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Mr. Larry Minor
Associate Administrator for Policy
1200 New Jersey Avenue, SE
West Building, Ground Floor, Room W12-140
Washington, DC 20590-0001

Docket No. FMCSA-2018-0180: Hours of Service of Drivers: Application for Exemption; Small Business in Transportation Coalition

Dear Associate Administrator Minor:

As I read over the Small Business in Transportation Coalition's (SBTC) exemption application,¹ I was reminded of a scene from a mid-1990s movie, *Billy Madison*.² In *Billy Madison*, the titular character must demonstrate basic high-school level proficiency by winning an "Academic Decathlon" or lose access to his father's money, which he has been squandering for years.³ After a particularly banal response to a trivia question, the decathlon moderator states, "At no point in your rambling, incoherent response were you even close to anything that could be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul."⁴ Reading the SBTC's application elicited a similar response from me and, I imagine, from anyone who takes highway safety even remotely seriously.

The National Tank Truck Carriers, Inc. writes today in opposition to the SBTC's exemption application.⁵ The Electronic Logging Device (ELD) Final Rule and its accompanying docket more than adequately demonstrate the safety benefits of requiring ELDs in all trucks.⁶ Granting the SBTC's request would eviscerate the ELD rule and be tantamount to enabling a highway killing spree. While that sounds like hyperbole, the Federal Motor Carrier Safety Administration's (FMCSA) own analysis estimated that

¹ James Lamb Re: Application to Federal Motor Carrier Safety Administration ("FMCSA") for Exemption from the Electronic Logging Device ("ELD") Rule Federal Docket ID FMCSA-2018-0180-0001 (February 1, 2018) ("Application").

² *Billy Madison* [video] Directed by T. Davis, Universal Pictures. (February 10, 1995).

³ *Id.*

⁴ *Id.* The selected quote is available for public viewing online at <https://youtu.be/5hfYJsQAhl0> (accessed on June 5, 2018).

⁵ The National Tank Truck Carriers has represented the tank truck industry before Congress and various federal agencies since its founding in 1945. NTTC's mission is to champion safety and success in the tank truck community through advocacy and education. NTTC also operates Tank Truck University, an in-house educational program designed to disseminate best practices in safety, tank truck operations, and leadership to all individuals working in the segment, including drivers, dispatchers, mechanics, and management all the way to the C-suite. NTTC's membership is comprised of over 600 companies that specialize in bulk transportation services by cargo tank throughout North America. The tank truck industry generates roughly 6% of all truck freight revenue, but that represents 30% of all truck freight in terms of tonnage due to the heavy nature of the liquid bulk products we handle.

⁶ Electronic On-Board Recorders Broader Including Hours of Service of Drivers; Supporting Documents Federal Docket ID FMCSA-2010-0167 (December 16, 2015).

installing ELDs would prevent 1,844 crashes and save 26 lives per year.⁷ It would be the height of irresponsibility and a total abdication of FMCSA's congressionally-mandated mission to "consider the assignment and maintenance of safety as the highest priority" to grant the request.⁸ According to the American Trucking Associations, 91.0% of all motor carriers operate 6 or fewer trucks.⁹ This would therefore exempt 9 out of 10 motor carriers from one of the most significant safety rules promulgated since deregulation. Since the fleets with fewer than these drivers almost certainly have fewer than 50 employees, granting this exemption would essentially undo the ELD mandate and its well-documented safety effects.

In addition to the application's failure to state any rational case for the exemption, it also has several other, fatal, errors.

The Exemption is Incorrectly Filed

In the application, SBTC states that "a permanent exemption is needed from the ELD rule."¹⁰ However, SBTC has applied for an exemption under Part 381.¹¹ As Subpart C "Procedures for Applying for Exemptions" notes, exemption are limited to a five-year period, with unlimited five-year renewals.¹² There is a method for applying for "permanent exemptions."¹³ That method is laid out in Part 389.¹⁴

FMCSA could choose to consider SBTC's exemption request under Part 389. However, NTTC recommends that the agency choose not to. Rather, NTTC urges FMCSA to treat this filing as lazy legal work. Treating the application as a Part 389 petition for rulemaking would be proper if the filer was ignorant of government processes or administrative procedure. But, this is far from the case with the SBTC. As the first page of their application states, SBTC has already filed a petition for reconsideration of the ELD mandate.¹⁵ The processes for filing petitions for reconsideration are codified at 49 C.F.R. §§ 389.35-389.37.¹⁶ Those Code sections appear immediately after the Code sections for petitioning for a rulemaking. A reader cannot see one without the other. In short, no one using the Code to file a petition for reconsideration can make a colorable claim to be ignorant of the rules for applying for a rulemaking. Without that ignorance, there is no reason to give favorable treatment to the application.

