3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Oklahoma, is amended by removing Channel 268A at Nowata and by adding Collinsville, Channel 268C3.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 95–16116 Filed 6–29–95; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 383

[FHWA Docket No. MC–95–16]

Commercial Driver's License; Waiver for Pyrotechnics Industry

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of final disposition.

SUMMARY: The FHWA is issuing its decision generally denying a waiver from the commercial driver's license (CDL) regulations (49 CFR Part 383) to certain drivers employed by the pyrotechnics industry. The FHWA is granting alternate relief which would enable a willing State to substitute, in very limited circumstances, demonstrated training for the requirement of a written hazardous materials endorsement examination. The American Pyrotechnics Association submitted a petition on March 6, 1995, requesting waivers from the CDL testing and licensing standards for certain drivers transporting fireworks to displays during the period of Independence Day celebrations. Under the notice of petition, request for comments, issued May 10, 1995 (60 FR 24820), part-time drivers who have an otherwise valid driver's license and a good driving record, as well as licenses or permits issued by applicable State or local agencies certifying that they are approved pyrotechnic operators, would have been eligible for a waiver from the CDL standards. As proposed, States would have been authorized to issue waivers for the transportation of less than 500 pounds of fireworks classified as DOT Class 1.3G explosives, from June 30 through July 6 of each year, provided that the vehicles transporting such fireworks had a gross vehicle weight rating (GVWR) of less than 10,001 pounds and were operated within 300 miles of the site of origin. The FHWA requested public comment on whether, if granted, the proposed waiver would be contrary to the public interest or diminish the safe operation of commercial motor vehicles. The comment period closed on June 9, 1995. Based upon the information submitted by commenters, and a late rebuttal to the adverse comments presented on behalf of the petitioners, the FHWA has concluded that it does not have the requisite empirical evidence available to make the safety finding necessary to grant a full waiver from the CDL provisions. Nevertheless, the FHWA will allow States to substitute an alternate demonstration of knowledge for certain hazardous materials endorsement testing provisions, provided that drivers availing themselves of this relief obtain an otherwise valid CDL and have completed appropriate hazardous materials training that meets the standards adopted by the Research and Special Programs Administration (RSPA) at 49 CFR 172.704. Consequently, the petition is denied except to this very limited extent.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Redmond, Office of Motor Carrier Standards, (202) 366–4001, or Mr. Raymond W. Cuprill or Mrs. Allison Smith, Office of the Chief Counsel, HCC–20, (202) 366–0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW, Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

The Commercial Driver's License (CDL) regulations, issued pursuant to the Commercial Motor Vehicle Safety Act of 1986 (CMVSA) (Title XII, Pub. L. 99–570, 100 Stat. 3207, 3207–170) (49 U.S.C. 31502), are found at 49 CFR Part 383 (1994). Section 383.23 of the regulations sets forth the general rule that no person shall operate a commercial motor vehicle (CMV) unless such person (1) has taken and passed a knowledge test and, if applicable, a driving test, which meets Federal standards, and (2) possesses a CDL, which is evidence of having passed the required tests. These Federal standards ensure that each driver of a CMV: (1) has a single driver's license and a single driving record, (2) is tested for the knowledge and skills needed to drive a vehicle representative of the vehicle that he/she will be licensed to drive, and (3) is disqualified from driving a CMV when convicted of certain criminal offenses or traffic violations. Drivers operating CMVs that haul hazardous materials requiring placarding are also required to take and pass a specialized knowledge test to obtain a hazardous materials endorsement to their licenses.

The term ''commercial motor vehicle'' is defined to include, a motor vehicle:

(1) With a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a GVWR of more than 10,000 pounds; or

(2) With a GVWR of 26,001 or more pounds; or

(3) Designed to transport 16 or more passengers, including the driver; or

(4) Used in the transportation of quantities of hazardous materials which require the vehicle to be placarded under the Hazardous Materials Transportation Regulations (49 CFR part 172, subpart F), 49 CFR 383.5 (1994).

Waivers

Section 12013 of the Commercial Motor Vehicle Safety Act of 1986 (the Act) authorizes the Secretary of Transportation to waive any class of drivers or vehicles from any or all of the provisions of the Act or the implementing regulations if the Secretary determines that the waiver is not contrary to the public interest and does not diminish the safe operation of commercial motor vehicles. The regulatory procedures governing the issuance of waivers are found at 49 CFR 383.7 (1994). The authority to issue waivers has been delegated to the FHWA at 49 CFR 1.48 (1994).

Petition

The American Pyrotechnics Association, a non-profit group representing the pyrotechnics industry, petitioned the FHWA to reconsider its previous determinations,[1] and grant a

[1] The FHWA had denied a petition for a CDL waiver filed by the American Pyrotechnics Association. *In the Matter of American Pyrotechnics Association*, Petition No. 91–03, May 3, 1991. See also, Administrator Larson's letter dated July 5, 1991, denying the American Pyrotechnics Association's request for reconsideration. Both of these documents are available for inspection and copying from the docket file MC–95–16.

