Nos. 18-73488, 19-70323, 19-70413

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 2785 and EVERARDO LUNA, *et al.*,

Petitioners

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, *et al.*

Respondents

One Petition for Review of a Decision of the Federal Motor Carrier Safety Administration (Docket No. FMCSA-2018-0304)

BRIEF OF AMICUS CURIAE SPECIALIZED CARRIERS & RIGGING ASSOCIATION (SC&RA), PODS ENTERPRISES, LLC (PODS), RYDER SYSTEM INC. (RYDER) and WESTERN STATES TRUCKING ASSOCIATION (WSTA) *in Support of Affirmation of FMCSA Preemption*

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Ninth Circuit Rule 26.1A, amicus curiae Specialized Carriers & Rigging Association (SC&RA), PODS Enterprises, LLC (PODS), Ryder System Inc. (Ryder) and Western States Trucking Association (WSTA) make the following disclosures:

The SC&RA is an international trade association and is established as 501(c)(6) business association. Its members are involved in specialized transportation, machinery moving and erecting, industrial maintenance, millwrighting and crane and rigging operations, manufacturing and rental. SC&RA issues no stock, and no publicly held company has 10% or greater ownership of SC&RA.

PODS is a wholly owned indirect subsidiary of APLPD Holdco. Inc., (APLPD), which is not a publicly traded company. APLPD is controlled by the Ontario Teachers' Pension Plan.

Ryder System, Inc. does not have a parent company and there is no publicly held corporation owning 10% or more of its stock.

The WSTA is nonprofit mutual benefit corporation incorporated in 1941 in the state of California. The WSTA is organized for the purpose set forth in the Internal Revenue Code section 501(c)(6). The WSTA's specific purpose is to

protect the interests of owners and operators of trucks using the highways of the State of California.

INTEREST OF *AMICI CURIAE*

All parties consent to the filing of this brief. No party or party's counsel authored any portion of this brief. No party or party's counsel contributed any money to the preparation or submission of this brief. No person, other than *Amici Curiae* and their member companies, contributed money to the preparation or submission of this brief.

The **SC&RA** is an international trade association of more than 1,400 members from 46 nations whose members are involved in specialized transportation, machinery moving and erecting, industrial maintenance, millwrighting and crane and rigging operations, manufacturing and rental. SC&RA was formed as an advocacy group to address laws and regulations specifically affecting the transport of specialized loads and helps member companies run more efficient and safer businesses by monitoring and affecting pending legislation and regulatory policies at the state and national levels.

SC&RA member companies routinely provide commercial carriage in California, and its member companies are subject to conflicting federal motor carrier safety requirements governing the timing of rest breaks mandated 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's meal and rest break rules").

SC&RA member companies can be sued under the provisions of California's Labor Code Private Attorney's Act, Cal. Labor Code § 2698 – 2699.5, for violations under California's meal and rest break rules while operating consistent with federal motor carrier safety regulations promulgated in 49 C.F.R. 395.3 (a)(3)(ii) and California motor carrier safety regulations mandated under California Vehicle Code Section 34501.2(a).

PODS is a moving and storage company. It was founded in 1998 and is based in Clearwater, Florida. PODS offers long distance moving, contents protection, storage and vehicle transportation services in California, and because of similarity of interest in the primacy of federal regulation of motor carrier safety standards and regulations has joined SC&RA in support of this brief.

Ryder is a commercial fleet management, dedicated transportation services, and supply chain solutions company. It was founded in Miami, Florida in 1938. Ryder, which provides commercial truck rental, truck leasing, used trucks for sale, and last mile delivery services in California, and because of similarity of interest in the primacy of federal regulation of motor carrier safety standards and regulations has joined SC&RA in support of this brief.

WTSA is nonprofit mutual benefit corporation incorporated in 1941 in the state of California. The WSTA is organized for the purpose set forth in the Internal Revenue Code section 501(c)(6). The WSTA's specific purpose is to protect the interests of owners and operators of trucks using the highways of the State of California.

