

Transport Topics

The Weekly Newspaper of Trucking and Freight Transportation

December 22, 2011

FMCSA Issues New Hours Rule

Legal Challenges Have Followed Previous Proposals

By Eric Miller
Staff Reporter

Since initially being granted an 11th hour of driving time in 2003, motor carriers have been fighting to keep it ever since.

Now that the Federal Motor Carrier Safety Administration has issued another hours-of-service rule — the fourth one in eight years — it's a pretty sure bet that the legal battles aren't over.

The court fight began after Annette Sandberg, then acting FMCSA administrator, introduced an HOS rule in April 2003 that extended allowable driving hours to 11 from 10, but cut drivers' overall workday to 14 hours from 15.

However, since 2003, the 11-hour driving standard has twice been rejected by a federal appeals court, although it has remained in effect.

American Trucking Associations President Bill Graves called the April 2003 rule a "good mixture of common sense and sound science."

Sandberg said that Congress had been pressuring trucking regulators to get it on the books since 1999.

"We just had to make a decision and get one out," Sandberg told TRANSPORT TOPICS in a recent interview.

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Agency Maintains 11th Hour of Driving, But Reduces Total Work Week to 70 Hours

By Eric Miller
and Timothy Cama
Staff Reporters

Federal regulators have decided to allow the nation's truck drivers to continue to operate their vehicles 11 hours a day, but intend to sharply reduce the overall allowable workweek to 70 hours from 82.

The changes were contained in a new hours-of-service rule released on Dec. 22, just before the government shut down for the Christmas holiday.

The Federal Motor Carrier Safety Administration's 212-page latest "final rule" allows drivers to reset their weekly work cycles by resting for 34 hours. However, a change will require that time block to include two periods between 1 a.m. and 5 a.m. That means that the restart will only be allowed once a week, FMCSA said.

"This final rule will help prevent fatigue-related truck crashes and save lives. Truck drivers deserve a work environment that allows them to perform their jobs safely," Transportation Secretary Ray LaHood said in releasing the rule.

The rule also limits the maximum driving window to 14 consecutive hours after drivers come on duty. They are permitted to also work on tasks other than driving during this time.

In addition, truckers cannot drive after working eight hours without first taking a break of at least 30 minutes — but at a time of their choosing.

Most of the rule will not take effect for 18 months.

Anne Ferro, FMCSA's administrator, said the rule is the "culmination of the most extensive and transparent public outreach effort in our



DOT's LaHood (left), with FMCSA's Ferro, said the new regulation will save lives.

agency's history."

FMCSA said the restart provision "allows drivers to work intensely for one week, but will require them to compensate by taking more time off in the following week."

However, Bill Graves, president of American Trucking Associations, said the group was "frustrated and disappointed with the rule" and that it will do nothing to improve highway safety.

In a statement, ATA said the alteration to the restart provision will put more trucks on the road during rush hours, statistically the riskiest time of the day.

"From the beginning of this process in October 2009, the agency set itself on a course to fix a rule

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New HOS Rule Released

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that's not only not broken, but by all objective accounts is working to improve highway safety," Graves said. "Unfortunately, along the way, FMCSA twisted data and, as part of this final rule, is using unjustified causal estimates to justify unnecessary changes."

Graves said he was pleased the major components will not become effective for 18 months.

"This will give ATA time to consider legal options," he said.

In a statement, Ferro defended the rule, saying it included "robust input from all areas of the trucking community, coupled with the latest scientific research."

Dan England, chairman of ATA,

disagreed with her assessment.

"By forcing through these changes, FMCSA has created a situation that will ultimately please no one, with the likely exception of organized labor," said England, who is also chairman of C.R. England Inc., Salt Lake City. "Both the trucking industry and consumers will suffer the impact of reduced productivity and higher costs."

"The restart is the big unjustified change," David Osiecki, ATA senior vice president of policy and regulatory affairs, told TRANSPORT TOPICS. "There's just absolutely no basis for that. It's purely a labor decision that's just meant to limit somebody's

"[The new rule] will have no positive impact on safety."

— Bill Graves, ATA President

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ATA's Graves says the federation was disappointed with the rule, and may take legal action to overturn it.

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Initially Started During the Great Depression, HOS Has Undergone Many Alterations Since

By Michele Fuetsch
Staff Reporter

It was 1936, the Great Depression still gripped the United States, Franklin D. Roosevelt was seeking a second term as president and American Trucking Associations held its third annual convention in Chicago.

That same year, the Interstate Commerce Commission began debate on an issue as central to trucking today as it was when the first farmer bought a truck to haul produce to market — how many hours a driver should be allowed on the road.

