

BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

DOCKET NO. FMCSA-2004-19608

HOURS OF SERVICE OF DRIVERS

COMMENTS OF NATIONAL SHIPPERS STRATEGIC TRANSPORTATION
COUNCIL, INC. AND THE HEALTH AND PERSONAL CARE
LOGISTICS CONFERENCE, INC.

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I. INTRODUCTION

The National Shippers Strategic Transportation Council, Inc. (“NASSTRAC”) and The Health and Personal Care Logistics Conference, Inc. (“H&PCLC”) (hereafter collectively “Shipper Associations” or “Associations”) respectfully submit their Comments on the proposed Hours of Service regulations issued December 29, 2010 (75 Fed. Reg. 82170, et seq.) by the Federal Motor Carrier Safety Administration (“FMCSA”).

The Associations urge FMCSA to preserve the current Hours of Service rules, which have worked well. The case for the significant changes proposed by the agency is equivocal, at best, and does not reflect a balanced analysis of all relevant factors. The adverse impacts of the proposed changes are real, severe, and far outweigh claimed benefits.

The Shipper Associations’ regular members are shippers of freight, whose main concern is their need for safe, reliable and efficient motor carrier service, at reasonable rates. Members of H&PCLC are manufacturers and distributors of pharmaceuticals and

personal care products. NASSTRAC's members include manufacturers of a broad range of commodities, and also include motor carriers as associate members. While the Associations' members ship most of their truck freight via LTL and package carriers, they also use truckload carrier services. The Shipper Associations have been active for many decades in proceedings before the ICC and STB, and before DOT.

II. BACKGROUND OF THIS PROCEEDING

Members of the Shipper Associations do not oppose efforts to improve safety on the highways. Aside from the fact that crashes cause property damage and missed or delayed deliveries, Association members and their families and friends share the nation's highways and streets with truck drivers. Unsafe driving threatens lives, and sometimes claims them. All Americans benefit from safer highways.

The current Hours of Service rules have served both safety interests and economic interests well, and deserve to be retained. The President of the ATA noted that the Hours of Service proposal being considered prior to adoption of the current rules threatened \$130 billion in just-in-time inventory efficiencies and would require 180,000 additional drivers and trucks just to maintain then current service levels. Today, freight volumes are up and the driver shortage is even worse. The Shipper Associations have supported the currently effective Hours of Service rules since they were adopted in 2003, and continue to support those rules.

Though difficult and costly to implement, the current rules were adopted with due consideration for the productivity gains made by major carriers and shippers in the years since deregulation. As intended by Congress, the trucking industry expanded, offering

new service options and sharply increased efficiency. Shippers and the economy have also benefitted.

Thanks to just-in-time delivery schedules, inventories can be reduced dramatically. The construction, handling, maintenance and carrying costs that go with large inventories and the warehousing to store them can be avoided or minimized. Raw materials can be delivered to manufacturing facilities when needed, and finished goods can be delivered to wholesalers and retailers with enough dependability to minimize waste and under or over-production. As a result, companies have been able to move beyond the management of separate purchasing, production, sales and distribution functions and have developed systems for integrated supply chain management.

The point of all this, for purposes of this proceeding, is that the interconnectedness, speed, and precision of transportation and distribution have increased in unprecedented ways. However, the integration of transportation and distribution into a complex and interdependent system has also increased the vulnerability of the system to disruption.

Overregulation today can act like sand (or worse) in the gears of a well-oiled machine. Shippers that once relied on 100 trucking companies may now have long term contracts with a handful of carriers, each of which specializes in certain product lines or traffic lanes. If one of those carriers is unable to perform its obligations, replacing it is difficult, due to the investment of both parties in coordinated operations and integrated information technology systems.

One of the critical issues FMCSA faces in this proceeding is the issue of arriving at a proper balance of costs and benefits. In assessing the costs of more restrictive regu-

lation, FMCSA must consider all costs, not just the costs to trucking companies of complying with further changes. If Hours of Service regulation is not done right, it will hurt not just the trucking industry, but also the customers of the trucking industry, and all of the consumers who rely on truck deliveries of the products they buy.

