



February 12, 2019

Via Certified U.S. Mail, R.R.R

The Honorable Raymond Martinez, Administrator
Federal Motor Carrier Safety Administration
United States Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Also Via Fax (202) 366-3224

c/o FMCSA TX Division Administrator
903 San Jacinto Blvd., Suite 1100
Austin, TX 78701

Also Via Fax (512) 916-5482

Re: EXEMPTION APPLICATION REQUIRED TO BE PUBLISHED IN THE FEDERAL REGISTER "UPON RECEIPT" PURSUANT TO 49 U.S. CODE § 31315*

Dear Mr. Martinez,

On October 26, 2018, the Small Business in Transportation Coalition ("SBTC") filed the attached complaint and petition for preemption against the City of Midland, Texas. In our complaint and petition for preemption, we advised you:

"Effective October 1st, the City of Midland, TX outlawed the parking of commercial motor vehicles city-wide (local Midland ordinance).

Pursuant to the definition set forth in 49 CFR 390, the City of Midland, Texas is a **"receiver"** for the purposes of the aforementioned statute and the FMCSA Coercion Rule in that it regularly receives shipments of freight by motor carrier in interstate commerce as an operating municipality.

The local Midland ordinance prevents operators of commercial motor vehicles operating under electronic logging devices from parking their vehicles to cease operating their vehicles after 11 hours of driving time.

The local Midland ordinance also prevents operators of commercial motor vehicles operating under electronic logging devices from parking their vehicles to cease operating their vehicles after having been on duty for 14 hours.

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The local Midland ordinance also prevents operators of commercial motor vehicles from taking their mandatory 30 minute rest break when in mid-route while in the City of Midland.

Furthermore, the local Midland ordinance imposes a \$500 fine on interstate truck drivers who park their vehicles in Midland, Texas when attempting to comply with the Federal HOS regulations. This constitutes a "substantial violation," "harassment," and "coercion" in that operators of commercial motor vehicles are coerced by threat of property loss to keep driving --even if they are fatigued-- in order to avoid the fine, thus jeopardizing public safety.

The Federal government has the right to preempt the action of states and subdivisions of states. When state law and federal law conflict, Federal law displaces, or preempts, state law, due to the Supremacy Clause of the Constitution. U.S. Const. art. VI., § 2.

Pursuant to Congress' right to regulate interstate commerce, we therefore ask that the Federal Government find the City of Midland in substantial, institutional violation of 49 CFR 390.6 and act to preempt all municipalities, including the City of Midland, Texas, from enacting local ordinances that prevent interstate truck drivers from complying with the Federal HOS regulations."

Pursuant to 49 CFR (Code of Federal Regulations) 386.12 in furtherance of 49 CFR 390.6, we requested a **Federal investigation** into the actions of the City of Midland, Texas insofar as they interfere with the Federal Motor Carrier Safety Regulations (FMCSRs). We have received no written response to date.

On behalf of our membership and millions of America's truck and bus drivers this is now an **application to the Secretary of Transportation for class exemption** of the Hours of Service rules for motor carriers and their drivers who operate in interstate transportation and pass through Midland, Texas.

Notwithstanding our June 14, 2018 petition for rulemaking (published at <https://www.fmcsa.dot.gov/petitions>) requesting the agency promulgate rules specifically for class exemptions that transcend the current rules promulgated at 49 CFR 381.310 for individual carriers and drivers, in accordance with both 49 USC 13541 and 49 CFR 381.310, we offer --once again, to the best of our ability-- the following information:

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You must identify the person or class of persons who would be covered by the exemption.

All motor carriers and drivers required to comply with 49 CFR 395.3 and 49 CFR 395.5.

(1) Your name, job title, mailing address, and daytime telephone number;

The name, address, and telephone number of the person filing this application is:

JAMES LAMB, President

Small Business in Transportation Coalition ("SBTC") et al

1775 I. (Eye) Street, NW, Suite 1150

Washington, DC 20006

(202) 731-8223

<http://www.Truckers.com>

(2) The name of the individual or motor carrier that would be responsible for the use or operation of CMVs;

All Interstate Motor Carriers that pass through Midland, Texas as evidenced by their bill of lading, driver log, or other route documents.

(3) Principal place of business for the motor carrier (street address, city, State, and zip code); and

Various carrier addresses.

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(4) The USDOT identification number for the motor carrier.

Various USDOT Numbers.

(c) You must provide a written statement that:

(1) Describes the reason the exemption is needed, including the time period during which it is needed;

We offer this statement.

(2) Identifies the regulation from which you would like to be exempted;

§395.3 Maximum driving time for property-carrying vehicles.

(a) Except as otherwise provided in §395.1, no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, unless the driver complies with the following requirements:

(1) Start of work shift. A driver may not drive without first taking 10 consecutive hours off duty;

(2) 14-hour period. A driver may drive only during a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty. The driver may not drive after the end of the 14-consecutive-hour period without first taking 10 consecutive hours off duty.

(3) Driving time and rest breaks. (i) Driving time. A driver may drive a total of 11 hours during the 14-hour period specified in paragraph (a)(2) of this section.

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(ii) Rest breaks. Except for drivers who qualify for either of the short-haul exceptions in §395.1(e)(1) or (2), driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes.

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after—

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)

(1) Any period of 7 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1:00 a.m. to 5:00 a.m.

(2) Any period of 8 consecutive days may end with the beginning of an off-duty period of 34 or more consecutive hours that includes two periods from 1:00 a.m. to 5:00 a.m.

