

Responses to Questions Posed at Hearings
Held on May 31, June 1, June 16,
June 26, June 27, and July 7, 2000

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June 22, 2000

Ms. Melissa Young
Counsel, Petroleum Marketers Association
of America
1901 North Fort Myer Drive, Suite 1200
Arlington, VA 22209-1604

Dear Ms. Young:

During your May 31st testimony at the Washington, DC, hours-of-service hearing, you submitted a question. We promised a written response. I apologize for the delay.

Following is our response to your question:

Question: PMAA requests clarification of the term “workweek” as it pertains to the proposal. In section 394.107, DOT defines “workweek” as “any fixed and regularly recurring period of seven consecutive days.” For instance, a driver begins his on-duty hours at 8:00 A.M. Sunday morning and finishes at 8:00 P.M. Sunday evening. He works these same hours from Sunday through Thursday evening at 8:00 P.M. His mandatory “weekend” begins at 11:00 P.M. on Thursday and ends at 7:00 A.M. on Saturday. Thus, this driver should be able to begin a new “workweek” at 8:00 A.M. Saturday morning. However, there is some confusion in the proposed rule. We are asking DOT for a clarification of the definition of “workweek,” since it will have a great impact on productivity.

Response: The term “workweek” is defined in §§ 394.107 and 395.107 of the notice of proposed rulemaking. We seek public comment on the proposed definition, and the final rule will clarify its meaning.

I hope this information will be helpful. I would like to thank you again for your active participation in this most important rulemaking action.

Sincerely yours,

< Originally signed by: >

Julie Anna Cirillo
Acting Assistant Administrator

June 22, 2000

Mr. Timothy P. Lynch
President, Motor Freight Carriers Association
499 South Capitol Street, SW
Washington, DC 20007

Dear Mr. Lynch:

During your June 1 testimony at the Washington, DC, hours-of-service hearing, you submitted five questions. We promised written responses to your questions. I apologize for the delay.

Our responses to your questions are as follows:

Question 1: When FMCSA states that on-duty time will include “all time” on a “motor carrier’s premises,” are we to take this literally to mean from the time a driver actually arrives in the parking lot and reports to work?

Response: No. The definition the FMCSA proposes (§ 394.107) would make “on-duty time” the equivalent of “paid work” as defined by the Wage and Hour Division, U.S. Department of Labor. In other words, being in the parking lot, cafeteria, etc., before clocking in is not considered on-duty time.

Question 2: When FMCSA states that on-duty time will include “all work for non-motor carrier employers,” how is that time to be monitored and ultimately recorded on the Electronic On Board Recorder, a device that by definition is attached to the truck?

Response: This was not specifically addressed in the NPRM. We welcome public comment on this issue, including recommendations on how it might be addressed.

Question 3: It is our understanding that FLSA-related interpretations allow for “de minimus” [sic] contact with an employee off duty. However, the proposed rule will disallow any contact, including telephoning or paging that interrupts the mandatory ten-hour rest period. Is this what is intended?

Response: The proposed rule would not allow contact. We welcome public comment on this provision and suggestions that could mitigate your concern.

Question 4: When FMCSA states that a motor carrier “must agree in advance with (its) shipper, receiver, or other consignee whether the driver has the responsibility for loading or unloading cargo,” does this requirement include the daily pickup and delivery operations of LTL carriers?

Response: Yes. It is the FMCSA’s understanding that LTL motor carriers’ agreements with shippers already include this (for example, pickup by driver at designated locations, delivery to office suites within a building provided they are accessible by freight elevator, and so on.) On page 25590 of the NPRM, we note that this provision is to address the intent of Congress with respect to loading and unloading trucks as stated in H. Rpt. 96-1069, 96th Cong., 2nd Sess., June 3, 1980, pages 30 and 31, for the Motor Carrier Act of 1980, Pub. L. 96-296, July 1, 1980.

Question 5: When FMCSA states that a motor carrier's operations "must fit within one of the categories described in § 394.121," does this mean that an LTL motor carrier whose current operations fit into multiple categories must conform to a single category?

