OPPOSE THE AIRR ACT
PROTECT MEAL AND REST BREAKS AND FAIR PAY FOR TRUCKERS

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OF OREGON
IN THE HOUSE OF REPRESENTATIVES
Monday, March 21, 2016

Mr. Speaker, today the House considers a clean extension of aviation programs through July 15, 2016. While I have no objection to H.R. 4721, I do have serious concerns with H.R. 4441, the "Aviation Innovation, Reform, and Reauthorization Act of 2016" (AIRR Act), the controversial Federal Aviation Administration reauthorization bill. My remarks focus on one provision in H.R. 4441, Section 611.

Section 611 of H.R. 4441 pre-empts intrastate laws related to meal breaks, rest breaks, and hourly tracking of wages for truck drivers. Specifically, Section 611(a)(3) states:

> *(A) A State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law prohibiting employees whose hours of service are subject to regulation by the Secretary under section 31502 from working to the full extent permitted or at such times as permitted under such section, or imposing any additional obligations on motor carriers if such employees work to the full extent or at such times as permitted under such section, including any related activities regulated under part 395 of title 49, Code of Federal Regulations.*
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> *(B) A State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law that requires a motor carrier that compensates employees on a piece-rate basis to pay those employees separate or additional compensation, provided that the motor carrier pays the employee a total sum that when divided by the total number of hours worked during the corresponding work period is equal to or greater than the applicable hourly minimum wage of the State, political subdivision of the State, or political authority of 2 or more States.*

Section 611 pre-empts State laws in two parts. Part (A) is specific to meal and rest breaks, which are in effect in 21 States. Part (B) allows companies to continue to pay by the load or on a piece-rate basis, and to disregard State laws that require hourly tracking of wages.

Additional language in Section 611 makes these legislative changes retroactive to 1994. This retroactivity language will wipe out at least 50 pending lawsuits regarding wage and hour laws.

Part A: Preempting State Meal and Rest Break Laws

Section 611 is being pursued by a coalition of large trucking companies following a recent Ninth Circuit U.S. Court of Appeals decision that upheld the State of California's meal and rest

break laws for all workers, including truck drivers. *See Dilts v. Penske Logistics, LLC,* 769 F.3d 637 (9th Cir. 2014), *cert. denied,* 135 S. Ct. 2049 (2015). The trucking companies supporting Section 611 claim that the language in part (A) is needed to prevent a patchwork of State hours of service laws. In reality, Section 611 goes far beyond this stated purpose.

***Dilts v. Penske Logistics* Decision**

Section 611 pre-empts existing State meal or rest break laws, many of which have been on the books for decades, in 21 States. If enacted, Section 611 will prevent truck drivers who work exclusively within a single State from being protected by that State's wage and hour laws. I agree that if a truck driver is operating long haul, through several States, having to comply with new rest or meal break requirements every time the driver crosses a State line is confusing and impedes interstate commerce. The *Dilts* case was not a case that affected drivers moving goods from coast to coast – it was a case involving local appliance delivery drivers who never left California.

The trucking companies supporting Section 611 argue that a driver would have to pull off the road at inconvenient times or in potentially unsafe situations to take a break. That is simply not true. In fact, case law has specifically established that employers do not have to require employees to take a break – they simply must permit it by relieving employees of duties or pay employees for the time.

Moreover, it is disingenuous for some in the trucking industry to imply that the need for this legislative fix was caused by one "rogue" Ninth Circuit court decision. California changed its meal and rest break law in 2000 – 16 years ago – to provide a monetary remedy of an additional hour of pay to an employee if an employer does not allow for a meal or a rest break.

The 2014 *Dilts* decision regarding meal and rest breaks cites multiple cases setting the precedent for the decision. In addition, the U.S. Department of Transportation (DOT) filed an amicus brief in this case in support of the drivers, marking the first time the Federal Government has taken a position on intrastate pre-emption. DOT argues that there is a presumption against pre-emption in areas of traditional State "police power" or control, and that labor laws are a clear area of traditional State control. DOT also notes that Federal rules requiring a 30-minute rest break do not apply to short-haul drivers. Therefore, if Section 611 were enacted, short-haul intrastate drivers would not receive any rest break protection under Federal or State law.

