

CA/26719

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 391

[Docket No. FHWA-97-2759] - 1

RIN 2125-AE19

English Language Requirement; Qualifications of Drivers

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Advance Notice of Proposed Rulemaking (ANPRM); request for comments.

SUMMARY: The FHWA is considering a revision to the requirement in 49 CFR 391.11(b)(2) of the Federal Motor Carrier Safety Regulations (FMCSRs) that drivers of commercial motor vehicles operated in interstate commerce be able to read and speak the English language sufficiently to converse with the general public, understand highway traffic signs and signals, respond to official inquiries, and make entries on reports and records. In the interests of safety and civil rights, the FHWA is attempting to reconcile its obligation to assure adequate communication on the part of commercial motor vehicle drivers with concerns of possible discrimination raised by the present rule.

DATES: Comments must be received on or before October 27, 1997.

ADDRESSES: Signed, written comments should refer to the docket number that appears at the top of this document and must be submitted to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All comments received will be available for examination at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

FOR FURTHER INFORMATION CONTACT: Mr. Richard H. Singer, Office of Motor Carrier Research and Standards, HCS-10, (202) 366-4009; or Mr. Charles E. Medalen, Office of the Chief Counsel, HCC-20, (202) 366-1354, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. [TDD number for the hearing impaired: 1-800-699-7828] Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except federal holidays.

SUPPLEMENTARY INFORMATION:

Background

On December 23, 1936, as part of its newly-promulgated "Motor Carrier Safety Regulations," the Interstate

Commerce Commission (ICC) established an English language requirement for drivers of motor vehicles operated in interstate or foreign commerce by common and contract carriers. The original wording, as contained in paragraph 3 of Part I [Qualification of Drivers] required that:

On and after July 1, 1937, no motor carrier shall drive, or require or permit any person to drive, any motor vehicle operated in interstate or foreign commerce, unless the person so driving possesses the following minimum qualifications: * * * (k) Ability to read and speak the English language, unless the person was engaged in so driving on July 1, 1937 or within one year prior thereto, but in any case ability to understand traffic and warning signs. (1 M.C.C. 1, at 18-19)

The preamble explained that an English language requirement was * * *

* * * amply supported by the record. It is evident that ability to read and speak English is important to any adequate compliance with safety regulations. Cognizance has been taken, however, of the existence in certain areas of numbers of drivers in present service who are unable to read or speak English, but even in these cases the ability at least to understand traffic and warning signs is required. (1 M.C.C. 1, at 7-8)

On May 27, 1939, the ICC made certain changes and additions to the Motor Carrier Safety Regulations, including elimination of the exceptions granted by the original rules for those drivers unable to read and speak English. As stated in that notice, "The intent of the Commission to require such ability of all drivers in this service has been unmistakable since 1937, and the intervening period of more than two years is regarded as sufficient to justify the removal of the exception." (14 M.C.C. 669, at 675)

Present Requirement

Section 391.11(b) of the FMCSRs currently states,

Except as provided in Subpart G [Limited Exemptions] of this part, a person is qualified to drive a commercial motor vehicle if he/she—

* * * (2) Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records.

It has been brought to the attention of the Department of Transportation that the wording of this requirement might occasion a conflict with Title VI of the Civil Rights Act of 1964, which prohibits discrimination in the administration of federally funded programs based on race and national origin.

The American Civil Liberties Union (ACLU) raised this issue in a letter to

the Department's Office of Civil Rights. The ACLU also believes that, as written, the English-speaking requirement is overly broad and subject to arbitrary enforcement, causing potential interference with constitutional guarantees of due process and equal protection. The ACLU requested an opportunity to submit a comprehensive analysis of this issue, and this notice will, among other things, afford them that opportunity.

