



November 30, 2004

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

Re: FMCSA ANPRM on Electronic On-Board Recorders (EOBRs)
Docket No. FMCSA-2004-18940

Dear Docket Clerk:

These comments are filed in response to the U.S. Department of Transportation (DOT), Federal Motor Carrier Safety Administration (FMCSA) Advance Notice of Proposed Rulemaking (ANPRM) on Electronic On-Board Recorders (EOBRs) for Hours of Service Compliance published in the September 1, 2004 *Federal Register*.

The Truckload Carriers Association (TCA), with offices at 2200 Mill Road, Alexandria, VA 22314-4677 is the national trade association of the truckload segment of the trucking industry. As a major part of an industry that has over 524,000 companies within the United States 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 -- particularly as they relate to the critical issue of hours of service (HOS). Therefore, TCA is extremely interested in submitting comments to this ANPRM.

The TCA is fully aware of the reason behind the agency's publishing of the September 1 ANPRM on EOBRs. From *Federal Register* page 53387 in the agency's own words, "On July 16, 2004, the U.S. Court of Appeals for the District of Columbia Circuit vacated the 2003 final rule [on hours of service] for reasons unrelated to EOBRs. In *dicta*, however, the court said that section 408 of the ICC Termination Act 'required the agency, at a minimum, to collect and analyze data on the costs and benefits of requiring EOBRs.' This ANPRM, which has been under development for some time, is an effort to do just that."

By way of background, on January 9, 2003, we had joined with the American Trucking Associations (ATA) and the Distribution and LTL Carriers Association in filed comments in response to the National Highway Traffic Safety Administration (NHTSA) October 11, 2002 *Federal Register* notice (Docket No. NHTSA-02-13546) on Event Data Recorders (EDRs). The agency had requested industry comments on a series of questions related to the use of EDRs assisting in motor vehicle crash investigations, specifically divided into the following sections: 1) safety benefits; 2) technical issues; 3) privacy issues; and 4) NHTSA's role in this area. In our jointly filed comments, we stated, "we support the voluntary use of technology and devices to enhance safety and productivity. The group strongly supports reliability performance standards for safety-related equipment, regardless of whether the equipment is required or optional."

While we fully comprehend and understand the reasoning behind the issuance of the September 1 ANPRM mentioned earlier, and the extensive history behind it, the **TCA is opposed at this time to any potential future EOBR mandate** for a number of reasons which we will elaborate on in much greater detail in our comments to follow. We do encourage, however, the idea that a voluntary use of EOBRs along with strong tax incentives and legal protections could potentially increase the use and provide solid long term data analysis before any future consideration of a mandate.

TCA Member Survey on EOBR Proposal

In order to obtain pertinent information and feedback for the development of our comments and to best represent the TCA membership position on this issue – including a directive from our Policy Committees as well -- a decision was made to forward a brief survey to the entire membership on the September 1 proposal. This survey was basically comprised of a couple of questions covering the following issues as they relate to EOBRs: are they needed and is the technology sufficient for monitoring HOS compliance; prior experience; specific fears and concerns regarding a potential mandate; and potential support for an EOBR mandate.

To summarize, the responses and feedback we received were nearly unanimous in the fact that the membership is not in support of an EOBR mandate, with a number of important reasons forwarded supporting this position. It should be noted as well, that the respondents were in unanimous agreement that the technology is not currently sufficient to accomplish the agency's goal of properly monitoring HOS compliance. To these points, our comments will focus on the memberships' concerns regarding a potential mandate.

Specific Concerns Regarding an EOBR Mandate

Privacy of Data

Of critical concern regarding a Federal mandate was that of the privacy of the EOBR data. The members raised a slew of questions regarding this issue such as – who owns the information?; who should have access to the data?; who should have first right to correct inaccuracies without penalty? Data ownership, data access, liability protection and privacy issues are key points that must be addressed and resolved by the FMCSA prior to any future ruling on an EOBR mandate.

