83 FR 47961

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Notices

PHMSA finds that California's meal and rest break requirements 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 finds that the California meal and rest break requirements 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 California meal and rest break requirements 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, because the California requirements are an obstacle to carrying out the requirements of 49 CFR 172.800 with respect to such motor carriers.

Applicant: National Tank Truck Carriers, Inc. (NTTC).

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.

I. Background

NTTC has applied to PHMSA for a determination as to whether the Federal Hazardous Material Transportation Law, 49 U.S.C. 5101 *et seq.,* preempts California's meal and rest break requirements, as applied to the transportation of hazardous materials. Under the California requirements, an employee is entitled to a 30-minute meal period after five hours of work and a second 30-minute meal period after ten hours of work. Generally, the employee must be “off duty” during the meal period. In addition, employees are entitled to a 10-minute rest period for every four hours worked. If a meal or rest period is not provided, the employer is required to pay the employee one hour of pay for each workday that the meal period or rest period is not provided. *See* Cal. Lab. Code §§ 226.7(b) & (c), 512(a), 516(a); Cal. Code Regs. tit. 8, § 11090(11)-(12).

NTTC presents three main arguments for why it believes the meal and rest break requirements should be preempted. First, NTTC contends that the California requirements “were not promulgated with an eye toward safe transportation of hazardous materials[,]” and thus create the potential for unnecessary delay when a driver must deviate from his or her route to comply with the requirements. Next, NTTC argues that the meal and rest break requirements conflict with the attendance requirements that the HMR imposes in certain situations, because under certain circumstances, the HMR “implicate the driver `working' under California law.” As such, NTTC argues that a carrier (employer) cannot comply with both the state and federal requirements. Last, NTTC points out that many motor carriers include a “constant attendance of cargo” requirement in the written security plans required by the HMR. NTTC contends that the California meal and rest break requirements are inflexible and may require that the drivers make unnecessary stops or prohibit constant attendance by the driver. Therefore, NTTC believes the requirements are an obstacle to the security objectives of the HMR.

In summary, NTTC contends the California meal and rest break regulations should be preempted because they:

- Create unnecessary delay for the transportation of hazardous materials;
- Conflict with the HMR attendance requirements; and

- Create an obstacle to accomplishing the security objectives of the HMR.

PHMSA published notice of NTTC's application in the Federal Register on September 2, 2016. 81 FR 60777. Interested parties were invited to comment on NTTC's application. The initial comment period closed on October 17, 2016, followed by a rebuttal comment period that remained open until December 1, 2016. In response to the notice, six industry trade associations, seven petroleum distributors, four transport companies, and three individuals submitted comments in support of preemption. Only the International Brotherhood of Teamsters (IBT) opposed the petition; California did not submit comments. NTTC submitted rebuttal comments. The comments are summarized in Part III below.

II. Preemption Under Federal Hazardous Material Transportation Law

As discussed in the September 2, 2016 notice, 49 U.S.C. 5125 contains express preemption provisions relevant to this proceeding. 79 FR 21838, 21839-40. 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]

Under 49 U.S.C. 5125(d)(1), any person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision or Indian tribe may apply to the Secretary of Transportation for a determination as to whether the requirement is preempted. The Secretary of Transportation has delegated authority to PHMSA to make preemption determinations, except for those concerning highway routing (which have been delegated to the Federal Motor Carrier Safety Administration). 49 CFR 1.97(b).

Section 5125(d)(1) requires the Secretary to publish notice of an application for a preemption determination in the Federal Register. Following the receipt and consideration of written comments, PHMSA publishes its determination in the Federal Register. *See* 49 CFR 107.209(c). Any person aggrieved by a preemption determination may file a petition for reconsideration within 20 days of publication of the determination in the Federal Register. 49 CFR 107.211. If a person files a timely reconsideration petition, the decision by PHMSA's Chief Counsel on the petition for reconsideration becomes PHMSA's final agency action with respect to that person. If a person does not file a timely reconsideration petition, PHMSA's initial determination is PHMSA's final agency action as to that person, as of the date of publication in the Federal Register. Any person who wishes to seek judicial review of a preemption determination must do so by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit, or in the United States Court of Appeals for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final with respect to the filing party. 49 U.S.C. 5127(a).