Enforcement Practices

On January 20, 1995, the Utah Department of Transportation specifically requested guidance from FHWA relating to enforcement of the English language requirement. In its letter, Utah posed three questions: (1) Should a State establish sanctions for drivers who do not meet the language requirement? (2) Should the driver be placed out-of-service and the driver's company notified? and (3) Would a violation of 391.11(b)(2) invalidate the operator's commercial driver's license (CDL), since CDL applicants who expect to drive in interstate commerce must certify that they meet the requirements of part 391? The FHWA recognizes that section 391.11 was originally intended to be enforced through the motor carrier employer, i.e., it was the employer's responsibility to evaluate the driver's proficiency with the English language in the context of his or her duties and responsibilities. The ICC further recognized that the provisions as to qualifications of drivers embodied requirements which were "manifestly desirable"—but that final responsibility must rest with the motor carrier to " * * * satisfy himself that his drivers meet these requirements." (1 M.C.C. 1, at 6, December 23, 1936) When promulgated, the rule was not intended to be enforced at roadside. The employer was presumed to know what communication skills may be necessary for the type of cargo handled, the route to be taken, and the contact with the public that may be necessary. The FHWA never made speaking English a specific pre-requisite for the CDL, and, in fact, proposed and later authorized administration of the CDL test in foreign languages. States, however, do administer some form of test to all license applicants which is intended to demonstrate their ability to read or recognize warning signs.

NAFTA Resolution

Working Group One of the Land Transportation Standards Subcommittee established by the North American Free Trade Agreement (NAFTA) is striving to

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establish "compatibility and equivalence" between U.S., Mexican, and Canadian standards for commercial motor vehicles and drivers, as well as for motor carrier compliance. In June 1995 it adopted the following resolution: "That in recognition of the three countries' language differences it is the responsibility of the driver and the motor carrier to be able to communicate in the country in which the driver/carrier is operating so that safety is not compromised."

Request for Comments

The FHWA seeks to modify this regulation to require that drivers simply possess the basic functional communications/comprehension ability necessary to ensure safety. To replace the general requirement that drivers exhibit "English proficiency" or a "working knowledge of English," the FHWA is considering establishing a set of performance-oriented standards based on tasks a driver is expected to perform which require knowledge of the English language. The FHWA specifically requests comments addressing the following questions. However, commenters are also encouraged to include discussion of any other issues they may consider relevant to this rulemaking.

1. Are there known instances in which a safety problem occurred which could be attributed, in whole or in part, to the driver not being able to read and speak English sufficiently to understand traffic signs, or written or verbal instructions relating to the operation, loading or unloading of the vehicle? Commenters are encouraged to give a detailed description of such an occurrence, the likelihood of repetition, and how the inability to read or speak the English language played a role.

2. Do any of the States require drivers who operate commercial motor vehicles exclusively in intrastate commerce to read and speak the English language? If so, was the requirement established only to achieve compatibility with the FMCSRs? If there were other reasons for establishing such a requirement, please elaborate.

3. How do States typically determine whether or not a driver or motor carrier is in violation of Section 391.11(b)(2) or an equivalent State provision? Are there particular English phrases or terms that are used to test the driver's comprehension of the English language? Are there specific highway signs or messages that are shown to the driver?

4. Are there any cases in which State officials, exercising their authority under State law, have placed drivers out of service for being unable to read or

speak the English language, after making a determination that the driver's inability to comprehend the language created a safety risk that was too great to be ignored? If so, how did the State official determine that the safety risk was at a level that would warrant placing the driver out of service? Was the enforcement action subsequently challenged in court? What was the outcome?

5. How does one measure an individual's level of "English proficiency" or whether that individual has a "working knowledge of English"? Alternatively, what language tasks should a driver be able to perform, and what "performance-oriented" language standards should we impose to guarantee this performance?

Rulemaking Analysis and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket room at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the FHWA will also continue to file in the docket relevant information that becomes available after the comment closing date, and interested persons should continue to examine the docket for new material.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 or significant within the meaning of Department of Transportation regulatory policies and procedures. Due to the preliminary nature of this document and lack of necessary information on costs, the FHWA is unable to evaluate the economic impact of the potential regulatory changes being considered in this rulemaking. Based on the information received in response to this notice, the FHWA intends to carefully consider the costs and benefits associated with various alternative requirements. Comments, information, and data are solicited on the economic impact of the potential changes.

Regulatory Flexibility Act

Due to the preliminary nature of this document and lack of necessary information on costs, the FHWA is unable to evaluate the effects of the potential regulatory changes on small entities. Based on the information

received in response to this notice, the FHWA intends, in compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), to carefully consider the economic impacts of these potential changes on small entities. The FHWA solicits comments, information, and data on these impacts.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program. Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety.

Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

Authority: 49 U.S.C. 504, 31133, 31136, and 31502; and 49 CFR 1.48.

Issued on: August 18, 1997.

Gloria J. Jeff,

Acting Federal Highway Administrator.

[FR Doc. 97-22605 Filed 8-25-97; 8:45 am]

BILLING CODE 4910-22-P