TABLE OF AUTHORITIES

Cases:

Federal Statutes:

Presidential Executive Orders:

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Petitions and Applications to the Federal Motor Carrier Safety Administration:

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SUMMARY OF ARGUMENT

This *Amicus Curiae* brief is provided to the Court because of the importance of our concern in acknowledging Federal Motor Carrier Safety Administration's (FMCSA) primacy in the regulatory oversight of trucking safety. Failure to support the FMCSA's Determination of Preemption, issued pursuant to 49 U.S.C. § 31141 (Section 31141), preempting California's meal and rest break rules, 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. *Amici Curiae* contend that failure to preempt California's meal and rest break rules will also jeopardize the future role of FMCSA's decisional authority in motor carrier safety policy, and implementation of a uniform system of regulation.

This brief explains the federal government's role in determining compatibility of federal and state motor carrier safety laws. Current federal law induces states to comply with federal motor carrier safety standards by providing federal assistance to states that comply with federal motor carrier safety standards established under the MCSAP program, and in turn requiring states to have compatible state motor carrier safety regulations. This brief will also consider the federal role in preempting more stringent state motor carrier safety laws or

regulations that are determined to be incompatible with federal motor carrier standards[1].

The brief will focus on the legislative and regulatory histories surrounding the implementation of the federal/state uniformity requirements, and the fact that California law and policy has been implemented recognizing the federal primacy in regulating motor carrier safety.

The current system of regulating motor carrier safety is a shared federal/state endeavor. The federal government implements motor carrier safety regulations, and states adopt, either by reference or through their own regulation, federally set motor carrier safety regulations and enforce nationally set motor carrier safety laws. In order to facilitate and strengthen this partnership and strengthen motor carrier safety, Congress created the Motor Carrier Safety Assistance Program (MCSAP), which annually dedicates a portion of proceeds collected from the federal fuel tax for state enforcement of motor carrier safety programs. Federal proceeds are used to enable states to enforce federally set motor carrier safety standards implemented through state regulations that are compatible with federal regulation.

[1] 49 U.S. C. §31141(c)(3) prohibits states from enforcing less stringent regulations than those prescribed by federal regulation.

The MCSAP program requirements mandate that state motor carrier safety agencies submit plans annually as a condition to the receipt of funding. The annual plans require a certificate that state motor carrier safety regulations are compatible with those that are implemented in the Federal Motor Carrier Safety Regulations (FMCSRs). The MCSAP program requirements and attendant regulations establish a process to institute proceedings to withdraw state MCSAP funding for violating compatibility requirements and provides plenary jurisdictional authority over state interstate and intrastate motor carrier regulations to ensure that they are adopted to be uniform with federal regulation.

Federal 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. This definition has been in place, after notice and comment, since 1992, when Congress amended the requirements of the MCSAP program to require not only state laws and regulations governing interstate motor carrier safety to be compatible, but also required

intrastate motor carrier safety laws and regulations be compatible with federal regulations.[2]

Further, 49 C.F.R. 355.25(a) stipulates 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. § 355.25(c) authorizes the Administrator to initiate a rulemaking under 49 C.F.R. Part 389 to "declare the incompatible State law or regulation pertaining to commercial vehicle safety unenforceable in interstate commerce."

Specifically, with respect to Section 31141, the petitioners contend that California's meal and rest break rules are not regulations on "commercial motor safety". However, this is contravened by the vast volume of effort and federal regulatory presence in efforts to combat fatigue to commercial motor vehicle drivers. Since the Motor Carrier Act of 1935[3], when Congress passed legislation authorizing the Interstate Commerce Commission to prescribe "maximum driving hours and qualifications" it has been clear that this issue has been of preeminent importance in consideration of motor carrier safety.

[2] Motor Carrier Safety Assistance Program: Final Rule, 57 Fed. Reg. 40946 (September 8. 1992).
[3] The Motor Carrier Act of 1935 (P.L. 74-255, 49 Stat. 543).

