

Before the

U.S. DEPARTMENT OF TRANSPORTATION

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Response to Request for Comments

Proposed Rule

Hours of Service of Drivers

Docket No. FMCSA-2004-19608

Submitted by:

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February 2011

Introduction

The Snack Food Association (SFA) is the international trade association of the snack food industry representing snack manufacturers and suppliers. SFA represents over 400 companies worldwide. SFA's membership includes, but is not limited to, manufacturers of potato chips, tortilla chips, cereal snacks, pretzels, popcorn, cheese snacks, snack crackers, meat snacks, pork rinds, snack nuts, party mix, corn snacks, pellet snacks, fruit snacks, snack bars, granola, snack cakes, cookies and various other snack foods.

SFA member-companies are not a part of the "trucking industry" per se. Our core business is manufacturing and distributing convenience foods to thousands of retail outlets such as grocery and convenience stores. Nonetheless, SFA member-companies collectively employ tens of thousands of professional drivers and operate commercial vehicles in a wide range of private fleet operations. The vast majority of these workers are not over-the road drivers, but are engaged in short-haul store delivery activities and return to the same place of business each day.

Notice of Proposed Rulemaking

On December 29, 2010, the Federal Motor Carrier Safety Administration (FMCSA) published a Notice of Proposed Rulemaking (NPRM) to revise the regulations for hours of service for drivers of property-carrying commercial motor vehicles (CMVs). The proposal seeks to establish a "driving window" of 14 hours which may be extended to 16 hours twice during a one-week period; require that a driver be released from duty after the 14th or 16th hour; limit on-duty time within the 14 or 16 hours to 13 hours; require drivers to take a minimum 30-minute break after seven hours on-duty; require that a driver's "34-hour restart" include two periods between midnight and 6 a.m.; require that the restart be limited to once during a seven-day period; revise the definition of "on-duty" to exclude certain non-driving time spent in the CMV; and, clarify certain provisions of the oilfield operations exception. The proposal leaves open the question of whether driving time within the 14 or 16-hour window should be limited to 11 hours, as is currently the case, or reduced to 10 hours, which the Agency says it "currently favors".

Position of the Snack Food Association

SFA does not support the changes to the driver's hours of service rules proposed in this Notice of Proposed Rulemaking. FMCSA's own health and safety data do not support the proposed changes. Moreover, several provisions of the proposed rules would significantly diminish operational flexibility for SFA-member fleets. These include the proposed revision to the "restart" provision; the proposed requirement that a driver take a minimum 30-minute break after seven hours on-duty; the proposed requirement that limits a driver to 13 hours of work time within a 14-hour or 16-hour driving window and the proposed requirement that a driver be released from duty after the 14th or 16th hour.

After many years of research, regulation and litigation a final rule on drivers' hours of service (HOS) became effective January 19, 2009. This rule was largely unchanged from rules promulgated in 2003 and 2005. Given the torturous history of this rulemaking and the fact that every aspect of it has been subject to exhaustive public review and comment over a period of many years, SFA questions the policy rationale for now seeking substantive and potentially costly and counterproductive changes. SFA realizes that FMCSA is operating under the terms of a judicial settlement and perhaps political constraints as well. However, this in no way can be seen as relieving the Agency of its ultimate responsibility to act in accordance with its best professional judgment based on the facts before it.

What circumstances or events could have occurred that would justify reopening this matter after all these years of regulation and litigation? Are there new data that would result in the agency tossing out portions of the current rule and starting over? What new data there are suggest otherwise: Truck crash rates are at historic lows and have decreased significantly over the last 10 years. Fatigue-related truck crashes decreased by 33 percent from 2003 through 2009 and the number of truck-involved injuries declined by 39 percent.

It is difficult to imagine a worse time to be revisiting this issue. Daily and weekly duration of driving time and requirements for rest and time off-duty have a significant impact on the costs of fleet operations and on transportation as a whole. Fleet operators are struggling to recover from the worst economic crisis in over 60 years. Uncertainty abounds with respect to 2011 and beyond: questions concerning fuel prices, the cost of borrowing, environmental regulations, and most importantly whether and when demand for goods and services will fully recover, combine to produce serious business-planning challenges. To this list we now add doubt and uncertainty as to the makeup of the hours of service rules.