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"

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[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).

another federal law, or whether a fee is "fair" within the meaning of 49 U.S.C. 5125(f)(1).[2] In particular, PHMSA preemption determinations, including this determination, do not address whether a State, local, or Indian tribe requirement is covered by the preemption provision of the Federal Aviation Administration Authorization Act of 1994, which applies to laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. 14501(c)(1). In addition, PHMSA does not generally consider issues regarding the proper application or interpretation of a non-Federal regulation, but rather how such requirements are actually "applied or enforced." "[I]solated instances of improper enforcement (*e.g.,* misinterpretation of regulations) do not render such provisions inconsistent" with Federal Hazardous Material Transportation Law, but are more appropriately addressed in the appropriate State or local forum. PD-14(*R*), *Houston, Texas, Fire Code Requirements on the Storage, Transportation, and Handling of Hazardous Materials,* 63 FR 67506, 67510 n.4 (Dec. 7, 1998).[3]

In making preemption determinations under 49 U.S.C. 5125(d), PHMSA is guided by the principles and policies set forth in Executive Order *No.* 13132, entitled "Federalism" (64 FR 43255 (Aug. 10, 1999)), and the President's May 20, 2009 memorandum on "Preemption" (74 FR 24693 (May 22, 2009)). Section 4(a) of that Executive Order authorizes preemption of state laws only when a statute contains an express preemption provision, there is other clear evidence Congress intended to preempt state law, or the exercise of State authority directly conflicts with the exercise of federal authority. The President's May 20, 2009 memorandum sets forth the policy "that preemption of state law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the states and with a sufficient legal basis for preemption." Section 5125 contains express preemption provisions, which PHMSA has implemented through its regulations.

III. Public Comments

A. Comments Supporting Preemption

Unnecessary Delay

Several commenters argue that the California meal and rest break requirements conflict with the HMR's requirement that hazmat shipments by highway be transported without unnecessary delay. *See* 49 CFR 177.800(d). The commenters acknowledge that the health and safety of the driver might be a reasonable motive for requiring breaks, but contend that the delays caused by the California requirements are not necessary or reasonable in the context of the transportation of hazardous materials.

In support of this contention, several commenters note that many drivers transporting hazardous materials are subject to the break requirements set by the Department's Federal Motor Carrier Safety Administration (FMCSA) in its Hours of Service (HOS) regulations, 49 CFR part 395.

The commenters explain that the HOS rule requires a 30-minute rest at least every eight hours, whereas the California rule requires many more breaks during a comparable work day. The American Trucking Associations, Inc. (ATA), in its comments, illustrates this point by noting that a driver working an 11-hour day would have to make one stop for a 30-minute break under the federal rules. But under the California rules, ATA estimates the same driver would have to take five breaks (two 30-minute meal periods, and three 10-minute rest periods) over the course of the same work day. Furthermore, ATA reasons that since each break will entail a stop, the result would be four "arbitrary stops," in contrast to the HOS rule.

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[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).

[3] Preemption determinations issued by PHMSA are labelled herein as "PD." Inconsistency rulings issued by PHMSA's predecessor agency are labelled as "IR."

Also, Cox Petroleum Transport (COX) contends that the “conflicting and competing” federal and state standards make it extremely confusing and difficult to be in full compliance when a driver's work day includes interstate transportation.

Constant Attendance and Security Plans

Several commenters argue that the California meal and rest break requirements should be preempted because they interfere with the HMR security plan requirements. *See* 49 CFR 172.800-172.802 Specifically, the commenters argue that adherence to the California meal and rest break requirements would preclude motor carriers from including a “constant attendance” requirement in the en route section of the security plans that motor carriers are required under the HMR to develop when offering, or transporting, certain hazardous materials. As the commenters explain, although security plans may not be applicable to all of their hazmat shipments, most motor carriers that develop security plans often make them universally applicable to their hazmat transportation operations. According to the commenters, when motor carriers need to ensure en route security for hazmat, they use the constant attendance method because it is “a time-proven, low-cost, and highly effective method” to ensure en route security. Moreover, the commenters say that PHMSA and FMCSA view a “constant attendance” requirement included in a security plan as a useful and effective method for ensuring the safety and security of hazmat in transportation. For example, the commenters point to PHMSA's guidance on implementing security plans and FMCSA's current exemption to the HOS rule for certain carriers subject to the security plan requirements. *See* 81 FR 83923 (Nov. 22, 2016). Regarding the exemption, ATA further reasons that if the federal off-duty break requirement presented a sufficient obstacle to the security plan regulations to warrant an exemption, it follows that state rules requiring off-duty breaks would constitute a similar obstacle and warrant preemption.

Uniformity

ATA, American Pyrotechnics Association (APA), California Trucking Association (CTA), COX, and National Association of Chemical Distributors (NACD) expressed their concerns that if the California rule is allowed to stand, other states may follow suit, leading to many different standards that would seriously hinder a motor carrier's ability to transport hazardous materials safely and securely, while also trying to comply with all the potentially different sets of rules it may encounter during the trip. To illustrate this point, ATA argues that without preemption of non-federal meal and break laws, carriers operating in multiple states would potentially be subject to “an arbitrarily large and complex patchwork” of different state rules. According to ATA, approximately twenty-one states have their own set of varying meal breaks and nine states have rest break requirements.

