



New England Fuel Institute

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Comment Tracking Number: 80e30c1a

May 22, 2011

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

RE: Docket No. FMCSA-2010-0167 – Electronic On-Board Recorders and Hours of Service Supporting Documents

FILED ELECTRONICALLY

INTRODUCTION:

The New England Fuel Institute (NEFI) appreciates the opportunity to present the following comments on the FMCSA's Notice of Proposed Rule Making (NPRM) for mandatory installation and use of electronic on-board recording devices to track driver hours of service (HOS) along with proposed requirements for ordinary course of business documents that support HOS records.

NEFI is the largest heating oil trade association in the country. NEFI represents nearly 1,000 marketers of heating oil, kerosene, diesel fuel, propane and other petroleum products in the Northeast region of the United States. All NEFI members are private short haul carriers who transport petroleum products in cargo tank transport vehicles. NEFI members are primarily engaged in the retail sale and delivery of heating oil to residential customers but also supply an array of petroleum products to, agricultural, commercial, aviation, marine, industrial users as well as to a variety of wholesale- purchaser consumers. Virtually all NEFI members qualify for the 100-air mile radius exemption from keeping written driver hours of service log books pursuant to *49 CFR 395.1(e)*. Deliveries of product are loaded and unloaded in compact local areas. Heating oil drivers return to their place of origination at the end the delivery day and rest at home until their next shift. Nearly all heating oil dealers qualify as small businesses under size categories established by the U.S. Small Business Administration.

BACKGROUND:

The NPRM - On April 5, 2010, the Federal Motor Carrier Safety Regulations (FMCSA) issued a final rule that mandates installation and use of electronic on-board recording systems (EOBRs) as a remedial measure available under *49 CFR Part 385, Appendix C*, for any motor carrier determined to have a 10% or greater HOS violation rate (*75 FR 17208*).

Under the latest NPRM (*76 FR 5537*) the FMCSA proposes to expand the requirement for EOBR beyond current use as a remedial directive to a larger class of motor carriers for daily tracking and recording of drivers' HOS. Specifically, the FMCSA proposes mandatory installation and use of EOBRs in all commercial motor vehicles (CMV) for which the use of driver Record of Duty Status (RODS) is required pursuant to *49 CFR 395.8*. The Agency is currently considering three options for the EOBR mandate. Option 1 would require EOBRs for all carriers currently

using paper RODS. Option2, expands the EOBR further to include all bulk shipments of hazardous materials, including those carriers exempted from paper ROD requirements under the 100-mile air radius exemption for short-haul operations in *49 CFR 395.1(e)*. Option 3 would extend the EOBR mandate still further to all CMV operations subject to the HOS requirements.

Applicability of HOS Regulations - Both interstate and intrastate heating oil dealers transporting hazardous materials must comply with FMCSA HOS requirements under *49 CFR 395.1*. While the Federal Motor Carrier Safety Regulations (FMCSR), apply only to interstate carriers, regulations promulgated by the U.S. DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) extends much of the FMCSR, including the HOS requirements to *intrastate* hazardous material carriers (*49 CFR 177.804*). The majority of both interstate and *intrastate* heating oil dealers subject to the HOS, are not required to keep paper RODs because they *qualify* for the 100 air-mile radius exemption under *48 CFR 395.1 (e)*. Under this exemption, driver time cards along with other supporting documents generated in the normal course of business are used to demonstrate compliance with the HOS requirements. Though most heating oil dealers qualify and use the 100- air mile radius exemption, some opt to voluntarily maintain paper RODs based on unique business and compliance needs.

COMMENTS:

NEFI Opposes the EOBR Mandate – NEFI is opposed to any regulatory alternative that would impose an EOBR mandate on short-haul carriers. NEFI questions the need for expanding the EOBR mandate beyond its current use as a remedial directive for defined threshold HOS violations. The FMCSA's own Regulatory Impact Analysis (RIA) contained in the docket reveals that the rate of out-of-service orders for HOS violations has dropped significantly since 2004. Data in the RIA shows; out-of-service orders for all HOS related violations have dropped precipitously from 2004 to 2009; the overall HOS out-of-service rate declined 84% during this 5-year period; out-of-service orders for violations of the 11-hour driving limit declined 67%; and, out-of-service orders related to missing, incomplete, improper, or fraudulent RODS declined 84%;. Moreover, incomplete inspection data for 2010 reveal a further decline in the HOS out-of- service rates compared to that in 2009. Given the continuing downward trend in HOS violations, an expansion of the EOBR mandate is unnecessary at this time.