While it is difficult to quantify, *Amici Curiae* contend that it would be safe to say that driver fatigue has been considered more closely than any other issue contemplated in the purview of commercial motor safety. The petitioner's contention that regulations governing rest requirements for commercial drivers are not "on commercial motor safety" simply ignores the history of federal study and regulation in this area and in the implementation of truck driver hours of service requirements (HOS).

The petitioners also contend that California meal and rest break rules are more stringent than those rest break rules imposed by the federal government in 49 C.F.R. 395.3 (a)(3)(ii), because there are certain provisions in California's meal and rest break rules that provide flexibility[4]. 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 eighth hour of driving time and is silent on requirements to be "relieved of all duties".

The federal requirements governing driving time set a maximum driving time of 11 hours daily, and California's motor carrier safety laws implement the same federal motor carrier safety standards on maximum driving time. Under

[4] For instance, Cal. Labor Code § 512(b) provides, "the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees."

California's meal and rest break rules, this would mean a driver operating in California would have to take two rest breaks a day, where under federal regulations and those implemented under California's Vehicle Code[5], the same driver would only have to take one rest break. *Amici Curiae* contend that this factor on its own clearly illustrates that California's meal and rest break rules are more stringent than federal regulations.

Under the provisions of Section 31141(c)(4), the Secretary of Transportation is required to preempt, after administrative review, a state law or regulation on motor carrier safety that is more stringent than a federal regulation if 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.

Amici Curiae solely confine their brief to the compatibility arguments under the provision of Section 31141(c)(4)(B) which requires an assessment of whether a state law or regulation is more stringent than a federal FMCSR, and if so, whether

[5] California Vehicle Code § 34501.2(a) provides, "The regulations adopted under Section 34501 for vehicles engaged in interstate or intrastate commerce shall establish hours-of-service regulations for drivers of those vehicles that are consistent with the hours-of-service regulations adopted by the United States Department of Transportation in Part 395 of Title 49 of the Code of Federal Regulations, as those regulations now exist or are hereafter amended."

or not it "is identical or has the same effect", as the term is identified in federal regulation[6] as a federal regulation included in the FMCSRs.

Amici Curiae contend that clearly California's meal and rest break rules are both more stringent, and not identical to the FMCSRs rest break requirement. For these reasons, we believe that Court should affirm the FMCSA Determination of Preemption.

[6] 49 C.F.R. § 355.5

ARGUMENT

I. BACKGROUND

The SC&RA serves 1400-member companies in 47 nations involved in specialized transportation, machinery moving and erecting, industrial maintenance, millwrighting and crane and rigging operations, manufacturing and rental. SC&RA member companies routinely provide commercial carriage in California, and its member companies are subject to conflicting federal motor carrier safety requirements governing the timing of rest breaks, and rest breaks mandated 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's meal and rest break rules").

On September 24, 2018, the American Trucking Association filed a petition (ATA petition) for a determination that California's meal and rest break rules for commercial motor vehicle drivers be preempted under 49 U.S.C. § 31141 (Section 3114). Section 31141 authorizes the Secretary of Transportation to preempt more stringent state laws or regulations on commercial motor vehicles 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.

On October 29, 2018, the SC&RA filed their own comments in support of the ATA petition. The purpose of this action was to expound on FMCSA primacy of authority in prescribing a nationally uniform system of 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 important functions provided to FMCSA and help to avoid a patchwork of state-generated safety requirements. The SC&RA petition did not consider issues related to whether the FMCSA had authority to preempt state laws that had "no safety benefit", or whether a state law could "cause an unreasonable burden on interstate commerce", but solely considered whether the state law was "compatible with federal regulations".

