

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

DOCKET NO. FMCSA-2004-19608
HOURS OF SERVICE OF DRIVERS

COMMENTS OF
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.

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National Motor Freight Traffic Association, Inc., (NMFTA), files these comments on behalf of its member motor carriers in response to the Federal Motor Carrier Safety Administration's Notice which appeared in the December 29, 2010 issue of the Federal Register proposing revisions in the current regulations for hours of service for drivers of property-carrying commercial motor vehicles. NMFTA supports the currently-effective regulations, and in support thereof respectfully states as follows:

I.

IDENTITY AND INTEREST OF NMFTA

NMFTA has its offices at 1001 North Fairfax Street, Suite 600, Alexandria, VA 22314. It is a non-profit Virginia corporation, and has as members motor carriers operating in interstate and foreign commerce under certificates of public convenience and necessity issued by the former Interstate Commerce Commission and/or the Federal Motor Carrier Safety Administration, (FMCSA). Included among its 776 member carriers are 521 less-than-truckload (LTL) motor carriers, 26 truckload (TL) motor carriers, and 34 motor carriers handling government traffic, all of which are subject to FMCSA's hours-of-service regulations for their drivers. The remaining members are intrastate motor carriers.

NMFTA has as its corporate purpose the mutual improvement and advancement of the interests and welfare of its member motor carriers. Among its standing committees is the Commerce Committee which participates in regulatory proceedings, such as Docket No. FMCSA-2004-19608, involving matters of importance to NMFTA's member motor carriers. As indicated, FMCSA's proposed regulations would govern the hours of service which their drivers could operate in interstate commerce.

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II.

THE CURRENT HOS REGULATIONS ARE ACHIEVING THE GOALS WHICH
UNDERPINNED THEIR IMPLEMENTATION

The hours of service regulations for drivers currently in effect were established by the Federal Motor Carrier Safety Administration (FMCSA) on April 28, 2003. Those rules made substantial changes to the prior hours-of-service regulations which had been established by the former Interstate Commerce Commission in 1938, and modified in 1962. While drivers presently can drive for 11 hours, the window in which that can be accomplished is limited to 14 consecutive hours after coming on duty. The daily rest period has been increased to 10 hours, and drivers can restart the calculation of weekly hours only after taking an off-duty break of at least 34 consecutive hours.

As FMCSA acknowledges, considerable study and evaluation preceded the comprehensive revision which replaced the former hours-of-service regulations established by the ICC. FMCSA candidly points out that:

The new rules were to be science-based; the Agency collected relevant studies and completed its own comprehensive Commercial Motor Vehicle Driver Fatigue and Alertness Study, a joint undertaking with Canada and the trucking industry. FMCSA assembled an expert panel of recognized authorities on traffic safety, human factors, and fatigue to review the science and evaluate regulatory alternatives. FMCSA conducted eight nationwide public hearings on the NPRM and three two-day public roundtable discussions. (See 75 Fed. Reg., No. 249, at 82173.)

Only after that thorough and careful consideration did FMCSA issue the current hours-of-service regulations. Significantly, even following a court remand of the rules to FMCSA, Congress directed that the 2003 HOS regulations were to remain in effect pending the agency's review in response to the court's order.

Again, in its decisions on the HOS rules issued in 2005, 2007, and 2009, the agency, based on comprehensive findings that the regulations were achieving the safety and driver health objectives envisioned in their establishment, reaffirmed the continuation of the current regulations. It is respectfully submitted that there is no negative information or data which has surfaced over the almost eight years that the driver rules have been in effect which indicates there is a valid need for the changes proposed in this proceeding.

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III.