The ICC's first suggestion — 15 hours — was met with such fierce opposition from drivers and labor advocates that the commission opted for a 12-hour rule and began enforcing it in 1938.

That rule, however, survived only a year before the ICC in 1939 reduced to 10 the number of allowable driver hours.

Congress killed the ICC in 1995, but the 10-hour limit outlived it, surviving 64 years before being changed to 11 hours in 2003, sparking the legal battle that continues today.

For much of the time since 1936, the tug of war between trucking's desire for productivity and labor's demand for shorter hours has played out mostly in the halls of Congress and in the offices of government regulators.

Between 1939 and 1962, the ICC was pressed for various exemptions to the hours-of-service rule by a host of business sectors, from farming to oil producers. Occasionally, the commission would grant an exemption to the 10-hour rule, as it did in 1940 for truckers delivering catalogs around Christmas.

The first significant changes to the 1939 rule did not occur for nearly 25 years.

In 1939, the ICC had not specified total on-duty hours for drivers, but the rule did set a time cycle of 24 hours, during which drivers had to have eight consecutive hours off duty to rest.

In 1963, when the commission finished revisiting the rule, the 10-hour drive time and the eight-hour rest period were still intact. But a

new on-duty time of 15 hours was added, and the 24-hour cycle was reduced to 18, meaning drivers could start a new 10-hour driving shift within a shorter period.

The next change was actually a bureaucratic shift.

In 1967, the ICC lost jurisdiction over the industry when Congress transferred oversight to the newly created U.S. Department of Transportation. Within that Cabinet-level department, Congress established a Bureau of Motor Carrier Safety to oversee trucking.

In 1973, the bureau lost a suit over HOS to a group called the Professional Drivers Council for Safety and Health, backed by consumer advocate Ralph Nader.

The court ordered the bureau, housed in DOT's Federal Highway Administration, to update the HOS rule, a task the bureau spent the next five years trying to accomplish.

In May 1978, the bureau and the FHWA laid out a series of alternatives with which to update the existing rule, one of which was to reduce to 12 from 15 the maximum hours a driver could be on duty.

Another alternative was to set driver mileage limits in connection with hours limits. The bureau came up with two choices: set the allowable time behind the wheel to 10 hours or 450 miles, whichever came first, or to 11 hours or 500 miles.

A third alternative would have banned driving between midnight and 6 a.m.

In the end, the bureau decided there was no justification for changing the existing 10-hour rule, and the alternatives were shelved.

In 1981, Ken Pierson, then the bureau's director, said of the decision to abandon the

proposed changes: "There simply was no evidence to establish a direct relationship between hours of service and significant reduction in accidents."

During the decade, the Insurance Institute for Highway Safety pressed the bureau to require interstate carriers to have devices on trucks that would monitor drivers' compliance with the hours rule. But the bureau rejected the idea, saying the insurance group had not presented evidence that the onboard recorders would reduce accidents.

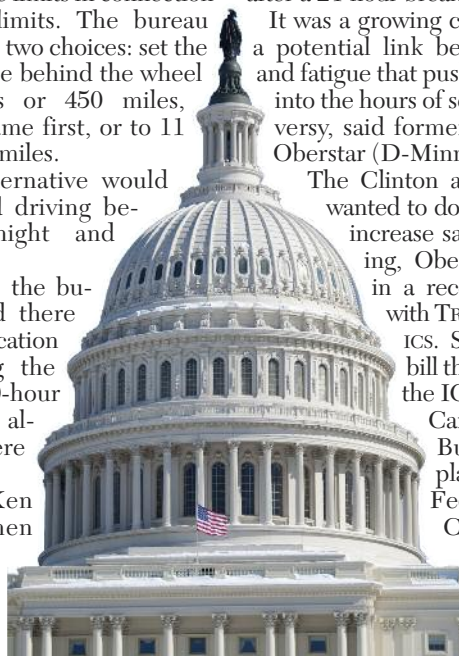
Then in 1990, the National Transportation Safety Board joined the fray over driver hours, calling for reductions, something it was to do again in 1995.

In February 1990, the safety board had published a study of driver fatalities in truck-involved crashes that said a third of the incidents involved fatigue on the part of the trucker.

In 1992, the administration of President George H.W. Bush tried and failed in the face of labor opposition to change the HOS rule. Trucking backed the proposed change, which would have allowed drivers to restart their time clocks after a 24-hour break.

It was a growing concern about a potential link between safety and fatigue that pushed Congress into the hours of service controversy, said former Rep. James Oberstar (D-Minn.).

The Clinton administration wanted to do something to increase safety in trucking, Oberstar recalled in a recent interview with TRANSPORT TOPICS. So, in the 1995 bill that dismantled the ICC, the Motor Carrier Safety Bureau was replaced with the Federal Motor Carrier Safety Administration and directed to address the HOS rule.



