

DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

49 CFR Part 395

[Docket No. FMCSA-2017-0360]

Hours of Service of Drivers of Commercial Motor Vehicles; Regulatory Guidance Concerning the Transportation of Agricultural Commodities

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT

ACTION: Notice of regulatory guidance

SUMMARY: FMCSA announces regulatory guidance to clarify the applicability of the “Agricultural commodity” exception in the “Hours of Service (HOS) of Drivers” regulations. This regulatory guidance clarifies the exception with regard to: (1) drivers operating unladen vehicles traveling either to pick up an agricultural commodity or returning from a delivery point; (2) drivers engaged in trips beyond 150 air-miles from the source of the agricultural commodity; (3) determining the “source” of agricultural commodities under the exemptions; and (4) how the exception applies when agricultural commodities are loaded at multiple sources during a trip. This regulatory guidance is issued to ensure consistent understanding and application of the exception by motor carriers and State officials enforcing HOS rules identical to or compatible with FMCSA’s requirements.

DATES: This guidance is applicable on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] and expires [INSERT DATE 5 YEARS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Public Participation

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to www.regulations.gov and insert the docket number, "FMCSA-2017-0360" in the "Keyword" box and click "Search." Next, click the "Open Docket Folder" button and choose the document to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

II. Legal Basis

The National Highway System Designation Act of 1995, Pub. L. No. 104-59, sec. 345, 109 Stat. 568. 613 (Nov. 28, 1995) (the Act), provided the initial exception for drivers transporting agricultural commodities or farm supplies for agricultural purposes. The Act limited the exception to a 100 air-mile radius from the source of the commodities or distribution point for the farm supplies and during the planting and harvesting seasons as determined by the applicable State.

The Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU) revised this provision, redesignated it as new section 229 of Title II of the Motor Carrier Safety Improvement Act of 1999, and defined the terms

“agricultural commodity” and “farm supplies for agricultural purposes.” Pub. L. No. 109-59, §§ 4115 and 4130, 119 Stat. 1144, 1726, 1743 (Aug. 10, 2005). These terms are now defined in 49 CFR 395.2.

Most recently, the statute was amended by section 32101(d) of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, 126 Stat. 405, 778 (July 6, 2012). This provision revised the description of the exception’s scope and extended the applicable distance from 100 air-miles to 150 air-miles from the source.

III. BACKGROUND

The focus of today’s guidance is limited to the application of the 150 air-mile exception for the transportation of “agricultural commodities,” 49 CFR 395.1(k)(1). It does not address “farm supplies for agricultural purposes” under § 395.1(k)(2) or (3), since few questions have been raised about their applicability, nor does it address the specifics of the definition of an agricultural commodity as defined in § 395.2. While the regulatory provision governing the agricultural commodity exception closely tracks the statutory provisions discussed above, the language is susceptible to multiple interpretations, and the Agency acknowledges that various stakeholders and enforcement officials in different States have expressed inconsistent understandings of the exception from time to time.

IV. PUBLIC COMMENTS AND RESPONSES

On December 20, 2017, FMCSA published a *Federal Register* notice proposing regulatory guidance concerning the transportation of agricultural commodities and requested public comment on the proposals (82 FR 60360). The comment period ended on January 19, 2018, but was extended to February 20, 2018 (83 FR 2765, Jan. 19, 2018).

There were 566 comments submitted to the docket. Approximately one-half of them addressed issues other than this regulatory guidance, such as electronic logging devices (ELDs), other aspects of the HOS rules, and other provisions of the Federal Motor Carrier Safety Regulations (FMCSRs). Some commenters suggested specific revisions to the FMCSRs, which are beyond the scope of regulatory guidance. Of the remaining comments, most were supportive of the proposed guidance and suggested only minor revisions. Many were from umbrella agricultural associations, some representing as many as 15 other associations. Additional details regarding the public comments are provided under the topical headings below.

1. Unladen Vehicles (Question 34)

Interpreted literally, the agricultural commodity exception could be read as applicable only during the period during which the commodity is being transported, and not to movements of an unladen commercial motor vehicle (CMV) either traveling to pick up a load or returning after a delivery. The Agency does not consider that view consistent with the de-regulatory purpose of the exception since applying HOS rules on these unladen trips would limit the relief that Congress intended to grant, while needlessly complicating the regulatory monitoring task that enforcement officials are asked to perform. It is unreasonable to assume that the 1995 statute intended to exempt, for example, farmers hauling soy beans from the field to an elevator, while subjecting them to the full extent of the HOS regulations during the empty return trip to the field to pick up the next load. The Agency has therefore informally advised stakeholders that both legs of a trip are covered. In the proposed guidance (Question 34), FMCSA sought to clarify how the agricultural commodity exception applies to someone driving an

unladen CMV either to a source to pick up an agricultural commodity or on a return trip following delivery of an agricultural commodity. The proposed Guidance to Question 34 stated that the agricultural commodity exception (§ 395.1(k)(1)) does apply while driving unloaded to a source where an agricultural commodity will be loaded, and to an unloaded return trip after delivering an agricultural commodity, provided that the trip does not involve transporting other cargo and the sole purpose of the trip is to complete the delivery or pick up of agricultural commodities, as defined in § 395.2.