Short-Haul Carrier Costs and Benefits - Second, the EOBR mandate will impose costs on short-haul carriers with little measurable benefit. The FMCSA states in the RIA that carrier costs for EOBR equipment are largely offset or eliminated altogether by reduced costs in paperwork preparation for RODs. This may be true for carriers who currently use paper RODs to record HOS. However, for those short-haul carriers who qualify for and use the 100-air mile radius exemption, paper RODs are not required so there is no associated paperwork cost savings to offset EOBR costs.

If there were measurable safety benefits from including short-haul carriers under the EOBR requirement the FMCSA would have an easier time justifying the expense associated with the purchase, installation, monitoring, repair and training required for EOBR equipment.. However the FMCSA itself states in the RIA that the greatest overall net benefits in safety and other areas would accrue to long haul drivers. This is true because long-haul drivers are most at risk to suffer fatigue due to longer continuous daily driving periods and nights spent away from home. Due to this risk, long-haul carriers commonly use EOBRs to efficiently route drivers and track their movements. As a result, an EOBR mandate for long-haul carriers is accomplished more rapidly, with fewer compliance costs and maximum safety benefit. The same is not true for short-haul drivers, however. Short-haul drivers pick up and drop off multiple shipments within a localized area, with work shifts generally conforming to standard business hours. Short-haul drivers do not spend long hours driving on monotonous interstate highways for several days or weeks at a time or rest in sleeper berths. Instead, short-haul drivers return to their point of origination at the end of each daily shift and sleep at home each night. Short-haul drivers are also in constant contact with dispatchers during the delivery day so their precise location and activities are fully known and managed throughout their daily on duty period. Due to all these factors, short haul carriers do not experience the frequency and severity of driver fatigue common to long haul drivers which the EOBR mandate seeks to address.

Moreover, for short haul carriers who do violate HOS regulations, road side inspections and on site audits will expose HOS non-compliance violations and result in a remedial directive to install EOBR along with a lowered carrier safety rating. Forcing the bad players among short-haul drivers to install EOBR is a more sensible, balanced, and flexible approach which would yield greater safety benefits than an across the board EOBR mandate for all carriers.

Distinguishing Between Long and Short-Haul Carriers at Roadside Inspections - NEFI agrees with the FMCSA statement in the RIA that the distinction between short haul and long-haul carriers is an important analytical concept for evaluating HOS rules and EOBR mandate. However, NEFI disagrees with the FMCSA conclusion that “operationally it is extremely difficult for enforcement personnel to differentiate between drivers and CMVs by length of haul. Consequently, *the Agency does not believe a LH only option would be practical.*” (RIA Page vi, Footnote 5). Based on this conclusion, the FMCSA would extend the EOBR mandate to all short-haul carriers who use written RODs for HOS compliance. NEFI respectfully disagrees with the FMCSA on this point. There are many ways for roadside inspectors to distinguish between long-haul and short-haul carriers. First, and foremost, the inspectors can ask the driver to present a HOS log book. If no logbook is available then the carrier is likely engaging in short-haul operations under the 100-air mile radius exemption. Additional information can confirm this presumption. If a hazardous material shipment is involved, the HAZMAT registration certificate will list the location of the carrier’s principle place of business. Shipping papers will also indicate where the load originated and its ultimate destination. The state of issuance of the driver’s CDL, the truck registration, the truck U.S. DOT number, identifying information on the truck and the assurances of the driver are all factors that should be considered to determine whether the carrier is engaged in a short-haul or long-haul operation. These bits of information taken together and combined with the deductive intuition of roadside inspectors who conduct thousands of inspections annually, NEFI believes an accurate determination can be made honed by years of experience that allow them to make the distinction pretty quickly and without much difficulty.

Self Certification for Short-Haul Carriers - If the FMCSA is not convinced that the distinction between long-haul and short haul carriers can be made reliably at roadside inspections by experienced enforcement officers from a totality of observable evidence then, NEFI would like to offer an alternative solution. NEFI proposes requiring a self-certifying, verifiable, statement signed by the carrier and kept in the cab of every truck, confirming the short-haul status of a carrier’s operation. This is the simplest way to make the distinction between long-haul and short-haul carriers and to ensure that the EOBR mandate is effectively targeted to carriers that pose the greatest risk for HOS violations. The impact of an EOBR mandate on small business short-haul carriers, together with the marginal safety benefits the FMCSA acknowledges will result, makes it imperative for the agency to find a way to easily distinguish between long-haul and short-haul carriers. Self certification is the way to achieve this goal.

