

BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
DEPARTMENT OF TRANSPORTATION

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.
IN RESPONSE TO REQUEST FOR COMMENTS

DOCKET NO. FMCSA-2011-0318

Alabama Metal Coil Securement Act: Petition for Determination of Preemption

JAMES J. JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.
1 NW OOIDA Drive
Grain Valley, MO 64029

CLAIRE SHAPIRO
Eisen & Shapiro
10028 Woodhill Rd.
Bethesda, MD 20817

Counsel for Owner-Operator Independent
Drivers Association, Inc.

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FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
DEPARTMENT OF TRANSPORTATION

The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) submits these comments in response to the November 23, 2011, Notice of Petition for Determination of Preemption (“Notice”) published at 76 Fed. Reg. 72495 by the Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”), Docket No. FMCSA-2011-0318. That Notice is the direct outgrowth of Alabama’s Metal Coil Securement Act, enacted in March of 2009 to prohibit motor carriers from transporting metal coils in a movement that originates or terminates in Alabama unless the driver is *certified* in metal coil load securement in accordance with Alabama law, carries the written certification in the vehicle when transporting metal coils, and *produces* that certification upon demand. After passage of the law, FMCSA advised Alabama that it appeared to be incompatible with the requirements of the Motor Carrier Safety Assistance Program (“MCSAP”) and also might be preempted by the pre-existing regulation on metal coil securement contained in the Federal Motor Carrier Safety Regulations (“FMCSR”). Alabama, however, refused to rescind the legislation and instead, in April of 2011, adopted a regulation that offered three alternate methods for obtaining the required certification.

Faced with Alabama’s intransigence, the American Trucking Associations (“ATA”) filed a petition seeking a determination that both the certification and production components of the Alabama law were preempted by federal law. This ultimately led Alabama to rescind the statutory production requirement, but not the certification requirement, which it still allowed to be satisfied by three alternative methods. Importantly, we would note that the Alabama Department of Public

Safety (“ADPS”) websites have not been modified to reflect this statutory change or the three means for obtaining the mandatory certification. *See* dps.alabama.gov/Documents/Documents/MCSU-CertificationForMetalCoilTransportationDrivers.pdf, *citing to* metalcoiltraining.com. To the contrary, even though nearly 10 months have passed since the regulation was adopted, those official Alabama websites only offer drivers one option, to take the Securing Metal Coils Course mandated by the state for a \$25 fee, and requires them to obtain and keep a copy of the resulting certificate in their vehicle when carrying metal coils.¹ *See id.* It also states that “Other testing or training will not be grandfathered into the certification process.” *Id.*

FMCSA has now asked commenters to address the burden imposed on interstate commerce by Alabama’s statute and implementing regulation. Specifically, FMCSA has asked the public to comment upon the safety, economic, and operational effects, including cumulative effects, of the certification requirement on interstate motor carriers. The Alabama law and implementing regulations are objectionable under MCSAP if they impose an “undue” burden on interstate commerce and objectionable under 49 U.S.C. § 31141 if they impose an “unreasonable” burden on interstate commerce.

OOIDA is a not-for-profit corporation incorporated in 1973 in Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. The approximately 150,000 OOIDA members are independent owner-operators, small-business motor carriers, and professional truck drivers (“small-business truckers”) located in all 50 states and Canada. Since one-

¹ While the affidavit that must be completed if a motor carrier wants to attempt to qualify to certify the training of their drivers is located on the website, ADPS offers no instructions when discussing the certification requirement on its website that would direct a motor carrier to that affidavit, nor are there any instructions on the affidavit itself as to how and when it may be used. *See* dps.alabama.gov/Documents/Documents/MCSU-CarrierInformationMetalCoilAffidavit.pdf.

truck motor carriers represent nearly half the total number of active motor carriers operating in the United States, and approximately 93 percent of active motor carriers operate 20 or fewer trucks, these small-business truckers have a significant presence in the trucking industry. OOIDA is the largest international trade association promoting their views before government agencies, legislatures, courts, other trade associations, and private businesses; as well as numerous local, state, national, and international committees and forums.