Julie Cirillo was the first acting director of FMCSA.

"I said if we're going to make changes, and this is our one opportunity to do this, let's take a leaf out of the aviation book," Oberstar recalled.

In 1958, Congress created the Federal Aviation Administration and set into law the mandate that safety "shall be maintained at the highest possible level," Oberstar said. He made safety a central part of the FMCSA's mandate and put the word "safety" into its title, though some critics wanted the word taken out, he said.

Julie Cirillo was named acting director of the new FMCSA and set the government on a course to explore the link between driver fatigue and crashes.

In April 2000, Cirillo and then-Transportation Secretary Rodney Slater issued a proposed rule that limited a driver's on-duty time to 12 hours with no distinction between on-duty and driving time.

The proposal also called for trucks to have onboard recorders that would monitor drive time, and the plan distinguished between five types of carriers, from long-haul to regional to incidental, giving them different hours-of-service configurations.

Congress killed the proposal and, in 2003, then-FMCSA director Annette Sandberg unveiled a new rule that allowed drivers to work 14 hours, 11 of which could be spent driving, followed by 10 hours off.

That rule, in effect today, was immediately challenged in the courts by the Teamsters union and safety advocates who said the FMCSA has failed to adequately consider the health of the drivers.

TT File Photo

HOS Has Led to Lawsuits

(Continued from p. 1)

And the administration felt that if it was going to shrink drivers' allowable on-duty time, there would have to be some sort of offset, like allowing the 11th hour of driving, she said.

"It's one of those rules that has been very contentious since the get-go," Sandberg said. "It has been extremely difficult to sort out."

Once announced, it didn't take long for Public Citizen and several other organizations to take their opposition to the federal courts. They initially argued before the U.S. Court of Appeals for the District of Columbia that long and irregular driving hours would impair driver health.

In July 2004, the appeals court rejected the 2003 HOS rule as "arbitrary and capricious," mostly because FMCSA did not consider the rule's impact on driver health. The court also noted in its decision that FMCSA did not cite the research needed to justify the increase in daily driving time and suggested they would reject any subsequent rule that was too similar.

But, in January 2005, FMCSA issued a proposed rule that looked almost identical to the one the appeals court had rejected.

"When the court ruled the way it did in 2003, it really didn't deal with the merits of the case," former FMCSA Administrator John Hill recalled in an interview with TT last month. "They really invalidated the rule based on driver fitness."

Hill watched the rule wind through the courts as FMCSA's chief safety

officer from 2003 to 2006 and administrator from 2006 to 2009. He is now a transportation consultant.

"The agency at that time felt like the rule was still a good rule and therefore they only needed to address the driver fitness issue," Hill said. "That's why the agency moved ahead with basically the same rule."

The 2005 rule, finalized in August, maintained the 11-hour daily driving limit, contending that it was economically beneficial to carriers and that all available research data indicated that the additional hour did not "pose a significant risk."

However, Henry Jasny, general counsel for the Advocates for



"It's one of those rules that has been very contentious since the get-go."

— **Annette Sandberg,
Former FMCSA
Administrator**

Highway and Auto safety, called the agency's action in reintroducing the same rule as "in your face."

"But on technical grounds they can get away with it. That's the power of agencies," Jasny recently told TT. "FMCSA can pretty much do what it wants, and the court doesn't have any police power. All the court can do is say, 'you should do what we told you.'"

In January 2006, the Owner-Operator Independent Drivers Association asked the appeals court to review the rule. The process took more than a year, but the court again rejected the rule in mid-2007, this time more on procedural than safety grounds.

It wasn't until November 2008 that FMCSA published its third rulemaking, one that still retained the 11-hour limit. The interim final HOS rule went into effect three



A driver checks his electronic log on his in-cab computer at a truck stop on Interstate 5 near Aurora, Ore.

months later, in January 2009.

Since then, a third court challenge was put on hold after a settlement in October 2009 between the agency, the Teamsters union and the Advocates for Highway and Auto Safety.

"We actually filed a suit, but we also sent a letter and said let's talk about this," Jasny said. "They asked for a time out to talk about what can be done. That talk led to a discussion about 'why don't you take a new look at it.'"

"We never thought, never suggested, that they have to do it our way. We have never had any understanding that the rule would be different."

The settlement simply gave the Obama administration time to create its own rule, Jasny said. The administration's new proposed rule was made public in December 2010 and the final rule was announced on Dec. 22.

Hill is convinced that the issue could potentially bounce around the courts for years before it's finally settled.

He said he feels the most judicious solution would be for Congress to pass legislation that better spells out specific hours requirements.