Response: No. A motor carrier's operations that conform to a specific category would have to comply with the hours-of-service regulations proposed for that category. However, a motor carrier may very well have more than one type of operation and would need to comply with more than one set of hours-of-service rules. For example, a motor carrier may have some operations whose drivers would fit into the Type 2 regional category, as well as operations using drivers that fit into a Type 4 local/short haul category.

I hope this information will be helpful. I would like to thank you again for your active participation in this most important rulemaking action.

Sincerely yours,

< Originally signed by: >

Julie Anna Cirillo
Acting Assistant Administrator

July 25, 2000

Ms. Jennifer LeFevre
Director of Government Relations
National Ready Mixed Concrete Association
900 Spring Street
Silver Spring, MD 20910

Dear Ms. LeFevre:

During your June 16th testimony at the Kansas City, Missouri, hearing on the Federal Motor Carrier Safety Administration's proposal on hours of service for commercial vehicle drivers, you submitted a question. We promised a written response.

Following is our response to your question:

Question: The Department of Transportation's (DOT) definition of "driving time" is "all time spent at the controls of a commercial motor vehicle in operation." The ready mixed concrete industry has a unique circumstance of having its manufacturing equipment (mixer drum) mounted on a truck body and powered by the same engine that propels the truck on-road. Generally, ready mixed concrete producers do not consider a driver's time spent at the job-site or at a plant as driving time although the individual may be at the controls for the mixer drum, located near the truck controls, while the truck is idling but in park. They generally only consider the time driving back and forth as driving time. However, the vagueness of this definition and the circumstance of mixer drum controls being located near truck controls creates a question over what, exactly, is considered "driving time." Are we correct in our estimation that only time spent driving the truck to a job-site and back to the plant as driving time?

Response: The proposed definition of "driving time" is identical to the definition that appears in the current rules. Under the current rules, it has been determined, by a 1988 interpretation signed by Paul L. Brennan, Director, Office of Research and Standards, that "... if the driver is operating the controls for the mixer, but is still able to reach the driving controls because he or she is still in the normal driving position, the time is recorded as on-duty time." Unless changed, this interpretation would apply to the proposed rule.

If you favor a different definition or interpretation, please submit your suggestion and rationale supporting it to the public docket (Docket FMCSA-97-2350) at the following address:

Docket Clerk
U.S. DOT Dockets
Room PL-401
400 Seventh Street, SW.

Washington, DC 20590-0001

I hope this information is helpful. I would like to thank you again for your active participation in this important rulemaking.

Sincerely yours,

< Originally signed by: >

Julie Anna Cirillo
Acting Assistant Administrator

July 25, 2000

Mr. Robert Petrancosta
Director of Safety and Environmental Compliance
Con-Way Transportation Services
110 Parkland Plaza

Ann Arbor, MI 48103

Dear Mr. Petrancosta:

During your June 26 testimony at the Vernon, CT, hours-of-service hearing, you submitted four questions. These are the written responses we promised.

Question 1: Why is there an inconsistency between § 394.121 and § 394.147?

Response: The inconsistency between proposed §§ 394.121(b)(4) -- which would require Type 4 drivers to be released from work within 12 consecutive hours after beginning work -- and 394.147(a) -- which would allow Type 4 drivers to be on duty no more than 12 hours within any period of 14 consecutive hours -- was an error. The Federal Motor Carrier Safety Administration (FMCSA) will eliminate the inconsistency in the next rulemaking document. Because the Administrative Procedure Act prohibits changes to a proposed rule through interpretations, the agency cannot discuss the

substance of the correction. We welcome public comment of this issue, including which version is preferred and the rationale for that preference.

Question 2: As the rules are proposed, our less-than-truckload companies would only be eligible for either a Type 3 or 4 operation only since all our drivers return to their domicile terminal each day or night. Specifically, in an instance when a Type 4 driver meets an unpredictable delay, such as an unusual traffic tie-up or a road closure while operating near their 12th hour that prevents the driver from making it back to their terminal; the driver must shut down his/her vehicle and take 12 consecutive hours of rest.