Shortage of Parking and Safe Havens

Western States Trucking Association (WSTA) believes the core reason the California meal and rest break requirements need to be preempted is the inability of a driver of a commercial motor vehicle (CMV) “to `just pull-over' or even find suitable truck parking in order to comply with an inflexible state meal and rest break requirement.” According to WSTA, the shortage of available truck parking is a well-documented national issue. Consequently, WSTA argues that the ability of truck drivers to simply pull over or find a safe place to park is not as easy as the proponents of California's rule claim, especially when hazardous materials are involved. For example, according to WSTA, “safe haven” parking is even in shorter supply than general truck parking.

WSTA believes that the California rule is ill-conceived as applied to CMVs. It presumes the regulations were designed for employees working in more structured environments that are not subject to many of the external factors that impact the trucking industry, such as road and weather conditions, shipper/receiver delays, breakdowns of equipment, randomized vehicle inspections by law enforcement, and traffic conditions.

California Independent Oil Marketers Association (CIOMA)

CIOMA submitted its comments supporting federal preemption of California's meal and rest break requirements. Eight additional commenters voiced their support for CIOMA's comments.

CIOMA points out that California's high demand and use of hazardous materials, particularly petroleum fuels, along with the state's large size and its congested traffic conditions, create conditions that make delivering petroleum fuels safely and on-time a complicated logistical feat.

CIOMA says it has long been involved with issues involving hazardous material carrier meal and rest breaks, and that its previous attempts to work with the California Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) to obtain clarity regarding driver breaks under the California requirements have been unsuccessful. CIOMA reasons that since "a simple, broad based determination from DLSE" interpreting the rules is not available, it believes the federal constant attendance regulation "definitively achieves clarity, with public safety as the utmost priority."

According to CIOMA, companies that transport hazardous materials, despite the lack of clarity surrounding meal and rest breaks, often require their drivers to take meal and rest breaks near the truck. CIOMA cites several reasons for this practice, including the safety of their drivers, the public, and the environment; minimizing unintentional releases; security threats; and insurance and other economic considerations. CIOMA says fuel marketers and cargo carriers provide this type of maximum security for their fuel cargos despite the risk of running afoul of California's "unreasonable and contradictory" meal and rest break requirements, and the risk of costly legal judgments "due to the complexity of [the] California requirements."

Therefore, CIOMA believes the highest and best manner to assure the continued safe conduct of hazardous materials deliveries in the state is to adhere to the federal constant attendance requirements. CIOMA reasons that this will ensure drivers will collect pay for their constant vigilance of hazardous cargos, while employers will be assured that they will not be penalized for conduct in the best interest of the health, welfare, and safety of the public.

Miscellaneous Issues

Two of the individual commenters indicated that there were increased administrative burdens, additional operational costs, and an increased threat of litigation associated with trying to comply with the California rule. According to one individual, complying with the California rule has raised the annual cost of operating his small company to approximately $300,000. Additionally, he stated that he is faced with higher administrative costs associated with tracking his employees' rest breaks, as well as increased exposure to "frivolous labor lawsuits." He also indicated that in order to accommodate the required break periods, his company had to reduce its delivery hours, and consequently, suffered losses due to price fluctuations.

B. Comments Opposing Preemption

The International Brotherhood of Teamsters (IBT) is the only commenter opposing the petition. With respect to NTTC's unnecessary delay argument, IBT rhetorically asks, "what constitutes unnecessary delay?" IBT contends that California has determined that its break requirements are necessary to protect the health, welfare, and safety of drivers and others on the roads, by ensuring that drivers are well-rested and attentive.

With respect to NTTC's argument based on the HMR attendance requirement, IBT argues that there are sufficient exemption provisions in the California regulations to make federal preemption unnecessary. IBT points out that the California regulations have an "Exemptions" provision that explicitly covers rest periods.[4] As for the meal break requirement, IBT notes that the provision permits an on-duty meal break when the nature of the work

[4] Cal. Code Regs. tit. 8, § 11090(17) ("If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.").

prevents an employee from being relieved of all duty, which NTTC argues applies here because of the attendance requirements under the HMR. An on-duty meal break is an on-the-job paid meal period, and therefore, it must be agreed to by the employer and employee by written agreement. As such, IBT believes that a motor carrier can comply with both the federal attendance rule and the California meal break requirement by simply executing a meal break agreement with its drivers.

IBT further argues that the California rules are not an obstacle to the HMR, as alleged by NTTC. NTTC says that delays from drivers deviating from their routes to accommodate the California rule are inconsistent with safe transportation, are an obstacle, and should be preempted. However, IBT believes that the potential for route deviation and/or delay is the same under either the California or the federal HOS regulations. IBT reasons that a state mandated break cannot jeopardize safety more so than a federally mandated break such as the HOS rule. Therefore, it concludes that if there is not an "obstacle" argument against the HOS rule, there cannot be one against the California rule.

