



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2016-0342]

Hours of Service of Drivers: American Concrete Pumping Association (ACPA); Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition; grant of application for exemption.

SUMMARY: FMCSA announces its decision to grant the American Concrete Pumping Association (ACPA) and others an exemption from the 30-minute rest break requirement in the Agency's hours-of-service (HOS) regulations for commercial motor vehicle (CMV) drivers. The exemption enables all concrete pump operators, concrete pumping companies, and drivers who operate concrete pumps in interstate commerce to count on-duty time while attending equipment but performing no other work-related activity, toward the 30-minute rest break provision of the HOS regulations. FMCSA has analyzed the exemption application and the public comments and has determined that the exemption, subject to the terms and conditions imposed, will achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.

DATES: The exemption is effective on March 21, 2017 and expires on March 21, 2019.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver, and Vehicle Safety Standards; Telephone: (614) 942-6477. E-mail: MCPSD@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain parts of the Federal Motor Carrier Safety Regulations. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews the safety analyses and public comments, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the specific person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period of the exemption, and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

Request for Exemption

The American Concrete Pumping Association (ACPA) represents more than 600 member companies who employ over 7,000 workers nationwide. The exemption would be applied to all interstate concrete pumper trucks and their operators, regardless of the motor carrier or membership in ACPA. Although many of the trucks operate intrastate and would therefore not be covered by an FMCSA exemption, an unknown

number of the pumping trucks are operated in metropolitan areas and do routinely cross State lines.¹

ACPA requests an exemption from the 30-minute rest break provision in 49 CFR 395.3(a)(3)(ii). The exemption would apply industry-wide to all concrete pump operators, concrete pumping companies and drivers who deliver, set-up, and operate concrete pumps in interstate commerce across the United States. ACPA requests the exemption because it states that the mandatory 30-minute rest break increases the risk of dangerous conditions on job sites. A mandatory break during which the concrete pump operator is considered to be “off duty” would require the pump to be shut down and likely cleaned out. Stopping the flow of concrete through the pump creates the risk of introducing air in the pump’s pipe system which in turn could cause hose-whipping that can injure not only the pump operator, but any personnel within reach of the hose. Concrete pump operators also already take rest breaks throughout the typical day that reflect the work flow at the job site, so an additional 30-minute rest break does not enhance job safety.

ACPA added that concrete is a perishable product. The perishable nature of concrete also creates difficult schedule coordination issues due to concrete being needed on a just-in-time basis. Concrete pump operators cannot plan the timing of the 30-minute break, as they cannot interrupt their work activity without the threat of failure – failure to accept and deliver concrete within its perishable limits and failure to comply with their contracts. Once the ingredients of ready-mixed concrete have been combined, there is a brief window during which the product can be pumped (roughly 90 minutes before the

¹ FMCSA does not have jurisdiction over intrastate transportation; however, most States have commercial motor vehicle statutes and regulations that are compatible with Federal regulations. An FMCSA exemption only applies to interstate transportation, although some States honor them for intrastate traffic.

concrete hardens). Should the concrete pump operator be required to take the 30-minute rest break, it would cause a ripple effect on the ready-mixed concrete trucks in line to supply the pump. Such a delay could cost thousands of dollars to rectify and could potentially violate a delivery contract, according to ACPA. Once the concrete pump starts to receive a delivery, it must be completed without disruption to conduct a safe and structurally sound pour.

Further details regarding this industry's safety controls can be found in the application for exemption, which can be accessed in the docket identified at the beginning of this notice. ACPA asserted that granting this exemption would achieve the same level of safety provided by the rule requiring the 30-minute rest break. The Association stated that the concrete pumping industry has a "solid" safety record, and that concrete pump operators already receive numerous other breaks throughout the workday. ACPA's Operation Certification Program ensures, encourages, and educates the industry on safe pumping and placement procedures, and these safety practices allow concrete operators to maintain their safety record through careful training and well-developed safety guidelines. The proposed exemption would be effective for 2 years.

Public Comments

On October 25, 2016, FMCSA published notice of this application, and requested public comment (81 FR 73465); four responses were submitted. Comments in favor of the proposed exemption were submitted by the Western States Trucking Association (WSTA) (formerly known as the California Construction Trucking Association (CCTA)); and the National Ready Mixed Concrete Association (NRMCA). Comments in opposition to the proposed exemption were submitted by the International Brotherhood of

Teamsters (IBT). One individual commenter took no formal position on the exemption request.

WSTA stated that it “is supportive of FMCSA granting the exemption requested by the ACPA from the 30-minute rest break provision in 49 CFR 395.3(a) (3) (ii). Concrete is a perishable commodity and as such once the pump-operator begins pumping concrete, needing to comply with the 30-minute break requirement can have significant negative ramifications for both the product and machinery.” WSTA added that the ready-mixed concrete drivers delivering product to a work site that is dependent on the pump operator performing their job function are already exempted from the 30-minute break requirements. WSTA referenced their prior support of the ready-mixed concrete request several years earlier, and further noted that in those same comments they had requested FMCSA to expand the 30-minute break exemption to operators of concrete pumpers.