(d) A driver may not take an off-duty period allowed by paragraph (c) of this section to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days until 168 or more consecutive hours have passed since the beginning of the last such off-duty period. When a driver takes more than one off-duty period of 34 or more consecutive hours within a period of 168 consecutive hours, he or she must indicate in the Remarks section of the record of duty status which such off-duty period is being used to restart the calculation of 60 hours in 7 consecutive days or 70 hours in 8 consecutive days.

And:

§ 395.5 Maximum driving time for passenger-carrying vehicles.

Subject to the exceptions and exemptions in § 395.1:

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(a) No motor carrier shall permit or require any driver used by it to drive a passenger-carrying commercial motor vehicle, nor shall any such driver drive a passenger-carrying commercial motor vehicle:

(1) More than 10 hours following 8 consecutive hours off duty; or

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(b) No motor carrier shall permit or require a driver of a passenger-carrying commercial motor vehicle to drive, nor shall any driver drive a passenger-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after -

(1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(3) Provides an estimate of the total number of drivers and CMVs that would be operated under the terms and conditions of the exemption;

Unknown

(4) Assesses the safety impacts the exemption may have;

Drivers of commercial motor vehicles are not allowed to park **anywhere** in the city of Midland. This induces them to **violate** the Federal Hours of Service regulations if they are out of time at the time they arrive in Midland. Drivers are currently being coerced and compelled under penalty of local fine to violate the Hours of Service regulations contrary to the interest of public safety. The exemption is intended to relieve carriers and drivers from regulations that they cannot lawfully comply with due to a local ordinance that interferes with their ability to rest enacted in 2018 by the city of Midland.

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Unless FMCSA preempts the Midland, TX ordinance as originally requested by the SBTC to cure violation of their Fourteenth Amendment Right to "Equal Protection of the Law" and due process, exemption is in carriers', drivers,' and the public's interest. The Fifth Amendment also requires the Federal Government to afford due process. Fines against carriers for failure to abide by Federal Hours of Service regulations because they sought to avoid a local no parking fine violates the Fifth Amendment. The Federal government cannot lawfully ignore the "damned if I do, damned if I don't" precarious situation drivers are currently in. They should not have to choose between taking the fine for the Hours of Service violation or taking the fine for no parking. This constitutes unreasonable deprivation of property in violation of the U.S. Constitution.

(5) Explains how you would ensure that you could achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation; and

Drivers are unable to navigate around this situation. Preemption of the local Midland ordinance is the only reasonable course of action for FMCSA to take to reconcile protecting drivers' rights and avoiding adverse affects on public safety.

(6) Describes the impacts (e.g., inability to test innovative safety management control systems, etc.) you could experience if the exemption is not granted by the FMCSA.

Drivers Constitutional rights will continue to be infringed upon if the exemption is not granted unless FMCSA preempts the Midland ordinance.

(d)Your application must include a copy of all research reports, technical papers, and other publications and documents you reference.

We offer the FMCSA Coercion Rule, noting that as a municipality, the city of Midland is a "receiver."

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In 2012, Congress through the enactment of the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), specifically, SEC. 32911. PROHIBITION OF COERCION, prohibited the coercion of commercial motor vehicle operators "by a motor carrier, shipper, receiver, or transportation intermediary to operate a commercial motor vehicle in violation of a regulation promulgated under this section, or chapter 51 or chapter 313 of this title."

Effective January 29, 2016, the FMCSA duly promulgated a Federal Regulation to prevent Coercion of Motor Vehicle Drivers, which amended 49 CFR 386 and 49 CFR 390:

§ 390.6 Coercion prohibited.

(a) Prohibition.

(1) A motor carrier, shipper, receiver, or transportation intermediary, including their respective agents, officers, or representatives, may not coerce a driver of a commercial motor vehicle to operate such vehicle in violation of 49 CFR parts 171-173, 177-180, 380-383 or 390-399, or §§ 385.415 or 385.421;

(2) A motor carrier or its agents, officers, or representatives, may not coerce a driver of a commercial motor vehicle to operate such vehicle in violation of 49 CFR parts 356, 360, or 365-379..

(b) Complaint process.

(1) A driver who believes he or she was coerced to violate a regulation described in paragraph (a)(1) or (2) of this section may file a written complaint under § 386.12(c) of this subchapter.

(2) A complaint under paragraph (b)(1) of this section shall describe the action that the driver claims constitutes coercion and identify the regulation the driver was coerced to violate.

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(3) A complaint under paragraph (b)(1) of this section may include any supporting evidence that will assist the Division Administrator in determining the merits of the complaint.

We note it is the stated public policy of the FMCSA to impose Federal HOS regulations to combat driver fatigue in the interest of preventing loss of life and serious bodily injury in furtherance of public safety. But it cannot do so without reconciling Drivers' rights.

We therefore again, request the agency either preempt the local Midland Ordinance or grant the exemption requested herein. **In any event, now that this application has been filed and received by the agency, we respectfully request the agency immediate publish this application in the Federal Register without unreasonable delay** and make a determination within 180 days pursuant to the agency's rule promulgated at 49 CFR § 381.320.

Thank you for your consideration.

Sincerely,

/s/JAMES LAMB, President

Small Business in Transportation Coalition ("SBTC")

Cc: Secretary Chao, Mr. Martinez, Mr. Fromm and Mr. Minor via email:

Elaine.Chao@dot.gov

Raymond.Martinez@dot.gov

Charles.Fromm@dot.gov

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**(6)Notice and comment.—*

(A)Upon receipt of a request.—

Upon receipt of an exemption request, the Secretary shall publish in the Federal Register (or, in the case of a request for an exemption from the physical qualification standards for commercial motor vehicle drivers, post on a web site established by the Secretary to implement the requirements of section 31149) a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request. This subparagraph does not require the release of information protected by law from public disclosure (emphasis added).