Finally, IBT disputes NTTC's argument that security for hazardous materials shipments is jeopardized because the California rule negates a constant attendance requirement that many carriers include in the en route section of their security plans that are required under the HMR. According to IBT, nothing in the California rules prevents constant attendance, when required. In fact, IBT, recalling its earlier exemption argument, contends that constant attendance is accommodated by the California rule with its rest period exemption and the on-duty meal break exception.

C. Rebuttal Comments

NTTC, in rebuttal comments, notes that California did not submit comments in this proceeding. NTTC argues that the state's silence here is "indicative of the low importance the State attaches to its interests in applying California meal and rest beak [sic] laws to motor carriers transporting hazardous materials versus the federal interests in safe and secure hazardous materials transportation."

NTTC addresses IBT's rest break exemption argument by pointing out that although it is true there is the potential for employers to receive an exemption on a case-by-case basis, an exemption is entirely discretionary, an exemption may be revoked, and qualification for the exemption is based on a finding by the Division [5] that enforcing the rest break requirement would not materially affect the welfare or comfort of employees. Notwithstanding the potential for an exemption, NTTC characterizes the meal and rest breaks requirements as a "separate regulatory regime" for hazmat transportation, which creates confusion and frustrates Congress's goal of developing a uniform, national scheme of regulation.

NTTC contends that no such exemption exists for the meal break requirement. According to NTTC, IBT has contrived an exemption for the meal break requirement, because the rule only allows for an on-duty meal break in lieu of the requirement that the meal break must be off-duty. However, an employer still has to provide a meal break, whether on-duty or off-duty, which according to NTTC, will likely result in additional stops and delays in the transportation of hazardous materials.

NTTC also refutes IBT's notion that there is sufficient flexibility, through exemptions and other permissible alternatives, in the California rule that makes federal preemption unnecessary. NTTC notes that a recent California Supreme Court decision makes it clear that failure to provide a meal or rest break is a legal violation. As such, NTTC argues that federal preemption is appropriate.

NTTC further points out the uncertainty a motor carrier faces when trying to comply with the meal break requirement—or, alternatively, qualifying for, receiving, and maintaining an allowance for an on-duty meal break—while also attempting to comply with the federal rules that implicate a constant attendance requirement.

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[5] Division of Labor Standards Enforcement of the State of California. *See* Cal. Code Regs. tit. 8, § 11090(2).

NTTC is not persuaded by IBT's public policy argument, *i.e.,* that there is no conflict with the federal unnecessary delay requirement because California has deemed its rest and meal breaks necessary for the health, safety, and welfare of the driver.

NTTC points to an example in ATA's submission that contrasts the HOS rule with the California rule to rebut IBT's assertion that any route deviation due to the meal and break requirements is no different from an HOS deviation. The example reveals four extra stops, resulting in an estimated additional hour of break time per work day under the California rule, compounded by the lack of safe and legal places to park.

NTTC explains that while it is true the California rule has been in place for decades, the requirements were not being enforced against hazmat carriers, until recently. According to NTTC, litigation against hazmat carriers for meal and rest break violations has increased dramatically. NTTC posits that the trend of increased litigation will have a negative effect on the safe and secure transportation of hazardous materials. Therefore, NTTC believes it is imperative that PHMSA provide clarity to this issue by determining that the California rule is preempted with respect to drivers of motor vehicles transporting hazardous materials.

Fundamentally, NTTC reasons that the State's interests, with respect to drivers transporting hazardous materials, are outweighed by the necessity for a national uniform set of rules for the transportation of hazardous materials.

IV. Discussion

A. The California Requirements

Section 512(a) of the California Labor Code provides that:

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.

Cal. Lab. Code § 512(a)

The state Industrial Welfare Commission is permitted to modify these requirements and to require additional rest breaks. *See* Cal. Lab. Code §§ 512(b), 516(a). The Commission has issued an order for the transportation industry that repeats the statutory meal break requirements, while also requiring additional rest breaks. Cal. Code Regs. tit. 8, § 11090. The provisions at issue here are subsections (11) and (12).

These subsections state:

11. Meal Periods

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

(B) An employer may not employ an employee for a work period of more than ten (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.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an “on duty” meal period and counted as time worked. An “on duty” meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between

the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

(E) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

12. Rest Periods

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work 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.

Cal. Code Regs. tit. 8, §§ 11090(11) and (12)

Section 226.7 of the California Labor Code provides that:

. . .

(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

(c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

. . .

Cal. Lab. Code §§ 226.7(b) & (c).

B. Unnecessary Delay

NTTC argues that as applied to drivers of motor vehicles transporting hazardous materials, California's meal and rest break requirements conflict with 49 CFR 177.800(d), a provision of the HMR that states that:

All shipments of hazardous materials [by motor vehicle] must be transported without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination.