Because the majority of OOIDA's member small-business truckers operate in interstate commerce, any state laws and regulations that impose unique cargo securement-related requirements that are more stringent than the uniformly applicable federal law addressing the same subject can have a significant impact upon their safety, economics, and operations. The potential exists for an unacceptable cumulative impact if other states, following Alabama's lead, decide to require some unique type of certification for the movement within their jurisdiction of metal coils or other specific commodities covered by the FMCSRs. Further, there are a number of other alternative methods for ensuring the safe movement of metal coils that have no similar adverse effects on interstate commerce. Accordingly, as discussed below, OOIDA believes the Alabama metal coil law is preempted and should be rescinded by the State.

DISCUSSION

I. Alabama's rule is impermissibly burdensome for out-of-state drivers.

Alabama law has for many years required motor carriers operating in Alabama to comply with the FMCSRs. *See* Ala. Code 32-9A-2(a) (2008). Such a requirement is compatible with Federal law and does not unduly or unreasonably burden interstate commerce. However, under the law now being questioned, Alabama not only requires those transporting metal coils to or from

Alabama to comply with the Federal requirements pertaining to metal coil securement, it requires drivers to be “certified” in proper metal coil securement in a manner specified in Alabama regulations and the State can impose substantial penalties on drivers and their carriers lacking such certification. What this effectively means is that a driver of a truck carrying a load of metal coils in Alabama may be fined and imprisoned, even if the load is properly and safely secured, because that driver lacks the proper Alabama certification.

The need for certification, whether obtained through a driver’s completion of Alabama’s metal coil course (the only alternative presented on the relevant State websites) or by a motor carrier’s receipt from Alabama of authorization to issue its own certifications (itself a rather unwieldy process), imposes a particularly heavy administrative burden on out-of-state carriers and their drivers who infrequently move cargo in Alabama and even less frequently move metal coils. Indeed, while Alabama licensed drivers and drivers working for Alabama motor carriers would, in all likelihood, know of and comply with the requirements, out-of-state long-haul drivers and carriers may not even be aware of this unique, single-state requirement. Thus, such a requirement by itself impedes the free flow of metal coils in interstate commerce by eliminating non-certified drivers from competing for freight opportunities.

II. Other states have recognized that their authority is limited either to drivers they license or to intrastate traffic.

To aid in its determination of the burden the Alabama law imposes on interstate commerce, FMCSA has asked in the Notice for information on “similar requirements” imposed by other states. So far as OOIDA is aware, only two other states have adopted metal coil securement laws and those laws do not impose requirements similar to those contained in the Alabama law. Other states seem

either to have realized that such provisions are unnecessary in light of the pre-existing detailed FMCSRs addressing this subject or that such provisions would be problematic because of their impact upon interstate commerce. For example, following several incidents involving metal coils, New York adopted a law requiring NY-licensed drivers to get a metal coil endorsement on their CDL based upon a written knowledge test. *See* NYS Vehicle and Traffic Law, § 501(2)(b)(ix). Because New York understood that it must recognize validly issued licenses from other states, they did not and could not require a comparable endorsement or any other certification for drivers licensed in other states. *See* fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?reg=383.91&guidance=Y. In 2010, Indiana considered adoption of a law like Alabama's in response to a serious metal coil incident. Because of concerns about the impermissible effects of such a law on interstate commerce, Indiana chose to limit its law to those driving in intrastate commerce. *See* Indiana Code § 9-21-8-58. In short, other states have appropriately limited the scope of their laws to drivers licensed in their state (NY) or to those traveling exclusively in intrastate commerce (IN).

The burden imposed upon interstate commerce is often undue and unreasonable when the State's interest can be promoted as well with a lesser impact in interstate activities. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Diamond Waste, Inc. v. Monroe County, Ga.*, 939 F.2d 941 (11th Cir. 1991). Other less burdensome alternatives, that do not require any new state legislation or regulations, also exist. First, a program aimed at educating truck drivers about metal coil securement could help alleviate the problem. For example, FMCSA could either create a video and place it on its website or give more prominence to cargo securement rules on its website. *See*: www.fmcsa.dot.gov/rules-regulations/truck/vehicle/cs-policy.htm. Second, more aggressive enforcement of the federal securement requirements is a preferred alternative that places virtually no burden on interstate