CDL waiver to part-time drivers involved in fireworks displays. This petition was submitted on March 6, 1995. Petitioner asserted that the requested waiver would only be available to part-time employees who drive small vehicles containing limited quantities of fireworks over short distances within a period of seven days. All permanent fireworks employees will continue to be required to possess CDLs as part of their basic job qualifications. Moreover, all part-time employees falling within this proposed waiver would have been required to complete fireworks specific training pursuant to 49 CFR 172.704.

Petitioner argued that the waiver is necessary because the fireworks industry has faced serious problems in delivering small fireworks displays to customers located in remote areas since implementation of the CDL rule in 1992. In order to respond to thousands of requests by Fourth of July celebrants, such as small townships, the companies must rely on part-time drivers who not only drive to the display sites, but also handle and discharge the fireworks. Most such technicians work full-time at other jobs, but return each year to the fireworks industry because of their interest in fireworks displays and the opportunity to earn extra money. Petitioner claimed that these individuals would not go through the trouble and expense of obtaining a CDL, which required preparation for irrelevant endorsement examinations that cover all hazardous materials, in part because they do not receive sufficient compensation to make the effort worthwhile. Moreover, these are not professional commercial drivers transporting hazardous materials, but persons who derive their livelihood from other professions, typically school teachers, and are involved in the fireworks business for several days every year. Due to the extensive use of such seasonal employees by the fireworks industry to meet the peak demands of the Fourth of July season, Petitioner asserted that the proposed waiver would alleviate the need for those employees to obtain a CDL, while still requiring that they meet extensive Federal safety and local licensing requirements specific to the transport and handling of fireworks.

In addition, Petitioner asserted that the transportation of fireworks for displays in small communities is provided by vehicles, generally having a GVWR of less than 10,001 pounds, for which a CDL would not be required but for the hazardous nature of the cargo. The vehicles are largely pickup trucks and vans for which no special vehicle operation skills are required.

Proposed Waiver

In order to provide relief to the pyrotechnics industry, the FHWA proposed to authorize a limited waiver to be granted by States, at their discretion, from the CDL testing and licensing standards, without jeopardizing Federal funds. The proposed waiver authority would have been available to drivers 21 years of age who hold a valid operator's license, and drive solely on a part-time basis for the pyrotechnics industry. The term ''part-time driver,'' as used in the notice, referred to drivers working for the pyrotechnics industry for no more than 7 consecutive days per year (June 30 through July 6) and involved in the transportation of fireworks to be used in pyrotechnics displays. Drivers would also have been required to hold the appropriate license and approval as a pyrotechnic operator issued by State or local authority having jurisdiction in accordance with State law and to carry documentation certifying that he/she has received fireworks-specific transportation safety training pursuant to 49 CFR 172.704. A waiver would not have been available to drivers convicted of a ''serious traffic violation'' as defined in 49 CFR 383.5, in any type of motor vehicle during the preceding 12 month period.

A waiver from the CDL requirements would only have been valid for the period from June 30 through July 6; would have authorized the transportation of only 500 or less pounds of fireworks classified as DOT Class 1.3G explosives; and would have been limited to the operation of Group C vehicles (GVWR of less than 10,001 pounds), as defined in 49 CFR 383.91.

Waivers would have been granted for vehicle operation within a 300-mile radius from the driver's work reporting location. Neighboring States would have discretion to recognize such waivers provided the driver and the vehicle were operating within the 300-mile radius. The final decision on whether to implement a waiver program would have rested with the individual States.

Docket Comments

The FHWA received over 450 responses to its request for public comment. The agency received over 400 letters from part-time drivers for the pyrotechnics industry who would presumably qualify for the waiver as described in the notice of petition. These comments were in support of the agency's proposal. For the most part, these comments were form letters requiring only that the writers fill in the blanks with information regarding what State they were licensed in, how many years they had been driving for the pyrotechnics industry, and what their full-time occupation was. These letters failed to provide any specific information or data that the agency should consider when determining whether or not the proposed waiver would be contrary to the public interest or would diminish the safe operation of CMVs.

The FHWA also received 20 letters from pyrotechnic fireworks companies. These letters also were, for the most part, form letters that voiced strong support for the proposed waiver, but failed to respond to the agency's specific inquiry whether the proposed waiver would be contrary to the public interest or would diminish the safe operation of CMVs. These letters, and one from an industry association, the Pyrotechnics Guild International, reiterated the oppressiveness of the Federal regulation on their industry and the high cost to part-time drivers of obtaining a CDL, but failed to provide any empirical evidence establishing the actual safety of the proposed waiver.