THE INFORMATION AND DATA ACCUMULATED BY FMCSA SINCE 2003 DEMONSTRATE THAT
THE CURRENT RULES HAVE ENHANCED SAFETY

The issues raised in this phase of the proceeding have been addressed in detail in recent prior reviews of the effects of the current HOS rules. For example, in the agency's December 17, 2007 decision implementing its Interim Final Rule, it reiterated that safety had not been compromised by the current driver regulations. It stated:

We found that the 2005 rule has maintained highway safety outcomes while enhancing operational flexibility for the motor carrier industry. Every alternative, including immediate restoration of a 10-hour driving limit with no 34-hour restart, entails a risk of disrupting that achievement. As mentioned above, in the years since 2003, when the 11-hour driving limit and 34-hour restart provision were adopted (along with the critically important 10-hour minimum daily off-duty period), there has been no upward trend in the number of fatal crashes as a whole or fatigue-related fatal crashes in particular. In fact, the 2006 fatality rate per 100 million vehicle miles traveled (VMT) by combination unit trucks (mostly standard tractor-trailer combinations) is the lowest since the Department of Transportation began keeping such statistics over 30 years ago. The percentage of large truck fatal crashes where the driver was coded as fatigued has remained essentially the same since 2003, despite small fluctuations. Similarly, the percentage of large-truck fatalities in the 11th hour of driving where the driver was coded as fatigued has remained below the average of the years 1991-2002 since 2003. (Docket No. FMCSA-2004-19608, Interim Final Rule, pp. 6-7.)

Regarding driving in the 11th hour, a survey then conducted by FMCSA showed that "virtually no one attempts to use every minute of driving or on-duty time theoretically allowed by the regulations, just as the Agency predicted in the 2005 rule." (Interim Final Rule, at p.10.) Additionally, as was demonstrated by the agency's 2007 review of 16,676 driving periods, 27 percent involved the 11th hour of driving. (Interim Final Rule, at p.61.) Moreover, it was pointed out that the "analysis of further data collected for the Virginia Tech Transportation Institute (VTTI) operational study supports the preliminary results described in the 2005 rule: there is no increase in 'critical incidents' (a surrogate for crash risk) in the 11th hour of driving." (Interim Final Rule, at p.10.)

A study conducted by American Trucking Associations, Inc. (ATA) for the month of June 2007 included information obtained from 69 motor carriers, principally less-than-truckload and truckload carriers, on driving in the 11th hour also was referenced by FMCSA. Those companies

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employed about 234,000 drivers, and it was indicated that 46 percent of their drivers used the 11th hour of driving during the month surveyed, and that the 11th driving hour was used an average of 8.42 times during the 30 days of June. FMCSA computed that based on the 30-day period in that month 13 percent of daily trips involved the 11th hour. Based on the 22 working days in that month, it was calculated that the 11th driving hour was used 18 percent of the daily driving trips. (Interim Final Rule, pp.62-63.)

The success of compliance with the 34-hour restart rule was documented by the 2007 FMCSA survey, which included a review of the 1,925 restart records of some 1,035 drivers. It was seen that 8 percent took exactly 34 hours, while 5 percent were between 34 to 36 hours, 22 percent were between 34 to 36 hours, and 64 percent exceeded 44 hours. Further, 84 percent of the drivers had at least one continuous off-duty period equal to or greater than 34 hours in length during a typical work week. (Interim Final Rule, at p.60.)

In the agency's November 19, 2008 Notice in the Federal Register adopting its final HOS rule, which became effective January 19, 2009, FMCSA again reiterated that safety had not been compromised by allowing the 11 hours of driving. The agency pointed out that "the fact that the fatal crash rate continues to follow a downward trend suggests that the HOS regulations have not had an adverse impact on safety." (73 Fed. Reg. at 69572.) FMCSA also noted that "multiple analyses that parsed the data in many different ways consistently came to the same conclusion: There is no measurable increased risk for drivers driving in the 11th hour as compared to the 10th hour or any other driving-hour." (73 Fed. Reg. at 69576.) Moreover, in the 2007 Trucks in Fatal Accidents data, it was reported that of the 45 fatal crashes reported in the 11th hour of driving during the period running from 2004 through 2006, only one was coded as driver fatigue-related. There were none reported in 2004 when 13 fatal crashes occurred in the 11th hour, and none in 2006 when 16 fatal 11th hour crashes were reported. (73 Fed. Reg. at 69583.)