commerce. Third, because speeding was often found to play a role in the Alabama metal coil accidents, more aggressive enforcement of speed limits at what has become known as “Malfunction Junction,” the Alabama interchange where most of the metal coil incidents occurred, is another approach likely to prove effective. See University Transportation Center for Alabama, *Strategic Highway Safety Plan for Alabama*, p.84 (Sept. 30, 2006) (“SHSP”); see *Stiff Penalties Eyes for Lost Truckloads*, The Birmingham News (July 11, 2006). Indeed, greater enforcement of existing laws and regulations through “high visibility inspection and enforcement of trucks transporting metal coils in the Birmingham area,” together with “education and outreach,” is precisely the approach promoted in Alabama’s SHSP. See *id.* at 84-85. That is also the approach supported by Alabama’s Department of Public Safety’s Motor Carrier Safety Unit (“MCSU”) before the law was enacted. As reported in a local Alabama newspaper, the commander of the MCSU said “The way to keep massive steel coils from falling on Decatur roads is not through more regulations, but tighter enforcement of existing ones” because the problem is “a combination of failure to follow those guidelines [federal securement regulations] and inappropriate driving practices, such as taking turns too fast.” See archive.decatordaily.com/decatordaily/news/060815/coils.shtml.

Importantly, as FMCSA knows well, States are expected to play an integral role in the direct enforcement of the FMCSRs to ensure safe commercial motor vehicle operations. In fact, the Motor Carrier Safety Assistance Program (“MCSAP”) provides grants to states to encourage programs involving driver/vehicle inspections, traffic enforcement, compliance reviews, public education and awareness, and data collection. 49 C.F.R. §§ 350.101, 350.109. Alabama received \$3.5 million in MCSAP grants in 2010 and is expecting \$3.7 in the current year. Some portion of these funds could

be allocated along with state funds to greater enforcement of the FMCSR requirements in lieu of a certification program.

In sum, when there are so many alternatives to a certification program that should be able to effectively minimize the number of metal coil accidents in Alabama, the burden imposed by Alabama's certification requirements clearly impedes interstate commerce in an undue and unreasonable manner.

III. An unmanageable patchwork of state certification laws should be anticipated if the Alabama law is allowed to stand.

In 1993, Congress began investigating the adequacy of Federal regulations pertaining to cargo securement on heavy trucks, as well as the enforcement of those regulations. First a research working group and then a standards drafting group were convened to develop uniform North American Cargo Securement Standard Model Regulations. That process led ultimately to a notice-and-comment rulemaking proceeding at FMCSA, which culminated in the adoption in September of 2002 of the Federal cargo securement rules located at 49 C.F.R. Part 393, Subpart I. *See* 67 Fed. Reg. 61212 (Sept. 27, 2002). In addition to general rules applicable to all cargo, these rules include specific provisions addressing a variety of commodities that were found by the research work group to be the most difficult to adequately secure. 67 Fed. Reg. at 61221. The commodities given this unique treatment were, of course, heavy metal coils, and the following: logs; dressed lumber; paper rolls; concrete pipes; intermodal containers; automobiles, light trucks, and vans; heavy vehicles, equipment and machinery; flattened or crushed vehicles; roll-on/roll-off containers; and large boulders. *Id.*; 49 C.F.R. §§ 393.116-393.136.

If Alabama's decision to add a certification requirement to the existing substantive cargo securement rules is allowed to stand, it is not unreasonable to expect a proliferation of unique state certification, confirmation, or validation requirements. Further, FMCSA's acquiescence in this case could result in unique certification requirements that go beyond metal coil securement to securement of any of the 10 other commodities that are specifically regulated by the FMCSRs. The focus would likely vary depending upon which commodities have created particular problems in a state. For example, Washington and other logging states could respond to past accidents involving overturned log trucks by requiring all drivers carrying logs into or out of that State to somehow certify, confirm, or validate compliance with the Federal rules governing securement of logs. *See, e.g.,* www.valleyrecord.com/news/112902924.html. Utah could respond to an accident involving a backhoe carried on a flatbed truck by developing a certification, confirmation, or validation requirement for movement of heavy vehicles, equipment, and machinery. *See, e.g.,* publicsafety.utah.gov/highwaypatrol/history_1989/backhoe.html. California could respond to a fatal accident involving concrete pipes that fell from a flatbed truck with some type of certification, confirmation, or validation program for concrete pipe transport. *See, e.g.,* articles.latimes.com/1999/aug/03/news/mn-62107. These are only three random examples of what could become a very long list if states, instead of simply enforcing the applicable Federal regulations, are allowed to establish unique driver certification requirements at will for any commodity already covered by the Federal cargo securement regulations.²

² Insofar as contemplating the appropriateness of creating what is essentially another form of an endorsement for a Commercial Drivers License ("CDL") that applies to all drivers regardless of state of residence, that should be a decision made by FMCSA and going through the federal rulemaking process - not the individual states.