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In prior decisions, the agency [6] has identified several principles regarding unnecessary delay that are relevant to this proceeding.

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[6] Effective February 20, 2005, PHMSA was created to further the "highest degree of safety in pipeline transportation and hazardous materials transportation," and the Secretary of Transportation redelegated hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to PHMSA's Administrator. 49 U.S.C. 108, as amended by the Norman Y. Mineta Research and Special Programs Improvement Act (Pub. L. 108-426, § 2, 118 Stat. 2423 (Nov. 30, 2004)); and 49 CFR 1.96(b), as amended at 77 FR 49987 (Aug. 17, 2012). For consistency, the terms "PHMSA," "the agency," and "we"

First, “[t]he manifest purpose of the HMTA and the Hazardous Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation. Given that the materials are hazardous and that their transportation is not risk-free, it is an important safety aspect of the transportation that the time between loading and unloading be minimized.” IR-2, *State of Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas Intended to Be Used by a Public Utility,* 44 FR 75566, 75571 (Dec. 20, 1979).

Second, “[s]ince safety risks are `inherent in the transportation of hazardous materials in commerce', an important aspect of transportation safety is that transit time be minimized. This precept has been incorporated in the HMR . . ., which directs highway shipments to proceed without unnecessary delay . . . .” IR-6, *City of Covington Ordinance Governing Transportation of Hazardous Materials by Rail, Barge, and Highway Within the City,* 48 FR 760, 765 (Jan. 6, 1983) (citation omitted) (determining that city requirement to provide an advance notification of the intent to transport hazardous materials within city limits was inconsistent with federal law).

Third, State and local requirements likely to cause unnecessary transportation delays are preempted. IR-2; IR-6; PD-22(***R***), *New Mexico Requirements for the Transportation of Liquefied Petroleum Gas,* 67 FR 59386 (Sept. 20, 2002) (determining that state vehicle inspection requirements and fees for vehicles transporting bulk quantities of liquefied petroleum gas within the state were preempted). Closely related to the problem of delay is that of redirection. State and local requirements which “directly or indirectly divert hazardous materials shipments onto longer, more circuitous routes increase the time both that these shipments are in transit and that the public is exposed to the risks inherent in their transportation.” IR-17, *Illinois Fee on Transportation of Spent Nuclear Fuel; Application for Inconsistency Ruling by Wisconsin Electric Power Company,* 51 FR 20926, 20931 (June 9, 1986), *decision on appeal,* 52 FR 36200 (Sept. 25, 1987). Accordingly, “several types of non-Federal requirements have been found to be inconsistent with the HMTA and the HMR on the basis that they create a potential for unnecessary delay,” including subject areas such as advance notification of hazardous materials shipments, time-consuming permitting processes with no definite decision dates, and route, time, and weather limitations on travel. PD-4(***R***), *California Requirements Applicable to Cargo Tanks Transporting Flammable and Combustible Liquids,* 58 FR 48940 (Sept. 20, 1993), *decision on reconsideration,* 60 FR 8800 (Feb. 15, 1995).

Last, as for what constitutes unnecessary delay, the agency has found that a delay of “hours or days” is unnecessary, but a minimal delay is reasonable and presumptively valid. PD-22(***R***) at 59400; IR-17 at 36205.

Applying these principles here, it is clear that the delays caused by California's meal and rest break requirements are unnecessary. California requires that drivers be given a 30-minute meal break every five hours, as well as an additional 10-minute rest break every four hours. For example, in the course of an 11-hour shift, California will often require drivers to pull over and take a break at least four separate times. As many of the commenters point out, the amount of delay caused by these multiple required stops far exceeds the sum of the required break times. The commenters cite factors such as more stops, the shortage of parking and safe havens, deviations from routes, congested traffic conditions, and forfeiting a place in line to take mandated breaks. For example, the inability of driver of a commercial motor vehicle to “just pull over” in order to take one of the state mandated breaks generally results in additional time spent looking for safe parking and significant deviations from the carrier's intended route. These delays may result in the driver missing a delivery and thus negatively impacting the scheduling of subsequent pickups and deliveries, and causing even more delays. Under our standards, cumulative delays of this type cannot be considered “minimal.”

The unnecessary nature of these delays is further demonstrated by comparing California's requirements with the requirements of FMCSA's HOS regulations. As noted by many of the commenters, the HOS regulations generally require drivers to take a 30-minute rest break every 8 hours. *See, e.g.,* 49 CFR 395.3(a)(3)(ii). This requirement is imposed in order to enhance highway safety by requiring a break after a driver has completed what, in most industries, would be a full day's work. California, on the other hand, will often require drivers to take at least 3

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are used in the remainder of this determination, regardless of whether an action was taken by RSPA before February 20, 2005, or by PHMSA after that date.

breaks during that 8-hour period and at least 4 breaks during the driver's 11-hour driving window. There is no evidence that such frequent delays are necessary.

