Commercial Vehicle Safety Alliance
promoting commercial motor vehicle safety and security

January 25, 2012

Ms. Anne Ferro
Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, SE
Washington, DC 20590-0001

Dear Administrator Ferro:

Pursuant to 49 Code of Federal Regulations (CFR) §389.35, the Commercial Vehicle Safety Alliance (CVSA) is filing a Petition for Reconsideration to the Federal Motor Carrier Safety Administration (FMCSA) to reconsider several provisions set forth in the final rule establishing the hours of service (HOS) for drivers of commercial motor vehicles (CMVs), published in the Federal Register on December 27th, 2011 (76 Fed. Reg. 81134): Docket ID Number FMCSA–2004–19608, Hours of Service of Drivers.

49 CFR §395.2 – Definition of 'On-Duty Time'

CVSA requests that FMCSA amend 49 CFR §395.2 Definition of 'On Duty Time' (4)(i) to read *"Time spent resting in or on a parked **commercial motor** vehicle, except as otherwise provided in 397.5 of this subchapter."* Throughout FMCSA's explanation for this change, the agency references CMVs, however, the actual rule language says only 'parked vehicle'. The existing language could lead to complications and confusion as to what constitutes 'on duty time' for enforcement.

Delay All Requirements Until July 1, 2013

CVSA requests that FMCSA delay implementation of all requirements to the July 1, 2013 date set forth in the final rule. Having multiple implementation dates will place an unnecessary burden on industry and the enforcement community, as training will need to be revised twice. Further, 60 days is not enough time for the enforcement community to conduct the necessary training and for industry to make the necessary software updates to their AOBRDs.

We appreciate FMCSA's consideration of this request. If you have further questions or comments, please do not hesitate to contact me by phone at 301-830-6145 or by email at stevek@cvsa.org.

Sincerely,

Stephen A. Keppler
Executive Director

6303 Ivy Lane Suite 310 Greenbelt, MD 20770-6319
Phone: 301-830-6143 Fax: 301-830-6144 www.cvsa.org

U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

February 28, 2012

Refer to: MC-PSD

Mr. Stephen A. Keppler
Executive Director
Commercial Vehicle Safety Alliance
6303 Ivy Lane, Suite 310
Greenbelt, MD 20770

Dear Mr. Keppler:

This letter is in response to your January 25 petition for reconsideration of the December 27, 2011, final rule on hours of service (HOS) [76 FR 81134] to the Federal Motor Carrier Safety Administration (FMCSA). The Commercial Vehicle Safety Alliance (CVSA) requested that the FMCSA change the definition of on-duty time (49 CFR 395.2), and delay the implementation of all final rule provisions until July 1, 2013. For the reasons explained below, I have decided to deny your petition.

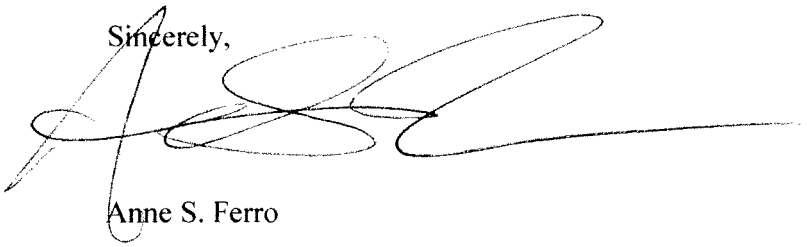
The FMCSA acknowledges your concern about the use of the term "vehicle" in the definition of on-duty time. However, we do not believe it is necessary to replace the term with "commercial motor vehicle." Drivers relieved of all duties and responsibilities for performing work have always been allowed to record time spent in a parked non-commercial motor vehicle (CMV) as off-duty time. However, any time spent in a parked CMV subject to the Federal Motor Carrier Safety Regulations was required to be recorded as either on-duty (not driving), or sleeper berth time. A driver resting outside of the sleeper berth area in a parked CMV could not receive credit for that rest period. With the December 27, 2011, final rule, drivers may now receive credit for rest periods in a parked CMV. Because drivers have always been allowed to receive credit for rest time in a parked non-CMV, and the final rule now allows them to receive credit for rest time in a parked CMV, the use of the term "vehicle" is appropriate and ensures clarity in implementing the flexibility provided by the new provision. Therefore, we do not believe it is necessary to replace "vehicle" with "commercial motor vehicle."

With regard to CVSA's request for a delay in the implementation date to allow more time for training the enforcement community, we believe the provisions that were effective on February 27, 2012, require minimal training for implementation. The main provisions of the final rule that were effective on February 27 are the change in the definition of on-duty time to enable drivers to log time spent resting in a parked CMV as off-duty time (for both truck and bus drivers), and to enable team drivers of property-carrying vehicles to record up to 2 hours of off-duty time in the passenger seat while the vehicle is moving, immediately before or after an 8-hour sleeper berth period. Also effective on February 27 are the penalty provisions for egregious violations of the driving time limit for truck and bus drivers, and clarification of the oilfield operations "waiting time" provision. We believe that these changes require minimal training, but warrant a bulletin or similar notification to ensure all personnel responsible for conducting enforcement interventions are aware of these changes. This can be handled by supervisors using the materials we provide on our Website, www.fmcsa.dot.gov/hos.

We value our partnership with the State enforcement agencies and CVSA, and we are committed to providing information to make the enforcement community and the industry aware of the changes to the HOS rule.

I hope this information is helpful. Should you need additional information or assistance, please contact Thomas Yager, Chief, Driver and Carrier Operations Division at (202) 366-4325, or by e-mail at tom.yager@dot.gov.