"It's a symptom of what's wrong with our legislative process," Hill said. "I think Congress has a responsibility to step into this process, because it's very clear that whatever rule is published by any agency in this matter, it's going to be litigated. I just don't see that either side is going to give up."

Sandberg said that fighting rules in the courts drains time and money that could be otherwise better directed. It also frustrates the agency's staff, many of whom believe that the science indicates there are better ways to reduce fatalities than fighting over an hours rule.

"What's frustrating from an administrator's standpoint is you've got limited people and limited financial resources," Sandberg said. "You only have some much time to work your regulatory agenda. You only have a chance to get a couple of big rules out."



Another former FMCSA Administrator John Hill says Congress should get involved with HOS.



Annette Sandberg was the head of FMCSA in 2003 when the hours-of-service rule gave truckers the 11th hour of driving.



TT File Photo

Under the new rule, truckers will not be able to drive after eight hours of work without first taking a break of at least 30 minutes.

Restart Provision Affected

(Continued from p. 2)

work availability. If indeed somebody's fully rested after a restart with two nights, why would you say it can only be used once a week?"

FMCSA indicated it did not have the research to back up reducing the allowable hours to 10 as it suggested it might do in the proposed rule, issued late last year.

"This rule does not include a change to the daily driving limit because the agency is unable to definitively demonstrate that a 10-hour limit — which it favored in the notice of proposed rule-making — would have higher net benefits than an 11-hour limit," FMCSA said.

FMCSA said it will "continue to conduct data analysis and research to further examine any risks associated with the 11 hours of driving time."

Henry Jasny, general counsel for the Advocates for Highway and

Auto Safety, a plaintiff in the lawsuit that prompted the HOS rewrite, called the new rule a "major disappointment" because it retained the 11-hour driving time.

"We're going to figure out how to proceed, but one way or another, I think we're going to be back in court over the issue," Jasny told TT on Dec. 22.

Likewise, Todd Spencer, executive vice president of the Owner-Operator Independent Drivers Association, called the new rule "a one-size-fits-all approach that will not improve safety."

"Collectively, the changes in this rule will have a dramatic effect on the lives and livelihoods of small-business truckers," Spencer said. "The changes are unnecessary and unwelcome and will result in no significant safety gains."

The Retail Industry Leaders Associations said the rule will increase highway congestion and pollution and raise the cost of goods moving by truck.

"Supply chain optimization is the bread and butter of America's most successful retailers. Their ability to move goods efficiently has changed the retail landscape and benefited consumers by reducing prices and increasing product assortments. The new hours-of-service rule will upend the advances in efficiency made over the past decade," said Kelly Kolb, RILA's vice president for government relations.

FMCSA said companies and drivers that commit egregious violations of the rule could face the maximum penalties for each offense. Fleets that allow drivers to exceed the 11-hour driving limit by three or more hours could

be fined \$11,000 per offense, and the drivers themselves could face civil penalties of up to \$2,750 for each offense.

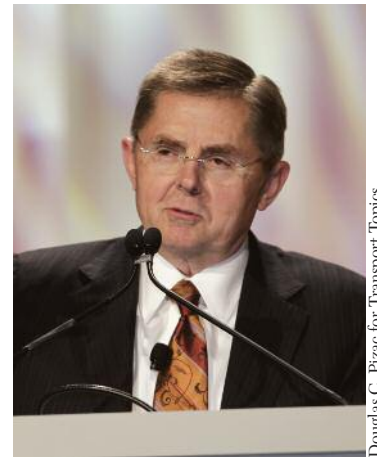
This rule marks the fourth time in the past eight years that FMCSA has attempted to put a lasting hours-of-service regulation on the books.

In 2003, Annette Sandberg, then acting administrator of FMCSA, introduced a "final" hours-of-service rule that extended allowable driving hours to the current 11 from 10 but cut drivers' overall workday to 14 from 15 hours.

That rule and a near identical hours rule issued in 2005 were both rejected by a federal appeals court.

The current interim hours rule, which retained the 11-hour driving provision, was issued in 2008 and has remained in effect since.

In October 2009, legal challenges by Public Citizen, the Teamsters union and the Advocates for Highway and Auto Safety were put on hold in a settlement with FMCSA that has given the Obama administration an opportunity to study and



Douglas C. Pizae for Transport Topics

ATA Chairman England says the rule will hurt both trucking and consumers.

create its own rule.

The current proposed rule was to originally have been finalized by July 26 but had been delayed twice.

Before 2003, since the late 1930s, truck drivers were only permitted to spend 10 hours a day behind the wheel but the workday was longer.



TT File Photo

ATA's Osiecki says there was no basis for the change in the restart provision.

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