

Despite Recent Challenges, California Meal and Rest Break Remains Pre-empted, While Briefing Closes in the Ninth Circuit Case

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Department of Transportation dismisses the California Labor Commissioner's Petition for Reconsideration of California's Meal and Rest Break Rules. While briefing in the Ninth Circuit closes, oral Argument in *Intl Brotherhood of Teamsters, et al. v. FMCSA* is expected in summer 2020.

1. Background

On February 21, 2020, the Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) dismissed the California Labor Commissioner's most recent attempt at overturning PHMSA's previous ruling, preempting the application of California's Meal and Rest Break Rules (MRB Rules) as applied to drivers of motor vehicles transporting hazardous materials. This decision, as noted by DOT/PHMSA, will be subject to reconsideration pending the Ninth Circuit's decision in *Intl Brotherhood of Teamsters, et al. v. FMCSA*, Court of Appeals Docket No.: 18-73488. Notably, briefing in the Ninth Circuit recently closed, also on February 21, 2020, and the Ninth Circuit has indicated that it will schedule oral argument some time during the summer of 2020.

This adds to a laundry list of currently pending issues in the California motor carrier and logistics industry. As explained in detail in *Interconnect FLASH* Nos. 76, 77, 78 and 79, the State of California is currently enjoined from enforcing AB-5—a law that would make it virtually impossible for most California-based owner-operators to be classified as independent contractors without some type of structure modification.

Additionally, in February 2020, the U.S. House of Representatives passed the "Protecting the Right to Organize Act," H.R.2474 (PRO Act), which would fundamentally shift various important employee-employer relationships in concert with AB-5 at the federal level, and commensurate laws and regulations, in favor of employee status, and ultimately, unions. As noted, it is unlikely that the Senate and President Trump will pass and sign the bill into law. Yet, if it were pushed through in some format, it would severely limit preemption arguments under the Federal Aviation Administration Authorization Act. (See details in *Interconnect FLASH* No. 79.)

2. The Current State of California's Meal and Rest Break Rules

On September 21, 2018, PHMSA published a determination responding to a petition from the National Tank Truck Carriers, Inc. (NTTC) stating that the MRB Rules are preempted, under 49 U.S.C. 5125, as applied to drivers of motor vehicles transporting hazardous materials. In response to

the PHMSA decision, the California Labor Commissioner submitted a petition for reconsideration of the issue.

After the California Labor Commissioner filed its petition for reconsideration, on September 24, 2018, the American Trucking Association (ATA) and the Specialized Carriers and Rigging Association (SCRA) separately petitioned the Federal Motor Carrier Safety Administration (FMCSA) to preempt the California MRB Rules as applied to drivers of commercial motor vehicles subject to FMCSA's hours of service regulations.

On December 28, 2018, 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 concluded that the MRB Rules are state laws or regulations that are incompatible with and additional to or more stringent than FMCSA's HOS rules. Further, FMCSA concluded that the MRB Rules have no safety benefit, and enforcement would cause an unreasonable burden on interstate commerce. As such, FMCSA granted the petitions for preemption under 49 U.S.C. 31141.

After receiving inquiries, FMCSA's Office of the Chief Counsel issued a legal opinion on March 22, 2019, concluding that FMCSA's preemption decision precludes courts from granting relief pursuant to the preempted state law, regardless of when the underlying lawsuit was filed or when the underlying conduct occurred.

PHMSA followed suit, finding that the NTTC's petition for reconsideration of the MRB Rules applicability to motor vehicles transporting hazardous materials was moot. PHMSA stated: "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." Therefore, because the NTTC's drivers are subject to FMCSA's HOS rules, FMCSA's decision precludes enforcement of the MRB Rules against NTTC's members.

However, in closing, PHMSA noted that in "the event the FMCSA decision is overturned and the state requirements become enforceable again, the California Labor Commissioner may petition the PHMSA to reopen the docket so that it may refile its petition for reconsideration." This is important, as four petitions for review challenging FMCSA's decision are consolidated and currently pending in the U.S. Court of Appeals for the Ninth Circuit, in the case captioned, *Intl Brotherhood of Teamsters, et al. v. FMCSA*, Court of Appeals Docket No.: 18-73488.

In March 2020, an extensive briefing period-beginning when the challenges were filed shortly after the FMCSA's decision in December 2018-finally closed. Several interested groups have submitted briefs in amici curiae on both sides. This includes: ATA (joined by the California Trucking Association, Washington Trucking Association, Intermodal Association of North America, and the American Moving and Storage Association), the Chamber of Commerce, the Armored Car Association, and a group of motor carriers (CRST, Heartland Express, John Christner Trucking, Penske, Rail Delivery Services, and U.S. Xpress) filing in support of FMCSA's determination. Those filing in support of the challengers were the State of Washington and a group of state and national employment lawyers associations.

3. Conclusion

The Ninth Circuit previously indicated that it planned to schedule oral arguments in the case during the summer of 2020. However, in light of the COVID-19 pandemic, it is likely that such dates will be further delayed, and thus the MRB Rules and AB-5 will remain preempted in California. In the interim, motor carriers can operate as the rules intended and without interruption of the federal preemption.

Please look for updates on this issue from Benesch's transportation team in upcoming Bulletins, Flashes, and *Interconnects*.

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