Comments: All comments on this issue were supportive. The American Farm Bureau Federation (Farm Bureau) agrees with the Agency's interpretation that unladen vehicles traveling to and from a source of an agricultural commodity should be able to take advantage of the agricultural commodity exception. The Oregon Cattleman's Association supports FMCSA's view that time spent driving an unladen or empty vehicle to or from a source of an agricultural commodity should be exempt from the hours-of-service (HOS) provisions. The New Mexico Farm and Livestock Bureau agrees, commenting that unladen vehicles hauling to and from an agricultural source or multiple sources should fall under the exception. A number of multiple-group filers commented that the Agency must clearly define that unladen trucks are covered under the agricultural exception. The Owner-Operator Independent Drivers Association (OOIDA) supports the revised guidance that would allow the exception for drivers while driving unloaded to a source where an agricultural commodity will be loaded, and to an unloaded return trip after delivering an agricultural commodity. The Agricultural and Food Transporters Conference, an affiliate of the American Trucking Associations (ATA), commented that the Question 34 guidance is crucial for the movement of agricultural commodities and

farm supplies. When a carrier is delivering an agricultural commodity, it must have the ability to unload and travel back to reload, all while under the exception. Not only does this minimize confusion for the carrier in having to travel exempt and non-exempt over and over, but it also significantly minimizes confusion for enforcement officials who are working with the carriers.

FMCSA Response: The Agency agrees that the § 395.1(k)(1) exception should apply to all portions of a round-trip involving agricultural commodities that occur within the 150 air-mile radius of the source, regardless of whether the CMV is loaded or empty or whether the destination is outside the 150 air-mile radius. The Guidance in Question 34 to § 395.1 is revised to this effect.

2. Loads beyond a 150 air-mile radius (Question 35)

The Agency recognizes that some enforcement personnel and other stakeholders have interpreted the agricultural commodity exception as inapplicable to any portion of a trip if the destination exceeds 150 air-miles from the source. Under that reading, the word “location” in § 395.1(k)(1) is interpreted as reflecting only the final destination of the load. FMCSA considers the statutory language, as amended,¹ and the implementing regulation² to be ambiguous, given the legislative intent to create an exempt zone with a

¹ As amended by MAP-21, Pub. L. 112-141, § 32101(d), 126 Stat. 778 (July 6, 2012), this statute reads:

(1) TRANSPORTATION OF AGRICULTURAL COMMODITIES AND FARM SUPPLIES.—Regulations prescribed by the Secretary under sections 31136 and 31502 regarding maximum driving and on-duty time for drivers used by motor carriers shall not apply during planting and harvest periods, as determined by each State, to—

(A) Drivers transporting agricultural commodities from the source of the agricultural commodities to a location within a 150-air-mile radius from the source;

...

² The regulatory exception reads:

Agricultural operations. The provisions of this part shall not apply during planting and harvesting periods, as determined by each State, to drivers transporting

radius of 150 air miles. The Agency believes that a narrow interpretation is unwarranted. In the proposed regulatory guidance (Question 35), the Agency stated that “location” means the outer limit of the exception distance, *i.e.*, 150 air-miles from the source. Thus, the Agency proposed to interpret the exception as available to a driver transporting agricultural commodities for a distance up to 150 air-miles from the source, regardless of the distance between the source and final destination or place of delivery. Upon crossing the 150 air-mile point, however, the driver would be subject to the HOS rules for the remainder of the trip to the destination. The hours accumulated within the 150-mile radius are not counted toward the driver’s hours of service. Returning empty, the driver would be subject to the HOS rules until returning within the 150 air-mile radius in which the trip began.

