Court of Appeals No. 12-55705

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICKEY LEE DILTS, RAY RIOS, AND DONNY DUSHAJ, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

vs.

PENSKE LOGISTICS, LLC AND PENSKE TRUCK LEASING CO., L.P.
Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of California
Case No. 08CV0318 CAB (BLM)

BRIEF OF *AMICUS CURIAE* TRUCK RENTING AND LEASING ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, the Truck Renting and Leasing Association ("TRALA") submits the following statement of its corporate interests and affiliations:

1. TRALA does not have a parent corporation.
2. There are no publicly held corporations owning 10% or more of stock in TRALA.

Respectfully submitted,

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STATEMENT OF CONSENT

All parties have consented to the filing of this brief.

STATEMENT OF AUTHORSHIP AND FUNDING

No party's counsel authored this brief in whole or in part. No party, counsel or person other than *amicus curiae*, its members, or its counsel contributed money to fund this brief. The Truck Renting and Leasing Association ("TRALA") notes that this brief was funded from TRALA's General Fund and that Appellant Penske Logistics, LLC's parent company Appellant Penske Truck Leasing Co., LP (hereafter "Penske") and Penske's counsel are members of TRALA and paid member dues into TRALA's General Fund.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

TRALA, headquartered in Alexandria, Virginia, is a voluntary, not-for-profit national trade association founded in 1978 to serve as a unified and focused voice for the truck renting and leasing industry. TRALA's members engage primarily in commercial truck renting and leasing, vehicle finance leasing, and consumer truck rental. Its membership also includes more than one hundred supplier member-companies that offer equipment, products, and services to TRALA leasing company members. Some TRALA members, including Ryder System, Inc. ("Ryder") and Penske, have motor-carrier operations. These TRALA members' prices, routes, and services are directly impacted by mandatory compliance with

California's meal and rest-break rules.

Many other TRALA members are leasing companies that routinely have to reposition lease or rental vehicles from one part of California to another or from within California to another State. Repositioning often requires the services of the TRALA members' employee-drivers. When repositioning within California these drivers are subject to California's meal and rest-break laws, and when these drivers cross State lines they are subject to a patchwork of differing meal and rest-break rules.

Other TRALA members also operate fleets of heavy-vehicle tow trucks or other vehicles that perform repair and maintenance services on the commercial motor vehicles leased to motor carrier-customers. These maintenance vehicles may be asked to respond to highway accidents or breakdowns on an emergency basis where compliance with California's meal and rest-break rules would limit their ability to respond and/or potentially pose safety concerns. For example, TRALA member Ryder often dispatches Ryder Fleet Management Services ("FMS") technicians on an emergency basis to the site of a truck breakdown on the shoulder of a busy interstate. Compliance with California's meal and rest-break rules can jeopardize the safe and prompt performance of these services as there may be insufficient time for Ryder to dispatch another technician to relieve the first-responding technician during a break.

Almost all members of TRALA lease vehicles to motor carriers that will be adversely impacted by the application of California's (and other States') meal and rest-break rules. These rules will impede the interstate flow of motor freight and reduce the motor carriers' ability to compete on the basis of prices, routes, and services.

TRALA has a long history of supporting federal preemption initiatives whose goal is to achieve nationwide uniformity in regulation of motor carriers. By way of example, TRALA supported the Graves Amendment, a federal statute that abolished vicarious liability of companies that rent or lease motor vehicles based on the negligent driving of their customers and thereby brought all States in line with the majority that did not impose vicarious liability on vehicle owners. *See* 49 U.S.C. § 30106(a). Similarly TRALA supports the International Fuel Tax Agreement ("IFTA"), an agreement among the lower 48 States and the Canadian provinces to simplify the reporting of fuel use by motor carriers that operate in more than one jurisdiction.[1] TRALA also supports the International Registration Plan, a registration reciprocity agreement among States, the District of Columbia, and provinces of Canada providing for payment of apportionable motor-carrier

[1] International Fuel Tax Association, Inc., *International Fuel Tax Agreement, Articles of Agreement* (Rev. Sept. 2011). Available at: http://www.iftach.org/manuals/2011/AA/Articles%20of%20Agreement%209%202011%20FINAL%20FOR%20WEBSITE.pdf (last accessed October 30, 2012).

fees on the basis of total distance operated in all jurisdictions.[2]

ARGUMENTS

I. FEDERAL PREEMPTION OF CALIFORNIA'S MEAL AND REST-BREAK LAWS IN THIS CASE WILL BE CONSISTENT WITH CONGRESSIONAL OBJECTIVES.

