

October 5, 2016

Office of the Chief Counsel
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
Docket Operations (M-30)
West Building Ground Floor
Room W12-140
1200 New Jersey Avenue, SE
Washington, DC 20590

Via Electronic Filing: www.regulations.gov

Re: Docket PHMSA-2016-0097; PDA-38(R): Hazardous Materials: California Meal and Rest Break Requirements

The National Association of Chemical Distributors (NACD)¹ appreciates the opportunity to comment on the National Tank Truck Carriers' (NTTC) petition demonstrating the conflicts between following the California meal and rest break requirements and the federal Hazardous Materials Regulations (HMRs). NACD agrees with NTTC that the two sets of rules conflict and urges the Pipeline and Hazardous Materials Safety Administration (PHMSA) to grant the petition and preempt the conflicting state regulations.

California's Requirements Conflict with Federally-Adopted Standards

The HMRs contain a requirement that hazardous materials shipments by highway "be transported without unnecessary delay."² Although the health and safety of the driver would be a reasonable reason to delay, Congress has delegated the responsibility to promulgate regulations ensuring truck drivers have adequate rest and breaks to the U.S. Department of Transportation.³ The Secretary of Transportation has delegated that responsibility to the

¹ NACD is an international association of nearly 440 chemical distributors and their supply-chain partners. NACD members represent more than 85% of the chemical distribution capacity in the nation and generate 93% of the industry's gross revenue. Members of NACD operate in every region of the country through approximately 1,500 facilities. The membership includes small businesses as well as many regional and national companies.

NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association's third-party-verification environmental, health, safety, and security quality management system. Through NACD Responsible Distribution®, association members demonstrate their commitment to continuous performance improvement in every phase of chemical storage, handling, transportation, and disposal operations.

Hazardous materials transportation is an integral part of the chemical distribution business. In 2014, NACD members made over 4 million shipments, were responsible for 26.3 million tons of product, and drove more than 140 million miles while making deliveries to customers every 7.3 seconds. In 2014, NACD members achieved a handling/storage safety record of 99.988% and averaged just one traffic incident for every 1.53 million miles driven.

² 49 C.F.R. 177.800(d).

³ 49 U.S.C. 31502(b).

Federal Motor Carrier Safety Administration (FMCSA).⁴ FMCSA has exercised that responsibility by promulgating the federal hours of service regulations, which govern interstate trucking operations nationwide, including rest breaks.⁵

PHMSA adopted those hours of service regulations into the HMRs.⁶ Because PHMSA's authority over hazardous materials transportation extends to both interstate and intrastate shipments, all drivers transporting hazardous materials must adhere to the federal hours of service requirements.⁷ The HMRs preempt any state-issued requirement that "is an obstacle to accomplishing and carrying out the Federal hazardous material transportation law [or] a regulation issued under the hazardous material transportation law."⁸

When PHMSA adopted laws governing hazardous materials transportation, Congress clearly expressed its intention that hazardous materials be regulated from a single, uniform, national standard by stating "in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable."⁹ Hazardous materials are dangerous, and because of the inherent danger in transporting them, Congress has preempted any non-federal law that "stands as an obstacle" to adhering to the HMRs. This applies to both laws that directly conflict with the HMRs and to those that impose standards beyond those required by the HMRs. The HMRs are not a federal floor that states are free to regulate more tightly. Rather, Congress' desire was for *uniformity*, from which there should be no deviation.

California's meal and rest break regulations are different from the driving and rest break provisions contained in the Federal Motor Carrier Safety Regulations, as adopted into the HMRs. California's laws require a thirty-minute rest break after five hours working and another thirty-minute break after the tenth hour working. However, FMCSA has already issued regulations governing when rest breaks are required at 49 C.F.R. 395.3(a)(3). FMCSA's rule requires a thirty-minute rest break at least every eight hours. As noted, PHMSA has adopted this requirement into the HMRs, rendering it a uniform standard rather than as a regulatory floor. Accordingly, any requirement that differs from the federal standard as issued by FMCSA and adopted by PHMSA should be preempted.