Comments: Most commenters supported Question 35 as proposed, and one commenter was completely opposed. The Farm Bureau requested the Agency to modify Question 35 to simply state: “The exception applies to transportation during the initial 150-air miles from the source of the commodity. Starting at zero from that point, the driver must then begin recording his or her duty time, and the limits under the 11-hour, 14-hour, and 60/70-hour rules apply.” The Florida Fruit and Vegetable Association commented that the agricultural exception is unclear on how it is to be applied beyond the 150 air-miles, and does not encompass trucks returning once they have been assigned a specific pick-up. Additionally, it is not clear how hours would be recorded if multiple pickup points are involved. An individual commenter stated that the proposed guidance is

(1) Agricultural commodities from the source of the agricultural commodities to a location within a 150 air-mile radius from the source;

49 CFR 395.1(k)(1). The term “agricultural commodity” is defined in 49 CFR 395.2.

unreasonable and is likely to create unsafe conditions where fatigued drivers are operating on the highway. According to him, the term “location” in the phrase, “from the source of the agricultural commodities to a location within a 150 air-mile radius from the source,” can only mean the delivery location. He states that under the proposed guidance, if a person is stopped outside the 150 air-mile radius of the source, neither the motor carrier nor an enforcement officer will be able to determine compliance with the law. If a driver is exempt from part 395 some of the time, but has to comply with all of part 395 at other times, it would be impossible to determine compliance with HOS when the driver is not exempt. The National Grain and Feed Association asked FMCSA to apply the HOS regulations only to situations in which a driver operates beyond the 150-air mile radius. Therefore, starting at the time and location where the vehicle goes past the 150-air mile distance, the driver must maintain logs.

FMCSA Response: FMCSA believes it would be contrary to the purpose of the exception to apply it to only one portion of the trip within the 150 air-mile radius. The Agency disagrees that it would be impossible to determine HOS compliance outside the 150 air-mile radius. Transporters are required to maintain records of duty status (paper or AOB RD/ELD) and supporting documents when not operating under an exception. Commercial vehicle inspectors are trained to ascertain compliance with the HOS regulations, and would be able to do so as with any other transporters who are not under an HOS exception at the time of inspection.

3. Sources (Question 36)

Several agricultural transporters have requested guidance on the extent to which grain elevators or livestock sale barns, for example, should be considered a “source” of

agricultural commodities under § 395.1(k)(1). Historically, the nature of the commodities included in the definition led to an informal conclusion that the “source” was the location where the crops were grown or the animals raised. That concept does not adequately address the aggregation and interim storage of commodities. The identification of the source is more reasonably defined by factors that include more than a farm or ranch.

As long as the commodity retains its original form, a place where the commodity is aggregated and stored may be treated as a “source” from which the 150 air-mile radius is measured.

Comments: Those persons who commented on the issue agreed that elevators and livestock markets are examples of “sources” other than the original farm or field. Many suggested other broad examples that they believe should be included. No one specifically objected to the proposal. The Farm Bureau believes that logic and common sense dictate that grain elevators and livestock markets are “sources” of agricultural commodities. The Oregon Cattleman’s Association agrees with this position, and cites the dictionary definition of “source” as “a point of origin” and describes the challenges of loading at such locations as virtually identical to loading at a farm or ranch. Other commenters point out that feed mills and barns, as well as processing plants that produce bulk animal feed, are often legitimately viewed as sources. The Midwest Shipper’s Association states that grain elevators are often a source, and that other facilities are closely related to elevators. These include facilities that clean and process grain, soybeans and oilseed, as well as ethanol plants that ship distiller grains.

FMCSA Response: While an agricultural commodity may have several “sources” under Question 36 (e.g., for grain, both a field and an elevator), the “source” necessarily excludes the point at which the commodity is processed to such an extent that it is no longer in its original form or does not otherwise meet the definition of an agricultural commodity in 49 CFR 395.2. Question 36 to § 395.1 has been added to clarify that the source of an agricultural commodity includes more than just the original location at the farm or field. The Agency recognizes that further regulatory guidance may be necessary as the industry and enforcement communities adjust to these clarifications of § 395.1.

4. Multiple Sources (Question 37)

Many transporters have also asked how the agricultural commodity exception would apply if the driver were to pick up partial loads at two or more locations. Specifically, they asked whether a pick-up at a subsequent source has the effect of extending the 150 air-mile radius, *i.e.*, restarting the calculation of the 150 air-mile distance. Previous informal guidance has been that the 150 air-mile radius is based on the first source of an agricultural commodity on a particular trip, and that additional stops to load additional agricultural commodities do not extend the 150-mile radius.

Comments: Most commenters agreed that multiple pick-ups and deliveries should be allowed, but that the 150 air-mile radius should be measured from the last pick-up point, not the first point as proposed. Other than the disagreement with that part of the proposal, no one objected to allowing multiple pick-ups and deliveries. The Farm Bureau believes that the exception should not be limited to one “use” each day, and all locations at which agricultural commodities are loaded for shipment should qualify as a source. The Oregon Cattleman’s Association agrees, and points out that the alternative – limiting

a vehicle or driver to a single “trip” – adds unnecessary complexity to the analysis. Each of several loading stops during the duty day takes place at what the industry views as a “source” – the industry does not think in terms of a single daily “trip.” The New Mexico Farm and Livestock Bureau concurs that livestock markets and elevators are properly viewed as the source of the commodity. The Colorado Farm Bureau states that Congress did not intend to limit a driver or vehicle to a single “source” each calendar day. The Iowa Cattlemen’s Association supports the Farm Bureau position.