The Exemption Lacks Proper Supporting Information

Above and beyond the incorrect filing method, SBTC's application provides no reason to grant an exemption. SBTC fails to include essential information when considering granting an exemption, including a reason for granting the exemption, the total number of drivers and commercial motor vehicles that would be affected, the safety impacts of granting the exemption, how the proposed exemption would ensure no derogation of the current state of highway safety, or even any impacts for failure to grant the exemption.¹⁷ SBTC seems to believe that it is the FMCSA's job to do its research for it. SBTC's rationales in the petition contain no linkage as to why the statements put forth would yield the results

⁷ Federal Motor Carrier Safety Administration REGULATORY EVALUATION OF ELECTRONIC LOGGING DEVICES AND HOURS OF SERVICE SUPPORTING DOCUMENTS FINAL RULE: REGULATORY IMPACT ANALYSIS, FINAL REGULATORY FLEXIBILITY ANALYSIS, & UNFUNDED MANDATES ANALYSIS v Federal Docket ID FMCSA-2010-0167-2281 (November 2015).

⁸ 49 U.S.C. § 113(b) (2016).

⁹ Robert Costello AMERICAN TRUCKING TRENDS 2017 6 (Spring 2017).

¹⁰ Application at 3.

¹¹ 49 C.F.R. 380.300 *et. seq.* (2017) (emphasis original).

¹² 49 C.F.R. 380.300(b) (2017).

¹³ Often called rulemakings.

¹⁴ 49 C.F.R. 389.31 *et seq.* (2017).

¹⁵ Application at 1.

¹⁶ (2017).

¹⁷ 49 C.F.R. 381.310(c) (2017).

posited.¹⁸ What little information SBTC provides includes two articles about the CMV parking Jason's Law, another about the driver shortage, and a poll about ELDs beginning with the prompt "What is your issue with the Electronic Logging Device ("ELD") mandate..."¹⁹ None of this information is relevant to the safety impacts of exempting the vast majority of the CMVs on the road from the ELD mandate. To be sure, sufficient truck parking and incentives to enter the trucking industry as a driver *are* important issues. But, there is no nexus between them and the proposed exemption. These "supporting" articles are just smoke and mirrors.

Too Cute by Half – Mocks FMCSA's Safety Mission

SBTC's application cherry picks from FMCSA's statutory mission and from FMCSA's past statements in an attempt to portray its request as even half rational. Rather, it is too cute by half. SBTC starts off by stating that FMCSA has recognized that the ELD Mandate "is not a 'safety regulation' per se," but rather "a mechanism intended to enforce a safety regulation."²⁰ While this may be true, it ignores two important points. First, FMCSA's choice of the enforcement mechanism impacts compliance and, therefore, safety. Second, FMCSA need only demonstrate a rational reason for choosing the mechanism that it does. SBTC not only fails to offer any compelling reason why FMCSA's choice is flawed, it fails to offer any reason at all. SBTC's comment that Congress merely required CMVs "to be equipped with ELDs" without requiring their use flies in the face of all tenants of statutory interpretation.²¹ Lacking any true analysis, there is little reason to consider granting the request.

Conclusion

SBTC's requested exemption is flawed in four ways. The financial argument has already been covered in great depth during the ELD Mandate debate and the facts are well-settled and against them. They've filed the petition incorrectly, giving FMCSA grounds to dismiss it. They've also failed to provide the information required by either Part 381 or Part 389. Finally, their cherry picking and selective use of statute shows their request for the unsafe strawman that it is. Alone, each of these failures should merit a denial. Taken together, they are fatal.

NTTC urges FMCSA to reject this petition. Thank you for your time and attention. If you'd like to discuss this matter in greater depth, I can be contacted at bsteshenson@tanktruck.org or at (703) 838-1960.

Sincerely,



Boyd Stephenson
SVP, Government Affairs & Counsel
National Tank Truck Carriers, Inc.

¹⁸ See "Too Cute by Half," *infra*.

¹⁹ Application at 12-17.

²⁰ Application at 4.

²¹ Application at 5.