DOT's brief also cites a finding from a decision by the Seventh Circuit Court of Appeals, well known for its pro-business decisions, in a trucking case that found that any changes to economic inputs may raise the cost of doing business, but that does not rise to the level of challenging pre-emption. In *S.C. Johnson & Son, Inc. v. Transport Corp. of America, Inc.*, 697 F.3d 544 (7th Cir. 2012), the Seventh Circuit found:

> [L]abor inputs are affected by a network of labor laws, including minimum wage laws, worker safety laws, anti-discrimination laws and pension regulations. Capital is regulated by banking laws, securities rules, and tax laws, among others. Technology is heavily influenced by intellectual property laws. Changes to these background laws will ultimately affect the cost of these inputs, and thus, in turn, the

> price… or service of the outputs. Yet no one thinks that the ADA or the FAAAA preempts these and the many comparable State laws. *S.C. Johnson & Son, Inc.*, 697 F.3d at 558.

The Ninth Circuit's *Dilts* decision very clearly spells out that California's labor laws, particularly related to intrastate truck drivers in this case, are not preempted under the 1994 F4A pre-emption provision:

> Although we have in the past confronted close cases that have required us to struggle with the "related to" test, and refine our principles of FAAAA preemption, we do not think that this is one of them. In light of the FAAAA preemption principles outlined above, California's meal and rest break laws plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt. They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly…They are normal background rules for almost all employers doing business in the state of California. *Dilts,* 769 F.3d at 647.

Therefore, Part (A) of Section 611 goes far beyond addressing the concern that drivers may face different rules in different States in interstate commerce. If enacted, it would deny drivers who operate under one set of rules, in one State, coverage under laws designed to ensure adequate rest on the job. The language also legislatively overturns a body of case law that has consistently upheld labor protections for truck drivers.

Part B: Preempting Fair Pay for Truckers

Part (B) of Section 611 restricts the ability of States to improve truck driver working conditions and pay. The language dictates that the "piece rate" (or pay-by-the-load) a trucking company offers as compensation to a driver supersedes State laws that require compensation for time a driver spends doing tasks such as loading or unloading or being detained – in other words, any time a truck's wheels are not turning.

California Piece-Rate Pay

Several Federal district court and California State appellate court decisions between 2011 and 2013 have redefined piece-rate pay in California. Piece-rate or per-trip pay is common in many industries, such as trucking, agriculture, automotive repair shops, and others. Prior to 2011, employers who paid by the trip or piece were considered to be in compliance with Federal and State minimum wage laws provided that an employee's average hourly wage (total compensation over a work period divided by total hours worked) was at the minimum wage level or higher.

The problem, however, was that "non-productive" work hours – such as a truck driver waiting at a loading dock, or a strawberry picker waiting to be transported to and from the field, or an auto repair shop employee waiting in between jobs – was untracked and unpaid. A series of class action cases brought against employers for unpaid time all were found in favor of employees. In

each decision, employers were found to be in violation of California's minimum wage law if they calculated average hours worked through piece rate because, if non-productive time is not separately compensated, the employees were not compensated at all. Two cases involved truck drivers – one for Safeway and one for Con-way Freight – and the courts specifically found that pay by the load (as calculated in the trucking industry) did not provide compensation for activities such as loading and unloading because they were not included in the piece-rate.

In response to these decisions, California passed a new law (effective January 1, 2016) requiring the following for anyone paid on a piece-rate basis:

- Separate tracking of compensation for the time to take rest and recovery breaks, which must be paid at an hourly rate of the greater of the State minimum wage or the employee's average hourly wage for the week. (Importantly, based on a separate 2012 court decision, employers do not have to require employees to take a break – employers must permit it and relieve the employees of duties or pay them for the rest break.)

