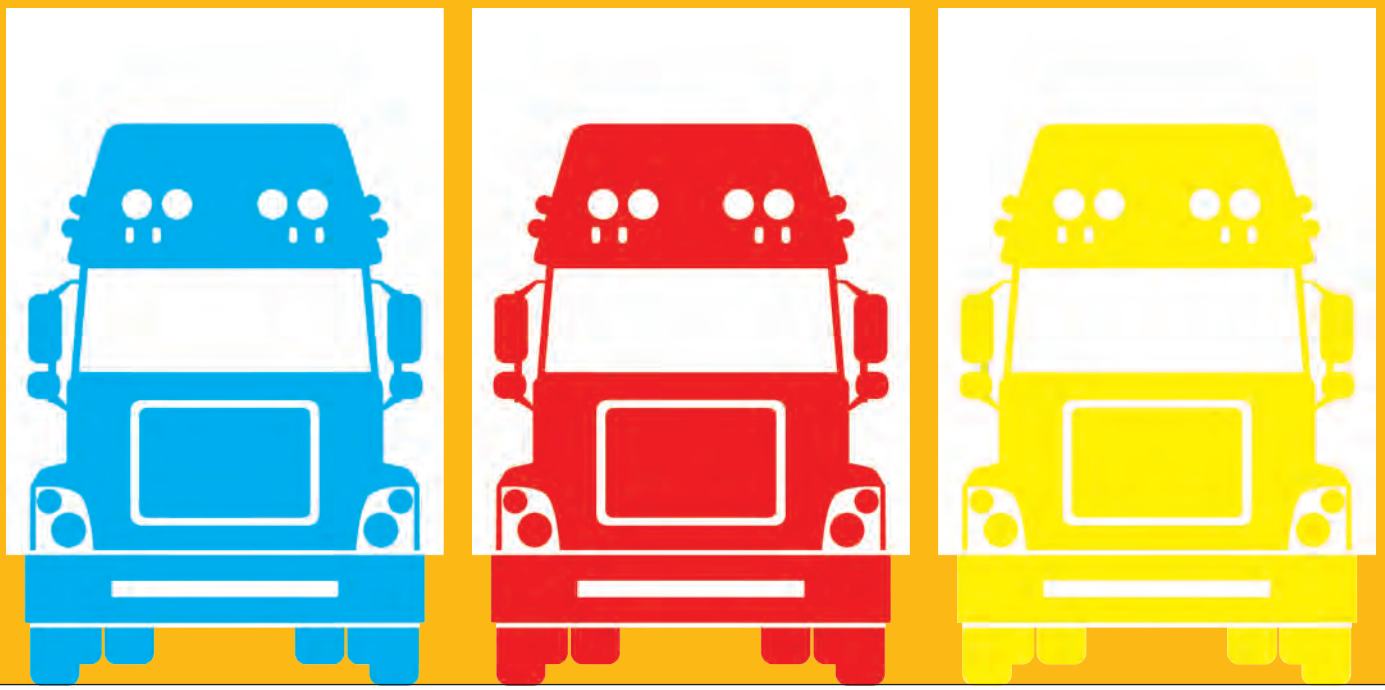
RULES OF THE ROAD

by LOUIS M. MARLIN

On May 11, 2015, the United States Supreme Court denied the petition for certiorari in *Dilts v. Penske Logistics, LLC*, likely putting to rest once and for all whether California's employee-friendly labor laws relating to meal and rest breaks are or are not preempted by the Federal Aviation Administration Authorization Act (FAAAA—often referred to as the "F Quad A"). *Penske Logistics, LLC v. Dilts*, 135 S. Ct. 2049 (2015) (denying petition for certiorari).