Some 80% of the freight transported in the U.S. moves on trucks. The proportion of manufactured goods transported by truck is even higher, since railroads and barge lines specialize in bulk commodities like coal and grain. It is therefore vitally important to the Shipper Associations' members, and to consumers generally, that FMCSA avoid unnecessary, uncalled-for and unwise regulation in this proceeding.

III. THE CURRENT RULES HAVE WORKED WELL, DESPITE THE BURDENS OF IMPLEMENTATION

Even good rules can sometimes be improved, though common sense and, here, the directive of Congress in 49 U.S.C. §§ 31136(c)(2)(A) and 31502(d) instruct that changes in the status quo must do more good than harm. The Shipper Associations will address flaws in FMCSA's cost-benefit analysis at more length below.

However, it must be recognized at the outset that there should be greater reluctance to change good rules than bad ones. The Hours of Service Rules adopted in 2003 and defended ever since by carriers and shippers (and by FMCSA itself, until December 2010) have worked well.

Despite increased miles traveled by trucks since 2004, truck related crash fatalities are down 33% and truck related crash injuries are down 39%. Highway travel overall is safer, with traffic fatalities down 21%, but the safety record of the trucking industry has been particularly praiseworthy.

These improvements in safety cannot all be attributed to the current Hours of Service rules, since trucking companies have always promoted safety improvements whether or not regulations change, and shippers have increasingly rewarded safer carriers with more business.

Some of the improvement, however, did result from adoption of the Hours of Service rules now in effect, and the Shipper Associations regard those rules as an improvement over pre-2003 rules, but the improvements have not come without costs and burdens for motor carriers and the shipper customers.

Members of the Shipper Associations include shippers and receivers of many types of commodities, in all volumes, located across the country. Because these members range from small companies to some of the nation's largest corporations, they represent a good cross-section of the businesses that rely on the trucking industry to carry out their day-to-day operations.

Shipper Association members reported rate increases of 5-8% or more in the aftermath of implementation of the current regulations. In addition, carriers demanded changes in ancillary costs and terms and conditions of service. For example, it was common for carriers to impose new stop-off charges. Detention charges were increased, often by 100%, and the effective increase could be even larger, because the free time before detention charges accrued was often reduced significantly. Also increased significantly were carrier reconsignment and diversion charges, geographical surcharges, and out-of-route mileage fees.

In some cases, shippers and receivers could reconfigure their internal operations or their shipping and/or routing patterns to reduce their exposure to some of these

charges. However, such modifications were not cost-free. The fact that they may have been borne by shippers and receivers rather than carriers does not make such costs irrelevant to the statutory cost-benefit analysis required of FMCSA by Congress. While not easily quantifiable, the costs for shippers to adjust shipping schedules to reduce loading and unloading time are significant, since these adjustments can have ripple effects beyond the loading dock.

There were also implementation glitches when the current regulations took effect. Members of the Shipper Associations reported shipments that were delayed when drivers had to lay over due to hours issues. On other occasions, shippers were forced to pay premium spot rates to get service in a timely manner. The current regulations reduced carrier and driver flexibility in meeting shippers' needs for timely service, shifting costs to shippers and receivers of freight, who were forced to add to or reconfigure the operations of their personnel, warehouses, distribution centers and manufacturing facilities. Supplies of goods that might formerly have been unloaded over more time as needed now have to be unloaded over less time, possibly before they are needed. These goods have to be stored somewhere by the shipper or receiver until used.

As explained above, one of the main features of the supply chain revolution has been a reduction in inventory and attendant storage costs. Reversing direction is neither easy nor inexpensive. The warehouses that were closed and demolished in the 1990s cannot be replaced at all in their old locations. Added inventory means added costs.

Under the circumstances, shippers and carriers tend to feel, with good reason, that FMCSA should not adopt significant changes in rules that are working well unless the

benefits clearly and substantially outweigh the inevitable costs and burdens of further modifications in the Hours of Service rules.

Here, however, that standard has not been met. FMCSA admits that the number of crashes is declining. It goes on to say that the rate is still “unacceptably high,” but admits that the source of the decline is unclear. FMCSA also admits that it is not sure whether it should reduce maximum driving time to 10 hours (reduced by mandated breaks) or keep the limit at 11 hours (but mandate breaks).