The problem this creates is that:

1. the driver is not prepared to spend a night away from home and has not prepared or packed for an overnight trip;
2. the driver's family back at home is impacted by an unplanned night without a family member;
3. the driver now falls under the requirements of the sudden change from a Type 4 driver to a Type 2 driver;

Is this driver, who as a Type 4 driver is not required to have an Electronic On-Board Recorder, now suddenly non-compliant since he or she is now a Type 2 driver?

Response: This was not specifically addressed in the NPRM. We welcome public comment on this issue, including recommendations on how it might be resolved.

Question 3: Section 395.201(d) states: *Type 3, 4, or 5 operation.* If you are a driver in a Type 3, 4, or 5 operation, you are not required to make or maintain on-duty and off-duty time records, unless your motor carrier requires you to do so. My question is how will the enforcement officer at the side of the road adequately determine compliance to the hours of service rules and effectively

enforce these rules?

Response: The proposed hours-of-service rules would be enforced much like the current 100 air-mile radius rule (49 CFR 395.1(e)). The enforcement official could examine the documentation carried by the driver, e.g., waybills, bills of lading, etc. If not satisfied with that information, he/she could contact the motor carrier to determine compliance.

Question 4: **The record keeping requirement for all documents will now be consistent with current Department of Labor Wage and Hour requirements. However, the proposed rules maintain a six month withholding period while the Wage and Hour requirement is two years. The preamble to the proposed rules, under Section 394.207 states that “the FMCSA would reserve the right to inspect all records the WHD requires motor carriers to maintain for the two year period.” Does this now mean that a DOT compliance review of a motor carrier may allow the inspector to review two year’s of employee time records as opposed to just six months?**

Response: Yes. That does not change the current situation, however. While 49 CFR 395.8(k)(1) requires motor carriers to retain drivers’ records of duty status for only six months, an FMCSA investigator has the right to examine all relevant documents, including wage and hour records retained for up to two years to comply with Department of Labor regulations or records of duty status the carrier may have retained beyond the required six-month period.

I hope this information is helpful. I would like to thank you again for your active participation in this most important rulemaking action.

Sincerely yours,

< Originally signed by: >

Julie Anna Cirillo

Acting Assistant Administrator

September 5, 2000

Ms. Annamarie Kane
Annamarie Kane Associates
27 Diamond Drive
Egg Harbor Township, NJ 08234-9688

Dear Ms. Kane:

During your June 27 testimony at the Vernon, Connecticut, hours-of-service hearing, you submitted eight questions. We promised written responses to your questions.

Following are our responses to your questions:

Question 1: If a driver switches from one type to another, Part 394.125 (p. 25603) states “Your driver may move between the different types of operations after the appropriate off-duty time at the end of a workday or workweek for the previous type operation.” Which is it? At the end of a workday or workweek?

Response: Section 394.125 (Motor Carrier Fatigue Prevention) and § 395.125 (Driver Rest and Sleep for Safe Operations) allow the driver to move between the different types of operations after the appropriate off-duty time at the end of either a workday or a workweek. The reference you made to page 25586 was part of the section-by-section evaluation, and the workweek scenario was **one** example used for illustrative purposes.

Question 2: Page 25582 states carriers must comply with current Part 395 hours-of-service rules and on the “exact date” of the 180 days after the final rule, all carriers must start new hours-of-service regulations. Carriers will not realistically have drivers lined up, fully qualified, ready to start work on an “exact start date.” We’re looking at increasing fleets 20-30%... overnight! Will there

be a phase-in period?

Response: Section 394.111(a) of the proposed regulations states: “You must begin using subpart A of this part applicable to each type of operation on [date 180 days after the date of publication of the final rule in the **Federal Register**].” On page 25582 of the preamble, in section IX. Implementation, we offered the following explanation: “The agency believes this should be sufficient time to make any necessary adjustments to schedules and to familiarize drivers, other motor carrier personnel, and Federal, State, and local enforcement personnel with the details of the new rules.”