In *Dilts*, the certified class brought an action seeking to recover for the defendant's alleged failure to provide legally compliant meal and rest breaks pursuant to Cal. Labor Code §§ 226.7, 512, and the Cal. Code Regs. Title 8, § 11090. The FAAAA provides that "States may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Relying on its determination that the California meal and rest break requirements impose a "fairly rigid" regime for the timing of such breaks, the district court granted the defendant's motion for summary judgment, concluding that the FAAAA preempted the relevant portions of the California Labor Code because compliance with the meal and rest break requirements would indirectly affect the price, route, or service of motor carriers.

With numerous intrastate trucker cases pending in federal courts throughout California, the Ninth Circuit took up the *Dilts* matter, resulting in several cases being stayed by district courts, or held in the Ninth Circuit pending the resolution of *Dilts*. Issued in July 2014, and now not subject to any further



review, the *Dilts* decision appears to have put to rest, once and for all, the issue that has plagued the California trucking industry with its often unique challenges as to staffing and scheduling. Simply put, the Ninth Circuit, three-judge panel held that California's timing requirements for meal and rest breaks are not preempted: "[G]enerally applicable background regulations that are several steps removed from prices, routes, or services, such as prevailing wage laws or safety regulations, are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide. Such laws are not preempted even if they raise the cost of doing business or require a carrier to re-direct or re-route some equipment." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2049 (2015).

With the United States Supreme Court's denial of certiorari, the question for attorneys and their clients on both sides of the numerous pending intrastate trucking cases is, "what is next?" The fact that preemption does not apply does not mean that these cases are easy to resolve. Trucking cases involve unique issues with which both sides may struggle. By example, the question arises as to how a driver can take a legally compliant, ten-minute, duty-free, paid rest period when he or she is only paid by the distance driven (*i.e.*, when the wheels are turning). And, even if drivers are given hourly wages during non-drive time, what evidence exists that breaks are, or are not, being taken in light of the schedules and routes drivers are assigned? That question raises the issue of what information or data will companies, or the drivers, provide as to their work and route history to substantiate the number of meal and rest breaks that have been missed.

In addition, there are other compensation issues that remain unresolved, such as whether drivers are being properly compensated for non-driving time such as vehicle inspections, re-fueling, and delivery and pick-up stops. Also, the issue of whether drivers are properly classified as independent contractors or whether they are, in reality, employees is a frequent and difficult stumbling block to case resolution. These and similar issues are indicative of the unique challenges that face the parties involved with trucking industry matters.

For those parties attempting to resolve these matters through mediation, a number of pre-mediation steps, all of which are based upon the cooperation of the parties, may well facilitate satisfactory resolution. They include:

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1. The plaintiffs should provide copies of any evidence they have to establish claims such as the number of missed meal or rest breaks. To protect unnamed claimants (such as absent class members), this information could be provided without identifying information to defense counsel, with the mediator verifying the existence of a link to actual people by privately reviewing unredacted versions of the information.

2. The trucking company should be transparent in disclosing what data it maintains regarding employment history, compensation history, driving and route history, as well as what "real time" analysis and data systems it employs in connection with its trucks.

3. This data should be subject to an agreed-upon protective order, and thereafter the plaintiffs' counsel should be given an opportunity to have it, or an acceptable sample of the data, analyzed by their own expert.

4. Again subject to a strict "mediation only" protective order or written agreement, the parties should exchange their experts' analysis of all relevant data prior to the mediation date so, at a minimum, the parties will understand where their experts disagree. If possible, the experts should be given a chance to communicate to see if they can resolve their differences.

5. Each side should separately participate in a telephonic conference with the selected mediator in advance of the mediation to address what are perceived as stumbling blocks to a meaningful session so that the mediator can attempt to address the same, either prior to the mediation or at the beginning of the session.

Thus, while the denial of certiorari in the *Dilts* case clarifies, to a large degree, the fact that many California Labor Code protections are not preempted by the FAAAA, challenges to resolution of these cases remain. Cooperative counsel, working with a knowledgeable mediator, will be the key to successful case resolutions.

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