In fact, the responsibility of truck drivers in general (as opposed to other drivers) in “truck-involved” crashes is relatively low, as is the role of fatigued truck drivers particularly, or the role of truck drivers in the 11th hour of driving as opposed to the 10th even more particularly.

These and other uncertainties, which should lead FMCSA to adopt a regulatory precautionary principle leading to minimal, if any, changes in current rules, are unfortunately given short shrift. Rather than addressing the narrow and largely procedural concerns identified in the last court appeal, FMCSA has gone back to the drawing board, and mandated significant changes in its rules.

IV. THE LATEST COST BENEFIT ANALYSIS IS SO FLAWED AS TO BE UNSUSTAINABLE

In support of its decision to propose rule changes despite pervasive uncertainty, FMCSA cites its analysis of costs and benefits, which leads it to believe that the benefits of its proposed changes outweigh their costs. The Shipper Associations believe both sides of the analysis – costs and benefits – are marred by errors, most of which are adverse to the interests of carriers, shippers and drivers in preserving current rules that work well for all concerned.

A. FMCSA has Overstated Projected Benefits

The Shipper Associations are not experts in driving conditions or driver health, and will therefore rely on the American Trucking Associations to address in detail the flaws in FMCSA's benefit analysis. However, we are aware of and support the critique of errors of analysis and mathematics in the February 15, 2011 Review prepared for ATA by Edgeworth Economics. The analysis done to date by FMCSA is clearly faulty.

Moreover, FMCSA needs to understand that the Shipper Associations, and thousands of other shippers in the U.S. who depend on reliable, timely and safe motor carrier service, generally share trucking industry concerns regarding excessive regulatory costs and burdens. These costs and burdens must, in part, be borne by shippers and reflected in prices paid by consumers for the products delivered to stores in trucks.

This connection between the trucking industry and their customers seems to be ignored or undervalued in FMCSA's cost benefit analysis, even though the trucking industry would not exist if there were no freight for trucks to transport. FMCSA seems to regard the purpose of drivers as being to drive miles, rather than to deliver goods – raw materials to factories and finished goods to consumers.

Indeed, the thinking seems to be that truck drivers are like brick layers building walls. At the end of the day, if the job is unfinished, the brick layer can leave the wall partially finished and come back after a good night's sleep to pick up where he or she left off. A 90% completed wall is presumed to be worth 90% of the value of a completed wall.

In fact, truck drivers are more analogous to chefs and helpers in a kitchen or medical personnel in an operating room. Their work may have no value to their employers or

their customers or patients until it is finished, even if hourly workers in the kitchen or operating room remain entitled to paychecks for time spent on the job.

Because trucking companies are hired by shippers not to drive as many miles as they can per day but to pick up goods at origins and deliver them at destinations, FMCSA underestimates the value to motor carriers, shippers, and the larger economy, including consumers, of the system of highway transportation that has been developed and refined under the current rules. FMCSA calls those rules “Option 1” but appears not to have devoted much study to the cost benefit ratio of the “no change” option, i.e., maintaining the status quo.

Because of the overriding importance of deliveries, motor carriers and shippers will often regard a truncated “shipment” that stops short of the destination due to reduced Hours of Service as unacceptable. Rather than tolerate stranded shipments, carriers and shippers will make alternative arrangements, which will often involve the need for extra trucks (with attendant capital costs, congestion, and safety issues), as well as extra drivers.

FMCSA’s Regulatory Impact Analysis brushes these concerns aside, based on the assumption that if trucking costs go up or service quality goes down, shippers will substitute rail transportation for truck transportation. Indeed, these effects are seen as a “wash,” obviating the need for extensive analysis.

DOT Secretary LaHood has expressed publicly the desire of the Administration to shift more freight from trucks to trains, partly to reduce funding that needs to be budgeted for highway construction and maintenance. However, the assumption that shippers depending on truck transportation will switch modes is fallacious, for several reasons.