IBT offers an opposing view. IBT denies that the California rule causes unnecessary delay, and insists that California has a legitimate public safety interest to require that drivers on California roads are well-rested and attentive. To be sure, we have acknowledged "[t]here is a longstanding Federal-State relationship in the field of highway transportation safety that recognizes the legitimacy of State action taken to protect persons and property within the State, even where such action impacts upon interstate commerce." IR-2 at 75566. California undoubtedly has a legitimate interest in protecting its citizens, and its meal and rest break requirements may be an effective way of promoting that interest across a variety of industries and work settings. And PHMSA of course recognizes that drivers of motor vehicles need to—and do—take meal and rest breaks. However, in the specific context of the transportation of hazardous materials by motor vehicle, any delay imposes additional safety risks by increasing the time during which a hazardous materials accident or incident many occur. In this context, California's rigid rules—which require drivers to take breaks within tightly specified intervals, rather than allowing drivers to use their judgment—impose delays that are unnecessary. Notwithstanding California's interest in the welfare and comfort of its citizens, the state laws supporting those interests, with respect to drivers transporting hazardous materials, must not conflict with the HMTA. Here, we find that the amount of delay caused by California's requirements is unnecessary.

PHMSA, for the reasons set forth above, finds that California's meal and rest break requirements create an unnecessary delay in the transportation of hazardous materials. California's requirements therefore make it impossible to comply with 49 CFR 177.800(d), and are an obstacle to accomplishing and carrying out that regulation. Therefore, California's requirements are preempted by 49 U.S.C. 5125(a)(1) and 49 U.S.C. 5125(a)(2) with respect to all drivers of motor vehicles that are transporting hazardous materials.[7]

C. Conflict With the HMR Attendance Requirements

NTTC also raises two additional preemption arguments that would apply to a narrower set of drivers than its "unnecessary delay" argument. All drivers covered by those arguments are also covered by PHMSA's "unnecessary delay" determination. Nevertheless, PHMSA will address NTTC's narrower arguments in the interest of completeness.

NTTC argues that the California meal and rest break requirements conflict with 49 CFR 397.5, which generally requires that a motor vehicle: (1) "be attended at all times by its driver or a qualified representative of the motor carrier that operates it" if it contains a Division 1.1, 1.2, or 1.3 explosive material; and (2) "be attended by its driver" if it contains hazardous materials other than Division 1.1, Division 1.2, or 1.3 materials, and is "located on a public street or highway, or the shoulder of a public highway." NTTC argues that because California requires breaks to be off-duty, it is not possible to comply with both the state law and the federal law.

The Federal attendance requirement is a part of the Federal Motor Carrier Safety Regulations (FMCSR) issued by FMCSA. The requirement has been incorporated into the HMR by 49 CFR 177.804(a), which provides that if a motor carrier or other person is subject to the portion of the HMR concerning carriage by public highway, it "must comply with 49 CFR part 383 and 49 CFR parts 390 through 397 . . . to the extent those regulations apply." PHMSA has explained that the incorporation of portions of the FMCSR into the HMR "was not intended to change the intent, scope of application, or preemptive effects of the FMCSR as they existed under their original statutory authority." IR-22, *City of New York Regulations Governing Transportation of Hazardous Materials,* 52 FR 46574, 46575 (December 8, 1987), *affirmed on appeal,* 54 FR 26698 (June 23, 1989). The FMCSR provide that they are "not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with [the FMCSR] by the person subject

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[7] Some commenters make arguments based on the purported applicability of California's requirements to drivers who cross into or out of California. Because PHMSA has determined that the California requirements are preempted as to all drivers of motor vehicles that are transporting hazardous materials, regardless of where they are operating, it is not necessary to reach these arguments or determine the extent to which California's rules apply in the context of interstate transportation.

thereto." 49 CFR 390.9. Thus, a provision of the FMCSR that has been incorporated by reference into the HMR has preemptive effect under 49 U.S.C. 5125 only to the extent that it is impossible to comply with both the FMCSR provision and a State, local, or tribal law. *See* IR-22 at 46575.

NTTC argues that it is not possible for drivers subject to the federal attendance requirement to comply with both that requirement and California's meal and rest break requirements. It notes that California law prohibits an employer from requiring an employee to work during a mandated meal or rest break. Cal. Lab. Code § 226.7(b). And it argues that an employer that requires its drivers to comply with the federal attendance requirements is necessarily requiring its drivers to work.