This issue is similar to instances in which PHMSA adopts American Society of Mechanical Engineers or International Standards Organization standards into the HMRs. In cases where multiple organizations have developed standards and PHMSA adopts only one, following any standard other than that adopted by PHMSA is not adherence to the rule. This remains true even if the other standard is also effective. It is not the program's effectiveness that controls, but rather hazardous materials shippers' and carriers' need for a single uniform standard. In this case, PHMSA has adopted a single rest and meal break standard. Appropriately, this meal and rest break standard is also the one that FMCSA, the federal agency tasked with ensuring driver safety, has promulgated for interstate commerce.

⁴ 49 C.F.R. 1.87(i).

⁵ 49 C.F.R. 395.3.

⁶ 49 C.F.R. 177.804(a).

⁷ 49 USC 5102(1).

⁸ 49 C.F.R. 107.202(b)(2)

⁹ H. Rep. 109-12 at 362 (March 7, 2005).

Although it is possible to adhere to both the federal and California meal and rest break requirements, doing so forces a driver to violate the requirement in 177.800(d) of the HMRs prohibiting unnecessary delays in hazardous materials shipments. Hazardous materials are those that “pose an unreasonable risk to health and safety or property.”¹⁰ Thus, regulations for transporting hazardous materials by highway must balance a driver’s human need for rest against the dangers posed by these materials while they are in transit.

The HMRs are designed to minimize hazardous materials releases, but no economically feasible system can prevent all releases. Because PHMSA is the agency tasked with issuing regulations ensuring the safe transport of hazardous materials, it is also the agency that must strike the balance between driver fatigue and avoiding unnecessary delay. FMCSA’s eight hours on duty before a thirty-minute rest break rule is well supported by research, and PHMSA adopted it into the HMRs. PHMSA could have chosen to adopt a more stringent standard, but did not.¹¹ Thus, the rational course is to follow the rest break policy PHMSA has adopted and balance that against preventing unnecessary delays. Forcing hazardous materials drivers to adhere to the state’s requirement subjects them to multiple regulations, undercutting the uniformity in hazardous materials transportation mandated by Congress.

Finally, if California’s rule is allowed to stand, other states may follow suit. Some might adopt the California standard. Others might choose alternate standards. Every state that adopts meal and rest break requirements different from the federal standard disrupts the uniformity that Congress recognized as of paramount importance in hazardous materials transportation. Eventually, there could be different standards in each state, seriously imperiling carriers’ ability to transport hazardous materials legally. As it is obvious that 50 different standards would run afoul of congressional intent, it is similarly obvious that just one deviation from the uniform HMRs does so as well.

California’s meal and rest break requirements must be preempted for shipments subject to the HMRs to preserve Congress’ safety goal through uniformity.

Freight at Rest is Freight at Risk: Hazardous Materials Security Plans

Under the HMRs, motor carriers transporting certain security-sensitive hazardous materials are required to develop security plans.¹² Once developed and adopted, the carrier violates the HMRs if it does not adhere to its security plan.¹³ Security plans need only be applied to shipments of security-sensitive hazardous materials;¹⁴ however, most motor carriers that transport security-sensitive hazardous materials choose to apply them for all hazardous materials shipments. They do so for two reasons. First, training a driver to follow the security plan’s procedures for all placarded loads is easier than training the driver on the complex distinctions between which loads do or do not qualify as security-sensitive. Second, subjecting all hazardous materials shipments to the security plan’s procedures is a value-added service for all loads.

¹⁰ 49 U.S.C. 5103a.

¹¹ Unlike the HMRs, which operate as a uniform standard, the Federal Motor Carrier Safety Regulations act as a regulatory floor that states can choose to exceed, but not to fall below.

¹² 49 CFR 172.800.