The very positive effect the current regulations have had on safety cannot be gainsaid. The 2006 study by the American Transportation Research Institute (ATRI) reviewed how the 2005 rule has functioned within the trucking industry by examining aggregated collision and driver injury data before and after the implementation of the 2003 HOS rule. As FMCSA pointed out the study involved the largest number of drivers and trucks the agency was aware of; namely, 23 medium-to-large trucking companies with approximately 100,000 drivers operating more than 10 billion vehicle miles each year. FMCSA indicated the study found that there were:

[S]tatistically significant reductions in the overall collision rate per million vehicle

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miles traveled (-3.7 percent), as well as reductions in the preventable collision rate (-4.8 percent), the driver injury rate (-12.6 percent), and the collision-related injury rate (-4.8 percent).

FMCSA concluded that those results were consistent with the trends in the Fatality Analysis Reporting System (FARS) data and “further support the conclusion that the overall safety of the motor carrier industry has been maintained since the 2003 and 2005 HOS rules became effective.” (73 Fed. Reg. at 69577.)

FMCSA found, as well, that its Field Surveys showed increased use of the restart provision from 2005 to 2007, and during that time the fatigue-related fatal truck crashes remained essentially unchanged and the overall large-truck fatal crash rate dropped to the lowest level ever recorded. Thus, the agency concluded that it would readopt the 34-hour restart provision in the interim final rule without change. (73 Fed. Reg. at 69575.)

The underlying rationale for FMCSA’s proposed decreasing of driving time from 11 to 10 hours appears to be predicated on the agency’s assumption that “drivers who work to the limits of the current rule are those most likely to develop fatigue over the course of the day and week; and, therefore, a reduction in their driving hours should lead to reductions in fatigue-related crashes. (75 Fed. Reg. at 82172.) However, that assumption is not consistent with the voluminous information and data previously developed, and concomitant agency findings made, in this proceeding, which has been ongoing since 2003.

Importantly, the agency has heretofore correctly recognized that drivers simply do not attempt to use the total driving time allotted under the rule. Additionally, based on the ATA study in June 2007 of some 234,000 drivers it was shown that the 11th hour of driving was used, on average, in only 18 percent of the daily driving trips. Also, as indicated, it should be recognized that driving in the 11th hour does not mean the driver drove for 11 hours. Rather, due to delays encountered in loading and unloading, weather, highway congestion or other delays, the driver may have found it necessary or desirable, because of the loss of driving time within the 14-hour on-duty window to utilize the available 11th hour of driving. So too, data supports the conclusion that there is no measurable increase of risk for drivers driving in the 11th as compared to the 10th hour. As for fatigue, the data shows that in the 2007 FMCSA study of some 1,035 drivers, 92 percent took more than the 34 hours allowed before restart of the on-duty clock was permitted. Plainly, adequate time for rest is available and is being taken advantage of by the drivers.

In citing the number of large truck crashes that occurred in 2008, the agency asserts that “even if fatigue is a contributing factor in only a small percentage of crashes, it still has a profound safety impact.” (75 Fed. Reg. at 82176.) Given the improved and improving safety record of the trucking industry while the current HOS regulations have been in effect, and the fact that drivers clearly now have adequate time for rest with the mandatory 10-hour off-duty period, coupled with the minimum 34-hour restart period, FMCSA’s reliance on fatigue as rationalization for the proposed changes clearly is misplaced. Further, the agency’s statement that the National Transportation Safety Board (NTSB) “studied single-vehicle crashes and crashes in which the driver was killed, and estimated that 31 percent of fatal-to-driver accidents may be fatigue-related,” probably is misplaced as well. (75 Fed. Reg. at 82176, fn. 9.) It appears that the 31 percent estimate is found in a 1988 NTSB Safety Study entitled *Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-To-The-Driver Heavy Truck Crashes*. The principal focus of the study, which reviewed 186 accidents which occurred in eight states, was to assess the role alcohol and other drugs had in the accident. Most important, that study was conducted under the HOS rule which preceded the current rule, and did not assess fatigue predicated on the time for rest now provided to drivers.