The issue raised by NTTC is similar to an issue identified by FMCSA with respect to its HOS regulations. As discussed above, the HOS regulations generally require drivers to take a 30-minute, off-duty break every 8 hours. When FMCSA promulgated that requirement in 2011, it included an exception specifying that "[o]perators of commercial motor vehicles containing Division 1.1., 1.2, or 1.3 explosives may use 30 minutes or more of attendance time to meet the requirement for a rest break." 76 FR 81134, 81187 (Dec. 27, 2011) (codified at 49 CFR 395.1(q)). FMCSA explained that "[t]his exception will allow the driver to meet the requirements of 49 CFR 397.5 . . . to attend the vehicle at all times without violating the break requirement." *Id.* at 81154. Thus, FMCSA was concerned—as NTTC is concerned here—that it would not be possible to comply with a break requirement while also complying with the attendance requirement.

IBT argues that there is no conflict between California's meal and rest break requirements and the federal attendance rule, because there are exemptions and other accommodations in the California rule that make it possible to comply with both sets of requirements. For example, IBT points out that the California rule has an exemption provision that explicitly covers rest periods. *See* Cal. Code Regs. tit. 8 § 11090(17) ("If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in . . . Section 12, Rest Periods . . . would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division."). As for the meal break requirement, IBT notes that the provision permits an on-duty meal break when the nature of the work prevents an employee from being relieved of all duty, and the employer and employee agree to an on-duty break in writing. *See* Cal. Code Regs. tit. 8, § 11090(11)(C). Overall, IBT contends that a motor carrier employer can easily obtain the necessary exemptions and other accommodations in order to be in compliance with the state and federal rules.

However, in its rebuttal comments, NTTC's description of the procedural requirements and standards for obtaining an exemption implies that motor carriers may face a greater administrative hurdle than that described by IBT. For example, NTTC points out that the exemption for rest breaks is entirely at the discretion of DLSE, the exemption may be revoked, and qualification for the exemption hinges on whether DLSE finds that enforcing the rest break requirement "would not materially affect the welfare or comfort of employees" irrespective of whether the requirement causes a conflict with the federal attendance requirement.

Additionally, the experience shared by CIOMA in its comments supports NTTC's characterization that obtaining the necessary exemptions and allowances may not be the simple administrative process portrayed by IBT. For example, CIOMA stated it has long been involved with issues protecting hazardous material carrier meal and rest breaks, and that its previous attempts to work with DLSE to obtain clarity regarding driver breaks under the California rule have been unsuccessful. In its submission, CIOMA provided copies of its correspondence with DLSE whereby it sought clarification on an earlier interpretation issued by DLSE regarding the applicability of the state's meal break requirement. After reviewing the letters, some key principles are evident. For instance, although DLSE confirmed that the rule provides for the possibility of an on-duty meal break, it indicated that it was a "limited alternative" to the off-duty requirement. DLSE further cautioned that it was not a waiver of the meal break requirement, and is narrowly construed. Also, DLSE emphasized that the burden is on the employer to prove the "nature of the work" prevents an employee from being relived of all duty and is therefore eligible for the exception. Moreover, DLSE indicated that a determination whether to allow an on-duty meal break is very fact specific and that there many factors that it may consider in evaluating an exception request. More importantly, DLSE said that it could not issue an opinion or give a blanket exception from the obligation to provide off-duty meal periods.

PHMSA agrees with NTTC and CIOMA, for the reasons summarized above, that there is significant uncertainty about whether motor carriers could obtain exemptions and other accommodations from California's requirement, and that the mere possibility of obtaining relief from California's requirement, particularly since such relief is within the discretion of the State, is too illusory to defeat preemption. In any event, IBT's focus on exemptions also misses a more fundamental point. If it is only possible for a motor carrier to simultaneously comply with a federal requirement and a State requirement if it obtains an *exemption* from the State requirement, then it is not actually possible to simultaneously comply with both requirements.

Therefore, for the reasons stated above, we find that the California meal and rest break requirements are preempted under 49 U.S.C. 5125(a)(1) with respect to the drivers of motor vehicles which contain a Division 1.1, 1.2, or 1.3 explosive material, and which are subject to the attendance requirement of 49 CFR 397.5(a), because it is not possible to simultaneously comply with that requirement and the California requirements.[8]

D. Obstacle To Accomplishing the HMR Security Objectives

NTTC also argues that the California rules are an obstacle to the security objectives of the HMR. Specifically, NTTC argues that the California rule frustrates the ability of carriers to deploy an effective, widely used deterrent, *i.e.,* constant attendance, in their written security plans.

Constant Attendance in Security Plans

The HMR requires that carriers of certain security-sensitive hazmat must develop and implement a written security plan that accounts for personnel, cargo, and en route security. *See* 49 CFR 172.800-172.802. According to NTTC and several commenters, many carriers include a constant attendance requirement for en route security in their plans. As the commenters explain, although security plans may not be applicable to all of their hazmat shipments, most motor carriers that develop security plans often make them universally applicable to their hazmat transportation operations. According to the commenters, when motor carriers need to ensure en route security for hazmat, they use the constant attendance method because it is “a time-proven, low-cost, and highly effective method” to ensure en route security.

