



April 18, 2007

Mr. John H. Hill, Administrator
Federal Motor Carrier Safety Administration
U.S. Department of Transportation
400 Seventh St., SW
Washington, DC 20590

**Comments on Electronic On-Board Recorders for Hours-of-Service Compliance,
Notice of Proposed Rulemaking, 72 FR 2340, January 18, 2007, Docket No.
FMCSA-2004-18940**

Dear Administrator Hill:

Public Citizen is disappointed to be, once again, pointing out significant flaws in a needed improvement to highway safety – the installation of electronic on-board recorders (EOBRs) for hours-of-service (HOS) compliance. The Federal Motor Carrier Safety Administration (FMCSA) has once again failed to propose making installation of these devices mandatory, delaying the potential for these devices to fundamentally change the face of motor carrier safety. Mandatory installation of these devices is indispensable to the safety of every driver on the road.

Interstate truck drivers have some of the most exploitative working conditions of contemporary workers in the United States. Truck drivers have been exempted, since 1938, from the Fair Labor Standards Act, and therefore, even though that they work more than twice as many hours in a week as the average worker, they are paid no overtime. Unrealistic scheduling, which fails to take into account long wait times at loading docks - amounting to 33 to 43 hours of wasted trucker time per week - contributes to the falsification of truck driver log books.¹ Many individual commenters to the Advanced Notice of Proposed Rulemaking (ANPRM) noted the concern about delays at loading docks contributing to HOS noncompliance.² Most truckers are paid by the trip or by the mile, which encourages not only driving excessive hours but also speeding – a combination of factors which significantly imperils highway users.

There are approximately 5,000 fatalities and 130,000 injuries in commercial motor vehicle-related crashes each year.³ On-the-job deaths for truckers are higher than for any other profession; in 2003 there were 620 driver fatalities.⁴ FMCSA's compliance reviews have shown that "During roadside safety inspections, the most frequent violation cited for removing a driver from operation is exceeding allowed hours of service."⁵ Hours-of-service violations lead to fatigue, which the agency itself admits that "is a major factor in commercial vehicle crashes."⁶ The agency concluded that "[u]se of electronic recorders and other technologies to manage the HOS requirements has significant safety value."⁷ Inexplicably, the agency fails to take the logical action and mandate EOBRs for all interstate motor carriers. Instead, it proposes to require them only for carriers "[i]f FMCSA determined, based on HOS records reviewed during each of two compliance reviews conducted within a 2-year period, that a motor carrier had a 10 percent or greater violation rate (pattern violation) for any regulation in proposed Appendix C to Part 385, FMCSA would issue the carrier an EOBR remedial directive."⁸ The hours-of-service "records," of course, are the paper logs the drivers often call "comic books" because they are so inaccurate.

The Debate on Electronic On-Board Recorders Has Gone On Long Enough.

Safety advocacy organizations have been petitioning for mandatory automatic, and later electronic, on-board recorders for hours-of-service compliance since the Insurance Institute for Highway Safety petitioned in 1986.⁹ The Hazardous Materials Transportation Authorization Act of 1994, section 113 (a), requires that the Secretary of Transportation promulgate a regulation to improve hours-of-service compliance,¹⁰ and FMCSA specifically was required by the Interstate Commerce Commission Termination Act of 1995 to improve enforcement.¹¹ In a 2000 notice of proposed rulemaking on hours-of-service, the agency initially proposed mandating EOBRs, but in the final hours-of-service rule, issued only after Public Citizen sued FMCSA for failure to issue it, the EOBR requirement was removed.¹²

Public Citizen again sued FMCSA, this time over the inadequacies of its 2003 final rule, and the U.S. Court of Appeals for the District of Columbia Circuit in 2004 found that "the agency's justification for not requiring EOBRs to monitor driver compliance is...of questionable rationality."¹³ The agency continues to show this "questionable rationality" by proposing that EOBRs be installed only in carriers with a pattern of hours-of-service violations.