Compliance by the LTL carriers with the current rule is acknowledged by FMCSA. As it indicates, “many short-haul drivers, including unionized drivers who mostly engage in local or LTL operations, operate well within all the provisions of the rule. LTL firms and many private carriers have set their routes and terminals to stay within the HOS rule.” (75 Fed. Reg. at 82175.) The positive effect of the current rule on driver sleep-time is also evident. FMCSA’s 2005 Truck Driver Fatigue Management Survey, which collected data from almost 2,300 unionized LTL drivers, showed that the drivers reported an average 6.94 hour of sleep in 24 hours on working days, and indicated that they were getting about 42 minutes of additional sleep during the working day. (75 Fed. Reg. at 82177.) In addition, the 2006 FMCSA Truck Driver Fatigue Management Survey indicated that more than 65 percent of the drivers now take breaks of a half hour or more during the work day. (75 Fed. Reg. at 82180.)

It is equally clear that the vast majority of TL carriers comply with the HOS rule, and conduct safe operations in their transportation operations. This is well demonstrated in the agency’s comments in Docket No. FMCSA-2004-18940, *Electronic On-Board Recorders for Hours-of-Service Compliance*. FMCSA stated that:

Based on data concerning HOS violation from CRs conducted between June 2001 and June 2005, this trigger, if adopted, would result in the issuance of

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approximately 465 remedial directives to EOBs annually. The Agency believes this relatively small carrier population, with its severe and recurring HOS compliance deficiencies, poses a disproportionate risk to public safety. (72 Fed. Reg. at 2364.)

It further pointed out that:

FMCSA, based on its safety research, believes that motor carriers whose drivers routinely exceed HOS limits or falsify their HOS records have an increased probability of involvement in fatigue-related crashes and therefore present a disproportionately high risk to highway safety. Based on the Agency's analysis of its Motor Carrier Management Information System (MCMIS) data from CRs conducted since 1995 on motor carriers operating in interstate commerce, carriers to which a remedial directive would apply under this proposal have crash rates that are 87 percent higher than average. (72 Fed. Reg. at 2372.)

Manifestly, motor carrier safety risks on the highways arise from noncompliance with the HOS rule which creates that fatigue which does, in fact, result in the overwhelming majority of truck crashes.

As ATA has correctly pointed out previously, the 11th hour of driving provides dispatchers with flexibility working with drivers and customers to efficiently schedule pickup and delivery times. Drivers are better able to take off-duty rest periods at home. The extra hour also provides drivers a better ability to deal with highway congestion, weather, construction, and other unexpected delays. Further, some carriers can operate more efficiently, and some can provide dedicated services with fewer trucks and drivers.

In addition, it is estimated that the majority of freight moving over the highways is transported under contracts with shippers. Over the past 8 years some shippers have adopted just-in-time inventory practices, and others, including brokers, have incorporated various "time is of the essence" requirements into their agreements. The carriers' abilities to meet those requirements are predicated on the current driving hours permissible under the HOS rule. Not only will the 14-hour on-duty window be reduced by the proposed mandatory one-hour break, but the remaining driving hours will lose the flexibility created by the present rule because of the manner in which the driving periods must be taken in response to that break. As noted by FMCSA, the 11th hour of driving is used sparingly, and drivers already take breaks as needed. Ample studies exist, and already have been noted by FMCSA, which indicate that there is no critical link between safety and driving in the 11th versus the 10th hour. Failure to maintain the present rule will impact carrier operations, and could impair the ability to meet contractual commitments without employing additional drivers and trucks to fulfill those service needs.

