



January 3, 2005

U.S. Department of Transportation
Docket Management Facility
Room PL-401
400 Seventh Street, S.W.
Washington, DC 20590-0001

Re: FMCSA SNPRM on Hours of Service of Drivers; Supporting Documents
Docket No. FMCSA-1998-3706

Dear Docket Clerk:

These comments are filed in response to the U.S. Department of Transportation (DOT), Federal Motor Carrier Safety Administration (FMCSA) Supplemental Notice of Proposed Rulemaking (SNPRM) on Hours of Service of Drivers; Supporting Documents published in the November 3, 2004 *Federal Register*.

The Truckload Carriers Association (TCA), with offices at 2200 Mill Road, Alexandria, VA 22314-4677 is the only national trade association whose sole focus is the truckload segment of the motor carrier industry. The association represents dry van, refrigerated, flatbed and intermodal container carriers operating in the 48 contiguous states as well as Alaska, Mexico and Canada. Furthermore, as a major part of an industry that has over 524,000 companies within the U.S. operating millions of power units, TCA and its trucking company members are vitally interested in the DOT's objectives and strategies to improve highway safety and the potential impact these objectives and strategies could eventually have on our operations -- in particular, as they relate to the important issue of hours of service (HOS). To this point, TCA has commented in the past on not only the then Federal Highway Administration's (FHWA's) original April 20, 1998 Notice of Proposed Rulemaking (NPRM) on HOS supporting documents, but also on other HOS-related proposals -- therefore we are extremely interested in submitting comments to this SNPRM.

Similar to our understanding of the reasoning behind the agency's recent publishing of an Advance Notice of Proposed Rulemaking (ANPRM) on electronic on-board recorders (EOBRs) for HOS compliance, we recognize the reasoning behind the issuance of this proposal. In the agency's own words [from *Federal Register*

page 63997 of the November 3, 2004 SNPRM], “This rulemaking is required by, and based on, section 113 (Driver’s Record of Duty Status) of the Hazardous Materials Transportation Authorization Act of 1994 (HMTAA), Pub. L 103-311, August 26, 1994.... Section 113(a) requires FMCSA to amend 49 CFR part 395 to improve both driver and carrier compliance with the HOS regulations and the effectiveness and efficiency of HOS enforcement, at a cost reasonable to the motor carrier industry.”

That said, we believe that while the agency is statutorily required to implement an HOS supporting document rulemaking initiative, the scope of the November 3 SNPRM is too broad, does not meet the reasonable cost tests as required by the HMTAA, and is fundamentally flawed in a number of other respects that we will elaborate on in our comments to follow. We believe that the SNPRM is a **considerable** expansion of the current HOS recordkeeping requirements for motor carriers, and is another prime example of government over-regulation and rulemaking aimed at easing the agency’s enforcement burden without regard to the cost implications for the trucking industry.

Specific Concerns on HOS Supporting Documents SNPRM

1) Scope of the Proposed Rule is Far Too Broad

The FMCSA’s proposed regulations regarding the HOS supporting documentation are overly broad and as a result will likely dilute the motor carrier’s safety efforts and may even cause certain carriers to actually become less safe. Furthermore, given this potential new burden of capturing, deciphering, manipulating and storing all this information now included as supporting documentation leads us to believe that some carriers may simply avoid the use of modern technologies to access this information. This is in spite of the fact of the present and potential safety and operational benefits provided by the data acquired from such technologies. The FMCSA is proposing in §395.2 to add the statutory definition of supporting documents as provided in the HMTAA, with the addition of clarifying language and a list of examples. They go on to state that the proposed list is only a sampling of the types of documents that the FMCSA believes could support the HOS and be used to verify the accuracy of records of duty status (RODS), when used either by themselves or with other documents.

What this proposed regulatory language implies is that the rule would basically require that **all** records generated in the normal course of business, which possibly could be used as a supporting document, must be kept, identified, filed systematically and produced for review. If not, a proposed new provision to be added to Appendix B of Part 385 reads, “§395.10(f) Failing to maintain each supporting document in a manner that permits the matching of the record to the original driver’s record of duty status (critical violation).” This proposed mandate would cause a multitude of problems for the motor carrier that are absolutely unnecessary for the agency’s ultimate goal of properly

monitoring HOS compliance. First and foremost, retaining all of these added documents would be an unnecessary added cost for the industry. Added staffing would be necessary to monitor all of this new documentation, which most carriers – particularly the small trucking companies cannot afford. To this point, the DOT’s own statistics indicate that over 90% of currently licensed and registered motor carriers operate 6 trucks or less. More importantly, relating to this voluminous paperwork requirement is the fact that no one can prove that the current system of the carriers monitoring their logs with the present required documentation is not working. As a matter of fact, in our suggested revisions that we will discuss later in our comments, we believe that the list of required HOS supporting documents can be effectively narrowed to a very select few.