A number of recent cases of bills that have either been enacted, current legislative or regulatory acts that have been signed into law, or industry comments filed on government proposals have addressed the critical issue of privacy and protection of information. It is of critical importance in any potential future rule on EOBRs that the agency must include legal protections to ensure that the accompanying invasion of privacy is proscribed as mandated by judicial precedent. Examples of recent legislative initiatives and filed comments as they relate to this concern are as follows:

- A.B. 213, which was signed into law by California Governor Gray Davis on September 22, 2003. This bill requires a manufacturer of a new motor vehicle sold or leased in the state that is equipped with one or more recording devices, commonly referred to as “event data recorders” (EDR) or “sensing and diagnostic modules” (SDM), to disclose that fact in the owner’s manual for the vehicle. The bill prohibits specified data that is recorded on a recording device from being downloaded or otherwise retrieved by a person other than the registered owner of the motor vehicle, except under specified circumstances.
- In filed comments submitted by the Electronic Privacy Information Center (EPIC) to a 2004 NHTSA notice to standardize the data format of EDRs in passenger vehicles, they specifically stated the following: “Our comments focus on the privacy implications of EDR technology. The NHTSA should protect the privacy of vehicle owners and drivers with respect to their EDR data in order to efficiently meet the goals of NHTSA.... In order to ensure public acceptance of EDR data collection and its use for NHTSA purposes, such as in centralized, statistical research databases, basic privacy protections must be provided and clearly communicated to the public.” EPIC goes on to say in their filed comments: “Privacy involves a series of rights and responsibilities in personal information known as Fair Information Practices (FIPs), upon which our federal privacy statutes are based. Furthermore, our government agencies, corporations, and foreign government organizations have adopted FIPs when creating privacy laws and policies.” The group goes on to forward a number of recommendations to NHTSA as they relate to the privacy of EDR data including the following: 1) the

vehicle owner should be explicitly recognized as the owner of the EDR data; 2) consent of the vehicle owner should be required for the disclosure of EDR driving data to the NHTSA or any other government or commercial organization, including automotive insurance companies; and 3) the agency should craft regulations consistent with their recommendations to fully protect the privacy rights of vehicle owners and drivers.

- The Fair Credit Reporting Act (FCRA) enforced by the Federal Trade Commission (FTC) is designed to promote accuracy and ensure the privacy of the information used in consumer reports. The FCRA is designed to promote accuracy, fairness and privacy of information in the files of every “consumer reporting agency” (CRA). To this point, access to an individual’s credit file and information is extremely limited, and a CRA may provide information about you only to people with a need recognized by the FCRA – usually to consider an application with a creditor, insurer, employer, landlord or other business. In addition, a CRA may not give out information about you to your employer, or prospective employer, without your written consent. A CRA may not report medical information about you to creditors, insurers, or employers without your permission as well. Individual state laws provide additional protections as well.
- Congress called on the Department of Health and Human Services (DHHS) to issue patient privacy protections as part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). To this end, the first-ever federal privacy standards to protect patients’ medical records and other health information provided to health plans, doctors, hospitals and other health care providers took effect on April 14, 2003. Developed by the DHHS these standards provide patients with access to their medical records and more control over how their personal health information is used and disclosed. They represent a uniform, federal floor of privacy protections for consumers across the country.

Under HIPAA, covered health plans, doctors and other health care providers must provide a notice to their patients how they may use personal medical information and their rights under the new privacy regulation. Doctors, hospitals and other direct care providers generally will provide the notice on the patient’s first visit following the aforementioned compliance date and upon request.

Furthermore, the privacy rule sets limits on how health plans and covered providers may use individually identifiable health information. To promote the best quality care for patients, the rule does not restrict the ability of doctors, nurses or other providers to share information needed to treat their patients. In other situations, though, personal health information generally may not be used for purposes not related to health care, and covered entities may use or share only the minimum amount of protected information needed for a particular purpose. In

addition, patients would have to sign a specific authorization before a covered entity could release their medical information to a life insurer, a bank, a marketing firm or another outside business for purposes not related to their health care.