The agency claims that there is insufficient data on the economic and safety benefits of EOBRs.¹⁴ However, electronic tachographs are required in all European Union (EU) countries, and Morocco, Argentina, Brazil, Peru, Uruguay, Venezuela, Israel, Turkey, Japan, South Korea, and Singapore also use the devices.¹⁵ In the 2004 decision in *Public Citizen v. FMCSA*, the court commented on this, saying that it "cannot fathom...why the agency has not even taken the seemingly obvious step of testing existing [recorders] on the road."¹⁶

The potential benefits are wide and various. EOBRs would reduce the prevalence and ease with which paper logbooks are currently falsified, and would provide enforcement officers with more accurate information about hours-of-service compliance (or noncompliance). The movement away from paper logs to electronic data would allow data to be collected, downloaded, and analyzed using a simple computer program, so that noncompliant drivers could be identified and enforcement monitoring could increase significantly, which would reduce the amount of noncompliance, and, in turn, fatigue. Meanwhile, the recorder data could be used to reduce the amount of wasted time at loading docks, because this wasted time would be accurately reported. Currently, it is of no benefit to trucking companies to accurately report this time, because by-the-trip and by-the-mile pay schemes make this wasted time apparently free. If EOBRs forced accurate reporting, scheduling practices would change to reflect the fact that wasted time counts against hours-of-service, and then is no longer “free.” Improved scheduling practices would eliminate a major cause of hours-of-service noncompliance. Ultimately, all these improvements in hours-of-service compliance would reduce driver fatigue, decrease the number of crashes, and save lives.

FMCSA has wasted years in failing to live up to its mandate and improve compliance with hours-of-service standards. The agency has failed to effectively regulate the motor carriers to improve highway safety. FMCSA has ignored direction from the court and from Congress, and its own voluminous research in this latest inadequate proposal.

Hours-of-Service Violations Will Continue to Be Insufficiently Enforced Under the Proposed Rule.

During an intensive compliance check in 2006, the number of drivers placed out-of-service rose from 4.4 percent in 2004 to 5.6 percent in 2006. Of the drivers placed out-of-service, 57 percent were placed out-of-service for hours-of-service violations in spite of the fact that allowable hours-of-service rose in this period.¹⁷ Review of hours-of-service with the current paper logbooks is costly and difficult because the logbooks have to be reviewed by an auditor who must review the records by hand. Moreover, FMCSA admits that falsification of paper logbooks is “widespread.”¹⁸ By failing again to mandate EOBRs, the agency has again passed up an opportunity to expedite and improve hours-of-service compliance.

The Agency Conducts an Insufficient Number of Compliance Reviews for ‘Pattern Violations’ to Be Meaningful.

In 2003, the agency conducted only 12,000 compliance reviews out of 670,000 registered carriers, amounting to less than 2 percent of the registered carriers.¹⁹ For a carrier to be identified as a pattern violator of hours-of-service would require either such blatant noncompliance that the carrier is caught twice due to extreme negligent behavior, or pure statistical improbability. If the agency seeks to reduce noncompliance, and to improve the efficiency of compliance reviews, there is no better remedy than making EOBRs mandatory for all motor carriers. EOBRs would allow the agency to more easily

collect HOS data, and compliance reviews could be conducted by a simple computer program. The accuracy of the data would be greatly improved over paper logbooks, as it would be significantly more difficult to falsify EOBR data.

If the agency were to make EOBRs mandatory, however, the process through which carriers' records could be reviewed would be significantly streamlined. The current proposed installation of EOBRs will also not promote carriers to voluntarily install the devices, because it is requiring them as remediation for noncompliance.²⁰ The agency estimates that under the proposal, the devices will be installed in just 465 carriers – less than one-tenth of one percent of registered carriers.²¹ This makes the installation of EOBRs too small a sample to even make statistically significant statements about the effectiveness of this paltry number of devices installed. There is still onus on the agency to commit to improving enforcement of hours-of-service compliance. The agency cites the Commercial Vehicle Safety Alliance: “EOBRs ‘can do little to reduce this risk [of HOS violations to highway safety] without rigorous monitoring by both law enforcement and the industry itself.’ CVSA predicted larger carriers would tend to gain the greatest productivity benefits from EOBR use.”²²

The Proposed Rule Fails to Tear Down Barriers to Hours-of-Service Enforcement.