NRMCA also supported the ACPA exemption request. As the representative of one of the primary material suppliers discharging into concrete pumps, NRMCA asserted that all the claims made and scenarios outlined by ACPA are legitimate and thus valid reasons for granting the requested exemption. NRMCA confirmed APCA’s concerns about ready mixed concrete being a perishable product and thus requiring a 30-minute break to be taken at a likely improbable time risks worker safety, equipment malfunctions and the delicate coordination required between ready mixed concrete deliveries and the concrete pump operators. Due to the nature of concrete pump operators’ schedules and inherent work practices, NRMCA agreed that requiring a 30-minute break for concrete pump operators would not provide an increased level of safety on our nation’s roadways, but in turn would likely create a potentially unsafe work environment.

The International Brotherhood of Teamsters (IBT) opposed the proposed exemption. IBT strongly objected to allowing this class of drivers to use 30 minutes of on-duty “waiting time” to satisfy the requirement for the rest break. IBT cites APCA’s argument that the 30-minute rest break would require the concrete pump to be shut down and cleaned out. Stopping the concrete flow, according to ACPA, creates the risk of introducing air into the pipe system and the attendant risk of hose whipping. ACPA stated, according to the IBT, that a hose whipping violently could injure the pump operator and any other workers within reach of the discharge hose. However, IBT contends that ACPA failed to provide any data supporting the contention that this is a frequent occurrence that has caused accidents and even deaths. IBT states that the rest break provision has been in effect since 2011, more than sufficient time to collect data to support ACPA’s claims of a safer workplace if the exemption was granted.

FMCSA Decision

FMCSA has evaluated APCA’s application and the public comments and decided to grant the exemption. The Agency believes that the exempted concrete pump drivers will likely achieve a level of safety that is equivalent to or greater than, the level of safety achieved without the exemption [49 CFR 381.305(a)]. It is important to note that the Agency is not granting a complete exemption from the 30-minute rest break provision required by 49 CFR 395.3(a)(iii)(2). Instead, FMCSA is granting an exemption for concrete pump operators and drivers who remain with the CMV (*i.e.*, wait) while not performing any other work-related activities to count that time toward the 30-minute break. The only subject of the exemption is the duty status of the driver while “waiting” with the vehicle during a required rest break. Like drivers of trucks

carrying certain kinds of explosives (§ 395.1(q)) drivers of concrete pump trucks will be allowed to use the 30-minute on-duty periods in attendance of the vehicles, while performing no other work, to meet the requirement for a rest break. A similar exemption from the 30-minute rest break was granted to the National Ready Mixed Concrete Association (NRMCA) on April 2, 2015 [80 FR 17819]. The Agency grants the exemption request subject to the terms and conditions in this notice.

Terms and Conditions of the Exemption

(1) Drivers who deliver, set-up, and operate concrete pumps in interstate commerce across the United States, and all concrete pump operators and concrete pumping companies and drivers, are exempt from the requirement for a 30-minute rest break in Section 395.3(a)(3)(ii), in that they may count “waiting” periods when they are performing no work activity as the required 30-minute break.

(2) Drivers must have a copy of this exemption document in their possession while operating under the terms of the exemption. The exemption document must be presented to law enforcement officials upon request.

(3) All motor carriers operating under this exemption must have a “Satisfactory” safety rating with FMCSA, or be “unrated.” Motor carriers with “Conditional” or “Unsatisfactory” FMCSA safety ratings are prohibited from using this exemption.

Period of the Exemption

This exemption from the requirements of 49 CFR 395.3(a)(3)(ii) is granted for the period from March 21, 2017 through March 21, 2019.

Extent of the Exemption

This exemption is limited to the provisions of 49 CFR 395.3(a)(3)(ii). These drivers must comply with all other applicable provisions of the FMCSRs.

Preemption

In accordance with 49 U.S.C. 31313(d), as implemented by 49 CFR 381.600, during the period this exemption is in effect, no State shall enforce any law or regulation applicable to interstate commerce that conflicts with or is inconsistent with this exemption with respect to a firm or person operating under the exemption. States may, but are not required to, adopt the same exemption with respect to operations in intrastate commerce.

Notification to FMCSA

Any motor carrier utilizing this exemption must notify FMCSA within 5 business days of any accident (as defined in 49 CFR 390.5), involving any of the motor carrier's CMVs operating under the terms of this exemption. The notification must include the following information:

- (a) Identity of the exemption: "ACPA"
- (b) Name of operating motor carrier and USDOT number,
- (c) Date of the accident,
- (d) City or town, and State, in which the accident occurred, or closest to the accident scene,
- (e) Driver's name and license number and State of issuance
- (f) Vehicle number and State license plate number,
- (g) Number of individuals suffering physical injury,
- (h) Number of fatalities,
- (i) The police-reported cause of the accident,

(j) Whether the driver was cited for violation of any traffic laws or motor carrier safety regulations, and

(k) The driver's total driving time and total on-duty time period prior to the accident.

Reports filed under this provision shall be e-mailed to MCPSD@DOT.GOV.

TERMINATION

FMCSA does not believe the drivers covered by this exemption will experience any deterioration of their safety record. However, should this occur, FMCSA will take all steps necessary to protect the public interest, including revocation of the exemption. The FMCSA will immediately revoke or restrict the exemption for failure to comply with its terms and conditions.

Issued on: March 10, 2017.

Daphne Y. Jefferson,
Deputy Administrator.

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