- Separate compensation for "non-productive" time under the employer's control that is not being compensated in the piece-rate formula, at an hourly rate no less than minimum wage.

The effect of this new law is employers will have to begin tracking non-productive time, which gets at the heart of the detention time issue in trucking.

If part (B) of Section 611 is enacted, interstate and intrastate truck drivers in California will be stripped of these protections that specifically track pay for time detained. Congress should be looking at ways to help the men and women in the trucking industry to earn living wages, not passing laws that further put the squeeze on drivers as they fight gridlock to deliver loads.

Congressional Intent

Finally, some of my colleagues on the other side of the aisle have argued that the Ninth Circuit Court of Appeals *Dilts* decision undermines Congressional intent. In fact, Section 611 represents a sweeping expansion of Federal pre-emption that Congress enacted in 1994. The Conference Report (H. Rept. 103-677) accompanying the 1994 law (P.L. 103-305) very clearly lays out the background and situation Congress was intending to address – direct economic regulation of intrastate trucking by States, through direct actions such as "entry controls, tariff filing and price regulation, and types of commodities carried".

The trucking industry was deregulated by Congress in the Motor Carrier Act of 1980. The Conference Report accompanying the 1994 law notes that, in 1994, 41 States continued to regulate intrastate prices, routes, and services of motor carriers and 26 States strictly regulated trucking prices. The Report further states that such regulations were usually designed to ensure that prices "are kept high enough to cover all costs and are not so low as to be 'predatory'. Price regulation also involves filing of tariffs and long intervals for approval to change prices." In other words, States were still directly dictating the rates and prices motor carriers could charge for movement of goods through the particular State.

The broad pre-emption language was added in Conference. The House bill had no provision, and the Senate bill had a provision narrowly tailored to apply pre-emption to intermodal all-cargo air carriers. The Senate provision was inserted to address an inequity in which the Ninth Circuit Court of Appeals, in a separate decision, determined that Federal Express (FedEx) was not subject to intrastate economic regulations for motor carriers because FedEx could rely on pre-emption under the Airline Deregulation Act of 1978 because it was an air carrier. *See Fed. Express Corp. v. Cal. Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert denied*, 112 S.Ct. 2956 (1992). UPS, however, remained regulated as a motor carrier, "putting it at a competitive disadvantage in a number of States." H. Rept. 103-677. After the Federal Express Corporation decision, California and other States began to enact laws extending the pre-emption to other carriers affiliated with direct air carriers, but some segments of the motor carrier industry, such as owner-operators, were still subject to regulation. Therefore, Congress was attempting to fix a glaring competition issue that placed certain companies at an advantage.

The law in 1994, which still stands today, also enumerated that States could continue to exercise regulatory authority in areas such as safety, vehicle size and weight, insurance requirements, and hazardous materials routing. Almost all of the 21 laws that would be pre-empted by Section 611 were in place in some form in 1994, yet Conferees never mentioned meal or rest break laws as problematic, or part of what was being contemplated under the types of troublesome activity at the State level that was impeding commerce.

Therefore, it is disingenuous to imply that Section 611 is simply a restoration of Congressional intent in 1994, because Congress never contemplated meal and rest breaks when enacting the law.

Conclusion

Section 611 has no place in a Federal Aviation Administration reauthorization bill. This is a trucking issue. Last year, the Conference Committee on the FAST Act (P.L. 114-94) rejected this identical language. I strongly opposed this provision in the FAST Act and continue to strongly oppose it in this bill.

Section 611 is strongly opposed by the Teamsters, safety advocates, and the American Association for Justice. The trucking industry is split on Section 611. Smaller owner operators – which represent more than 90 percent of the companies in the industry – strongly oppose Section 611.

If the intent is really to solve an interstate commerce problem, this language completely – and purposefully – misses the mark. It is an expansive hacking away at the ability of a State to promote healthy working conditions for truck drivers.