Question 3. **Throughout the text of the proposal, including the regulations section, it consistently states a driver must take an off duty period...that includes at least 2 consecutive midnight to 6:00 a.m. periods before the start of the next work week. Every summary of these rules published references “midnight to 6:00 a.m.” Yet the chart assigning when a driver may start work after being off duty at the end of a work week requires two 11:00 p.m. to 7:00 a.m. off duty periods. Why don’t the rules simply state that a driver must be off duty for 2 consecutive 11:00 p.m. to 7:00 a.m. shifts? Please explain.**

Response: The preamble, at page 25587, discusses this issue at length:

As the ICC found in 1937,
‘[A]llowance must be made for eating,
dressing, getting to and from work, and
the enjoyment of the ordinary
recreations’ (3 M.C.C. 665 at 673).

“Logically, a driver cannot get full advantage of the minimum two consecutive midnight to 6:00 a.m. sleep periods if he/she is released at or just before midnight, and required to return to work at or just about 6:00 a.m. The FMCSA has chosen 11:00 p.m. as the latest time drivers could get off work and still get to sleep for

the first full midnight to 6:00 a.m. period on the first night of a 'weekend.' Likewise, the agency has chosen 7:00 a.m. as the earliest time drivers could start a new workweek and still sleep the last full midnight to 6:00 a.m. period on the last night of a 'weekend.'

“Generally, drivers would be off duty for more than the 32 consecutive hours, but fewer than the 64 consecutive hours in a 'normal weekend' (4:00 p.m. Friday to 8:00 a.m. Monday). A driver completing a workweek at 11:00 p.m., for example, could take only the minimum 32 hours before beginning the next workweek. A driver completing a work week at 11:10 p.m., though, would have to be off duty for at least 55 hours, 50 minutes before beginning the next workweek since the driver was released after 11:00 p.m. and would not have the full 'allowance * * * for eating, dressing, getting to and from work, and the enjoyment of the ordinary recreations.'

“The FMCSA is not suggesting that motor carriers provide only 32 hours that include the two consecutive midnight to 6:00 a.m. periods, or up to 55 hours 59 minutes off duty at the end of a workweek. The off-duty period that includes two consecutive midnight to 6:00 a.m. periods is only a minimum. The ICC made the mistake of assuming motor carriers would not “believe that the maximums herein prescribed will become either the minimum or the standard of hours” (3 M.C.C. 665, at 686). The FMCSA expects motor carriers to provide, and drivers to take, as much time as necessary to recover from any sleep debts and other conditions resulting from cumulative weekly fatigue.”

Question 4. What kind of flexibility will be granted to a driver who normally can complete a trip within the required hours limits but find himself running behind, even by 10 minutes and arrives at his scheduled stop (rest area) beyond the allowable hours? His EOBR will indicate a violation occurred. Worse yet, if he arrives at his scheduled rest area within the legal hours limits and there is no place to park, is there flexibility to

continue on to the next rest facility (which would put him in violation of allowable hours), or does he park on the shoulder of the road for rest?

Response: This was not specifically addressed in the NPRM. We welcome public comment on this issue, including recommendations on how it might be addressed.

Question 5. Why must a Type 1 or 2 driver maintain hours documents showing driving hours and on duty hours since there is no difference between driving and on duty-not driving?

Response: The requirement in §§ 394.201(a) and 394.301(h)(4)(iii) that electronic on-board recording devices (EOBRs) record time spent on duty but not driving is erroneous. These sections should have made clear that there is no difference between on-duty time and on-duty/not-driving time.

Question 6. Similar to the current 100 mile radius exemption, if a driver operates in a Type 4 mode for 2 days, then switches to a Type 1 or 2, will he need 7 prior day hours documents in his possession? What type of documents?

Response: This was not specifically addressed in the NPRM. We welcome public comment on this issue, including recommendations on how it might be addressed.