On December 28, 2018, the FMCSA granted both the SC&RA and ATA petitions for Determination of Preemption. The FMCSA decision indicated that California's meal rest break rules were "on commercial motor vehicle safety", the rest break rules were "more stringent that federal regulations" governing rest breaks; and concluded that the state law had "no safety benefit", that it was not

"compatible with federal regulation", and that it created an "unreasonable burden on interstate commerce".[7]

The petitioners are challenging the Determination of Preemption, and SC&RA, joined by PODS, Ryder and WSTA, have submitted this *Amicus Curiae* brief because of the gravity of concern for the policies that mandate uniformity of state laws on motor carrier safety and the requirement that state motor carrier safety regulations be compatible with federal regulations on motor carrier safety.[8]

This brief will consider the legislative history of the development of policies mandating a uniform system of safety regulation. It will also consider the establishment of requirements that require FMCSA to review state laws for compatibility and preempt state laws on motor carrier safety that are not compatible. FMCSA can preempt state laws or regulations that are not compatible with federal motor carrier safety standards or alternatively, or additionally, to withhold federal funds allocated to a state to help address enforcement of motor

[7] California's Meal and Rest Break Rules for Commercial Motor Vehicle Drivers; Petition for Determination of Preemption 83 Fed. Reg. 67480 (December 28, 2018).

[8] The definition of "compatibility" includes that they have to be either identical or have the same effect as the FMCSR's. *Amici Curiae* 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.

carrier safety regulations for failure to comply with federal motor carrier safety regulations in place on compatibility.

Additionally, the brief will illustrate that California's motor carrier safety law incorporated by reference all current and future federal motor carrier safety regulations[9] and require compliance with federal hours of service standards, and that California law under California Vehicle Code § 34503 on motor carrier safety mandates uniformity in the application of motor carrier safety regulation and prohibits any state agencies, cities or counties from enforcing inconsistent standards or regulations.

Finally, the brief will consider the potential implications if the Court decides not to affirm the FMCSA's Determination of Preemption and the potential effects on FMCSA's authority to regulate trucking safety, and the legislative and regulatory steps taken over the past over the past thirty years to establish a national uniform system of motor carrier safety. *Amici Curiae* contend that failure to preempt California's meal and rest break rules will jeopardize the future role of FMCSA's decisional authority in motor carrier safety policy, and implementation of a uniform system of regulation.

Amici Curiae 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

[9] California Vehicle Code § 34501.2(a).

implementation of the MCSAP. Specifically, 49 C.F.R. 355.25(a) stipulates 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. § 355.25(c) authorizes the Administrator to initiate a rulemaking under 49 C.F.R Part 389 to "declare the incompatible State law or regulation pertaining to commercial vehicle safety unenforceable in interstate commerce."

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.[10]

II. 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. *See* the findings section of the Motor Carrier Safety Act of 1984 currently codified at 49 U.S.C. § 31131(b)(2). To facilitate this interest, Congress developed complementary schemes to both prohibit states from enforcing interstate and intrastate[11] motor carrier safety regulations that were "incompatible" with federal motor carrier standards, or by restricting the substantial federal funds that are made available to the states[12] for the enforcement of motor carrier safety regulations with the proviso that state motor carrier safety standards must be compatible with federal regulations.

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[10] 49 C.F.R. Part 350.

[11] Intrastate motor carrier safety regulations while required to be compatible with federal motor carrier safety regulations, are allowed to apply to FMCSA for tolerances to provide variances from federal safety standards.

[12] California alone received over $36.5 million in federal funds in FY 2017 and 2018 alone (not including discretionary grants) see, MCSAP Basic Incentive Grants PDF available on FMCSA website at MCSAP Basic and Incentive Grants/Fiscal Year Awards

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 as the removal of economic regulation removed barriers to entry and increased competition. In order to help remedy safety concerns, Congress created MCSAP in the Surface Transportation Assistance Act of 1982 (STAA) (secs. 401–404, Pub L. 97–424, 96 Stat. 2097, 2154) to provide federal funding to states to enforce motor carrier safety laws. Section 402(b) of STAA provides in pertinent part:

> **"The Secretary shall formulate procedures for any state to submit a plan whereby the state agrees to adopt, and to assume responsibility for enforcing Federal rules, regulations, standards, and orders applicable to commercial motor vehicle safety, or compatible state rules, regulations, standards, and orders."**

In 1984, Congress took further action to enhance requirements for the uniformity of motor carrier safety regulation. The Motor Carrier Safety Act of 1984 (Title II of Pub. L. 98–554, 98 Stat. 2832, 2838) established federal preemption currently codified at 49 U.S.C § 31141 and requires the Secretary to preempt those state laws and regulations affecting interstate commercial motor vehicle safety found to be "incompatible" with federal laws and regulations, rendering "incompatible" state laws and regulations unenforceable.