Commenters explained that drivers often must pick up agricultural commodities at several locations to fill their vehicle. This is the only reasonable approach to making a living hauling agricultural products. It would be inefficient to operate below capacity, and one stop may not have enough product to fill a truck.

CVSA applauded efforts to update Agency guidance. It believes greater clarity is needed regarding the loading of agricultural commodities at multiple sources. It states that the exception should begin with the first source, and that stopping after that initial source should not restart the exception. In its view, the exception and the 150 air-mile radius should be applied from the original source only.

FMCSA Response: Question 37 to § 395.1 has been added to clarify that multiple pick-ups are permissible but that the 150 air-mile radius continues to be measured from the first pick-up point regardless of the number of times commodities are loaded or offloaded. The Agency agrees with CVSA’s position that the exception should begin with the first source only. FMCSA notes in the interest of safety that, under a contrary interpretation that restarts the 150-mile exception with each new source, a motor carrier could effectively extend the exception indefinitely. The Agency did not intend to imply

that a carrier would be limited to one “trip” per day. A trip terminates when all of the commodity has been offloaded or non-exempt freight or products are added to the load. Thereafter, a new trip under the agricultural exception could be started the same day by loading a shipment of agricultural commodities at a different source. The 150 air-mile radius would then be measured from this new trip initiation point.

V. REGULATORY GUIDANCE

FMCSA issues Regulatory Guidance, Questions 34, 35, 36, and 37 to 49 CFR 395.1 as follows:

PART 395—HOURS OF SERVICE OF DRIVERS

§ 395.1 Scope of the rules in this part

Question 34: Does the agricultural commodity exception (§ 395.1(k)(1)) apply to drivers while driving unloaded within 150 air-miles of the place where an agricultural commodity will be loaded, and to that portion of an unloaded return trip which occurs within a 150 air-mile radius of the place where the agricultural commodity was loaded?

Guidance: Yes, provided that the trip does not involve transporting any non-agricultural cargo and the sole purpose of the trip is to make a pick-up or delivery of agricultural commodities, as defined in § 395.2. In that case, driving and on-duty time are not limited, nor do other requirements of 49 CFR part 395 apply.

Question 35: Does the agricultural commodity exception (§ 395.1(k)(1)) apply if the destination for the commodity is beyond the 150 air-mile radius from the source?

Guidance: Yes, the exception applies to transportation during the initial 150 air-miles from the source of the commodity, regardless of the distance to the final destination. Once a driver operates beyond the 150 air-mile radius of the source, 49 CFR

part 395 applies. The driver is then subject to the limits under the hours-of-service rules and must record those hours. Once the hours-of-service rules begin to apply on a given trip, they continue to apply for the duration of that trip, until the driver crosses back into the area within 150 air-miles of the original source of the commodities..

Question 36: How is the “source” of the agricultural commodities in § 395.1(k)(1) determined?

Guidance: The “source” of an agricultural commodity, as the term is used in § 395.1(k)(1), is the point at which an agricultural commodity is loaded onto an unladen commercial motor vehicle. The location may be any intermediate storage or handling location away from the original source at the farm or field, provided the commodity retains its original form and is not significantly changed by any processing or packing. If a driver is making multiple trips, the first trip, and the 150 air-mile exception around that source, terminate once all agricultural products are offloaded at a delivery point. A new source for a new trip may then be identified, and the 150 air-mile radius for the exception will be around that source.

For example, a sales barn where cattle are loaded may be treated as a “source,” in addition to the location at which they were raised, since cattle remain livestock. As another example, a place where heads of lettuce are stored may become a “source,” provided they retain their original form. An elevator where grain is collected and dried may be a new “source,” again assuming that the grain is not milled or similarly processed at the elevator.

Question 37: How is the “source of the agricultural commodities” determined if the driver makes multiple pick-ups of the commodity en route to the final destination?

Guidance: When a driver loads some of an agricultural commodity at a “source” and then loads more of that commodity at additional stops, the first place where the commodity was loaded is the measuring point for the 150 air-mile radius.

VI. REVIEW DATE FOR THE REGULATORY GUIDANCE

In accordance with section 5203(a)(2)(A) and (a)(3) of the Fixing America’s Surface Transportation (FAST) Act, Pub. L. No. 114-94, 129 Stat. 1312, 1535 (Dec. 4, 2015), this regulatory guidance will be posted on FMCSA’s Web site, www.fmcsa.dot.gov. It expires **[INSERT DATE 5 YEARS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The Agency will consider whether the guidance should be withdrawn, reissued for another period up to five years, or incorporated into the safety regulations.

Issued on: May 31, 2018



Raymond P. Martinez,
Administrator.