Question 7. If a driver works on Monday (Type 4), then takes Tuesday off for a family emergency, does he lose that day's work since a workweek is 7 consecutive days at which at the end he must take 2 midnight to 6:00 a.m. shifts off duty with a minimum of 32 hours. If he works on Saturday to make up for Tuesday, his "weekend" won't occur within the 7 consecutive days. Or does he take off Wednesday following the off duty Tuesday and start a new workweek on Thursday?

Response: Assuming the workweek began at 7:00 a.m. Monday and your hypothetical driver was on duty for 12 hours

each day, he or she would have to go off duty no later than 11:00 p.m. Saturday in order to obtain the required 32-hour “weekend.” Although the NPRM does require the “weekend” to be taken within seven consecutive days, this driver could work 12 hours per day on Monday, Wednesday, Thursday, Friday and Saturday, and still be off duty before the “weekend” began.

Question 8. What kind of statistical data can DOT provide relative to the 24 hour restart exemption to the 70 hour rule granted to the construction, utilities, and agriculture industries. Have injury or fatal accidents increased, decreased, or remained the same for these groups since implementation of this exemption?

Response: Motor carriers that use these three exemptions are not required to identify themselves to the agency, and we have no reliable means of identifying them. We therefore have no statistics, or even trend data, on injury or fatality rates for these carriers during the period since the exemptions were adopted. We welcome any data that can be made available to us regarding this matter.

I hope this information is helpful. I would like to thank you again for your active participation in this most important rulemaking action. A copy of this letter will be placed in the public docket.

Sincerely yours,

< Originally signed by: >

Julie Anna Cirillo
Acting Assistant Administrator

September 5, 2000

Mr. LaMont Byrd
Director, Safety and Health Department
International Brotherhood of Teamsters
25 Louisiana Avenue, NW

Washington, DC 20001

Dear Mr. Byrd:

During your July 7th testimony at the Washington, DC, hours-of-service hearing, you submitted 11 questions. We promised written responses to your questions.

Following is our response to your questions:

Question 1. Clarify how the EOBRs will prevent inaccurate reporting of on-duty (not driving) times that are reported as off-duty?

Response: EOBRs would automatically record the date, engine status (on/off), vehicle speed, mileage, and a continuous time scale. Since the driver would be required to take ten consecutive hours off duty each day, vehicle speed must be zero for ten consecutive hours (except in team operations). Furthermore, the driver would be required to take two hours off duty (in increments of 30 minutes or more) during the other 14 hours. Vehicle speed must be zero during those periods as well (except for team operations). While an EOBR cannot literally prevent a driver from working during his/her ten consecutive hours off duty or the two hours off duty during the regular workshift, it would prevent the driver from moving the vehicle without leaving an electronic record. Because the work performed by Type 1 and 2 drivers is mainly driving, EOBRs would make it difficult for them to drive more than 12 hours per day without detection.

Question 2. Clarify how the enforcement community will enforce the proposal -

(a) How will an officer know what type of operation the driver is operating under?

(b) How will the officer know if drivers in types 3, 4, or 5 are operating legally if no logs are maintained in the vehicle?

Response: Drivers carry with them in the vehicle bills of lading, way bills, and other motor carrier documentation. An officer would ask the driver about his/her origin and destination, etc., and look at available information to confirm the driver's response. An officer who is unconvinced could call or visit the motor carrier for additional information, as now happens while enforcing the hours-of-service regulations.

Question 3. Does DOT intend to require training for supervisors, drivers, and enforcement personnel on the various types of EOBs that will be used?

Response: Training for motor carrier supervisors and drivers has historically been furnished by the manufacturer or vendor. We have no reason to believe this practice will change. We will continue to work with our state partners to train enforcement personnel.

Question 4. Why has DOT not addressed the responsibilities of shippers and receivers?

Response: The agency has no legislative authority to regulate shippers and receivers. Section 4026 of the Transportation Equity Act for the 21st Century (TEA 21) requires the Secretary to assess the scope of the problem of shippers, freight forwarders, brokers, or other persons encouraging violations of the FMCSRs or other rules issued by the Secretary. After completion of that assessment, the Secretary may submit an implementation plan to the Congress. The assessment is currently under review and will be submitted to the Congress in the near future.