¹³ *Id.*

¹⁴ *Id.*

PHMSA's security plan rule requires carriers to develop processes to ensure personnel, facility, and en route security.¹⁵ The most effective way to ensure en route security is to require "constant attendance," which requires the driver to be "on the vehicle, awake, and not in a sleeper berth, or...within 100 feet of the vehicle and [have] it within his/her unobstructed view."¹⁶ Constant attendance is already required by regulation for vehicles transporting Division 1.1, 1.2, and 1.3 explosives.¹⁷ It is a time-proven, low-cost, and highly effective method to ensure en route security. In fact, most motor carriers instructed their drivers to practice constant attendance on all of their hazardous materials loads even before the en route security requirement was imposed.

Thus, it is not surprising that when motor carriers were required to ensure en route security, they chose the constant attendance method. Even PHMSA's own guidance for implementing security plans suggests the following elements for en route security:

- Strive to minimize product exposures to communities or populated areas, including downtown areas; avoid tunnels and bridges where possible; and *expedite transportation of the shipment to its final destination*;
- *Minimize stops en route*; if you must stop, select locations with adequate lighting on well-traveled roads, and *check your vehicle after each stop to make sure nothing has been tampered with*; and
- Consider using two drivers or driver relays to *minimize stops during the trip. Avoid layovers, particularly for high-hazard materials.*¹⁸

PHMSA's own literature demonstrates the agency's focus on maintaining safety and security by delivering goods as swiftly as possible. Further, FMCSA has also granted a regulatory exemption for carriers under the security plan requirement that choose to require their drivers to maintain constant attendance on all hazardous materials loads.¹⁹ That exemption recognizes the strong security case for requiring constant attendance and allows drivers performing constant attendance to do so *even during their mandated rest break.*²⁰ Normally, a driver on a rest break must be off duty and completely relieved of any responsibility for the truck and its cargo;²¹ however, FMCSA saw both safety and security benefits in extending this exemption and allowed drivers to exercise constant attendance over their loads at all times the hazardous materials are in their care.

The California meal and rest break requirements impede carriers' and driver's ability to meet the requirements of their security plans as mandated under 49 CFR 172.802. PHMSA training materials recommend constant attendance. FMCSA has allowed an accommodation in its rest break requirement for these important loads. As both agencies have recognized the import of these matters, it is clear the California meal and rest break requirements present an obstacle to carriers performing their PHMSA-mandated security duties. Accordingly, for both safety and security reasons, the California meal and rest break requirement should be preempted as applied to hazardous materials loads.

¹⁵ 49 CFR 172.802.

¹⁶ 49 CFR 397.7

¹⁷ *Id.*

¹⁸ Pipeline & Hazardous Materials Safety Administration, HAZARDOUS MATERIALS TRANSPORTATION SECURITY REQUIREMENTS 11 PHH50-0124-0312 (emphasis added).

¹⁹ 80 Federal Register 162 50912 (August 21, 2015).

²⁰ *Id.*

²¹ *Id.*

Conclusion

NACD supports NTTC's petition and urges PHMSA to grant it. Congress has recognized the need for regulatory uniformity in hazardous materials transportation and directed PHMSA to ensure conflicting or confusing state, local, or other rules are struck down. California's meal and rest break requirements substantially deviate from the national standard. If allowed to stand, California's regulation presents a template other states could follow, creating just the patchwork system of hazardous materials transport laws Congress intended to prevent when it nationalized hazardous materials transport safety.

Further, the California meal and rest break requirement impedes motor carriers' ability to implement their PHMSA-mandated security plans. If the California meal and rest break requirement is not overturned for hazardous materials loads, carriers will be placing their cargo at risk of not only accidental release, but also of intentional release or theft while their drivers remain off duty.

For the reasons highlighted above, NACD urges PHMSA to grant the NTTC petition and preempt the California meal and rest break requirements as applied to drivers transporting hazardous materials.

Sincerely,



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I certify that copies of this comment have been sent to Mr. Prasad Sharma and Ms. Kamala Harris at the addresses specified in the *Federal Register*, reprinted below:

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