

MOTOR CARRIER SAFETY ADVISORY COMMITTEE

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C/O: Federal Motor Carrier Safety Administration

1200 New Jersey Avenue, SE

Room W64-232

Washington, DC 20590

February 8, 2012

The Honorable Anne S. Ferro

Administrator

Federal Motor Carrier Safety Administration

1200 New Jersey Avenue, SE

Washington, DC 20590

Dear Administrator Ferro:

The Motor Carrier Safety Advisory Committee (MCSAC) commenced work on Task 12-01 at its February 2012 meeting. The Federal Motor Carrier Safety Administration (FMCSA) tasked the Committee with presenting ideas, concepts, and information the Agency should explore as it considers ways to address potential harassment of drivers in future rulemaking concerning electronic on-board recorders (EOBRs). Specifically, FMCSA asked the MCSAC what information the Agency should consider to fulfill the statutory requirement that any “regulation about the use of monitoring devices on commercial motor vehicles to increase compliance by operators of the vehicles with hours of service regulations … shall ensure that the devices are not used to harass vehicle operators.”[[1]](#footnote-1)

The MCSAC met in public meetings on February 7-8, 2012, to discuss the task. The Committee considered the five questions presented in the task statement and the resulting ideas and recommendations are attached as the Task 12-01 Report.

I submit this report to FMCSA for its consideration.

Sincerely,

//signed//

David R. Parker

Enclosure

**MCSAC Task 12-01: Measures to Ensure Electronic On-Board Recorders (EOBRs) Are Not Used to Harass Commercial Motor Vehicle (CMV) Drivers**