Sincerely,



Anne S. Ferro

From: Jim Angel [jangel@peoplenetonline.com]
Sent: Thursday, January 26, 2012 8:29 PM
To: Ferro, Anne (FMCSA)
Cc: Minor, Larry (FMCSA); Brian McLaughlin
Subject: Petition for Reconsideration

Ms. Anne Ferro
Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, SE
Washington, DC 20590-0001

Dear Administrator Ferro:

Petition for Reconsideration
Filed with the Federal Motor Carrier Safety Administration Regarding the Final Rule on Electronic On-Board Recorders as Published in the Federal Register
81134 Federal Register / Vol. 76, No. 248 / Tuesday, December 27, 2011 / Rules and Regulations DEPARTMENT OF TRANSPORTATION Federal Motor Carrier Safety Administration
49 CFR Parts 385, 386, 390, and 395
[Docket No. FMCSA–2004–19608]
RIN 2126–AB26
Hours of Service of Drivers
AGENCY: Federal Motor Carrier Safety
Administration (FMCSA), DOT.
ACTION: Final rule.

PeopleNet understands the reasons for the recent changes in HOS for Off-Duty and Sleeper Berth provisions. We agree with the need for additional relief for these provisions but, we think additional clarification maybe needed for the proper interpretation for vendors, carriers and enforcement.

Regarding the Off-Duty time at rest and the 2 hours that a driver may take before or after a 8 hr. sleeper berth.

(1) To be clear from a calculations standpoint it is our understanding that this “at rest” time would not be counted against the cycle but would still count against the day. The same would count for off duty for a team unless attached to a 8hr sleeper berth is that true? If this is not correct it would require a system change.

(2) A larger concern is that there is no current provision for a driver to make a duty status change unless at rest (See 395.15(i)(2). There is no exception for a team driver NOT driving. This would require a change to current software that requires Q&A and BETA testing before being available commercially.

(3) Today a team driver that is not driving is either sleeper or on-duty, if the driver that is not driving would place himself in off duty and the truck then start to move the system would tag a violation for that driver, this would be another software update.

(4) Under the new rule what happens if the driver is sleeper for 8 hrs., off for 3? What happens to the extra hour? Is this a violation? Is it on-duty? This needs clarification to determine if additional changes are needed.

(5) How is the 2 hrs. handled if there is 1 hr. before and 1 hr. after the 8 hr. sleeper? If this scenario is legal per the rule it would require another calculation change to our current code.

(6) If the rule does not change for making a duty status change while only at rest then it is assumed that a driver could make an annotation after the fact. Annotations are not currently supported under 395.15 ?
.

Regarding the new Oilfield rules change

(1) The current 395.15 does not support a 5th line or annotations. Will this be changed as part of 395.15? What is the timeline for the amendment to 395.15? If this was to happen than this may be another system change that requires additional time that the Feb. date does not allow.

Summary Conclusions:

For PeopleNet to remain a compliant solution we need additional definition to the issues stated. Should any of these require changes within our systems we would require development time, Q&A and BETA testing. This process would require more time than the current Feb 27, deadline. Should the FMCSA provide published clarification of the items listed above than we could determine if any changes are necessary and provide training for our customers to adapt to the new rules with existing systems. Without the clarification, PeopleNet would have to ask for an extension of the Feb 27, 2012 deadline as changes would have to be made based on the level of guidance that has been currently provided by the new rule.

Regards

Jim Angel
Product Manager

PEOPLENET
Performance.

4400 Baker Road, Minnetonka, MN. 55343

DIRECT 952-908-1890 | **CELL** 817-269-8148
TOLL FREE 888-346-3486 x 890 | **FAX** 952-908-6129
www.peoplenetonline.com

U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

February 28, 2012

Refer to: MC-PSD

Mr. Jim Angel
Product Manager
PeopleNet
4400 Baker Road
Minnetonka, MN 55343

Dear Mr. Angel:

This letter is in response to your January 26 petition for reconsideration of the December 27, 2011, final rule on hours of service (HOS)[76 FR 81134] to the Federal Motor Carrier Safety Administration (FMCSA). PeopleNet requested that the FMCSA clarify several aspects of the HOS final rule relating to a perceived conflict with the automatic on-board recorder (AOBRD) provisions of 49 CFR 395.15, and to recognize the inability of some AOBRDs to comply with the revised exception for oilfield operations in 49 CFR 395.1(d). We are providing the clarifications you requested, but for the reasons explained below, I have decided to deny your petition to reconsider the February 27, 2012, compliance date for the final rule.

Section 395.8(f)(1) requires records of duty status to be current, and paragraph (4)(iii) in the definition of "On-duty time" adopted in the December 27 rule allows team drivers to record as off-duty time up to 2 hours riding in the passenger seat of a property-carrying commercial motor vehicle (CMV) moving on the highway before or after a period of at least 8 consecutive hours in a sleeper berth. Section 395.8(f)(1) requires a duty-status update when a driver moves from the sleeper berth to the passenger seat while the CMV is in motion (or vice versa). One of the issues you raised is that § 395.15(i)(2) requires duty-status changes of vehicles equipped with an AOBRD to be made only when the vehicle is at rest. The Agency will publish regulatory guidance in the Federal Register to clarify that this provision only applies to the operating driver, not the co-driver. Section 395.15(i)(6) makes it clear that the AOBRD must be capable of recording separately each driver's duty status when there is a multiple-driver operation (49 CFR 395.15(i)(6). Therefore, a system designed and maintained to handle multiple drivers would have a means for drivers to identify themselves and prevent the current driver from making entries on the electronic record (except when registering the time the vehicle crosses a State boundary) until the vehicle is at rest. However, the system may allow a co-driver to log into the system at any time to make updates while the vehicle is in motion.

You also indicated that the current AOBRD rule does not require that the device be designed to enable a driver to make annotations, or otherwise provide a means of complying with the new oilfield operations provision, § 395.1(d)(2), which provides that "waiting time" shall be off duty time, but shall in some manner be identified on the record of duty status as "waiting time." We note that § 395.15 does not prohibit AOBRDs from providing the capabilities for annotations or notes. In the event the device does not allow for annotations or notes by the driver, motor carriers may enter the annotations using the support systems as provided in § 395.15(b)(3).

