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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2016-0097; PD-38(R)]

Hazardous Materials: California Meal and Rest Break Requirements

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Dismissal of petition for reconsideration of an administrative determination of preemption.

PETITIONER: The California Labor Commissioner.

LOCAL LAW AFFECTED: California Labor Code, Sections 226.7, 512, and 516; California Code of Regulations (CCR), title 8, section 11090.

APPLICABLE FEDERAL REQUIREMENTS: Federal Hazardous Material Transportation Law (HMTA), 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171-180.

MODE AFFECTED: Highway.

SUMMARY:

On September 21, 2018, in response to a petition from the National Tank Truck Carriers, Inc. (NTTC), PHMSA published a determination that California's meal and rest break rules (MRB Rules) are preempted, under 49 U.S.C. 5125, as applied to drivers of motor vehicles transporting hazardous materials. The California Labor Commissioner's petition for reconsideration of that decision is denied on the grounds of mootness. After PHMSA issued its preemption determination, and after the request for reconsideration was filed, the Federal Motor Carrier Safety Administration (FMCSA) determined that the MRB Rules are preempted, under 49 U.S.C. 31141, as applied to property-carrying commercial motor vehicles drivers covered by FMCSA's hours of service regulations. FMCSA's decision covers a broader group of drivers than PHMSA's decision, including NTTC's members. Accordingly, granting the California Labor Commissioner's petition for reconsideration will not change the fact that the MRB Rules cannot be enforced against NTTC's members.

FOR FURTHER INFORMATION CONTACT: Vincent Lopez, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590; Telephone No. 202-366-4400; Facsimile No. 202-366-7041.

SUPPLEMENTARY INFORMATION:

I. Background

A. PHMSA Proceeding.

NTTC applied to PHMSA for a determination on whether Federal Hazardous Material Transportation Law, 49 U.S.C. §5101 *et seq.*, preempts the MRB Rules, as applied to the transportation of hazardous materials.

Section 5125 of 49 U.S.C. contains express preemption provisions relevant to this proceeding. In particular, subsection (a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted – unless the non-federal requirement is authorized by another federal law or DOT grants a waiver of preemption under section 5125(e) – if:

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.¹

¹ These two paragraphs set forth the “dual compliance” and “obstacle” criteria that are based on U.S. Supreme Court decisions on preemption. *See Hines v. Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978). PHMSA’s predecessor agency, the Research and Special Programs Administration, applied these criteria in issuing inconsistency rulings under the original preemption provisions in Section 112(a) of the Hazardous Materials Transportation Act, Pub. L. 93-633, 88 Stat. 2161 (Jan. 3, 1975).

PHMSA preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal Hazardous Material Transportation Law, unless it is necessary to do so in order to determine whether a requirement is “authorized by” another federal law, or whether a fee is “fair” within the meaning of 49 U.S.C. 5125(f)(1).²

On September 21, 2018, PHMSA published in the Federal Register its determination of NTTC’s application in PD-38(R), 83 FR 47961. PHMSA found that the MRB Rules create an unnecessary delay in the transportation of hazardous materials, and are therefore, preempted with respect to all drivers of motor vehicles that are transporting hazardous materials. The agency also found that the MRB Rules are preempted with respect to drivers of motor vehicles that are transporting Division 1.1, 1.2, or 1.3 explosive material and are subject to the attendance requirements of 49 CFR 397.5(a), because it is not possible for a motor carrier employer’s drivers to comply with the off-duty requirement of the California rule and the federal attendance requirement. Finally, the MRB Rules are preempted as to motor carriers who are required to file a security plan under 49 CFR 172.800, and who have filed security plans requiring constant attendance of hazardous materials.

The California Labor Commissioner (Labor Commissioner) filed a petition for reconsideration of PD-38(R) within the 20-day time period provided in 49 CFR 107.211.

² A State, local or Indian tribe requirement is not “authorized by” another federal statute merely because it is not preempted by that statute. *See Colorado Pub. Util. Comm’n v. Harmon*, 951 F.2d 1571,1581 n.10 (10th Cir. 1991).

The Labor Commissioner is seeking reconsideration of PD-38(R) and has asked PHMSA to issue a new determination finding no preemption.

B. FMCSA Proceeding.

On September 24, 2018, the American Trucking Associations, Inc. (ATA) petitioned FMCSA to preempt the California MRB Rules as applied to drivers of commercial motor vehicles subject to FMCSA's hours of service (HOS) regulations. The Specialized Carriers and Rigging Association (SCRA) also filed a petition seeking a preemption determination concerning the same meal and rest break requirements.³

FMCSA's preemption authority arises under the Motor Carrier Safety Act of 1984. Under 49 U.S.C. 31141, States are prohibited from enforcing a law or regulation on Commercial Motor Vehicle (CMV) safety that FMCSA has preempted. To determine whether a State law or regulation is preempted, FMCSA must decide whether a State law or regulation: (1) has the same effect as an FMCSA regulation prescribed under 49 U.S.C. 31136, (2) is less stringent than such a regulation; or (3) is additional to or more stringent than such a regulation. If FMCSA determines that a State law or regulation has the same effect as an FMCSA regulation, it may be enforced; but a State law or regulation that is less stringent may not be enforced. A State law or regulation that FMCSA determines to be additional to or more stringent than an FMCSA regulation may not be enforced if FMCSA decides that the State law or regulation (1) has no safety benefit; (2) is incompatible with the FMCSA regulation prescribed by FMCSA; or (3)

³ FMCSA did not open a separate docket for the SCRA's petition because the SCRA submitted its petition in lieu of comments as part of the ATA proceeding, Docket No. FMCSA-2018-0304.

would cause an unreasonable burden on interstate commerce. To determine whether a State law or regulation will cause an unreasonable burden on interstate commerce, FMCSA may consider the cumulative effect that the State's law or regulation and all similar laws and regulations of other states will have on interstate commerce. Only one of these conditions is necessary for preemption. See 49 U.S.C. 31141(c)(1) – (5).