The West Virginia Department of Transportation stated that the waiver would not significantly affect highway safety, noting that the vehicles covered are small trucks and vans that do not require special training to operate. However, they did express concern over the waiver of drug and alcohol testing requirements.

Commenters opposed to the waiver included nine State Departments of Transportation, Motor Vehicles, Police, the American Trucking Associations, Inc., and the National Association of Independent Insurers.

The Michigan Department of State Police, Motor Carrier Division, Hazardous Materials Section, opposed the waiver of these drivers for several reasons. They objected to the waiver from the requirements for alcohol and controlled-substances testing, and stated that the fact that these individuals were part-time drivers of hazardous materials was all the more reason to require them to meet the CDL standards. The States of Indiana and Wisconsin reiterated this comment. The Michigan Department of State Police also pointed out that the size of the vehicle is not the key issue, but rather the load that is being transported. ''Explosion from a load of fireworks is the same, from a response point of view, whether in a pick-up truck or a tractor-trailer.''

The Maryland Motor Vehicle Administration (MMVA), in its opposing comments, noted that the time

period for the waiver is usually a holiday week-end with heavier than normal week-end traffic. They also asserted that the limited time period for the waiver is potentially confusing for law enforcement, and that there is no difference in the level of danger imposed by 500 pounds of explosives during the waiver period than there is at any other time during the year. The States of Indiana, Tennessee, South Carolina, and Wisconsin had similar comments. The MMVA also noted that this is the third year that these drivers have been required to obtain CDLs with a hazardous materials endorsement, thus the industry can no longer claim surprise at the requirement. The Idaho Transportation Department, in its comments, notes that the question of compensation does not justify a waiver of the CDL requirements. Moreover, the pyrotechnics industry's assertion that its drivers must pass a hazardous materials test covering all hazardous materials, when they in fact transport only one type, could also be advanced by those drivers who solely transport fertilizer, propane, or any other single type of hazardous material. Arguably, those drivers could also demand a waiver from the CDL standards.

The American Trucking Associations, Inc. (ATA), also provided comments in opposition to the waiver. The ATA asserted that the FHWA had not met the statutory two-pronged test required before the agency can issue a waiver [49 U.S.C. 31136(e)]. Absent that finding, the ATA stated that issuing a waiver would be unlawful. The Association also found the proposed waiver irrational from a safety perspective, noting that transportation of 500 pounds of explosives within a 300-mile radius over a seven day period could add up to thousands of miles and numerous movements. Moreover, the ATA found it irrational to issue waivers to inexperienced drivers who only operate on a part-time basis. Finally, the ATA strenuously opposed the waiver of alcohol and controlled substances testing.

The National Association of Independent Insurers (NAII) opposed the proposal for similar reasons. ''Our concern is that if the petition is granted, operators who have not proven their competency, knowledge, or experience will be transporting highly hazardous incendiary materials with low flash points, on the national highway system. By petitioner's own admission, these drivers are seasonal part-timers rather than highway professionals. NAII is of the opinion that no exceptions should ever be made in the driver qualification requirements for the hauling of hazardous materials. Not only are the lives of the drivers hauling the pyrotechnics at risk, but the general public is also needlessly exposed.''

The American Pyrotechnics Association filed reply comments to the docket on June 20, 1995. Although these comments were filed after the docket closed, it is FHWA policy to give consideration to comments it can reasonably review and analyze before a decision is made. The APA took issue with the assertion that the ''freight industry'' stood ready to deliver fireworks materials, and contended that that alternative is just not practically available. The petitioners also stressed its position that the requirement to pass a largely irrelevant test placed a substantial burden in preparation time on people who were committing themselves to employment for only a few days a year for a few hundred dollars in compensation. The APA concluded that most of the part-time employees would simply opt to stay home. The APA reiterated its argument that the people engaged in the display of fireworks on the 4th of July are very safety conscious and that it was unaware of ''any transportation incidents over a twenty-year period involving fireworks in the size and type of vehicle described in this petition.''

FHWA Response to the Comments

The provisions of the CMVSA outlining the CDL regulations were specific and prescriptive. Congress, as a means to ensure the safety and qualification of drivers of commercial vehicles, not only mandated that minimum Federal testing standards be established for the operation of CMVs, but also required that each person receiving a CDL pass the written and driving test for the operation of a CMV which complies with the minimum Federal standards. Moreover, Congress expressly outlined requirements for those individuals who transport hazardous materials. Transporters of hazardous materials are required, by statute, to have a working knowledge of the hazardous materials regulations, the handling of hazardous materials, the operation of emergency equipment used in response to emergencies arising out of the transportation of hazardous material, and the appropriate response procedures to be followed in such emergencies. The intent behind these requirements was to maximize highway safety.