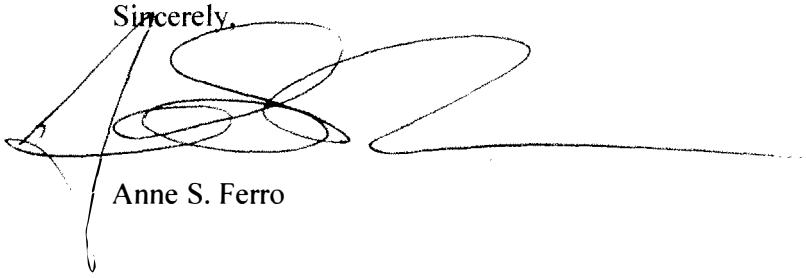
To allow AOBRD vendors additional time to modify their programs to meet the requirements of the new rule, we will issue a limited 90-day waiver under 49 CFR part 381. The waiver will cover drivers and motor carriers using AOBRDs that meet the minimum requirements of 49 CFR 395.15, but require programming changes to accurately capture drivers' duty status under the December 27 final rule. The limited waiver will not impact the effective or compliance dates of the HOS final rule, but during the transition period will block citations to non-driving team members for failing to have up-to-date records of duty status after moving from the sleeper berth to the passenger seat as allowed by the recent final rule. The waiver will preempt any State law or regulation that conflicts with or is inconsistent with the waiver.

With regard to your request for guidance concerning several scenarios involving the new HOS rule, the Agency has posted a series of logbook examples at www.fmcsa.dot.gov/HOS. We also offer the following brief explanations in response to your questions:

- Time "resting in a parked vehicle" may be recorded as "off-duty time" and requires no special recording to indicate the off-duty time was in a parked vehicle.
- If a team driver spends, for example, 3 hours in the passenger seat of a moving CMV immediately before or after at least 8 hours in the sleeper berth, 2 of the hours would be recorded as off-duty time, and 1 hour would be on-duty/not driving.
- A driver may split the 2 hour off-duty period in the passenger seat of a moving CMV on each side of the 8 hours in the sleeper berth. For example, 1 hour could be prior to the sleeper period and 1 hour after. The only requirement is that off-duty and sleeper-berth periods be consecutive to provide 10-consecutive hours of rest.

I hope this information is helpful. Should you need additional information or assistance, please contact Thomas Yager, Chief, Driver and Carrier Operations Division at (202) 366-4325 or by e-mail at tom.yager@dot.gov.

Sincerely,



Anne S. Ferro

January 26, 2012

Ms. Anne Ferro
Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, SE
Washington, DC 20590-0001

Dear Administrator Ferro:

Petition for Reconsideration

Filed with the Federal Motor Carrier Safety Administration

Regarding the Final Rule on Electronic On-Board Recorders as Published in the Federal Register

81134 Federal Register / Vol. 76, No. 248 / Tuesday, December 27, 2011 / Rules and Regulations

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety

Administration

49 CFR Parts 385, 386, 390, and 395

[Docket No. FMCSA–2004–19608]

RIN 2126–AB26

Hours of Service of Drivers

AGENCY: Federal Motor Carrier Safety

Administration (FMCSA), DOT.

ACTION: Final rule.

Submitted by:

XATA CORPORATION
965 Prairie Center Drive
Eden Prairie, MN 55344
800.745.9282 O
952.894.2463 F
www.xata.com

January 26, 2012

XATA Corporation

965 Prairie Center Drive

Eden Prairie, MN 55344

Tom Cuthbertson – VP Regulatory Compliance

Secretary, ATA Technology and Maintenance Council EOBR Task Force

Member MCSAC EOBR TASK FORCE

Petition to Reconsider EOBR Final Rule Requirements

This petition is filed consistent with the requirements of 49 CFR Section 389.35

The final Hours of Service rule requires clarification on specific items that have an effective date of 2/27/2012, as it relates to AOBRD as defined by 49 CFR Part 395.15, and potentially paper logs as defined in 49 CFR Part 395.8. We are submitting this Petition for Reconsideration for clarification of the rule as it pertains to the following items that are integral to AOBRD certifications. We are sensitive to the items that allow carriers flexibility with Off-Duty and Sleeper Berth provisions. We understand and the record reflects the need for additional relief for these provisions, however clarification is necessary for the proper implementation for carriers and enforcement.

Item 1 – In the new Hours of Service rule published on December 27, 2011 – the definition of "on-duty" time was change so that it NO longer includes: "up to 2 hours riding in the passenger seat of a property-carrying vehicle moving on the highway immediately before or after a period of at least 8 consecutive hours in the sleeper berth." (See 395.2(4)(iii))

Issue 1 with Item 1: An AOBRD as defined by 395.15, does not allow either the driver or co-driver to be in an "off-duty" status while the vehicle is in motion. The software for AOBRD devices was written to comply with the old definition of "on-duty" time. Thus if the AOBRD device is now required to allow a driver in **Driving** status and a **Co-Driver** in an **Off Duty** status and not Sleeper Berth, it would require a change in the software to allow the Co-Driver to be in a moving vehicle in

an OFF-DUTY status. The system violation reports would also need to be rewritten so a co-driver is not shown in violation when taking the two hours off-duty immediately before or after an 8-hour sleeper berth period.

Issue 2 with Item 1: Clarification is needed regarding the current rule to determine if a violation occurs when a co-driver exceeds 2 hours of **OFF DUTY** prior to or after the 8 hours in the sleeper berth in the passenger seat, of a moving CMV. The current AOBRD rule states that Duty Status changes cannot take place while the vehicle is in motion. (See 395.15(i)(2). This new HOS requirement that allows for a Duty Status change by Co-Driver, while vehicle in motion will require alterations in AOBRD systems, with additional time for distribution of software and driver training.

Issue 3 with Item 1: The Regulation as issued uses the terms of "**up to 2 hours**" in the passenger seat. Clarification is needed to understand whether the new rule allows the 2 hour **OFF-DUTY** period to be **1 hour prior and 1 hour after** the 8 hours in the Sleeper Berth to meet the criteria of 10 consecutive hours for the daily reset. If the FMCSA interprets the new rule to allow 1- hour prior and 1- hour after an 8 hour consecutive sleeper berth period, this change would require a change to AOBRD software.