A. Congress Enacted The FAAAA To Facilitate Interstate Commerce And Preempt A Patchwork Of State Regulation.

In 1980, Congress significantly deregulated the trucking industry by passing the Motor Carrier Act, Pub. L. No. 96-296, 94 Stat. 793. Congress found that "[t]he existing regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and ha[d] failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. Rep. No. 96-1069, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 2283, 2292.

Fourteen years later, Congress enacted the motor carrier federal preemption provision of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), *codified at* 49 U.S.C.S. § 14501(c)(1). Congress found that "the regulation of intrastate transportation of property by the States" continued to "impose[] an unreasonable burden on interstate commerce;" "impede[] the free flow of trade, traffic, and transportation of interstate commerce;" and "place[] an

[2] International Registration Plan, Inc., *International Registration Plan with Official Commentary* (rev. Jan. 1, 2011). Available at: http://c.ymcdn.com/sites/www.irponline.org/resource/resmgr/publications/irp_plan_1.1.11.pdf (last accessed October 30, 2012).

unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994); *see also* H.R. Conf. Rep. No. 103-677 at 87 (State regulation "causes significant inefficiencies," "increase[s] costs," and "inhibit[s] . . . innovation and technology").

In order to free carriers from this burdensome "patchwork" of state regulation, Congress concluded that "preemption legislation [was] in the public interest as well as necessary to facilitate interstate commerce." *Id.; see also Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 373 (2008) (a "state regulatory patchwork is inconsistent with Congress' major legislative effort [in passing the FAAAA] to leave such decisions, where federally unregulated, to the competitive marketplace").

In *Rowe*, the state of Maine had passed a statute requiring licensed tobacco retailers to utilize a special recipient-verification service when shipping an order of tobacco within the state. Several air and motor carrier associations brought suit, arguing that the FAAAA preempted Maine's law. *Rowe, supra*, 554 U.S. at 369. The Supreme Court agreed, ruling that the state law was preempted and noting:

> "To allow Maine to insist that the carriers provide a special checking system would allow other States to do the same. And to interpret the federal law to permit these, and similar, state requirements could easily lead to a patchwork of state service-determining laws, rules, and regulations." *Id.* at 996. [Emphasis supplied]

The same reasoning applies here. Enforcement of California's meal and rest-break laws as to motor carriers such as Penske and numerous TRALA member-companies will give rise to a flood of enforcement actions in States across the nation whose meal and rest-break laws differ from that of California's, thereby defeating Congress' stated objective in enacting the FAAAA.

B. California's Neighboring States Have Enacted Different Rules Regarding Meal Periods Rendering Compliance Complicated, Burdensome and Inefficient.

Oregon, Nevada, and Washington State have enacted meal break rules different from California's, creating a patchwork of distinct and at times irreconcilable requirements.

In California, an employer must provide its employees with a 30 minute meal break for every five (5) hours of work per day. Cal. Lab. Code § 512(a).

In Oregon, employers must provide employees with at least a 30-minute unpaid meal period when the work period is six (6) hours or greater. *See* Or. Admin. R. 839-020-0050(2)(a).

In Nevada, employers must provide employees a meal period of at least 30 minutes when the employee is working for a continuous period of eight (8) hours. *See* Nev. Rev. Stat. § 608.019(1).

In Washington State, employees must be provided a meal period of at least thirty minutes commencing not less than two hours nor more than five (5) hours

from the beginning of the shift. *See* Wash. Admin. Code § 296-126-092(1).

TRALA members lease vehicles and perform motor-carrier, vehicle-repositioning, or maintenance operations themselves that necessitate crossing into and out of California into these neighboring states. Compliance with this patchwork of differing regulations is difficult, burdensome and inefficient.