1. **Definition of Harassment**
2. Harassment: A course of conduct directed at a specific person that causes substantial emotional distress in such a person and serves no legitimate purpose.
   1. Terms in this definition – including “substantial emotional distress” and “legitimate purpose” – should be judged from the point of view of a “reasonable” carrier and a “reasonable” driver.
   2. Note: The perspective of the receiver of the message, or the history of interactions and experiences between the carrier and driver could influence whether conduct is considered harassment.
   3. See 49 U.S.C. § 31105(a), 29 CFR 1978.102, and 49 CFR § 392.3.
3. **Definition of Productivity**
4. Productivity: The amount of time and effort dedicated by the driver to complete the carrier’s mission safely and efficiently without violating any regulations, such as hours of service (HOS).
5. **Ideas, Concepts, and Information FMCSA Should Explore**
6. Role of FMCSA in preventing harassment: FMCSA should define harassment and prohibit carriers from participating in conduct that would result in harassment.
   1. FMCSA should consider civil penalty sanctions as deterrents for harassment.
   2. When a complaint of harassment is brought, FMCSA should seek out current regulations that appropriately address the complaint.
   3. FMCSA should consider if law enforcement would have authority to cite a carrier for a violation of “use of an EOBR in a way that harasses a driver.” How would law enforcement make that judgment?
   4. Formal, non-frivolous complaints of harassment by a driver against a carrier shall be investigated.
7. “Invasion of privacy”: Constant monitoring in a vehicle can result in monitoring during personal time (i.e., personal conveyance), which could be considered an invasion of privacy.
   1. Electronic logging devices do not record off duty activity; they record only on duty driving.
   2. Carriers need to limit contact with drivers to driving/appropriate work functions during the driver’s work period.
   3. When the driver is off duty, carriers should not repeatedly contact drivers.
      1. Exceptions to this requirement: Communications may occur to address serious conditions that would immediately affect safety, and when appropriate.
8. Potential for harassment by law enforcement:
   1. If the EOBR system goes down and the driver is unable to show the last seven days record of duty status (RODS) on the EOBR, then he would have to produce RODS in some other way, which might be considered harassment from the point of view of a driver.
      1. Drivers who show that they are in HOS compliance using an EOBR should not be required to recreate written RODS that contain redundant information provided already by the EOBR.
         1. See MCSAC Task 11-04 Report, Appendix D, Manual Inspection Flowchart, for MCSAC-recommended situation in which driver can be required to reproduce last seven days worth of RODS.
   2. Benefits of EOBRs vs. paper logs
      1. Monitoring or reviewing drivers RODS should not be considered harassment.
      2. Monitoring or reviewing RODS by enforcement officials would not increase with EOBR versus paper log. Perhaps if there were other information in the EOBR, examination of that information by law enforcement might be considered harassment.
      3. EOBRs could reduce or mitigate potential “harassment” from law enforcement (e.g., inspection goes more quickly, a lot more information available).
   3. FMCSA should consider adding a certification for non-harassment of drivers using EOBRs in a state’s annual commercial motor vehicle safety plan for states using Motor Carrier Safety Assistance Program (MCSAP) funds.
9. Potential for harassment by carriers:
   1. Trying to regulate the difference between productivity measures and carrier actions that result in harassment is difficult because it should be judged by a standard of reasonableness that could be interpreted differently based on a specific factual circumstance.
      1. Relevant factual circumstances include history of interactions between carrier and driver and whether carrier behavior constitutes a pattern.
      2. A driver should be able to save records of carrier contact with drivers.
   2. Carriers shall not take actions that put drivers in an unsafe situation.
   3. You cannot regulate bad management practices. You cannot prevent a carrier from pressuring a driver to do his/her job in a potentially unsafe way, yet that is the situation you want to avoid.
   4. Examples of harassment by carriers could include:
      1. Pressure on drivers from dispatch
      2. A driver’s decisions to stop for whatever reason being used against a driver
      3. Multiple contacts by carriers or shippers questioning why a driver is not moving
   5. Benefits of EOBRs vs. paper logs
      1. Carriers are less likely to pressure drivers to drive beyond their maximum hours.
   6. Subsequent regulations relating to harassment should preserve the rights of employers to supervise employees and monitor their safety, compliance, productivity, and well being.
   7. Subsequent regulations relating to harassment should preserve the rights of the driver to make final decisions having to do with safety.
10. Potential FMCSA actions against harassment:
    1. Training for driver supervisors as to what actions could constitute harassment.
    2. Training for relevant (MCSAP-funded) law enforcement regarding potential harassment.
    3. Look to rules that apply to supervisors in other work scenarios where employees involved in a safety task are closely supervised. How are those supervisors instructed not to harass employees?
11. Are there specific functions and capabilities of an EOBR that should be restricted to reduce the likelihood of the devices being used to harass vehicle operators?
    1. Incorporating fleet management systems into electronic logging devices is what opens the door to potential harassment.
       1. Owner-Operator Independent Drivers Association (OOIDA), International Brotherhood of Teamsters (Teamsters): FMCSA should not require carriers to integrate fleet management systems into electronic logging devices.
    2. Other members think that regulations should not say anything about fleet management systems.
       1. FMCSA does not regulate fleet management systems, which is an individual carrier choice to address productivity.
       2. American Trucking Associations (ATA): Any agency regulation involving fleet management systems should balance compliance safety benefits with concerns about harassment.
    3. FMCSA should carefully consider whether electronic logging devices should be required to use global positioning system (GPS) to record location.
       1. The concern is that GPS location information could be used to harass drivers in terms of an invasion of privacy if law enforcement or carriers use the information to question a driver’s location during off duty time.
       2. On the other hand, electronic RODS might not be as accurate without GPS location information.
       3. GPS also potentially adds complexity and cost to the electronic logging device, which may complicate implementation.
       4. See MCSAC Task 11-04 Report, pp. 8-9, 36.
12. Studies relating to this issue?
    1. FMCSA should look to the Compliance Safety Accountability (CSA) evaluation of its operational model test, which demonstrates a very strong correlation between HOS compliance and low crash rates.
    2. FMCSA should consider seeking comments on the issue of driver harassment from employment attorneys who work with drivers.
13. **Additional Notes of General Dialogue**
    1. Teamsters’ collective bargaining agreements often include provisions to prevent driver harassment.
       1. Language from current UPS/Teamster collective bargaining agreement: “The Employer shall not in any way intimidate, harass, coerce or overly supervise any employee in the performance of his or her duties.”
    2. Motorcoach industry has unique concerns. Eighty percent of the industry is charter and tour service (vs. scheduled service).
14. When law enforcement is kept from having any interaction with customers, customer-driven demands are more likely to pressure the motorcoach industry.
15. Perhaps if customers understood that law enforcement is monitoring the motorcoach industry for purposes of safety, they would not pressure chartered motorcoach industry as much.
    1. Some MCSAC members expressed that many of these issues would be eliminated if drivers were paid by the hour, instead of by the mile.
16. There should arguably be an incentive not to work drivers to the maximum allowed hours.
17. If companies were forced to pay overtime, companies would be more careful about the routes that are assigned.
18. If drivers were compensated for time worked, there would be less incentive for HOS non-compliance.
19. Many Teamsters drivers are paid by the mile, but by the hour when they are stopped.
20. Some MCSAC members believe that increased electronic performance management tools could be used to increase driver harassment, regardless of how drivers are paid.

1. 49 U.S.C. § 31137(a). The MCSAC recognizes that the 7th Circuit Court of Appeals’ August 26, 2011, decision vacating the 2010 EOBR Final Rule held that, contrary to this statutory requirement, the Agency failed to address the issue of driver harassment, including how EOBRs could potentially be used to harass drivers and ways to ensure that EOBRs were not used for this purpose. *See* *Owner-Operator Indep. Drivers Ass’n v. FMCSA*, 656 F.3d 580 (7th Cir. 2011) (vacating the 2010 EOBR Final Rule and remanding the rule to FMCSA for proceedings consistent with the court’s opinion). [↑](#footnote-ref-1)