ITEM 1 Conclusion – Off Duty of 2 hours in the Passenger Seat of a moving CMV

We are requesting interpretation and guidance on issues 1, 2 and 3 above for the effective date of February 27,2012. Current 395.15 AOBRD systems may not be able to accurately capture the changes in the HOS on-duty definition and may be out of compliance. Additionally, in order for existing AOBRD systems to be compliant, it will require software changes, testing, distribution and carrier/driver training. Since these regulatory changes for 395.15 devices were not contemplated in the original HOS rule we believe an effective date of February 27, 2012 will be extremely difficult.. In order to expedite these changes the following needs to be clarified;.

(a) Will the agency modify 395.15 to allow the OFF-DUTY status change while the Co-Driver is in the passenger seat of a moving vehicle?

(b) If a co-driver exceeds the 2 -hour off-duty limit just prior or after an 8 hour sleeper berth period, does the agency expect the 395.15 AOBRD systems to record this as a violation of the HOS rule?

(c) Will the agency allow a co-driver to have one hour prior and one hour immediately after an 8 hour sleeper berth period as an alternative to either 2 hours prior to 2 hours after?

XATA CORPORATION
965 Prairie Center Drive
Eden Prairie, MN 55344
800.745.9282 O
952.894.2463 F
www.xata.com

January 26, 2012

ITEM 2 – In the new HOS rule, in 395.1(d)(2) it states; "In the case of specially trained drivers of commercial motor vehicles that are specially constructed to service oil wells, on-duty time shall not include waiting time at a natural gas or oil well site. Such waiting time shall be recorded as ''off duty'' for purposes of §§ 395.8 and 395.15, with remarks or annotations to indicate the specific off duty periods that are waiting time, or on a separate ''waiting time'' line on the record of duty status to show that off duty time is also waiting time. Waiting time shall not be included in calculating the 14-hour period in § 395.3(a)(2). Specially trained drivers of such commercial motor vehicles are not eligible to use the provisions of § 395.1(e)(1).

In current Part 395 regulations there is not a definition or a requirement for either an "annotation" or an additional line on a grid log. See Part 395.15, 395.8 and 395.1. Additionally, there is no requirement in Part 395.15 that AOBRDs display a grid type graph as contemplated in this new regulation.

ITEM 2 Conclusion – Waiting Time Annotation of Oil Field status or additional line on a Grid log.

We are requesting additional guidance from FMCSA on how these changes for oilfield drivers can be made within the existing framework of 395.8 and 395.15. If in fact FMCSA contemplates a change to all grid logs used by oilfield personal that may use this exception, additional time will be needed for implementation. This additional time would be needed for both carriers using AOBRDs and grid logs, since both systems will need to be changed.

As they relate to AOBRD providers, software must be rewritten, tested, distributed and training provided. Additionally, AOBRD providers need clarification from FMCSA if the new rule now requires that all devices "certified" as 395.15 compliant must now display a grid log, in order to display "waiting time" as defined in the new rule.

Summary Conclusions:

We are requesting FMCSA provide guidance and clarification on the impacts of these changes for AOBRD providers. If these HOS revisions require changes to the software as anticipated we are requesting a delay in the effective date of these changes. However, if the agency provides interpretations that fit within the existing framework of 395.15, we request publication of the agency clarification as soon as possible in order to ensure devices current "certified" under 395.15 may remain "certified" and in turn we can provide training to customers on how the new rules will be captured within the existing devices.

XATA CORPORATION
965 Prairie Center Drive
Eden Prairie, MN 55344
800.745.9282 O
952.894.2463 F
www.xata.com

January 26, 2012

Additionally, an alternative resolution would be a delay in the enforcement date of this provision. This would also give AOBRD providers, carriers, drivers and enforcement personnel an opportunity to fully address the changes. Any question or clarifications I can be contacted at Tom.Cuthbertson@xata.com or phone is 952 707 5748.

Sincerely,

Thomas G Cuthbertson

VP Regulatory Compliance

XATA Corporation

U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

February 28, 2012

Refer to: MC-PSD

Mr. Thomas G. Cuthbertson
Vice President, Regulatory Compliance
XATA Corporation
965 Prairie Center Drive
Eden Prairie, MN 55344

Dear Mr. Cuthbertson:

This letter is in response to your January 26 petition for reconsideration of the December 27, 2011, final rule on hours of service (HOS)[76 FR 81134] to the Federal Motor Carrier Safety Administration (FMCSA). XATA requested that the FMCSA clarify several aspects of the HOS final rule relating to a perceived conflict with the automatic on-board recorder (AOBRD) provisions of 49 CFR 395.15, and to recognize the inability of some AOBRDs to comply with the revised exception for oilfield operations in 49 CFR 395.1(d). We are providing the clarifications you requested, but for the reasons explained below, I have decided to deny your petition to reconsider the February 27, 2012, compliance date for the final rule.

Section 395.8(f)(1) requires records of duty status to be current, and paragraph (4)(iii) in the definition of "On-duty time" adopted in the December 27 rule allows team drivers to record as off-duty time up to 2 hours riding in the passenger seat of a property-carrying commercial motor vehicle (CMV) moving on the highway before or after a period of at least 8 consecutive hours in a sleeper berth. Section 395.8(f)(1) requires a duty-status update when a driver moves from the sleeper berth to the passenger seat while the CMV is in motion (or vice versa). One of the issues you raised is that § 395.15(i)(2) requires duty-status changes of vehicles equipped with an AOBRD to be made only when the vehicle is at rest. The Agency will publish regulatory guidance in the Federal Register to clarify that this provision only applies to the operating driver, not the co-driver. Section 395.15(i)(6) makes it clear that the AOBRD must be capable of recording separately each driver's duty status when there is a multiple-driver operation (49 CFR 395.15(i)(6). Therefore, a system designed and maintained to handle multiple drivers would have a means for drivers to identify themselves and prevent the current driver from making entries on the electronic record (except when registering the time the vehicle crosses a State boundary) until the vehicle is at rest. However, the system may allow a co-driver to log into the system at any time to make updates while the vehicle is in motion.