In order to further review areas of disharmony 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), predecessor agency to the FMCSA, establish procedures for the continual review and analysis of the compatibility of state safety laws and regulations with federal requirements through the MCSAP, which ultimately, the FHWA incorporated into the annual review process as MCSAP grant award eligibility criterion.

The MCSAP was 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 included in the STAA contained the eligibility requirements for financial assistance, including the requirement to adopt and enforce safety regulations compatible with the FMCSRs and HMRs.

The changes established pursuant to ISTEA legislation and regulation were critical to the strengthening the mandate to achieve uniformity of federal and state motor carrier safety laws and regulations. ISTEA increased funding levels and established minimum funding levels for federal assistance programs and took further steps to strengthen uniformity by requiring FHWA to establish "guidelines and standards" for ensuring compatibility of state intrastate motor carrier safety

regulations with federal standards. In issuing regulations implementing ISTEA[13], the FHWA issued a final rule that revised the MCSAP as part of 49 C.F.R. Part 350 and issued a new 49 C.F.R. Part 355 which includes the current "compatibility" regulatory definition of "identical or having the same effect". The final rule states:

> "Finally, a new part 355 is added which will implement the recommendations of the Commercial Motor Vehicle Safety Regulatory Review Panel intended to carry out the objectives of the Motor Carrier Safety Act of 1984 with respect to achieving the benefits of uniform enforcement of consistent commercial motor vehicle safety regulations nationwide."[14]

The same Motor Carrier Safety Assistance Program regulation, pursuant to Executive Order 12612, which evaluated the impact of the regulation with an assessment of compliance with principles of federalism[15], provides further clarification of Congressional intent in establishing primacy for federal motor carrier safety regulation:

> "This rule does implement express preemption provisions contained in the MCSA of 1984. The preemptive authority therein furthers the goal of national uniformity commercial motor vehicle regulations and their enforcement as intended by Congress. This intention was evidenced in

[13] Motor Carrier Safety Assistance Program, 57 Fed. Reg. 40946 (September 8, 1992).
[14] Id.
[15] Executive Order 12612 sets forth certain fundamental principles and criteria to consider when federal agencies regulations have impact on state law. The federal government is required to minimize to the maximum extent possible federal preemption of state law, unless Congress has explicitly legislated preemption of state law, provided that law is otherwise Constitutional.

> the STAA of 1982, creating MCSAP; the review of State commercial motor carrier safety laws and regulations and determinations of compatibility required by the MCSA of 1984; and the intrastate compatibility provisions included in Section 4002 of ISTEA. The FHWA believes that the proposal contained in this document is consistent with the principles and criteria in Executive Order 12612 for the implementation of express statutory criteria."

Because of further dissatisfaction with state regulation and 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 (June 9, 1998) took further steps to strengthen administration of the MCSAP program. TEA-21 incorporated performance standards for state motor carrier plans, furthered compatibility requirements to tighten them to require states to adopt any new FMCSR's within three years of adoption, as well as implementing annual certification of state motor carrier plans to require certification 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 proposing that FMCSA, who had succeeded FHWA in the interim period between the TEA-21 ANPRM and the final rule[16], provide authority for

[16] The Motor Carrier Safety Improvement Act of 1999 (MCSIA), (Pub. L. 106-159, 113. Stat. 1748 (December 9, 1999) established the FMCSA as a separate modal Administration within DOT.

additional variances that FMCSA could grant to 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."[17]

Amici Curiae contend that the legislative history of requirements for uniformity of regulation on motor carrier safety was premised on implementation of the MCSAP program requirements mandating "compatibility", and by an act of Congress explicitly provided an extremely broad range of authority under which to preempt those state laws that were not compatible with federal safety regulations.