First, trucking company service quality has increased to the point that on-time delivery averages exceeding 90% are common, and are often guaranteed. Despite occasional lapses, generally due to circumstances beyond motor carriers' control, service quality at such a high level enables shippers to run just-in-time supply chains that are extremely efficient.

Neither straight rail nor rail intermodal is an acceptable substitute. Not only is rail almost always slower, but variability is higher, meaning that shippers have difficulty knowing when goods will arrive. Rail transportation and truck transportation are not interchangeable to most shippers.

The FMCSA mode shift analysis is also unsound as a technical matter. At pp 6-13 to 6-19 of its regulatory impact analysis, there is a reference to a Logistics Cost Model that is claimed to determine the lowest total logistics costs among competing modes, taking into account "service frequency, transit time, reliability ... and other service related factors." We are told that for rail service, the data source is the Rail Carload Waybill Sample maintained by the Surface Transportation Board.

However, the Waybill Sample does not include data on "service frequency, transit time or reliability" for rail transportation. Evidently FMCSA assumed rail service quality is equivalent motor carrier service quality. Not only is the assumption unfounded, but it is false. This is one reason the probability of a mode shift for shipments of 500 miles or less is almost nonexistent, and why a mode shift would be highly unlikely even for longer shipments.

To be sure, there are some shippers able to use rail or rail intermodal. However, straight rail serves less than 1 in 10,000 destinations for goods, and rail intermodal lacks

the capacity to absorb significant volumes of freight currently moving via motor carriers. Doubling volumes moved by rail intermodal would shift rail intermodal's share of freight transportation from 1% to 2%.

The Shipper Associations are confident that FMCSA has significantly underestimated the benefits of the "Option 1" status quo, as well as the reduction in those benefits represented by the other options it studied.

B. Flaws in FMCSA's Cost Analysis

Turning to the cost side of the equation, the first point to make is that all of the options FMCSA appears to have considered will cost more than staying the course with the current Hours of Service rules. In ascending order, Option 3, which keeps the 11 hour driving cap but makes other changes, would cost roughly \$500 million, Option 2, with a 10 hour cap and other changes, would cost \$1 billion, and Option 4 (a 9 hour cap plus other changes) would cost \$2 billion.

FMCSA states that it leans toward Option 2, despite its admittedly higher costs, but this preference appears to rest upon overstated benefits (as detailed in these and other shipper and carrier comments) as well as on a significant understatement of the costs of the FMCSA's preferred change. There are several categories of costs overlooked or underestimated by FMCSA, as well as specific costs within those categories,

The first and largest category of ignored costs is costs that shippers and their consumer customers will face due to the disruption of existing distribution systems, patterns, and production schedules, and reductions in motor carrier productivity accompanying any changes in existing Hours of Service rules. These shipper costs are likely to be lowest

under Option 3, as is also true of direct motor carrier costs under Option 3, inasmuch as Option 3 stays closer than Options 2 or 4 to the Option 1 status quo.

However, even under Option 3, costs for shippers will rise. At best, shippers will face increased freight rates, because the existing driver work force cannot work fewer hours and still carry today's truck freight volumes, let alone increasing volumes that are certain to come as the U.S. population increases to 350 million or 400 million people.

Increased detention costs, stop-off charges, team driver costs, etc., are likely based on shippers' experience with implementation of the current rules, even if more trucks and drivers are added to fleets to offset productivity reductions. As explained above, mitigation of these cost increases through mode shifts is highly unlikely.

Of greater concern is the possibility that the trucking industry will not be able to maintain current efficiency levels if Option 3 is adopted, much less if Option 2 is adopted with its 10 hour driving time cap.

If trucking industry capacity falls, shippers will face dramatically higher costs and burdens. Inventory levels may have to rise to provide "safety stocks," as "just-in-time" supply chains become "just-in-case" supply chains. Inventory production and carrying costs, warehousing costs, etc. can be expected to rise, along with additional transportation costs to get safety stocks to and from storage and distribution centers.

Needless to say, shippers will seek to minimize cost increases, but their costs of doing business will rise. Mode shifts are undesirable, impossible or both, and will do little or nothing to offset reductions in trucking industry productivity. These costs are hard to quantify, but treating them as nonexistent is plainly a defect in FMCSA's cost benefit analysis that undermines the rationale for any change in the Option 1 status quo.