You also indicated that the current AOBRD rule does not require that the device be designed to enable a driver to make annotations, or otherwise provide a means of complying with the new oilfield operations provision, § 395.1(d)(2), which provides that "waiting time" shall be off duty time, but shall in some manner be identified on the record of duty status as "waiting time." We note that § 395.15 does not prohibit AOBRDs from providing the capabilities for annotations or notes. In the event the device does not allow for annotations or notes by the driver, motor carriers may enter the annotations using the support systems as provided in § 395.15(b)(3).

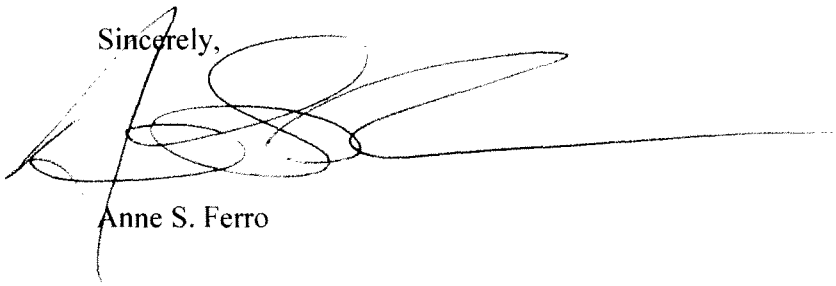
To allow AOBRD vendors additional time to modify their programs to meet the requirements of the new rule, we will issue a limited 90-day waiver under 49 CFR part 381. The waiver will cover drivers and motor carriers using AOBRDs that meet the minimum requirements of 49 CFR 395.15, but require programming changes to accurately capture drivers' duty status under the December 27 final rule. The limited waiver will not impact the effective or compliance dates of the HOS final rule, but during the transition period will block citations to non-driving team members for failing to have up-to-date records of duty status after moving from the sleeper berth to the passenger seat as allowed by the recent final rule. The waiver will preempt any State law or regulation that conflicts with or is inconsistent with the waiver.

With regard to your request for guidance concerning several scenarios involving the new HOS rule, the Agency has posted a series of logbook examples at www.fmcsa.dot.gov/HOS. We also offer the following brief explanations in response to your questions:

- Time "resting in a parked vehicle" may be recorded as "off-duty time" and requires no special recording to indicate the off-duty time was in a parked vehicle.
- If a team driver spends, for example, 3 hours in the passenger seat of a moving CMV immediately before or after at least 8 hours in the sleeper berth, 2 of the hours would be recorded as off-duty time, and 1 hour would be on-duty/not driving.
- A driver may split the 2 hour off-duty period in the passenger seat of a moving CMV on each side of the 8 hours in the sleeper berth. For example, 1 hour could be prior to the sleeper period and 1 hour after. The only requirement is that off-duty and sleeper-berth periods be consecutive to provide 10-consecutive hours of rest.

I hope this information is helpful. Should you need additional information or assistance, please contact Thomas Yager, Chief, Driver and Carrier Operations Division at (202) 366-4325 or by e-mail at tom.yager@dot.gov.

Sincerely,



Anne S. Ferro

PETITION TO RECONSIDER
the
Hours of Service of Drivers Final Rule

published by the Federal Motor Carrier Safety Administration
Tuesday, December 27, 2011 in Vol. 76 of the Federal Register on page 81134
(Docket No. FMCSA–2004–19608-28408[1], RIN 2126–AB26)
amending 49 CFR Parts 385, 386, 390, and 395

by William B. Trescott

1. The Agency's Regulatory Impact Analysis (RIA) must be redone

The hours of service rules that went into effect in 2004 were vacated by the DC Court of Appeals. The Agency's cost benefit analysis must therefore show costs and benefits relative to the hours of service rules in effect prior to 2003. The 13% increase in heavy truck fatalities between 2002 and 2007 attributable to changes in hours of service rules (after adjusting for the 20% reduction in passenger car fatalities during this period) must be included in the Agency's cost benefit calculations. The RIA fails to include an analysis of the 13% baseline increase attributable to the 2004 rule. Nor did it identify any real increase in productivity that would justify such an enormous increase in fatalities.

2. The Agency's cost benefit analysis failed to account for the 10% increase in crashes attributable to the 2004 rule's restart provision.

The Penn State University (Jovanis) study found that a "recovery period of 34 hours or longer is associated with a 50-percent increase in the odds of a crash on the 1st day back compared to a return to work with no recovery."[1] This research suggests that the 2004 rule 81 hour in 7 day schedule made possible by using a restart increased crashes 10% compared to the 80 hours per week or longer schedule under the 2003 and earlier rules without a restart that was possible by lying on logbooks. While it is understood that the Agency decided to limit the use of the restart provision to once per week, the Blanco study suggests that restarts under the 2013 final rule will increase crashes 5% compared to a 70 hour in 7 day schedule having the same productivity with no restarts (since the total hours worked would be the same). The GAO estimated there were $16.3 billion in unrecovered costs attributed to truck crashes in 2007,[2] therefore the Agency underestimated the annual cost of retaining the restart provision by $815 million (2007$).

3. The Agency failed to consider safety benefits of additional rest breaks.

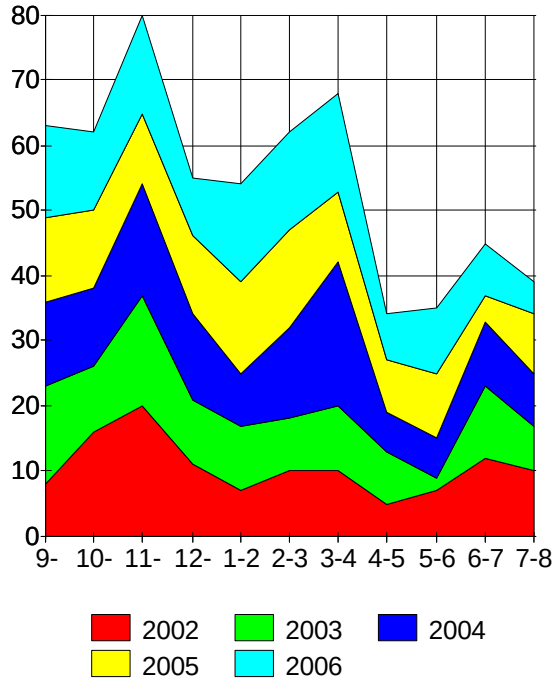
The Virginia Tech Transportation Institute (Blanco) study found that "[t]he benefits from breaks from driving ranged from a 30–50-percent reduction of rate of [safety