In summary, the EOBR data privacy issue is critical one, which must be fully addressed prior to the agency implementing any mandate.

Cost

The sizeable investment in an EOBR system compared to the current system of maintaining paper logs is an issue that must be carefully weighed by the agency. A case in point as it relates to the cost to the industry of complying with Federal regulations is the example of the current Federal drug testing regulations. The implementation of these rules in the early 1990's has provided the motor carrier industry first-hand evidence of the cost of complying with a Federal regulatory mandate. In some cases, the drug testing regulations have doubled the costs of compliance in a mandated vs. voluntary environment. While the cost of currently available EOBRs is in the \$1,000-\$3,000 range [plus installation], installation in older mechanical engine-equipped trucks is more complex and would prove to be even more costly.

A common member concern expressed was the issue of the added cost. A required implementation in the near term -- perhaps 2-5 years -- would be overly burdensome and would likely reduce capacity even further in the industry. In addition, several respondents would like to see real cost/benefit assessments associated with EOBRs -- i.e., start-up costs, replacement costs, monthly charges and training costs -- not only for industry but also for the enforcement community. The installation of an EOBR is only one small piece of the total cost equation. Data extraction and transfer from the vehicle to the fleet management system, additional disk drives for record retention, back-up systems, tamper detection software, and virus protections are just some of the potential added costs to consider. As part of the cost issue, it will be necessary to interface the data to a variety of transportation operating systems and law enforcement agencies. Proper protocol of the data will be a major arguable platform for both the public and private sectors. These costs will obviously add to the real costs of EOBRs.

Regarding the potential cost burden, we believe that an EOBR mandate would be particularly acute for the small trucking companies whose resources are extremely limited. To amplify this concern, as it relates to the purchase of EOBRs, the Department of Transportation's (DOT's) own statistics indicate that over 90% of the over 675,000 licensed and registered motor carriers operate 6 trucks or less. These companies, along with the rest of the industry, are currently facing record fuel costs along with the mandate of alternative fuels. Expected tighter emission controls are in turn also increasing the costs of new trucks. The cost to purchase EOBRs is one more financial burden that a majority of the carriers cannot afford.

There has been very little discussion regarding offsetting the cost to trucking companies if EOBR's are to be mandated. One trucking company executive suggested if EOBR's are mandated then all current log auditing should be entirely moved to roadside compliance and the trucking industry should be eliminated completely from the auditing process. TCA member carriers have considerable resources and staff dedicated to extensive and time consuming log auditing processes, and this responsibility should be lifted from them if there should be an EOBR mandate.

Perhaps one way to best summarize the enormity of this cost concern issue is from a TCA respondent who forwarded the following, "the truckload industry profit margins are unreasonable at best, and it seems as though any time we are able to secure any margin of increase, it is quickly captured by some new mandate or increased operating cost.... at this time, there is little to spare as far as profit with fuel prices and lower rates for all lanes... the cost of EOBRs would put a tremendous financial strain on carriers and owner-operators."

Furtherance of the Driver Shortage Issue

A common perception from the respondents is that an EOBR mandate will exacerbate the existing driver shortage problem -- as drivers are mindful of this potential mandate that we believe would complicate this problem even further. There is a real concern that many drivers will be offended that their integrity is being questioned and that recording devices are an infringement on their right to privacy. To further amplify this concern, the existing driver population is already faced with a number of key issues including truck idling, parking [and the current truck parking shortage], lane usage and varying interpretations of Federal safety regulations by the expansive enforcement jurisdictions. An EOBR mandate will undoubtedly add one more level of frustration that cannot be afforded in our industry.