Section 31141 provides 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 commerce.

[17] Motor Carrier Safety Assistance Program, 65 Fed. Reg. 15098 (March 21, 2000).

Amici Curiae 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. Since 1992, by regulation, after notice and comment, this has meant that state motor carrier safety regulations have to be "identical to, or have the same effect, as the FMCSRs and HMRs". These requirements have been implemented by Congress, and through DOT regulation, to provide the underpinning to foster a uniform national motor carrier safety system administered and determined by the FMCSA.

The petitioners contend, despite all of the statutory and legislative history on requirements governing uniformity, that regulations defining "compatibility" should have been interpreted to mean "consistent with", as opposed to the regulatory definition adopted in 1992, of "identical or having the same effect". Under this re-interpretation of the established regulatory structure that implements uniformity requirements, a state could impose a more stringent regulation as long as the regulated entity could apply with both the federal standard and the state standard. This interpretation is completely at odds with the steps that had been taken by Congress to require uniformity of motor carrier safety standards, and the primacy given to FMCSA to set such standards.

III. CALIFORNIA MEAL AND REST BREAK REQUIREMENTS AND EFFORTS TO SECURE FEDERAL COMPATIBILITY

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.[18]

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.[19] 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

[18] 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").
[19] Wage Order 9 § 11(C).

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.[20]

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.[21]

The application of California's meal and rest break rules tend to regulatorily dominate when in conflict with competing federal requirements that differ, since California authorizes under its Private Attorney's General Act ("PAGA")[22] that private attorneys are eligible to sue in civil actions for penalties on behalf of

[20] Wage Order 9 § 12(A).
[21] Cal. Lab. Code § 512(e), (f)(2).
[22] Cal. Lab. Code § 2698 – 2699.5

themselves, employees, and the State. Carriers facing potential conflicting requirements on rest breaks are forced to comply with California's requirements because of the imposition of penalties, and the potential that enforcement of violations can be imposed by private attorneys. Ironically, this has also set up a situation where a trucking company can be sued by private attorneys to collect state-imposed penalties ***for acting in compliance with federal standards*** on motor carrier safety.

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 rules should be preempted to the extent that they were subject to Federal HOS regulations.[23] 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, which it did in 2011, however, the basis for the Penske 2008 petition was that the California requirements were more stringent, and generally incompatible with Federal HOS requirements, as had been implemented at that time.

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

[23] 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).

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."[24] Clearly, the Agency made little effort to consider whether California's meal and rest break rules were a law or regulation 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, and whether its application was to a wider class of employees engaged in transportation.[25]

Amici Curiae 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)."

[24] *Id.* at 79205.

[25] *Amici Curiae* note that while California's meal and rest break rules are currently at issue in trucking, but as written could be construed to be generally applicable to aviation, rail and maritime transportation employees. However, *Amici Curiae* are unaware of efforts made to use California's meal and rest break rules to preempt federal regulations hours of service governing aviation, rail or maritime employees. *Amici Curiae* would not support such an extension, but only point to it to illustrate the apparent discrimination in its application.

The federal role in regulating hours of service of transportation employees has been one of the primary functions assigned to the Department of Transportation. While it is impossible to ascertain, *Amici Curiae* would posit that perhaps no other issue has been considered as much as how to regulate against driver fatigue. The United States Court of Appeals, District of Columbia Circuit, aptly describes this authority[26]:

> "The federal government has regulated the hours of service (HOS) of commercial motor vehicle operators since the late 1930s, when the Interstate Commerce Commission (ICC) promulgated the first HOS regulations under the authority of the Motor Carrier Act of 1935. *See* 49 U.S.C. § 31502(b)(1) (authorizing the prescription of "maximum hours of service" for motor carrier employees). Jurisdiction over HOS regulations passed from the ICC to the Federal Highway Administration (FHWA) in 1995, and then to the newly created Federal Motor Carrier Safety Administration (FMCSA) in 2000. Along the way, Congress added to the statutory basis for the HOS regulations. The current rule was promulgated under the authority of both the Motor Carrier Act of 1935 and the Motor Carrier Safety Act of 1984, which, as amended, directs the Secretary of Transportation to "prescribe regulations on commercial motor vehicle safety," 49 U.S.C. § 31136(a), and provides that "[a]t a minimum, the regulations shall ensure" that:
>
> > (1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators . . . is adequate to enable them to operate the vehicles safely . . .; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators. *Id.*"

[26] Owner-Operator Independent Drivers *v.* FMCSA, 494 F.3d 188 (D.C. Cir. 2007).