---

[1] Jovanis, Wu, Chen, *Hours of Service and Driver Fatigue,* page 59, www.fmcsa.dot.gov/facts-research/research-technology/report/HOS-Driver-Fatigue.pdf

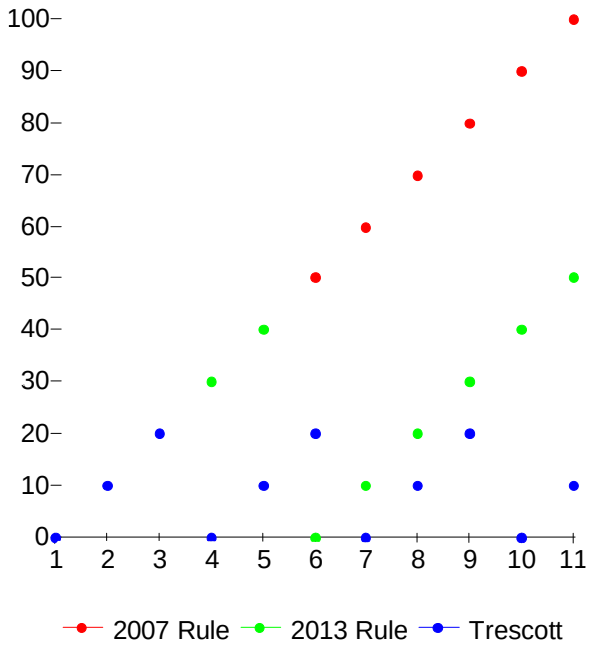
[2] *A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers,* GAO, 2011, http://www.gao.gov/products/GAO-11-134

Single Vehicle Semi Driver Fatalities



The chart at right shows the effect of breaks on the percentage increase in crashes per hour driven assuming fatigue related crashes increase at 10% per hour and breaks reduce crashes by 30%. Under the 2007 rule, crashes will increase 100% by the 11th hour, so 33% of crashes for drivers ordered to drive 11 hours without a break will be fatigue related. Under the 2013 final rule, a half hour break reduces crashes 30% after five hours so only 18% of crashes will be fatigue related. Under my proposed rules, which require a driver to take one hour of breaks every seven hours, only 6-8% of crashes will be fatigue related depending on whether three or four breaks are taken. As stated in my previous critical event] occurrence in the hour following a break."[3] The chart at left[4] clearly shows that breaks from 12 to 2PM and 4 to 6PM reduced drivers' probability of being killed in fatigue related crashes by 30-50 percent from 2002 to 2006. Increases from 2 to 4 PM and 5 to 7 PM show the likelihood of being killed in a fatigue related crash will almost double during seven hours of non stop driving." Because I relied on the National Highway Traffic Safety Administration's Fatality Analysis Reporting System as my source of data, these calculations prove that the Banko and Jovanis studies are indeed representative of the entire population of tractor-trailer drivers. Therefore, the Agency may not use its 7% or 13% assumptions of the percentage of crashes due to fatigue for the reasons made obvious in the chart below:

Fatigue Related Crashes



[3] Blanco, Hanowski, Olson, Morgan, Soccolich, Wu, Guo, *The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations*, page 78, www.fmcsa.dot.gov/facts-research/research-technology/report/Work-Hours-HOS.pdf

[4] Source: FARS Query System: Vehicle forms = 1; Injury Severity = 4; Vehicle Configuration = 6

comments, my three simplified rules are:

> Rule 1) Commercial motor vehicle operators must cease all work for 10 uninterrupted hours after each 14 hours on duty.[5]
>
> Rule 2) Commercial motor vehicle operators must rest a total of one hour during each 7 hours on duty.[6]
>
> Rule 3) Commercial motor vehicle operators may not be dispatched to drive more than 10 hours in a 24 hour period or to be on duty more than 70 hours in any time period unless an equivalent number of hours are logged off duty.

Because light duty work such as waiting time or counting freight is considered to be rest time under my proposed rules, it is unlikely that additional breaks would result in a decline in productivity. While I would impose a 10 hour dispatch limit, industry comments make clear that drivers do not usually schedule a trip for more than 10 hours anyway and that they use the 11th hour to deal with crashes, weather, and congestion. 76 FR 81167. My proposal allows two additional hours under such circumstances, so a 10 hour dispatch limit is also unlikely to result in a decline in productivity. All other things being equal, according to Table 13 at 76 FR 81179, reducing the number of fatigue related crashes from 18% to 7% by allowing drivers to take additional breaks will result in an additional $240 million annual net benefit, or a total benefit of up to $1.055 billon per year if restarts are not used. These savings would not have overlooked if the Agency had used the pre 2003 rule as the basis for its cost benefit analysis.

4. The Agency failed to consider the health benefits of additional rest breaks.

FMCSA has not quantified the benefits of improved health that accrue to drivers who have more time off. 76 FR 81178. The Agency's assertion that it does not have "dose-response curves that it can use to associate various health impacts other than sleep loss" is contradicted by its citation on the very same page that "obese CMV drivers were between 1.22 and 1.69 times as likely to drive while fatigued, 1.37 times more likely to be involved in an SCE." 76 FR 81178. Obesity does not cause fatigue. Persons with professional experience in motor carrier safety understand that **missing meals causes fatigue and eating junk food while driving causes obesity as well as distraction related crashes**.

The Agency's assertion that "[d]rivers will have great flexibility in deciding when to take the break," 76 FR 81136, is unsupported. Most trucks are equipped with satellite

---

[5] The EOBR will be programmed to log the driver on duty after 15 minutes of vehicle motion from the time of the first vehicle motion and off duty from the time of the last vehicle motion 14 hours after the first vehicle motion. Unless a second smart driver's license card is present, any vehicle motion occurring outside the 14 hour window less than 10 hours after the last vehicle motion will cause the device to transmit an alarm.