FMCSA suggests that trucking industry productivity will not really be affected, because most drivers work shorter hours, returning home every night, and only some 15% of drivers, most of whom are long-haul full truckload drivers, currently put in 70 or 80 hour work weeks. See 75 Fed. Reg. at 82172 and 82186.

Here again, FMCSA understates the adverse impact of its proposal. Of the universe of drivers, 85% may work shorter hours most days, just as 85% of office workers may go home at 5:00 pm most days. However, most of those office workers may work late on occasion, when an emergency means extra hours at the office are needed to meet a deadline. Similarly, 85% of drivers may sometimes need an extra hour or two of driving time to come through with an important delivery. Given the large number of truck drivers in the U.S., even occasional long days for 85% of drivers add up to a large number of hours productively worked, and a large number of shipments delivered on time.

A problem with the new proposed rules is that, contrary to FMCSA's statements, they affect all drivers every day, not just the "very-high intensity" and "extreme intensity" drivers who are often at or near the limits of currently permitted Hours of Service. Reduced productivity on a significant scale is a certainty.

Also ignored by FMCSA are other threats to trucking industry productivity, some of which are subject to the federal government's (or FMCSA's own) control, and others of which may be beyond its control but not irrelevant to this proceeding.

For example, FMCSA is currently implementing its Comprehensive Safety Analysis (CSA) program. Remarkably, CSA is not mentioned in FMCSA's Hours of Service NPRM, even though the CSA program is likely to reduce the number of available drivers

and exacerbate the driver shortage, but should also enhance highway safety, reducing to a larger or smaller degree the need to change current Hours of Service rules.

Also unmentioned in the NPRM is the advent of electronic on board recorders, EOBRs or black boxes, that should lead to more accurate logging of driver hours of service, more effective enforcement of FMCSA rules limiting fatigued driving, and increasing highway safety.

Whether these initiatives are seen as reducing the benefits otherwise attributable to changing current Hours of Service rules (because potential improvements in highway safety are not unlimited), or increasing costs (because carriers, drivers, shippers and law enforcement will need to adjust to multiple rule changes that are apparently to be imposed simultaneously), FMCSA's failure to mention these programs is startling. Like the omission of adverse impacts on shippers, they suggest blinders or an excessively narrow focus.

Not only should FMCSA expand its horizons to encompass other safety programs it is implementing but it should also consider the larger context in which it is acting.

New Hours of Service rules are being proposed at a time when, among other factors:

- The economic recession is over, but growth remains weak and surviving motor carriers are poorly positioned to absorb new costs
- Diesel fuel prices have risen almost \$1 in the last 12 months
- Motor carrier insurance premiums are high and rising
- Motor carriers must operate over a deteriorating infrastructure, with increasing congestion, inadequate parking and rising tolls

- Truck size and weight limits prevent efforts to increase trucking industry productivity to offset higher compliance and other costs

The Shipper Associations recognize that these are not all direct or even indirect costs of FMCSA's proposed changes. However, the federal government and state governments are currently tightening their belts, and cutting back on programs and services that may be desirable, but are too expensive for the benefits they provide. Carriers, drivers and shippers, like governments, face many demands on their resources, not all of which can be satisfied in full, or on an expedited basis.

FMCSA itself acknowledges that the case for its preferred Option 2, reducing driving time from 11 hours to 10, is a close call as compared with Option 3, which would preserve the 11 hour driving time cap.

To the Shipper Associations, Option 3 is preferable to Option 2, but both of these options are inferior to Option 1, staying the course with the existing Hours of Service Rules, including the driving time cap and restart requirements that have worked well for the last eight years.

Even Option 3, the least disruptive option FMCSA has put forward for comment, undermines the apparent 11 hour cap on driving time with other changes, including more onerous restart rules, mandated breaks, and dramatically greater complexity, that do more harm than good.

V. CONCLUSION

FMCSA should maintain the current Hours of Service rules, and adopt none of the alternatives discussed in the NPRM.

Respectfully submitted,

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