On December 28, 2018, FMCSA published in the Federal Register its determination with respect to ATA's application, 83 FR 67470. FMCSA concluded that: (1) the MRB Rules are State laws or regulations "on commercial motor vehicle safety," to the extent they apply to drivers of property-carrying CMVs subject to FMCSA's HOS rules; (2) the MRB Rules are additional to or more stringent than FMCSA's HOS rules; (3) the MRB Rules have no safety benefit; (4) the MRB Rules are incompatible with FMCSA's HOS rules; and (5) enforcement of the MRB Rules would cause an unreasonable burden on interstate commerce. Accordingly, FMCSA granted the petitions for preemption of the ATA and the SCRA, and determined that the MRB Rules are preempted pursuant to 49 U.S.C. 31141. Therefore, California may no longer enforce the MRB Rules with respect to drivers of property-carrying CMVs subject to FMCSA's HOS rules. As noted below, NTTC has made clear in this PHMSA proceeding that its members are covered by FMCSA's HOS rules; thus, the FMCSA decision precludes the enforcement of the MRB Rules against NTTC's members.

FMCSA, after issuing its decision, received inquiries about whether a preemption decision it issued under Section 31141 applies to litigation that was pending at the time

the decision was issued. Therefore, on March 22, 2019, FMCSA's Office of the Chief Counsel issued a legal opinion to address this question.⁴ The agency concluded that a FMCSA preemption decision under Section 31141 precludes courts from granting relief pursuant to the preempted state law or regulation at any time following issuance of the decision, regardless of whether the conduct underlying the lawsuit occurred before or after the decision was issued, and regardless of whether the lawsuit was filed before or after the decision was issued.

Four petitions for review challenging FMCSA's decision have been filed in the U.S. Court of Appeals for the Ninth Circuit. The cases have been consolidated and the proceeding is currently ongoing.⁵

II. Dismissal on Grounds of Mootness

FMCSA's preemption determination renders moot the California Labor Commissioner's petition for reconsideration of PHMSA's preemption determination. While PHMSA's determination applied to drivers of motor vehicles transporting hazardous materials, FMCSA's determination applies to a broader class of drivers: all drivers of property-carrying CMVs subject to FMCSA's HOS rules. NTTC's filings in this PHMSA proceeding make clear that its members – companies that specialize in bulk transportation services by cargo tank throughout North America – are subject to

⁴ Federal Motor Carrier Safety Administration Legal Opinion of the Office of Chief Counsel (March 22, 2019), available at <https://www.fmcsa.dot.gov/safety/fmcsa-legal-opinion-applicability-preemption-determinations-pending-lawsuits>.

⁵ Intl Brotherhood of Teamsters, et al v. FMCSA, Court of Appeals Docket No.: 18-73488; Consolidated Docket Nos.: 19-70323; 19-70329; and 19-70413.

FMCSA's HOS rules. FMCSA's decision therefore precludes enforcement of the MRB Rules against NTTC's members.

Furthermore, the express language of FMCSA's statute makes its preemption decision binding on courts. The plain language of FMCSA's preemption provision states that a "State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced." 49 U.S.C. 31141(a). Thus, as noted in the FMCSA legal opinion discussed above, once the agency issues a preemption decision under Section 31141, "the State law or regulation, to the extent preempted, is invalidated and 'without effect,' and courts lack authority to take any contrary action on the basis of that State law or regulation, regardless of when the underlying conduct occurred." Because 49 U.S.C. 31141(f) grants the Courts of Appeals exclusive jurisdiction to review FMCSA's decision, and because the Ninth Circuit denied a request that FMCSA's decision be stayed during the pendency of the litigation, FMCSA's decision will remain binding unless and until overturned by the Ninth Circuit. Therefore, FMCSA's decision rendered the MRB Rules "without effect" with respect to drivers of property-carrying CMVs subject to FMCSA's HOS rules – including NTTC's members – and may not be enforced. A PHMSA ruling granting the California Labor Commissioner's petition for reconsideration would not change the fact that the MRB Rules cannot be enforced against NTTC's members.

III. Ruling

For the reasons set forth above, the California Labor Commissioner's petition for reconsideration is dismissed because the issues raised in the petition are moot. In the event the FMCSA decision is overturned and the state requirements become enforceable again, the California Labor Commissioner may petition PHMSA to reopen the docket so that it may refile its petition for reconsideration.

Issued in Washington, DC, on February 13, 2020.

Paul J. Roberti,
Chief Counsel.

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