**Motor Carrier Safety Advisory Committee (MCSAC)**

**Task Statement 12-01**

**I. Task Title**

Measures to Ensure Electronic On-Board Recorders (EOBRs) Are Not Used to Harass Commercial Motor Vehicle (CMV) Operators

**II. Background**

On April 5, 2010, the Agency issued a final rule that provided new technical requirements for EOBRs. (75 FR 17208, as amended by 75 FR 55488 (Sept. 13, 2010). The final rule also required the limited, remedial use of EOBRs for motor carriers with significant hours-of-service (HOS) violations. The EOBR final rule required a motor carrier found to have a 10 percent violation rate for any HOS regulation listed in Appendix C of 49 CFR part 385 during a single compliance review to install and use EOBRs on all of its CMVs for a period of 2 years. The compliance date for the rule was June 4, 2012.

The Owner-Operator Independent Drivers Association (OOIDA) challenged the EOBR final rule in the United States Court of Appeals for the Seventh Circuit. OOIDA raised several concerns relating to EOBRs and their potential for the harassment of drivers.

On August 26, 2011, the Court vacated the entire EOBR final rule. Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin., 656 F.3d 580 (7th Cir. 2011). The Court held that, contrary to a 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. The Court focused on 49 U.S.C. § 31137(a), which reads as follows:

USE OF MONITORING DEVICES. If the Secretary of Transportation prescribes a regulation about the use of monitoring devices on commercial motor vehicles to increase compliance by operators of the vehicles with hours of service regulations of the Secretary, *the regulation shall ensure that the devices are not used to harass vehicle operators. However, the devices may be used to monitor productivity of the operators* (emphasis added).

The Court stated that the Agency ought to amplify what is meant by “harassment” and “productivity” and suggested how the Agency could address these issues:

“[A]n adequate explanation that addresses the distinction between productivity and harassment must also describe what precisely it is that will prevent harassment from occurring. The Agency needs to consider what types of harassment already exist, how frequently and to what extent harassment happens, and how an electronic device capable of contemporaneous transmission of information to a motor carrier will guard against (or fail to guard against) harassment. A study of these problems with EOBRs already in use, and a comparison with carriers that do not use these devices, might be one obvious way to measure any effect that requiring EOBRs might have on driver harassment.” 656 F.3d at 588-89.

In the October 7, 2011, Federal Register notice announcing the subcommittee meetings of the MCSAC Subcommittee on EOBR Technical Specifications, the Agency announced that it would not appeal the Court’s ruling and would issue a final rule at a later date to remove all regulatory text from the Code of Federal Regulations related to the vacated April 5, 2010, final rule (76 FR 62496).

As a result of the decision, carriers relying on electronic devices to monitor HOS compliance are currently governed by the rules addressing the use of automatic on-board recording devices as in effect immediately before the court’s ruling (49 CFR 395.15), provisions not affected by the Seventh Circuit’s decision.

**III. Task**

The Committee will provide a letter report to the Agency presenting ideas, concepts, and information the Agency should explore as it considers ways to fulfill the statutory requirements of 49 U.S.C. 31137(a) in any future rulemaking concerning EOBRs.

In its deliberations, the Committee should consider the following questions:

1. In terms of motor carriers’ and enforcement officials’ monitoring or review of drivers’ records of duty status (RODS), what would constitute driver harassment? Would that definition change based on whether the system for recording HOS is paper or electronically based? If so, how? As a starting point, the Agency is interested in potential forms of harassment, including but not limited to those that are (1) not prohibited already by current statutes and regulations; (2) distinct from monitoring for legitimate business purposes (e.g., efforts to maintain or improve productivity); and (3) facilitated or made possible solely by EOBR devices and not as a result of functions or features that motor carriers may choose to purchase, such as fleet management system capabilities.  Is this interpretation appropriate? Should it be broader? Or narrower?

1. Are there types of driver harassment to which drivers are uniquely vulnerable if they are using EOBRs rather than paper logs? If so, what and how would use of an EOBR rather than a paper log make a driver more susceptible to harassment? Are there ways in which the use of an EOBR rather than a paper log makes a driver less susceptible to harassment?
2. What types of harassment are motor carrier drivers subjected to currently, how frequently, and to what extent does this harassment happen? How would an electronic device capable of contemporaneous transmission of information to a motor carrier guard against (or fail to guard against) this kind of harassment? What experience have motor carriers and drivers had with carriers using EOBRs as compared to those who do not use these devices in terms of their effect on driver harassment or complaints of driver harassment?
3. What measures do you think the Agency should consider taking to eliminate the potential for EOBRs to be used to harass drivers? 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?
4. Motor carriers are often responsible for managing their drivers and equipment to optimize efficiency and productivity and to ensure transportation services are provided in accordance with a planned schedule. Carriers commonly use electronic devices, which may include but are not limited to EOBRs, to enhance productivity and optimize fleet operation. Provided such devices are not used to coerce drivers into violating Federal safety regulations, where is the line between legitimate productivity measures and inappropriate oversight or actions that may be construed as harassment?

In preparing its letter report to the Agency, the Committee should, wherever possible, indicate whether the ideas or concepts identified are supported by peer reviewed studies. The MCSAC meetings are open to the general public and the Committee should consider any ideas, information, and concepts identified by individuals making remarks during the meeting’s public comment period.

**IV. Estimated Time to Complete Task**

The MCSAC should begin work on this task at its February 2012 meeting with the goal of completing its discussions and issuing a letter report during its June 2012 meeting.

**V. FMCSA Technical Representatives**

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