The hiring and retention of drivers and the current driver turnover crisis in the truckload segment of the industry continues to be a primary issue -- particularly since the "new" HOS regulations became effective earlier this year. A recent *Fleet Owner* article on the driver turnover issue reads, "many fleets work hard to reduce driver turnover, as turnover represents a significant cost to their business. The ATA estimates that the average amount of turnover in the truckload sector hovers around 116%, which forces those fleet owners to spend time and money on continued driver recruiting efforts."

The question of the independent owner-operator fleet diminishing even further is an issue that must be addressed by the agency as well. To this point, based on statistics given by Randall Publishing on the independent owner-operator population of drivers, the numbers have been declining since the year 2000. In that year, the total number of independent owner-operators reached a high of 168,000, and has since declined to a total of 153,500 in the year 2003 -- a decrease of nearly 9%. Independent contractors, who

comprise a large portion of many truckload carrier driver pools, may feel trapped as the investment in an EOBR may not be compatible with their next motor carrier opportunity due to different use and linking of data. This potential additional cost to be borne by the independent operator on top of all of the other expense demands to own and operate a truck may lead to further deterioration of the small businessperson in our industry.

Question of Who Owns the EOBR Data

An EOBR mandate would raise the question of who would retain ownership of the data. As it relates to the EOBR data privacy issue discussed earlier, there is great concern over who would potentially have access to the data, and how it will be used. First and foremost, is the primary concern of the legal implications of the data. Trucking is a highly litigious industry as trucking companies are continually targeted in legal proceedings. Compounded with a lack of any real effort to reform the tort system in the United States, unbridled access to EOBR data could further complicate an already fragile environment for the trucking industry.

It is well noted that unfettered access to otherwise benign data can have unintended consequences. The SafeStat system for prioritizing carriers for Compliance Reviews bears mention here. Despite the fact that it was not the agency's original intent, the SafeStat information is publicly accessible over the internet and the public nature of this data dissemination impacts critical business decisions [until the agency recently agreed with the Office of Inspector General's (OIG) report on SafeStat and deleted certain categories of scores on the web] that effect trucking companies daily. Shippers became keenly aware of a motor carrier's SafeStat scores and have used them to decide on which carriers to utilize to transport their commodities. Additionally, insurance companies routinely use SafeStat scores in their carrier evaluations and underwriting decisions. Data posted on SafeStat, at times, has been inaccurate and incomplete. This fact is being presented only to emphasize the position that there would have to be protections for trucking companies from data obtained being utilized for unintended purposes. It is clear the intent of the data collected is to assist in the enforcement of the hours of service rules and therefore the data should be restricted to enforcement personnel. We see no evidence that this has been addressed.

Limitation of Technology (i.e., Reliability of Data)

While briefly discussed earlier in our comments, there was nearly unanimous agreement that the technological level is presently insufficient to accomplish the goal of mandated EOBRs. Of primary importance, the members stated a number of the following concerns relating to the technological limitations of the EOBR, "the technology is in place to tell exactly when a truck moves, where it moves to, how long it was moving and how fast it moved. ...the EOBRs still have no way to tell what the duty status of a driver is when the truck is not moving. This is the area that has always been most

vulnerable to falsification and EOBRs can't change that... I have not seen a device that sufficiently identifies the difference between off-duty and on-duty, not driving unless the driver manually enters the change of duty status... nor can it measure whether or not a driver is actually in the sleeper berth getting restorative sleep." In addition, it is our understanding that the driver can currently use the truck as a personal conveyance and log the time as off-duty. If this were correct, any EOBR mandate would have to address this situation as well.

An agreeable, acceptable protocol of EOBR data is absolutely mandatory. It is critical that the data capture process is secure from tampering and an appropriate back up process for system failure must be developed. To this point, even with the current systems used, the issue of driver tampering with these devices is a viable concern. Tampering on existing engine control module (ECM) systems is currently an issue.