As an example, it is often necessary for Ryder – acting as a private carrier – to relocate its commercial rental vehicles from one location to another (i.e., when demand for commercial rental vehicles fluctuates during certain weeks or in certain geographic areas). These services are most often performed by Ryder employees known as "transfer drivers." These transfer drivers are subject to the California meal and rest-break rules as well as a patchwork of different state meal and rest-break rules when their work crosses state lines, which it routinely does.

By way of example, suppose Ryder needs to relocate one of its commercial rental vehicles from Sacramento, California, to Eugene, Oregon, a trip covering approximately 475 miles and taking about 8.5 hours. Under California law, the driver would be required to take a 30-minute off-duty meal break within 5 hours of starting this work. If he started driving at 9:00 a.m., he would be required to take a meal break sometime before 2:00 p.m. But what if he crosses out of California and into Oregon 3 hours after going on duty (i.e., at Noon)? Does his "California clock" stop ticking at Noon, and a new clock pegged to Oregon's meal-break rules

begin to run? If so, the driver would not be required to take a meal break for another six hours (i.e., 6:00 p.m.). By contrast, if the driver's "California clock" continues to run, he would be required to take the meal break within 2 hours of crossing into Oregon (i.e., by 2:00 p.m.). Would that meal break satisfy Oregon's requirement, or would an "Oregon clock" start ticking once the driver crosses into Oregon and run concurrently with his "California clock," such that he would be required to take *both* a break within 2 hours of crossing into Oregon (to satisfy California law) and again within 6 hours of crossing into Oregon (to satisfy Oregon law)? There are no ready answers to these questions, which compounds the difficulty and burden of compliance with this patchwork of state laws.

II. COMPLIANCE WITH CALIFORNIA'S MEAL AND REST BREAK LAWS AND THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION'S HOURS-OF-SERVICE REGULATIONS PRESENTS A SERIOUS OBSTACLE TO EFFICIENT MOTOR CARRIER OPERATIONS.

A. The Current Federal HOS Regulations Are Inconsistent With California's Meal And Rest-Break Laws.

Drivers operating equipment owned by or leased to motor carriers already must comply with the Federal Motor Carrier Safety Administration's ("FMCSA") Hours-Of-Service ("HOS") regulations. 49 C.F.R. Part 395. The HOS regulations are the national standard of work hours for motor carrier drivers and currently require that a driver of a property-carrying motor carrier: (1) may drive only a maximum of 11 hours after 10 consecutive hours off duty; (2) may not drive

beyond the 14th consecutive hour after coming on duty, following 10 consecutive hours off duty; and (3) may not drive after 60/70 hours on duty in 7/8 consecutive days (though a driver may restart a 7/8 consecutive day period after taking 34 or more consecutive hours off duty). *See* 49 C.F.R. § 395.3 (Aug. 25, 2005 as amended by 76 Fed. Reg. 81134, Dec. 27, 2011).

As early as 1937, FMCSA's predecessor agency refused to mandate breaks at particular times on grounds "the driver [should] be left to take a period of relaxation *whenever he feels the need*," so as to best serve safety and operational flexibility. *In the matter of Maximum Hours of Service of Motor Carrier Employees*, 3 M.C.C. 665, 688 (I.C.C. 1937) (emphasis added). The same is true with the current HOS regulations. FMCSA, *Hours of Service of Drivers*, 68 Fed. Reg. 22456, 22466 (Apr. 28, 2003) ("Of course, drivers are free under the [HOS] rules to take rest breaks *at any time*…" (emphasis added).[3] In direct contradiction,

[3] Effective July 1, 2013, the HOS regulations will – for the first time since they were originally adopted in the late 1930s – require that if more than 8 consecutive hours on duty have passed since the last off-duty period of at least half an hour (i.e., vehicle parked), the driver must take an off-duty or sleeper berth break of at least 30 minutes before driving. FMCSA, *Hours of Service of Drivers*, 76 Fed. Reg. 81134 (Dec. 27, 2011), *to be codified at* 49 C.F.R. § 395.3(a)(3)(ii). This HOS rest-break is the subject of a pending legal challenge. *See Public Citizen v. FMCSA*, No. 12-1113 (D.C. Cir. Petition Filed Feb. 24, 2012). Even if the Federal law goes into effect it will still be far less restrictive than California law. Federal law will require only a single 30-minute off-duty break that drivers may take "*at a time of their choosing*" so long they do not drive after 8 consecutive hours on duty without a break. 76 Fed. Reg. at 81136 (emphasis added).