Interstate motor carriers and their drivers would be expected to be aware of and comply with any and all such requirements, which could change at any point in time unbeknownst to the involved drivers. The need to do this is particularly unreasonable in the case of long-haul motor carriers and drivers that operate over irregular routes. The Alabama law does not contain an exception for a driver that enters Alabama only rarely and carries metal coils even less often. Whether this is done on a one time or on a regular basis, the driver is subject to a potentially-substantial penalty for failure to comply with the certification requirement. This requirement effectively limits competition from motor carriers and drivers that otherwise could legally and safely haul metal coils into/out of Alabama simply because they were unaware of the unique requirements imposed by that State's law. The difficulty of keeping abreast of and complying with a multitude of specific state requirements like that proposed by Alabama is evidenced by the fact, as discussed above, that Alabama itself does not correctly describe the certification requirements on its website!

For all of these reasons, FMCSA cannot consider the effect of the Alabama law in isolation in determining whether the burden on interstate commerce is undue or unreasonable. Nor can it simply look at the State cargo securement laws in place at present. To the contrary, it must consider the "cumulative effect" that would be exerted on interstate commerce by a potential plethora of similar laws pertaining to a variety of commodities. 49 U.S.C. § 31141(c)(5); *C & A Carbone Inc. v. Clarkstown, N.Y.*, 511 U.S. 383 (1994); *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 672 (D.C.Cir.2005). When the situation is analyzed in this fashion, it is evident that if States are given free reign to impose such certification and comparable requirements, it could wreak havoc on interstate motor carrier operations.

Interstate motor carriers will need additional administrative personnel to regularly monitor each State's website to keep up and ensure compliance with their diverse requirements. They will also need to ensure that drivers who follow irregular routes are not only conversant with the FMCSRs (as they are required to be at present), but are familiar with and have satisfied any distinct state requirements, on the odd chance that they might occasionally transport a covered commodity in that State. This would create barriers to efficient goods movement between various states by effectively limiting competition. Absent compliance by all drivers, an uncertified driver might deliver an unregulated commodity into a State, then have to deadhead out of that State because he cannot accept the one suitable load because it contains metal coils or another commodity requiring certification. Alternatively, the drivers or their carriers can either absorb any potential fines imposed as a result of the failure to get appropriate certifications or can limit the range of operations for certain drivers. The operational and economic costs of doing business using any of these approaches, is substantial. Hence, any State laws that make such action necessary impose an undue and unreasonable burden on interstate commerce.

IV. Conclusion.

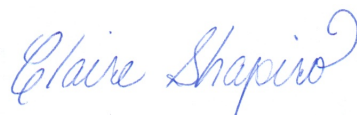
Recent statistical evidence from the FARS system shows that Alabama has many fatalities each year in accidents involving heavy trucks. In fact, in the five-year period from 2006-2010, there were anywhere between 80 and 137 fatalities annually. *See* www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/1_AL/2010/1_AL_2010.htm#MAPS_8. None of these fatalities resulted from accidents involving metal coils. Moreover, problems with metal coil securement are not even mentioned in the Alabama Department of Public Safety annual reports from FY 2005-2006 through FY 2009-2010 (the most recent year available), even in the sections discussing the operations of the

State's Motor Carrier Safety Unit. It seems a bit odd that a problem that Alabama decided justifies its own certification program would not even merit mention in the Agency's annual reports.

We do not point out these facts to suggest that the number of metal coil accidents don't merit some action on Alabama's part. However, they do suggest that the problem does not merit the allocation of resources that would go into the certification program, especially on the part of carriers and their drivers, and the resulting interference with interstate commerce. As discussed above, Alabama would be better advised to focus its efforts on driver education as part of its own licensing procedures coupled with increased enforcement of existing state and federal regulations, to reduce the number of metal coil accidents as well as the overall number of statewide fatalities involving trucks.

For all the reasons discussed in these comments, OOIDA respectfully submits that FMCSA should, in response to the pending petition, find the Alabama Metal Coil Securement Act to be preempted by Federal law.

Respectfully submitted,



JAMES JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.

CLAIRE SHAPIRO
Eisen & Shapiro
10028 Woodhill Rd.
Bethesda, MD 20817

Counsel for Owner-Operator Independent
Drivers Association, Inc.