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Lastly, FMCSA's preference for limiting the 11-hours driving time is based on several questionable assumptions. It states that "given the imprecise but demonstrated relationship between fatigue, time-on-task, hours awake, and hours worked, there is reasonable argument for limiting driving time to 10 hours." (75 Fed. Reg. at 82180.) That overly broad rationale could be used to "justify" any reduction in driving hours from a higher limit. It is submitted that, as recognized by FMCSA, it is the violation of the HOS rule by a relatively small number of carriers which gives rise to serious fatigue issues, and accounts for an accident rate that is 87 percent higher than the average. Although the agency appears hesitant to acknowledge a link between compliance with the HOS rule and the improving safety record on the Nation's highways, it is undeniable that those few carriers that do not comply with the rule are the ones creating the greatest risk to the public, and conduct unsafe operations—not the carriers which do comply.

No sound rationale is found in the Notice which would justify modifying the current 14-hour on-duty window, and the 11 hours for driving, or the 34-hour restart provisions as has been proposed.

IV.

FMCSA'S COST/BENEFIT ANALYSIS IS FLAWED

FMCSA has projected estimated annual benefits versus costs based on three options which are predicated, respectively, on 10, 11, and 9 hours of driving. (See 75 Fed. Reg. at 82187-82194.) The flaws in that analysis are clearly identified in the report of Edgeworth Economics, entitled Review of FMCSA's Regulatory Impact Analysis for the 2010-2011 Hours of Service Rule, dated February 15, 2011, which is an independent analysis requested by ATA, and is of record in this proceeding. NMFTA believes that the Edgeworth Economics review identifies serious erroneous assumptions in FMCSA's analysis and demonstrates that the alleged financial benefit resulting from the proposed reduction to 10 hours of driving time is illusory and vastly overstated. It further indicates that, actually, a substantial annual loss would result from the adoption of the 10-hour driving option.

It is particularly illuminating to revisit FMCSA's analysis of the costs/benefits anticipated from the then-rejected option of 10 hours of driving in its November 19, 2008 adoption of the current HOS regulations as its final rule. It concluded that:

The weighted productivity impacts from implementing Option 2 (that is, 10 hours driving, no restart) results in a 7.30 percent reduction in driver (labor) productivity compared to the current IFR. From research conducted for the 2003 Rule RIA

(contained in the docket), FMCSA analysts showed that each one percent change in driver productivity is associated with just under \$300 million in costs using a population estimate based on the year 2000 and cost figures expressed in 2004 dollars. Updating to a more recent and larger 2005 estimate for the long-haul driver population and expressed in terms of 2005 dollars raises the cost of each one percent change in productivity to \$335 million. Multiplying the weighted average productivity impacts by the costs percent decrease in productivity yields \$2, 443 million in annual costs associated with implementing Option 2 (relative to Option 1, which obviously showed no change in costs relative to the current operating environment).

In summary, the total annual costs from implementing Option 2 are roughly \$2, 443 million and the total annual safety benefits roughly \$214 million, resulting in a net annual cost from implementing Option 2 of approximately \$2, 229 million (in 2005 dollars). (73 Fed. Reg. at 69584.)

FMCSA's current reduction of the impact of the decrease in industry productivity resulting from the proposed 9 hours of driving to 2 percent, from 7.30 percent, and the projected annual cost of \$990 million from that option, as compared to the original assessment of \$2, 229 million, raises serious concerns as to the reliability of FMCSA's Regulatory Impact Analysis. (See 75 Fed. Reg. at 82187.)

The growing shortage of drivers cannot be disputed. Unaddressed is the financial impact the proposed HOS rule will have on drivers, and the concomitant difficulty that would be created by the changes proposed in recruiting new drivers to the industry. A number of drivers are compensated on a per mile or hourly basis. Without question, the reduction in permissible driving hours and the mandatory one-hour break will negatively affect the income of those drivers. Not only will that reduction in income make the task of retaining experienced drivers more difficult, but also becoming a truck driver could be deemed a less desirable career.

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V.

CONCLUSION

NMFTA believes that the current HOS rule, which was the product of careful and extensive consideration by FMCSA, has served the public and the trucking industry very well. Safety obviously has not been diminished, but has improved, and drivers are receiving adequate time off to obtain the necessary rest to avoid fatigue. No sound basis exists, or has been presented, for the proposed changes in the current hours-of-service regulations.

Respectfully submitted,

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