Flexible Approach HOS Compliance - The FMCSA requests comments on a flexible approach to the EOBR mandate. NEFI believes that the essence of a flexible and effective HOS compliance approach is already in place. NEFI believes that the current regulatory framework can be fine tuned to achieve enhanced HOS compliance without requiring an across the board EOBR mandate. The current FMCSA regulatory framework for HOS requirements is essentially a performance standard. There FMCSR offers several ways for carriers to comply with the HOS record of duty requirements. A carrier can log daily driver hours by using a paper ROD, use an automated EOBR or keep driver time cards together with supporting documentation generated in the normal course of business to verify HOS compliance. Many long-haul carriers who are at the greatest risk of HOS violations are already using EOBR because, - for this class of carrier - it is an effective method to ensure compliance, avoid penalties and reduce overall operating costs in the long term through the elimination of paper RODS. Short-haul carriers are not a high risk for HOS violations. Short-haul carriers that qualify for the 100-air mile radius exemption from paper RODS use time cards and supporting documentation to meet the HOS requirements. Short-haul carriers such as heating oil dealers tend to employ fewer drivers. These drivers are more closely monitored in a localized area and often return repeatedly to their originating location throughout the day and at the end of their daily shift. When the drivers are not at their originating location, they are in constant two-way communication with company dispatchers. Using time cards to demonstrate HOS compliance is a cost effective, accurate simple and imposes far less administrative burdens on short –haul carriers than paper RODs. Short-haul drivers require this flexibility in

HOS compliance options to stay competitive and to continue to supply underserved markets with necessary products.

EOBR Should Not Apply to Short-Haul Carriers - All of the driver HOS recording methods currently available under the FMCSR are verifiable for compliance purposes. Together, these methods have led to a dramatic reduction in out-of-service orders for HOS violations over the past seven years as described in the FMCSA RIA. For those carriers who choose not to use any of these alternative compliance methods roadside inspections and on site compliance audits will expose their HOS violations which will result in a remedial EOBR mandate. This “performance standard” approach to HOS compliance works. It is flexible, efficient, accurate and effective at reducing HOS violations that compromise safety.

If the FMCSA seeks to further increase HOS compliance, it can do so without a broad based EOBR mandate across all carrier classes. The FMCSA must target the carriers who pose the most significant risk of violation in order to obtain the greatest benefits from improved safety. The agency has taken initial steps in this direction by mandating EOBR as a remedial measure for carriers with poor HOS compliance. Any further refinement of the regulatory framework for HOS compliance that includes an EOBR mandate must be narrowly targeted to where the greatest risk of violation occurs. The FMCSA’s own data in the RIA reveals where this risk occurs – and it is not with short-haul carriers. The benefit gained from an EOBR mandate on short-haul carriers is marginal at best, as the FMCSA itself acknowledges in the RIA.

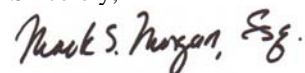
CONCLUSION:

NEFI opposes a regulatory approach that would mandate EOBR for short-haul carriers. Option I in the NPRM is the most viable alternative to address HOS compliance provided the FMCSA first makes some refinements and clarifications before a final rule is published. Specifically, the agency must clarify that any carrier who *qualifies* for the 100-air mile radius exemption from paper RODs and does not meet the 10% threshold for HOS violations is not subject to the EOBR mandate under Option 1. Furthermore, the FMCSA must clarify that those short-haul carriers who *qualify* for the 100-air mile radius exemption but choose instead to use paper RODs, are not subject to the EOBR mandate. NEFI believes that these short-haul carriers should not be penalized with an EOBR mandate simply because they chose to use an enhanced method of HOS compliance at their own election. NEFI also opposes any regulatory option that would impose EOBR’s on a carrier wide basis rather than an operational basis.

NEFI is not submitting detailed comments on FMCSA’s proposal to clarify the type and content of supporting documents necessary to verify HOS compliance. NEFI believes that heating oil dealers already generate documents compliant with the NPRM proposal in the normal course of business operations. Driver time cards as well as PHMSA and EPA information requirements for hazardous material shipping papers and other documents generate the supporting data the FMCSA proposes. It should be noted however that the regulatory requirements for supporting documents must be kept flexible in order to accommodate the many types of business documents generated by diverse sectors within the motor carrier industry. FMCSA must maintain a flexible regulatory approach to supporting documentation requirements which reflects these many differences.

NEFI appreciates the opportunity to submit these comments and is happy to provide any additional information upon request.

Sincerely,



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