[6] If the vehicle is not stationary for a total of one hour in seven, the EOBR will be programmed to transmit an alarm regardless whether a second driver's license is present.

tracking devices allowing their movements to be continuously monitored. The half hour break allowed under the final rule is not enough time to find a parking space, visit a restroom, find and empty table at a restaurant, order a meal, relax and eat, and then pay the cashier. 73 FR 79205. In many parts of the country truck stops are hundreds of miles apart and tend to cluster near each other rather than being equally spaced along the highway, therefore a value must be assigned to the increase in obesity and reduction in life expectancy that results from missing meals. The Agency cannot simply assert that "CMV drivers are both heavier for their height and less healthy than adult males as a whole," as though sick fat people are disproportionately attracted to driving trucks or that "[t]he only way to remove this stress is to allow drivers and carriers to work as many hours as they want regardless of the safety consequences." 76 FR 81181. My proposal would require employers to provide breaks during on duty hours without allowing drivers to work as many hours as they want.

Anyone with common sense will understand that the longer toxins are retained in the body, the higher the risk of bladder cancer. Drivers do not just eat during meals. They also drink. By reducing fluid intake, skipping meals increases the concentration of toxins in the bladder even if drivers are stop to relieve themselves. Driving continuously for eight hours will more than double the risk of bladder cancer. If the Agency does not reconsider its decision to allow employers to order their drivers to drive up to eight hours without meals in violation of California law,[7] the RIA must assign a value to the health effects and changes in life expectancy.

While no one disputes that "blue collar workers have rates of mortality that are roughly 25 percent higher than for 'mixed' collar workers" (RIA p.5-16), truckers have little in common with loggers, miners, and assembly line workers who perform hard labor (or are exposed to toxic substances) all day but take frequent breaks. Trucking is part of the service sector, not manufacturing, therefore **truckers must be compared to mixed collar workers who have normal live expectancy—not blue collar workers** who may have shortened life expectancy due to rigorous labor or chemical exposure. If the life expectancy of truckers is 61 or 62 as asserted by the Administrator and that of store clerks is 77 years and the value of a statistical life is 6 million, adequate meal and rest breaks must be assigned a value of $39,000 per obese driver per year for those drivers who were not in ill health prior to entering the industry. The Agency must compile data from drivers' medical certificates to identify those who's health has deteriorated since obtaining a commercial drivers license and add a prorated amount to the cost of the final rule.

5. The final rule violates 14th Amendment rights

By placing limits on truckers' personal mobility, this final rule violates "liberty interests in freedom of movement and in personal security [that] can be limited only by an overriding, non-punitive state interest." *Youngberg v. Romeo*, 457 U.S. 307, 313 (1982) (internal quotes omitted). The Banko and Jovanis studies reveal that there is no state interest that would justify increasing crash risk 50 percent by requiring drivers to remain against their will at a truck stop for 34 hours or increasing crash risk 30 percent by

[7] Sections 11090(11) & (12) of the California Labor Code

prohibiting drivers from stopping for meals if their employers order them to remain on duty for 14 hours—as was allowed under the 2003 and earlier rules. "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it…fails to provide for his basic human needs [such as meals] it transgresses the substantive limits on state action set by the…Due Process Clause." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 at 199-200 (1989).

6. The final rule violates the equal protection clause

The Bureau of Labor Statistics has estimated that due to the recession employment in the trucking industry declined 9-13% since 2008. 75 FR 82180. This decline occurred concurrently with a 30% reduction in truck related fatalities in 2008 and 2009.[8] It has long been known that "drivers in their first year of driving are about 3 times more likely than a veteran driver to be involved in an accident." 72 FR 71268. **A ten percent reduction in employment resulted in a thirty percent reduction in fatalities**. The 1997-1999 Belman studies (RIA p.6-25) have thus been discredited as obsolete. Surveys of this type no longer reflect the entire industry because employee turnover rates exceeding 90% per year[9] since the introduction of new hours of service rules prevent the vast majority of new drivers from being counted (since they leave the industry in only a few months) and experienced drivers change jobs or become self employed. The U shaped curve invented by the Agency in Exhibit 6-33 is therefore a relic of an age when most new drivers were apprenticed in the trade. Today's new drivers are 200% more dangerous than existing drivers, not 6.8%.

The Supreme Court has long recognized that unskilled pickup and delivery drivers are different than skilled long haul truckers (See *Teamsters v. United States,* 431 U.S. 324, 370 (1977) "City drivers…have regular working hours…and do not face the hazards of long-distance driving at high speeds.") and that short haul driver qualifications are not the same as linehaul driver qualifications ("[S]eniority could not be awarded for periods prior to the date when … the class member met … the qualifications for employment as a line driver." *id* at 333). The *Motor Carrier Safety Act* prohibits the Secretary from allowing first year drivers to be given responsibilities that exceed their ability to operate commercial motor vehicles safely. 49 U.S.C. § 31136(a)(2). The Due Process Clause requires the Secretary to provide equal protection from death and injury to all employees of a motor carrier. Therefore, carriers cannot have two classes of employees, one group sitting safely in offices receiving hundreds of thousands of dollars a year while others earning less than a tenth as much are exposed to three times the risk of death and injury of the average employee. **FMCSA must therefore reduce the driving hours of first year drivers to one third of experienced drivers** or require shorter routes or safer vehicles to drive. An agency's rule normally is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43(1983). 49 U.S.C. § 113(b).

