proper to find that federal law preempts a state regulatory scheme sometimes but not at other times, or that a federal law can preempt state law when applied to certain parties, but not to others.' *Cal. Tow Truck Ass'n v. City of San Francisco*, 693 F.3d 847, 865 (9th Cir. 2012)." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 648 fn. 2 (2014). The FMCSA's choice to force this issue, particularly in opposition to clear congressional limitations on its preemption authority, marks significant overreach by the agency and should be abandoned.

3. The Washington MRB Rules are Outside the Scope of the Preemption Provision of the MCSA.

Contrary to the WTA's position, the Washington MRB rules are neither laws implicating "commercial motor vehicle safety" nor do they satisfy the requirement that the laws be "on" commercial vehicle safety; and merely having an "as applied" effect is insufficient.

The Washington MRB rules occupy a regulatory space distinct from that held by the FMCSA. Contrary to the FMCSA's assertion otherwise, its power to regulate commercial vehicle safety relating to hours of service (HOS) is completely unrelated to the states' sovereign right to regulate compensable time of a workday generally. The HOS regulations address *when* you can and cannot be working, as shown through the critical distinction in the HOS rules between on-duty, be it driving or non-driving, and off-duty time. The HOS rules say nothing regarding what time on-duty must be compensable.

In contrast, the Washington MRB rules govern whether you must be paid *while working*. The Washington MRB rules do not address what hours a driver may be on or off the road, nor do they even regulate what hours employees must be on or off duty. Indeed, the Washington MRB rules contain no reference to drivers or commercial vehicles at all. Instead, the Washington MRB rules are couched in terms of workdays generally, as the law is one of general applicability.

As the FMCSA acknowledged in its recent Notice of Proposed Rulemaking, its HOS regulations do not necessarily regulate what hours the driver may be required to perform additional non-driving on-duty tasks.[32] There is, therefore, no logical basis for asserting that the FMCSA's authority to regulate hours of service necessarily crowds out a state's right to regulate compensable time while working.

As with the California MRB petition, both the WTA and the FMCSA acknowledge that the Washington MRB rules would only be preempted as applied to commercial motor vehicles. The FMCSA's approach suffers from two fatal flaws. The first is the underlying premise of the issue itself. The FMCSA asserts that the Washington MRB rules constitute laws on commercial motor vehicle safety in the same sense that the FMCSA HOS rules constitute regulations on commercial motor vehicle safety. However, as discussed above, the Washington MRB rules governing compensable time and the FMCSA HOS regulations address fundamentally distinct issues. There is, therefore, no means by which the Washington MRB rules can be characterized as laws on "commercial motor vehicle safety" at all.

The second flaw relates to the nature of the Secretary's preemption authority. Congress specifically authorized the Secretary to preempt only those laws "on" commercial vehicle safety. Congress did not authorize the Secretary to preempt laws merely because they had an effect on commercial motor vehicle safety. Instead, the Secretary is empowered to preempt laws such as the Alabama and Mississippi laws discussed above. The WTA and the FMCSA implicitly acknowledge that the Washington MRB rules are not actually "on" commercial motor vehicle

[32] Hours of Service of Drivers 84 Fed. Reg. 44190, 44207 ("Under current rules, drivers are not required to go off duty at the end of the 14-hour period. They must stop driving, but may remain on duty to perform other tasks.") (proposed Aug. 22, 2019) (to be codified at 49 C.F.R. pt. 395).

safety by recognizing that they are not specifically directed at regulating the commercial motor vehicle industry or commercial motor vehicles. Despite failing to meet this threshold requirement, the WTA and the FMSCA contend that the laws may be preempted "as applied" to commercial vehicle safety. However, the FMCSA may not will into existence an expansion of the preemption authority contained in the MCSA in order to preempt laws which merely have an effect on commercial motor vehicle safety. The limiting effect of Section 31141 is clear and the FMCSA must abide by the contours of the power afforded to it by Congress.

The FMCSA should abide by the plain, limited language of the MCSA in evaluating this Petition. Congress is fully aware of how to provide for broad preemption power and has done so in other labor related contexts. That the MCSA does not afford that power is a conscious legislative choice. Congress empowered the FMCSA to ensure uniformity among the states' safety regulations, not on every possible law affecting commercial motor vehicles and especially not on states' right to regulate the workplace. The FMCSA must respect the rule of law and reject the petition.