SFA supported the 2008 final rule which in effect reaffirmed the current rules and we continue to support those rules today. More than ever, we need a familiar and uniform set of national rules governing motor carrier transportation.

Implementation of the Proposed Rule Would Be Costly and Disruptive

It is evident from favorable crash statistics that the rules in place today have not compromised safety. At the same time, one provision in particular, the so-called 34-hour restart, has offered some degree of operational flexibility in a rule that has otherwise significantly reduced the flexibility that was available to fleet operators before the 2003 (and later 2005) rules were adopted. Elimination of the 34-hour

restart in favor of a requirement of two consecutive nights off largely eliminates this flexibility, disrupting distribution and delivery operations and increasing costs.

Under the pre-2003 HOS rules, a driver was permitted to exclude intermittent periods of off-duty time from the maximum 15 hours of “daily” on-duty time. In this way, a driver taking meal breaks or other off-duty periods could “extend” his or her 15-hour tour of duty. While such extensions were not the norm in our industry, snack food and similar fleet operations were able to take advantage of this during peak periods and to accommodate unforeseen circumstances such as weather or traffic delays. Under the current HOS rules, drivers may not drive after the 14th hour of coming on duty following 10 or more consecutive hours off duty, regardless of any intermittent off-duty periods.

In support of the 2003 rules, which were mostly retained in the 2005 rulemaking, the Agency contended that the 11th hour of driving time and the 34-hour restart would offer counterbalance to the economic loss occasioned by the change from a tour of duty that could be extended by rest breaks, to one defined by a 14-hour non-extendable time period.

However, the increase in allowable driving time from 10 to 11 hours provides an economic benefit primarily to long-haul carriers. Drivers such as those in snack food fleet operations rarely come close to driving 10 hours, much less 11 hours during a single tour of duty. Therefore our companies have derived little offsetting economic benefit from the additional hour of driving time provided in the current rules.

Nonetheless, our companies have been able to utilize the 34-hour restart as a means of offsetting a portion of the operational and economic loss occasioned by adoption of those rules. This provision is essential under the rules as they are today to allow drivers and carriers to schedule and complete work. The loss of this provision, according to FMCSA’s own estimate, would cost the industry overall \$1.6 billion per year.

As noted above, the 34-hour restart has offered fleets such as those managed by SFA-member companies a degree of operational flexibility. The restart allows drivers to be scheduled in a way which mitigates a portion of the productivity losses resulting from the 2003/2005 changes. The changes now proposed would gut this provision, making it available to very few drivers in select circumstances; i.e. those whose tours of duty happen to end in the evening hours.

SFA member-companies often schedule early morning deliveries as a means of avoiding traffic congestion and accident exposure and to ensure that product is delivered in advance of normal business hours. In fact, the midnight to 6:00 am time window is often the ideal time to make truck deliveries because traffic, congestion and accident exposure is reduced. The proposed changes to the restart fly in the face of long-standing government and industry initiatives to move traffic to off-peak hours. They would force a shift in a significant portion of truck trips into peak traffic and business hours and inhibit the ability to schedule deliveries in the most productive manner. The result would be reduced operating efficiency and negative impacts on safety, congestion and air quality.

The proposed requirements that drivers take a minimum 30-minute break after seven hours on-duty and limit them to 13 hours of work within a 14-hour “driving window” is also problematic for store-delivery operations. While such a rule may be appropriate for long-haul drivers, it makes little sense for drivers who spend only a portion of their time driving, with the rest spent stocking shelves or in other duties. It is evident that the seven-hour proposal is based on the assumption of fatigue as it relates to long-haul driving, not to intermittent driving punctuated by non-driving activities. If this rule becomes effective it will further reduce operational effectiveness with no demonstrated improvements to safety.

Similarly, the proposed revision requiring a driver to be released from duty following the 14th hour does not appear to have been considered with incidental drivers in mind. As we understand the proposal, anyone who drives a commercial vehicle in interstate commerce for any length of time, even, say for one hour, would be required to quit any type of employment activity after 14 hours of beginning a work cycle. Under this type of circumstance, why should the Agency involve itself in regulating how much someone wishes to work?

That this proposed rule would be extremely costly is beyond dispute. The benefits are far less clear.