the California and nearby States' break rules all require meal breaks to be taken *at designated times*. These State mandates will thus interfere with motor carriers' and leasing companies' federally-endorsed safety and operational flexibility under the HOS regulations and accordingly, with their services, routes, and prices.

B. The HOS Regulations Govern Not Only Those Motor Carrier Drivers Who Transport Goods Across State Lines But May Also Govern Those Who Perform Intrastate Services As Part Of Interstate Commerce.

The HOS regulations also govern drivers who perform delivery services solely within California because the goods they transport are in interstate commerce. See *Ruiz v. Affinity Logistics Corp.*, 2006 U.S. Dist. LEXIS 82201 (S.D. Cal. Nov. 9, 2006) (plaintiff's "in-state transportation of appliances from the San Diego [warehouse] to the homes of Sears' customers was, as a matter of law, transportation in interstate commerce") (citing *Motor Carrier Interstate Transp'n – From Out-of-State Through Warehouses to Points in Same State*, Ex Parte No. MC-207, 57 Fed. Reg. 19812, 8 I.C.C.2d 470, 473 1992 WL 122949, at **2 (1992)), appeal docketed on other grounds, No. 12-56589 (9th Cir. Aug. 29, 2012); *Glanville v. DuPar, Inc.*, No. H–08–2537, 2009 WL 3255292, at *11-12 (S.D. Tex. Sept. 25, 2009) (dismissing FLSA overtime claim after concluding intrastate delivery of appliances to retail customers qualified as interstate commerce subjecting drivers to HOS regulations).

In the *Ruiz* case, a class of motor carrier drivers sued their employer under

the Fair Labor Standards Act ("FLSA") for failure to pay them overtime worked. *Ruiz, supra*, 2006 U.S. Dist. LEXIS 82201 at *1-2. The driver employees argued that the FLSA overtime exemptions did not apply because the goods were picked up at the local distribution center and delivered to a local resident and since the drivers did not cross state lines they were not engaged in interstate commerce. *Id.* at *7. The employer countered that the local drivers were engaged in interstate commerce because the local "intrastate routes" were "but a leg of an interstate journey" and therefore the FLSA was controlling. *Id.* at *7-10. The District Court in *Ruiz* found that "[w]hether transportation is interstate or intrastate is determined by the essential character of the commerce, *manifested by shipper's fixed and persisting transportation intent at the time of the shipment* […]." *Id.* at *9, quoting *Klitzke v. Steiner Corp.*, 110 F. 3d 1465, 1469 (9th Cir. 1997) (emphasis in original).

Thus even though TRALA member-companies may make wholly intrastate deliveries, they are often engaged in interstate commerce and governed by the Federal HOS regulations. The current federal HOS regulations do not require motor carrier drivers to take breaks and allow drivers 14 consecutive hours on-duty during which they may drive a total of 11 hours preceding a 10-hour off-duty period. *See* 49 C.F.R. § 395.3 (Aug. 25, 2005 as amended by 76 Fed. Reg. 81134, Dec. 27, 2011). Since the HOS regulations are less restrictive than State law,

compliance with both sets of rules imposes an additional burden on TRALA members; i.e., if drivers were required to comply with California law, they would be required to pull their vehicles over at least four times within a 10-hour drive (in order to take the two 30-minute meal periods and two 10-minute rest breaks required under California law). Cal. Lab. Code § 512(a). These drivers would be required to locate a safe and lawful parking spot for the truck, driving to and from said location, decommissioning the truck and ensuring that it is safely parked. These requirements would in turn impact the prices, routes, and services that TRALA member-companies can offer their customers.