Regarding added costs, we must respectfully disagree with the agency’s statement found in the SNPRM on *Federal Register* page 64011, “The FMCSA has preliminarily determined that this proposal would not result in an increase in the existing information collection burden.” In responses and feedback from our membership, who are monitoring the HOS compliance of their drivers on a daily basis, it is likely that the proposal as currently written will add sizeable and unnecessary cost burdens to the industry. For example, with this all-encompassing proposed collection of every supporting document, identifying and matching all of these added records with drivers and truck numbers to the RODS, and auditing all of these records to determine HOS compliance will add huge costs to the carrier’s bottom line. Added staffing, file storage space, computer disc space for records (electronic and others), are just some of the examples of the sizeable additional cost burden this would be to the carrier. There are also added costs for monitoring compliance with this proposed rule. A carrier must put new systems in place to ensure that all documents are turned in by their drivers – and this is nearly an impossible task to accomplish particularly for the truckload carrier driver who is often away from the terminal or home location for several days at a time.

In short, the industry’s costs relative to identifying, filing, retrieving and matching all records that could possibly be considered HOS supporting documents will greatly escalate if this proposal is finalized as currently written. Furthermore, the current and proposed recordkeeping requirement of 6 months for all of the HOS supporting documents is too long – particularly if all of this newly proposed documentation must be retained. We believe a much more reasonable retention period of 2 to 3 months makes more sense from a cost standpoint.

2) The Proposal is Ambiguous and Does Not Meet the Statutory Provisions of the HMTAA

The SNPRM fails to fulfill the requirements in the HMTAA of 1994 that mandated this rulemaking initiative. Section 113(b)(2) of the Act specifically requires the agency to include “a provision specifying the number, type and frequency of supporting documents that must be retained by a motor carrier so as to allow verification

of the accuracy of such documents **at a reasonable cost**, to the driver and the motor carrier, of record acquisition and retention. . . . in prescribing the regulations, the Secretary of Transportation shall ensure that compliance can be achieved at a cost that is reasonable to drivers and motor carriers.” Further proof that the agency has not met this Congressional mandate can be found in another critical violation that is proposed to be added to Appendix B of Part 385 of Federal Motor Carrier Safety Regulations (FMCSRs) reads as follows, “§395.8(i) Failing to require driver to forward within 13 days of completion, the original of the record of duty status and all supporting documents (critical violation).”

The fact is that the SNPRM does not meet either of the statutory provisions. In the proposed definition of *Supporting Document* from §395.2, the agency ambiguously provides examples of numerous potential supporting documents, and says that it is not an all-inclusive list. However, by not specifying the number and type of supporting documents that must be retained, and by not specifying the frequency they should be compared to the RODS for compliance verification, the SNPRM has not clearly defined the motor carrier’s compliance requirements. Furthermore, it should be noted, that introducing electronic position readings as a required HOS supporting document would place those motor carriers using this technology at a competitive disadvantage.

3) Accuracy of Supporting Documents

Text from *Federal Register* page 64002 of the SNPRM reads as follows: “This rule would explicitly require the motor carrier to have a systematic inspection, verification, and maintenance system to verify the accuracy of the times and locations of each driver for every working day on each trip, as well as mileage for each trip.” This is another very troubling aspect of the SNPRM, particularly a proposed requirement to verify the beginning, intermediate and ending on-duty and/or driving times for all drivers.

This is a provision in the proposal that will be nearly impossible to accomplish. First, it is not uncommon for the truckload carrier driver to go for several days at a time without entering a terminal or other location where documentation is produced that could verify beginning or ending times. Secondly, and just as important, although intermediate supporting documentation is readily available to the drivers, it too presents problems – most notably the accuracy of the data entered. A third concern as it relates to the supporting documents is that of the accuracy of the trip mileage. Most of the supporting documents carriers identified never contain mileage information, and with the plethora of various mileage guides available to them, properly computing the exact lengths of trips is a chancy proposition at best. Not only with the various mileage guides available, but with inaccurate odometer readings, recorded engine miles, electronically-generated trip miles, dispatcher records -- just to name a few – resolving the exact trip mileage with all of these variables and systems is just about a nearly impossible task to accomplish.

Furthermore, supporting documents such as pre-stamped toll tickets, in some cases display the date and time of stamping, and not the actual time the bridge, tunnel or road was traveled. Meal receipts often do not contain the basic information required, and the times provided on the DOT roadside inspection reports, are often times at best approximations. To reiterate our concern, not every supporting document is accurate, as data entry errors are often made.

We believe these points highlight our contention that only a few select supporting documents are necessary to properly monitor HOS compliance. Our suggested solutions will be discussed in much greater detail in a later section of our comments entitled, Suggested Course of Action.