Question 5. How would the rules apply to a driver who is in one type of operation today but is in a different one tomorrow?

Response: Section 394.125 (Motor Carrier Fatigue Prevention) and § 395.125 (Driver Rest and Sleep for Safe Operations) allow the driver to move between the different types of operations after the appropriate off-

duty time at the end of either a workday or a workweek.

Question 6. How would a driver who normally operates under a type 4 operation be handled if, due to unusual circumstances, this driver is forced to spend the night away from home, thus becoming type 2?

(a) Would this driver/motor carrier be issued a citation for not complying with the requirements of type 2?

(b) What would prevent a motor carrier from operating this way frequently, yet claiming that it is an unusual circumstance?

Response: Section 394.125 (Motor Carrier Fatigue Prevention) and § 395.125 (Driver Rest and Sleep for Safe Operations) allow the driver to move between the different types of operations after the appropriate off-duty time at the end of either a workday or a workweek. What happens to a driver who is forced to spend the night away from home, thus becoming a Type 2 operation driver, was not discussed in the NPRM. We welcome public comment on this issue, including recommendations on how it might be addressed.

Question 7. Explain why 394.163 and 394.165 do not conflict when put into practice. The start times specified in 394.163 would allow a driver to drive greater than 60 hours in one week & specifically a driver would be allowed to start driving again on the seventh day. This would allow a driver to drive 72 hours in 7 days despite the requirements in 394.165 that prohibit driving greater than 60 hours in 7 days.

Response: Section 394.165(c) is an exception to the general rule. It allows Type 1 operation drivers to average their hours over a two-week period.

Question 8. Does DOT intend to provide a 32-hour restart provision for all drivers by allowing a minimum of 32 hours off-duty at the end of a workweek? If so,

**will this supersede the 60 hours in 7 days rule?
See question 7.**

Response: The 32-hour off-duty requirement is the minimum number of hours a driver can be off duty and is determined by the time a driver goes off duty. The rule would not supersede the requirement that drivers have no more than 60 hours on-duty time in seven consecutive days, but it would prevent drivers from driving every day of the workweek.

Question 9. Can DOT show how the proposed regulations would work in the real world by providing graphics that show the hours worked, breaks, time off-duty, and weekly totals?

Response: The rule speaks for itself. Some motor carriers and drivers developed charts showing how specific runs would be affected by the proposed rules. Those are available for review in the public docket.

Question 10. Why did DOT provide a 32-hour restart provision for type 1 drivers (two week flexible)?

Response: Many Type 1 drivers are away from their regular work-reporting locations for at least two workweeks. We recognize that drivers are more likely to get fully restorative sleep at home than on the road. The agency, therefore, proposed what you call a “32-hour restart provision” at the end of the first workweek in order to allow the driver to resume driving and return home as quickly as possible. The second “weekend,” however, would be much longer to bring into sync the driver’s rest needs with the requirement for no more than 60 hours in seven consecutive days.

Question 11. Why are type 5 drivers, who by definition drive less than 5 hours per day, required to take 2 hours of breaks, yet type 4 drivers, who can drive up to 12 hours per day, are not required to take 2 hours of breaks?

Response: Sections 394.147(a) and 395.147(a) both propose that “[t]ype 1, 2, 3, and 4 drivers may be on duty no more

than 12 hours within a 14-consecutive-hour period in any workday.” The charts in §§ 394.167 and 395.167 indicate that Type 4 drivers would be required to be off duty 12 consecutive hours during any workday. These two provisions are obviously inconsistent. If the 14/12 scenario is selected, there would be no conflict. We welcome public comment on this issue, including recommendations on how it might be addressed.

I hope this information is helpful. I would like to thank you again for your active participation in this most important rulemaking action. A copy of this letter will be placed in the public docket.

Sincerely yours,

< Originally signed by: >

Julie Anna Cirillo
Acting Assistant Administrator