---

[8] NHTSA, http://www-fars.nhtsa.dot.gov/Trends/TrendsLargeTruckRel.aspx

[9] *Truckload Turnover Rises for Fourth Straight Quarter* 12/13/2011 http://www.truckinginfo.com/news/news-detail.asp?news_id=75510

7. Unrecovered costs were not included in the Agency's cost-benefit analysis

The Government Accountability Office (GAO) recently reported that unrecovered pollution, accident, and congestion costs of long haul trucks exceeded 112.2 billion dollars in 2007 (GAO-11-134, p.4 & 23).[10] Of the $16.3 billion the GAO attributed to accidents, 30%, or $4.9 billion can be attributed to accidents caused by inexperienced truck drivers in 2007. In its 2003 RIA, FMCSA found "the effects of hiring new drivers were almost exactly counterbalanced by the reduced volume of long-haul trucking caused by shifting some traffic to rail." 75 FR 82180. Therefore, if first year drivers had been prevented from driving long haul trucks by more restrictive hours of service limits in the 2007 rule, most or all of the freight they hauled would likely have been diverted to rail. Unrecovered costs of trains were only one sixth as much as trucks (GAO-11-134, p.27). Diverting 10% of truck volume to rail in 2007 would therefore have saved an additional $9.35 billion or a total of $12.6 billion including accident reduction. Thus, the 2,810 additional deaths caused by inexperienced drivers attempting to drive long haul trucks from 2006 to 2008 cannot be justified by the Agency's cost benefit analysis.

The GAO estimated that trucks moved two trillion ton-miles of freight in 2007. The Department of Transportation estimated that large trucks traveled 227 billion miles the same year.[11] This means the average truck carried less than nine tons of cargo in 2007—less than half of what a typical 18 wheeler is capable of carrying. Before low wage truckload carriers drove most unionized common carriers out of business, experienced truckers earned high wages[12] by consolidating loads—stacking light bulky freight such as building insulation on top of heavy items like car batteries to make one truck to do the work of two (*see* PSU p.5). If railroads and common carriers replaced low wage truckload carriers so that the average truck carried 18 tons of cargo instead of just 9 tons, half of the 112.2 billion dollars of annual pollution, accident, and congestion costs estimated by the GAO could potentially be eliminated—a half trillion dollars in reduced health care costs within ten years.

According to PSU (p.57), the only drivers who benefited from the present hours of service rules were those who crashed! The fact that the nation's largest truckload carrier was able to announce record profits[13] in the most severe recession since the great depression (*see* Int. Br. at 18) should alert the Court that unrecovered costs of overworked trainees may have been deliberately omitted from the Agency's cost benefit analysis. See *Advocates* at 1146 (holding driver training standards arbitrary and capricious because the Agency said "practically nothing about the projected benefits").

CONCLUSION

The Agency should perform a new cost benefit analysis and reconsider.

---

[10] *A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers*, GAO, 2011, http://www.gao.gov/products/GAO-11-134

[11] NHTSA 2009 Large Trucks Fact Sheet, http://www-nrd.nhtsa.dot.gov/Pubs/811388.pdf

[12] *Sweatshops on Wheels*, Michael Belzer, Oxford University Press, 2000, p.122-3

[13] http://www.truckinginfo.com/news/news-detail.asp?news_id=73526

U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

March 8, 2012

Refer to: MC-PSD

Mr. William B. Trescott
8028 Farm to Market Road 457
Bay City, TX 77414

Dear Mr. Trescott:

This letter is in response to your petition asking the Federal Motor Carrier Safety Administration (FMCSA) to reconsider the final rule on Hours of Service (HOS) of Drivers published on December 27, 2011 [76 Fed. Reg. 81134]. The FMCSA has decided to deny the petition for the reasons given below.

In your petition, you criticized the Agency for failing to adopt your own preferred HOS regulations, which would include longer rest breaks. It appears that you regard the rest-break provision of the new rule as the equivalent of a requirement to drive for 8 consecutive hours. In fact, 8 hours is the longest period a driver may remain on duty without a break if he or she wants to drive after that point. Nothing in the rule prevents drivers from taking rest breaks whenever they wish, including rest breaks longer than 30 minutes when that is needed or desirable. The Federal Motor Carrier Safety Regulations have long prohibited motor carriers from requiring their employees to continue driving when they are too fatigued to do so safely [49 CFR 392.3]. You argue that "[t]he half-hour break allowed under the final rule is not enough time to find a parking space, visit a restroom, find an empty table at a restaurant, order a meal, relax and eat, and then pay the cashier." Actually, the break cannot start until the driver has found a parking space and gone off duty, and impediments to enjoying a quick meal existed long before the 2011 rule was adopted. The fact that you would have preferred a different regulation is not an adequate reason to reconsider the rule.

You argued as well that the Regulatory Impact Analysis (RIA) should have used the pre-2003 HOS rule as the baseline for the comparison of the costs and benefits of the new rule. We disagree. The HOS rule adopted in 2003 has governed motor carrier industry operations since January 2004. The White House's Office of Management and Budget requires that the effect of proposed rules be measured against existing rules. The only reasonable baseline for the 2011 rule is the HOS rule in effect during the immediately preceding years. The FMCSA correctly chose the post-2003 HOS rule as the baseline for the RIA calculations.

In your petition, you claimed that the restart provision infringes truckers' "liberty interests in freedom of movement" in violation of the Fourteenth Amendment to the Constitution by requiring them "to remain against their will at a truck stop for 34 hours . . ." You also contended that the Agency's failure to limit the allowable driving hours of "first year drivers" to one-third that of experienced drivers (in order to compensate for the former's allegedly 3-fold higher crash risk) amounts to a violation of the equal protection clause of the Fourteenth Amendment because it exposes inexperienced drivers to a higher risk of death. Both of these arguments are without

merit. Drivers who voluntarily seek employment in trucking implicitly consent to the safety regulations imposed on that highly regulated industry. There is no clear evidence for your contention that "first year drivers" are 3 times as likely to crash as more senior drivers, and reducing the driving time of inexperienced drivers would simply prolong the period before they become experienced (however long that may be) and thus extend the differential risk (whatever that may be). The Agency's 2011 rule does not violate the Fourteenth Amendment.

You also argued that the FMCSA should have adopted significantly more restrictive HOS rules in order to divert freight from trucks to railroads, which you claim would have reduced macroeconomic costs (of pollution, accidents, and highway congestion) to the country. The Agency has a statutory mandate to improve the safety of commercial motor vehicle operations, which the 2011 rule has done, not to manage private decisions about the choice of transportation options.

Should you need further information, please contact Thomas Yager, Chief, Driver and Carrier Operations Division, at (202) 366-4325 or by e-mail at tom.yager@dot.gov.

Sincerely,

Anne S. Ferro