C. Compliance With California's Laws Lessens The Motor Carriers' Ability To Compete On The Basis Of Routes And Services.

The FAAAA was enacted to preempt state laws that interfere with motor carriers' market-based decisions regarding services, routes, and prices. In *Rowe* the Supreme Court noted that the FAAAA represented "Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Rowe*, *supra*, 552 U.S. at 373.

The *Rowe* Court noted Congress' rationale for enacting the Airline Deregulation Act, (which contains preemption language identical to that found in FAAAA) as follows:

> "Congress' overarching goal [w]as helping assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating

> 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'" *Id.* at 371, quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

As in *Rowe*, California's meal and rest-break laws directly impact the routes driven by TRALA members' drivers which in turn causes an adverse impact on the prices, routes, and services of TRALA member-companies. TRALA member Ryder must take into account the impact of compliance with the break rules when plotting out the routes required to perform delivery services for its customers (what Ryder refers to as the "engineering" of routes).[4] If the break rules apply, Ryder's engineers are required to select non-optimal routes so as to allow for the maneuvering vehicles off and on the road. If the California break rules do not apply, Ryder's engineers can leave the decision of when and where to take a break to the discretion of their drivers. As just one example, Ryder's engineers may not be able to route a driver through downtown Los Angeles – even if this is the optimal route given operational considerations – if he is due for a meal break as the congestion in downtown may make it difficult (if not impossible) for the driver to locate and park in a safe parking space[5], and return to the road. As a result,

[4] Ryders' engineers strive to find the optimal route for each transport (i.e., the route that covers the shortest distance, requires the least amount of fuel, and takes the shortest amount of time).

[5] As an aside, the difficulty of finding a parking space for a commercial motor vehicle in California is well known. In 2007, the Institute of Transportation Studies at the University of California, Berkeley, released a report ranking California first in the nation in the shortage of overall private and public

Ryder's engineers would have to route the driver *around* the downtown area, on longer than optimal routes, thereby increasing fuel consumption and wear-and-term on the vehicles, with resulting rate increases – and correspondingly diminishing the range of competitive service and price options Ryder can offer.

The services that TRALA's member-companies offer their customers and potential customers are also impacted by California's rules. For example, Ryder's logistics division offers cash-in-transit or armored-car services. Ryder's contracts with armored-car customers seek to regulate the drivers' conduct during delivery by prohibiting drivers from leaving the truck unattended, parked or in public for safety and security reasons. The challenges of complying with both its customer requirements and California rules are apparent.[6]

CONCLUSION

This appeal present this Court with the opportunity to save the trucking industry from a patchwork of differing State meal and rest-breaks rules and thereby affirm Congressional intent in passing the FAAAA. If California is allowed to

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commercial parking. *See* Rodier, Carolina J., Shaheen, Susan A., Commercial Vehicle Parking In California: Exploratory Evaluation of the Problem and Possible Technology-Based Solutions, UCB-ITS-PRR-2007-11 (Aug. 2007), available at http://76.12.4.249/artman2/uploads/1/PRR-2007-11.pdf (last accessed Nov. 9, 2012). Penske cited this report in its Motion for Partial Summary Judgment (*see* ECF No. 87-2 at 6).

[6] TRALA is not aware of and has not found any exceptions to either the federal HOS regulations or the California meal and rest-break rules for armored-car services of this nature.

impose its regulations, motor carriers crossing state lines – from California to Nevada, for example – would be required to juggle and comply with the laws of two states *and* federal HOS regulations. Even carriers providing in-state services would be forced to comply with both the federal HOS regulations and California's meal and rest-break laws.

Both situations are untenable and unnecessarily burden the industry—a burden Congress intended to prevent by the FAAA. This burden decreases the ability of TRALA's members to effectively compete in the relevant marketplace on the basis of prices, routes, and services.

TRALA urges this Court to affirm the decision of the United States District Court for the Southern District of California that California's meal and rest-break laws are preempted by the FAAAA.

Respectfully submitted,

November 16, 2012

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TRALA

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

November 16, 2012

/s/ Guillermo Marrero
Guillermo Marrero

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, I electronically filed TRALA's *Amicus Curiae* Brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Guillermo Marrero
Guillermo Marrero