4) Privacy and Liability Concerns

As stated earlier, we firmly believe that the scope of the proposed rule is far too broad and basically means that the motor carrier must control everything in the business and private life of the commercial motor vehicle (CMV) driver. In addition to the obvious privacy issues this raises, carriers have a major concern that these efforts by the agency to further impede the privacy of CMV drivers will result in a furthering of the already critical driver shortage issue. For example, acquiring a driver's cell phone records, hotel and motel receipts, meal tickets, etc., is an unnecessary aspect of this proposal that we believe must be eliminated. The private lives of drivers are just that – private.

To further express the issue of the driver's privacy, we forward the following two examples of where this proposed rule goes far beyond what records should be required:

- A driver who stops at an ATM bank machine to withdraw cash and receives a receipt for this withdrawal that is dated and time stamped;
- A second example would involve a driver who while on the course of a long trip doesn't feel well, stops in for a doctor's visit, and when finished receives medical records for a certain condition that may have date and time information on them as well.

Both of these types of personal records are private to the individual, and neither the employer nor anyone else as well should be privy to them.

From a strict liability standpoint, if this proposal is finalized as currently written, a motor carrier could be subject to civil and criminal penalties, as well as new critical violations of the Federal Motor Carrier Safety Regulations (FMCSRs) for not complying with this rule [as we cited earlier in our comments]. From a liability standpoint, these proposed changes to the regulations leave the motor carrier exposed to penalties in

situations that they may have no control over. A perfect example of this would involve a driver who stops for lunch at a McDonald's and gets a copy of a receipt that is probably time-stamped. He/she then subsequently discards the receipt. In this scenario, one could assume that the motor carrier would be held liable for not retaining all of the appropriate HOS supporting documentation per the proposed regulations. We believe that it is not acceptable to revise the rules by declaring all documents both paper and electronic must be retained and used to audit. This type of language only increases the motor carrier's liability by opening up to attorneys and Federal compliance officers any document that can be identified.

While on this subject, we believe that the proposed regulations would also unfairly penalize motor carriers. As currently drafted, §395.10(h) makes motor carriers civilly and criminally liable per se if a driver falsifies or alters the RODS or supporting document or violates the HOS regulations. Even if a motor carrier systematically captures, verifies and compares all supporting documentation with a driver's RODS, takes appropriate preventative measures and corrective action when violations occur, and does everything short of not having any drivers in it's trucks, the motor carrier will be ultimately liable for the driver's actions. This is unrealistic.

Lastly, and we believe just as important, with this proposal the agency is attempting to shift the burden of proof of strict liability from themselves to the motor carrier. To this point, the agency's own current guidance to their field inspectors in their field training manual puts the burden on the inspector, and the agency, for producing at least two verifiably accurate (time, date, location, etc.) HOS supporting documents for charges of falsification. We believe that with this proposal as currently written, the agency is attempting to shift this burden of proof to the motor carrier.

5) There Currently is No Proof Linking this Proposal to the Agency's Ultimate Goal of Reducing Accidents and Eliminating Driver Fatigue

We begin by asking a fundamental question of whether or not HOS supporting documents strictly matched to the CMV driver's RODS really make the trucking industry safer. Furthermore, whether the agency currently has any statistical proof that an enforcement action on a motor carrier of matching the supporting documents to the RODS actually makes our highways safer, or improves the driving behavior of a CMV driver. We have seen no evidence of this. What we do believe in is the agency's supposition that any effective HOS supporting documents system should place the emphasis on finding excess hours, and not just being in compliance with the paperwork associated with the HOS rules.

To further these arguments, the recent trend line over the last 5 to 6 years has shown a steady decline in the number and percentage of large fatal truck crashes, long before any proposed changes to the HOS supporting documents rules. In addition, the

agencies own statistics in passenger car-large truck crashes indicate that the car driver is at fault nearly 75% of the time.

In preliminary numbers released from the DOT's own Large Truck Crash Causation Study (LTCCS), driver fatigue plays a very small part in large truck vehicle crashes – at around only 3% of those crashes. We believe, that this certainly is not a result of the proper monitoring of the supporting documents. What we do believe is that in some small measure the new HOS rules have had a positive impact on better addressing the critical issue of controlling driver fatigue. These rules were structured to provide CMV driver's adequate rest and recovery that allow them an ample period of rest to restart their clocks. We believe with these new rules that the agency has helped to better promote and address the critical issue of the driver's fatigue management, and we further feel that it is a difficult theory to prove that if all of the HOS supporting documents exactly match the RODS and the vehicle location that the CMV driver is driving appropriately and is not fatigued or mentally alert.