In addition to the enforcement of the CDL requirements, the FHWA is also charged with the statutory duty to issue a waiver from any of its requirements only if such waiver is in the public interest and consistent with the safe operation of commercial motor vehicles. If the agency cannot make a compelling finding that the statutory requirement is satisfied, it cannot lawfully issue a waiver.[2] Again, the paramount goal behind this requirement is highway safety.

The FHWA acknowledges that neither those in favor of the proposed waiver, nor those opposed, offer any meaningful scientific or other data regarding accident rates or the safety risk of transporting limited quantities of hazardous materials by these part-time drivers. Both experienced and inexperienced operators drive pickup trucks and vans every day in every location without benefit of a CDL. The nature of a cargo of fireworks has little, if any, effect on vehicle handling. Moreover, the likelihood of any explosion from properly packaged fireworks in highway collisions is minimal and was not even addressed by any of the commenters, nor was any mention offered of a single incident where the presence of fireworks in a pickup truck or van was a contributing or aggravating factor in a highway accident. The United States Court of Appeals has ruled that prior safe driving history, in and of itself, is not an adequate basis for making a waiver determination. The statutory standard, as interpreted by the Court, is that the agency may grant a waiver only after determining such an action is consistent with the safe operation of CMVs. [See *Advocates for Highway and Auto Safety* v. *FHWA*, 28 F.3d 1288, 1294 (D.C. Cir. 1994)]. Consequently, the decision of the FHWA must be the one that most reasonably fulfills that charge.

Grant of Alternate Relief

The FHWA, based upon the information presented in response to the docket comments, has concluded that some relief from certain testing requirements is justified in this instance, and therefore will allow States, at their discretion, to dispense with the requirement that part-time drivers for the pyrotechnics industry take the FHWA endorsement test for hazardous materials. In lieu of this testing requirement, States may only accept the training requirements outlined in 49 CFR 172.704, if the State believes that this training adequately prepares drivers meeting the other requirements of the waiver to deal with fireworks and the potential dangers posed by their transportation and use.

[2] See *Buck v. U.S. Department of Transportation*, U.S. Court of Appeals for the D.C. Circuit, No 94–1094, decided June 13, 1995.

These part-time drivers will remain subject to the general knowledge and skills testing required by the CDL for the class of vehicle they will be operating, as well as to alcohol and controlled substances testing. Drivers will not be limited to the 300-mile radius outlined in the proposed waiver, since they will, for all purposes, hold a valid CDL without restriction as to distance.

The FHWA has determined that this limited action is consistent with the two-pronged statutory test required for issuance of a waiver. The hazardous materials endorsement test currently administered by State licensing agencies provides no assurances that tested individuals have acquired any knowledge or skills specific to the handling of fireworks. In fact, review of samples of such tests revealed an absence of any material specific to fireworks. The FHWA believes that the training required under the RSPA regulations would provide sufficient assurances that the driver has received pertinent instruction in the requirements of the specific materials he or she is called upon to handle.

Any State opting to use this alternate method of complying with the hazardous materials endorsement requirement may issue a CDL with the following limitations clearly imprinted on its face: ''For use as a CDL only during the period from June 30 through July 6 for purposes of transporting less than 500 pounds of fireworks classified as DOT Class 1.3G explosives in a vehicle with a GVWR of less than 10,001 pounds.'' The State licensing agency may use other wording to the same effect. During the time when this limited CDL is in effect, the holder must comply with all regulations applicable to CDL holders, and will be subject to all disqualification sanctions. Operation of any vehicle transporting fireworks at any other time of the year is indicative of more than the part-time employment which provides the basis for this relief, and must be accompanied by a valid CDL for which an unrestricted hazardous materials endorsement has been issued after the administration of a required hazardous materials endorsement examination. Drivers will otherwise be required to meet all the testing and other qualifying requirements for issuance of a CDL, including the applicable drug and alcohol testing regulations, consistent with the Congressional intent behind the CMVSA. Drivers will also be required to demonstrate satisfactory completion of fireworks and/or hazardous materials specific training to ensure proper handling.

Although this action provides partial relief to part-time drivers who find much of the material covered on the hazardous materials test irrelevant to the transportation of fireworks, it continues to ensure that these drivers are familiar with the proper transportation of fireworks and hazardous materials. Because the drivers meet the requisite CDL training and an acceptable level of hazardous materials and/or fireworks specific training, this relief is not only consistent with the safe operation of commercial vehicles, but also furthers the public interest of facilitating the traditional celebration of the Nation's birthday as safely as in the past.

(Title XII of Pub. L. 99–570, 100 Stat. 3207–17–; 49 U.S.C. 31502; 49 U.S.C. 31136; 49 CFR 1.48; 49 CFR 383.7; 23 U.S.C. 315)

Issued on: June 27, 1995.

Rodney E. Slater,

Federal Highway Administrator.

[FR Doc. 95–16139 Filed 6–27–95; 3:45 pm]

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