FMCSA Data Do Not Support the Proposed Rule

In the preamble to this proposed rule, FMCSA freely acknowledges “the data show no decline in highway safety since the implementation of the 2003 rule and its re-adoption in the 2005 rule.” Nonetheless, the Agency seeks to justify the proposal on the grounds that “the total number of crashes though declining, is still unacceptably high [and] [m]oreover, the source of the decline in crashes is unclear.” This remarkable admission appears to leave us with a proposal for a costly and disruptive HOS regime that is based on nothing but conjecture.

Moreover, the Agency's previous data analysis concluded that drivers were not accumulating significant levels of cumulative fatigue over the course of the workweek under the current rules. In fact, FMCSA stated it "has not identified any evidence that cumulative fatigue represents a significant problem under the 2003 or 2005 rule." The Agency has consistently found fatigue to be a causal factor in a very small percentage of crashes. Additionally, the Agency's own data have consistently shown no additional negative health effects emanating from the current regulatory scheme.

Yet the Agency has now, using much the same data sets, somehow come up with a cost analysis that reaches not only a different, but an opposite conclusion: that driver fatigue is a serious problem under the current rules. The Agency goes so far as to cite driver health issues as central support for the proposed changes.

We believe the FMCSA has a duty to fully explain these analytical discrepancies before traveling further along the rulemaking path.

Moreover, as noted above, drivers in our industry are typically engaged in short-haul retail delivery activities and return to the same place of business each day. They spend a large portion of their workday in non-driving activities such as unloading, stacking shelves and in sales operations at multiple locations. The bulk of fatigue research on commercial drivers addresses the effects of over-the-road driving. There is little evidence to suggest fatigue as a safety issue in the short haul segment.

FMCSA has in the past freely acknowledged this point, admitting that "fatigue may be less problematic for local/short haul drivers." 68 Federal Register at 22492 (April 28, 2003) and that "the fraction of crashes attributable to fatigue is considerably larger" for the long-haul trucking industry than for short-haul carriers, *id.* at 22497.

If the Agency has little data to support the proposed rule as applied to over-the-road trucking, its basis as applied to short-haul is virtually non-existent.

The Proposed Rule Ignores Short-Haul Impacts

SFA contests the notion put forward by FMCSA that those "most affected" by the HOS rules "are long-haul TL [truckload] carriers." In reality, the greatest cumulative impact is on the many thousands of manufacturers, distributors, retailers and others who rely on mostly short-haul trucking in support of

their core business activities. These companies are not in the business of trucking except as a necessary support component. In many cases operating a commercial vehicle is secondary or even incidental to what their “drivers” are doing during a shift. And yet, because the HOS rules go beyond limits on driving time to prescribe how many non-driving hours even an incidental driver may work, they dig into the most critical of business functions: determining worker hours. Moreover, as FMCSA and other data show, most of the businesses regulated by HOS rules are private carriers engaged in short haul operations of less than 250 miles.

Despite this, the Agency virtually ignores the effects of the proposed rule on short haul trucking. The cost-benefit analysis, as described by the Agency “concentrated on inter-city long-haul or regional, as opposed to local, trucking operations.” FMCSA’s conclusion that “the rule changes proposed in this NPRM are expected to have little effect on such operations” is utterly without foundation.

Conclusion

SFA does not support the changes to the driver’s hours of service rules proposed in this Notice of Proposed Rulemaking. Implementation would prove costly and disruptive to fleets operated by SFA-member companies. Especially problematic are the proposed revision to the “restart” provision; the proposed requirement that a driver take a minimum 30-minute break after seven hours on-duty; the proposed requirement that limits a driver to 13 hours of work time within a 14-hour or 16-hour driving window; and the requirement that a driver be released from duty after the 14th or 16th hour.

As manufacturers and shippers, these proposed changes stand to add a layer of complexity and costs. They’re a productivity killer; especially for short haul, route and delivery fleets because they reduce, not just driving time, but allowable work hours and flexibility. They would inappropriately cut into the work time available to those workers for whom driving consumes only a portion of their work day. This problem would be especially acute during peak delivery periods. The ten vs. eleven- hour driving time is largely a non-issue for these fleets. However, the cumulative effect of the other proposed changes noted above would be substantial with no offsetting safety benefit.

These proposed rules, if implemented, promise only to limit productive work at a time when American businesses are struggling to recover from economic recession. They would make it more difficult for companies to do business, and therefore less likely to create jobs; a key national priority.