Exemption to the HOS Rule

Again, NTTC argues by analogy to an action taken by FMCSA with respect to the HOS regulations, which as noted above, generally require drivers to take a 30-minute off-duty break after eight hours of driving.

In 2015, ATA filed an exemption request with FMCSA. ATA sought the exemption from the HOS rule on behalf of all motor carriers whose drivers transport hazmat loads subject to PHMSA's security plan requirement. FMCSA, in consideration of ATA's request for an exemption to the federal HOS rule, recognized that a conflict existed between the HOS break requirement and the constant attendance requirement that motor carriers typically include in their PHMSA mandated security plans. As FMCSA explained in its notice announcing the application, although constant attendance is not specifically mandated by the security plan rules, “[t]hese plans normally require a driver to `attend' such cargo while the [commercial motor vehicle] is stopped, which would be an on-duty activity [under the HOS rules]. This forces drivers to choose between FMCSA's off-duty rest break requirement and compliance with PHMSA's security plans, many of [which] include an on-duty `attendance' requirement.” 80 FR 25004, 25004 (May 1, 2015).

Ultimately, FMCSA granted a two-year exemption from the 30-minute break requirements for carriers whose drivers transport hazmat loads requiring placarding under 49 CFR part 172, subpart F, or select agents and toxins identified in 49 CFR 172.800(b)(13) that do not require placarding, and who have filed security plans requiring

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[8] NTTC has not provided evidence that is impossible for those transporting other hazardous materials to comply with California's requirements while also complying with the requirement of 49 CFR 397.5(c) that such cargo be attended when it is “located on a public street or highway, or the shoulder of a public highway.” Indeed, it seems probable that drivers could—and do—take breaks at locations other than the public streets or highways, or the shoulders of public highways. Accordingly, PHMSA determines that the California requirements are not preempted on this basis.

constant attendance of hazmat in accordance with 49 CFR 172.800-804. 80 FR 50912, 50913 (August 21, 2015). In allowing the exemption, FMCSA determined that the exemption would "likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." *Id.* Congress later mandated that certain exemptions from FMCSA's HOS regulations be valid for five years from the date the exemptions were granted. *See* Fixing America's Surface Transportation Act § 5206(b)(2), Public Law 114-94 (Dec. 4, 2015). FMCSA accordingly extended the exemption through August 20, 2020. 81 FR 83923 (Nov. 22, 2016).

IBT's Comments and PHMSA's Conclusion

IBT, as the sole opponent to preemption on this basis, relies on the same defense that it used against NTTC's other preemption claims. Essentially, IBT contends that constant attendance is accommodated by the California rule with its rest period exemption provision and on-duty meal break exception.

PHMSA concludes that California's meal and rest break requirements are an obstacle to carrying out the HMR's security plan requirements. Just as FMCSA recognized that complying with its HOS regulations would present an obstacle to a motor carrier including a widely-used "constant attendance" provision in its security plan, PHMSA determines that complying with California's meal and rest break requirements would present a similar obstacle. IBT's arguments concerning the possibility of exemptions do not change this determination. As noted above, there is significant uncertainty about how available exemptions are. And more fundamentally, if a regulated entity were able to obtain an exemption from California's requirements, there would be no need to decide whether those requirements were preempted; the question before PHMSA is whether the State requirements are an obstacle to federal law with respect to those regulated entities who are *not* exempted.

For the reasons stated above, the California meal and rest break requirements are preempted under 49 U.S.C. 5125(a)(2) 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.

V. Ruling

PHMSA finds that California's meal and rest break requirements 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 finds that the California meal and rest break requirements 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 California meal and rest break requirements 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.

VI. Petition for Reconsideration/Judicial Review

In accordance with 49 CFR 107.211(a), any person aggrieved by this determination may file a petition for reconsideration within 20 days of publication of this determination in the Federal Register. If a petition for reconsideration is filed within 20 days of publication in the Federal Register, the decision by PHMSA's Chief Counsel on the petition for reconsideration becomes PHMSA's final agency action with respect to the person requesting reconsideration. *See* 49 CFR 107.211(d).

If a person does not request reconsideration in a timely fashion, then this determination is PHMSA's final agency action as to that person, as of the date of publication in the Federal Register.

Any person who wishes to seek judicial review of a preemption determination must do so by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit, or in the United States Court of Appeals for the circuit in which the petitioner resides or has its principal place of business, within 60 days after the determination becomes final with respect to the filing party. *See* 49 U.S.C. 5127(a).

The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5127(a).