One final issue relating to the technology limitations is accuracy. Even with the current GPS in use today, many carriers have found areas of coverage lapses and interference throughout the United States and Canada that limit the accuracy of identifiable locations and activities. Mountainous areas, large cities with tall buildings and units located behind certain structures confuse the GPS receivers. Transmissions by the driver can be delayed in these locations and submit inaccurate information. An EOBR mandate must ensure that these units are not only completely tamper resistant, but also accurate.

Other Concerns

While these are TCA's primary concerns as they relate to an EOBR mandate, we have a number of other various concerns as well. Before addressing those concerns, however, we firmly believe that the agency has a number of uncertainties and unanswered questions in it's own mind with an EOBR mandate based on text taken directly from the September 1, 2004 ANPRM that we wish to discuss. For example, from *Federal Register* page 53393, the agency poses the following: "What experience have motor carriers and roadside enforcement officials had using third-party software for compliance verification? Furthermore, questions regarding how would a driver, a supervisor or safety official know that an event data recorder was functioning properly and what would be the "propriety of FMCSA's rejecting a device and the circumstances under which enforcement action should be taken."

In addition, from a recent article in the November 15-30, 2004 issue of *The Trucker* magazine on EOBRs reads as follows, "Even in Europe, which has been using somewhat similar technology for several years and which apparently has more of a governmental infrastructure to handle it, there are problems. The European Commission has extended the time for Britain to transition from analog or manual tachographs [measuring instruments for indicating speed of rotation] to digital tachographs and 'smart

card' technology to track drivers' hours" according to information from a British government website on digital tachographs...."in it's commentary FMCSA noted the European Union's desire for an integrated system to tie together both on-vehicle recorders and record keeping systems, and the complexity of the hardware and software that would be needed to do that." One other point made by *The Trucker* article that bears mentioning here regarding our concern on the privacy issue: "and then there's the question of protecting the drivers' privacy rights, a whole other topic fraught with legal, political and ethical questions."

Further concerns with an EOBR mandate are listed as follows:

- To our knowledge we have seen no evidence that an EOBR will address the issue of a safer driver -- or for that matter, whether the EOBR will assist in HOS compliance. We do not have evidence that the existing paper log system is not performing as expected. Regarding safety, an EOBR cannot determine if the driver is alert or fatigued. An EOBR is incapable of determining where a safe and secure place to park is located or how best to avoid heavy traffic congestion or suggest an alternate route or destination. From the driver health standpoint, an EOBR in the vehicle could potentially become a distraction for the driver while driving, further increasing their stress level and awareness. The recent reduction in commercial motor vehicle (CMV) accident rates has proven the industry is effectively addressing public safety in a cost effective manner.
- There currently is a "lack" of a uniform EOBR performance standard. A performance standard should be adopted and subject to the Federal rulemaking notice and comment process before any EOBR mandate is considered.
- There is concern regarding the calibration and/or performance standards for EOBRs and for electronic data recorders, and who would ultimately bear this responsibility. Furthermore, if it was determined that an EOBR is not properly calibrated, is the driver/motor carrier in violation?
- As briefly mentioned earlier, while we are not in support of an EOBR mandate, in reading through the September 1 ANPRM, we see no mention in the notice of potential incentives for a carrier to install or use these devices. Regarding the cost of the devices, incentives including the elimination of the carrier's responsibility for the internal log auditing process, and tax incentives have not been openly discussed.

Summary

To summarize, and to briefly recap our concerns with an EOBR mandate they are as follows: Privacy; Cost; Furtherance of the Driver Shortage Issue; Question of Who

Page Ten
Docket No. FMCSA 2004-18940

Owens the EOBR Data; and Limitation of Technology (i.e., Reliability of Data). It is for these primary reasons, and others specified that the Truckload Carriers Association (TCA) is opposed to any future EOBR mandate. As mentioned earlier, and in line with our current position, we do encourage the idea that a voluntary use of EOBRs along with strong tax incentives and legal protections could potentially increase the use and provide solid long term data analysis before any future consideration of a mandate.

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

Sincerely,

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

Christopher Burruss
President