Simply put, to contend that a regulation issued governing when transportation employee needs to take a rest is not a regulation "on commercial motor safety", is to neglect the entire body of history and the direct jurisdictional authority of the Department of Transportation.

IV. 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 question at issue in this petition, also included a provision that allows truckers to drive only if they have had a break of at least 30 minutes, at a time of their choosing, sometime within the previous 8 hours of commencing driving.

The regulation is now codified as part of the FMCRS at 49 C.F.R.§395(a)(3)(ii). The federal requirements governing driving time set a maximum driving time of 11 hours daily, and California's motor carrier safety laws implement the same federal motor carrier safety standards on maximum driving time. Under California's meal and rest break rules, this would mean a driver operating in California would have to take two rest breaks a day. However, under federal regulations and those implemented under California's Vehicle Code,

the same driver would only have to take one rest break. *Amici Curiae* contend that this factor on its own clearly illustrates that California's meal and rest break rules are more stringent than federal regulations.

The FMCSA has taken the position that a 30-minute rest break before the commencement of an eighth hour of drive time is a FMCSR regulation that unquestionably conflicts with California's meal and rest break rules 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.[27] 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

[27] Cal. Vehicle Code 34501.2(a).

> the FMCSA as required under the MCSAP.[28] Specifically, the analysis acknowledged the potential adverse effect the failure to conform 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

[28] Assembly Bill Analysis of A.B. 3011, 2006 Assembly. (Cal. 2006) available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200520060AB3011 (updated reference on October 9, 2019).

MCSAP funds for not being compatible to the FMCSRs. They have taken steps in the California Motor Vehicle Code 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 rules 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.

V. FAILURE TO REQUIRE CALIFORNIA TO COMPLY WITH FEDERAL/STATE UNIFORMITY REQUIREMENTS WILL JEOPARDIZE EXISTING FEDERAL SAFETY DETERMINATIONS BY FMCSA, AND OPEN THE DOOR TO UNDERMINE THE UNIFORMITY OF THE FEDERAL SYSTEM OF MOTOR CARRIER SAFETY

Failure to declare that California's meal and rest break rules 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. *Amici Curiae* contend that failure to preempt California's meal and rest break rules 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, 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[29], 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

[29] See Application for Exemption: Hours of Service of Drivers: Specialized Carriers & Rigging Association (SC&RA), 80 Fed. Reg.34957 (June 18, 2015).

California's meal and rest break rules 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.

Amici Curiae contend that failure to affirm the FMCSA Determination of Preemption would undermine existing statutory authority that gives FMCSA primacy in the establishment of commercial motor carrier safety regulatory authority. This could open the door for every state to start to set their own policies on fatigue management, and lead to an impossible system of safety regulation, and jeopardize the future role of FMCSA's decisional authority in motor carrier safety policy, and implementation of a uniform system of regulation.

CONCLUSION

Amici Curiae contend that California's meal and rest break rules are rules on motor carrier safety, and, California's meal break rules are more stringent than federal rest break requirements mandated in the FMCSRs.

Amici Curiae contend that the FMCSA, in issuing the Determination of Preemption properly exercised its preemptive powers after finding that the California meal and rest break rules were not "compatible" with the governing

federal laws and regulations. That FMCSA properly used the regulatory definition of "compatibility" to be "identical or having the same effect", in making a Determination of Preemption.

For these reasons, we believe that Court should affirm the FMCSA Determination of Preemption.

DATED: December 5, 2019

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