6) Lack of Agency Resources and Staff For Currently Performing Compliance Reviews (CRs) of Motor Carriers

By the agency's own admission and current statistics, they are only auditing around 2% of the approximate 675,000 registered motor carriers with operating authority in the United States. The TCA membership is in agreement based on these statistics, that the agency does not have the personnel to audit carriers based on the current HOS [and other] rules, let alone complicating matters even further by increasing the HOS paperwork and retention requirements in such a large measure with this proposal. Furthermore, as it relates to the auditing process, the proposal fails in large measure to contain record collection and sampling criteria that will guarantee predictability and uniformity in determining how a motor carrier's records will be selected for review.

If the proposed regulations remain as drafted, the agency will find it virtually impossible to review and compare all drivers' RODS with all supporting documentation maintained by motor carriers, especially the larger-sized fleets. If the FMCSA intends to use a sampling method of auditing under the proposed rules, to be accurate and provide due process to all carriers, the regulations should require the sampling to be a statistically valid representation of the entire driver and supporting document pools.

TCA has attempted below to state our selected solutions to these issues of concern we have raised.

Suggested Course of Action

As has been stated repeatedly throughout our comments, the proposed rule as currently written will provide an excessively burdensome amount of new records to be

retained by the motor carrier, which among other things will add sizeable unnecessary costs to their businesses. As the agency proposes, we believe that the motor carrier should have the ability to institute their own “self-monitoring system” for verification of compliance with the HOS rules as reflected on the RODS. However, while we agree with the concept of a “self-monitoring system” for a carrier, the FMCSA must **reasonably prescribe** a system by clearly defining a limited number and the specific type of records. That said, we feel that this prescribed recordkeeping system of HOS supporting documents can be effectively narrowed to about 2 or 3 select documents generated during the normal course of business that include accurate date, time and location – that must be linked to an individual driver by driver or vehicle number – and used to verify their compliance.

That said, based on a small unscientific polling of our membership, we posed the following question: “What HOS supporting documents do you ‘normally’ process and control for monitoring HOS compliance?” The two most common responses forwarded by the membership were the bills of lading and the fuel receipts (primarily those electronically generated). As for other types of supporting documents mentioned -- toll receipts were mentioned by several carriers – however, the issue of the accuracy in some States providing of these documents was questioned. One other common response forwarded was that of records of safety data events including DOT roadside inspections, accidents and moving violations. The issue raised by the membership in regard to these documents is that for the most part the DOT special agent performing the CR of a motor carrier will normally have all of these documents at their disposal when auditing the carrier – which we believe makes the retention of these documents by the carrier unnecessary. However it is our belief that the predominance of carriers who are properly managing the safety programs and the safety of their drivers will already be retaining all of this information in their normal course of business.

Therefore, we believe the bills of lading and fuel receipts (primarily those that are electronically documented) are the most reliable and the most universally used by all motor carriers regardless of size in the normal scope of business. In regard to the retention of the bills of lading as a supporting document [and their reliability of accurate documentation] we wish to offer these additional words of advice and caution forwarded from the TCA membership. Many truckload carriers currently operate a good deal of “drop and hook” business. That said, a shipper can load a trailer, date and time stamp the bills and then the driver may not pick up the load for several hours or in some cases days after it’s loaded. In this scenario, the date and time on the bill of lading is not relative to when the driver shows on their log that he picked up the trailer. What we would suggest would be to reference that the bill of lading documents are only appropriate for “live” load and unload operations, and that they be used as verification of pick-up and delivery points only.

Summary of TCA Comments

By way of review, we have the following concerns with the proposal as currently written:

- Scope of the Proposed Rule is Far Too Broad;
- The Proposal is Ambiguous and Does Not Meet the Statutory Provisions of the Hazardous Materials Transportation Authorization Act of 1994 (HMTAA);
- Accuracy of Supporting Documents;
- Privacy and Liability Issues;
- There Currently is No Proof Linking this Proposal to the Agency's Ultimate Goal of Reducing Accidents and Eliminating Driver Fatigue; and
- Lack of Agency Resources and Staff for Currently Performing Compliance Reviews (CRs) of Motor Carriers.

We strongly urge the agency to better limit and specifically define the necessary HOS supporting documents, to produce a regulation that would enhance enforcement at a much more reasonable cost to motor carriers and drivers, and keep the drivers lives private. The agency must clearly delineate what constitutes supporting documents and avoid penalizing motor carriers with effective safety programs. Motor carriers have and are willing to provide the documents that the FMCSA will request, but the agency needs to understand what they can effectively use and audit. As the proposal stands as written now, the entire issue is too broad to deal with effectively.

In closing, we wish to thank the Department for the opportunity to comment on this important issue.

Sincerely,

A handwritten signature in blue ink, appearing to read "C. Burruss", with a long horizontal flourish extending to the right.

Christopher Burruss
President