FMCSA says in its notice that there are anticipated cost benefits to carriers from reduced paperwork burdens. These reduced paperwork burdens would also benefit the agency by facilitating compliance reviews. The agency has also judged that “mandated EOBR deployment has the potential to significantly reduce or practically eliminate several of the specific HOS [hours of service] violations noted previously, resulting in a 50 percent reduction in HOS-related violations for carriers using the devices.”²³

FMCSA is ignoring what it has long known about the safety potential in mandating EOBRs in all commercial trucks. In a 2000 Notice of Proposed Rulemaking (NPRM) on driver rest and sleep for safe operations, the agency noted that it “attempted to convert what appeared to be a very prescriptive statutory requirement into a way of breaking the mold of paperwork reliance.”²⁴ In this notice, the agency commented that “[t] here still appears to be a pervasive reluctance on the part of industry to employ technology to verify compliance with HOS rules.”²⁵ However, as FMCSA knows, much of the industry may oppose EOBRs, yet electronic recordkeeping is widely used for tracking cargo, pickup, and delivery times in the industry. The trucking industry opposes such improvements in HOS compliance because improved compliance would mean hiring more truckers, working truckers for shorter hours, and scheduling realistic trips. Accordingly, the culture of noncompliance with hours-of-service is ingrained in the industry. EOBRs would immediately change that culture and remove barriers to enforcement. The proposed rule, however, misses out on this possibility.

Failure to Adopt Mandatory EOBRs Perpetuates the Long-Standing Exploitation of Interstate Truck Drivers.

The extreme working conditions of interstate truck drivers are a threat to the health and safety of the drivers, and by extension everyone who shares the highway with these exploited workers. A 2004 review conducted by the National Institute for Occupational Safety and Health, confirmed by a 2005 evaluation of the literature by the Transportation Research Board, found that the working conditions of truckers promote fatigue, performance errors, and adverse health effects.^{26,27} In 2000, the agency proposed rules promoting driver rest and sleep for safe operations, and mandatory installation of EOBRs. In this proposal, the agency lists five major objectives with respect to sleep and rest, including “adjust the work-rest requirements” and “emphasize rest,”²⁸ neither of which are supported by the 2003 final rule on hours-of-service, which increased the number of allowable hours to 84 work hours and 77 driving hours in 7 days.²⁹ FMCSA admits the potential benefits of installing EOBRs: “[R]eductions in HOS violations would yield safety benefits for CMV drivers and the traveling public.”³⁰ In a 2006 report to Congress, the agency states that “fatigue was coded [by investigators in the Large Truck Crash Causation Study] twice as often for passenger vehicle drivers, and speeding more often for truck drivers.”³¹

Installation of EOBRs would expose the presently “invisible” wasted time of drivers at loading docks. The agency requested “any evidence demonstrating that voluntary use of EOBRs could mitigate safety risks associated with extended driving or on-duty time, such that carriers using EOBRs might be afforded added scheduling flexibility under the HOS rules,” a request that seems cruel in the context of the newly-extended hours-of-service.³² The agency and the commercial motor vehicle industry need to fundamentally change their attitudes about the exploitative labor practices toward commercial vehicle drivers, particularly interstate truckers. By-the-mile and by-the-trip pay is illegal in Europe, and drivers there are subject to hours-of-service compliance monitoring by automatic on-board recording devices.

Despite the potential benefits, the agency concludes that EOBRs do not provide sufficient safety benefit and cost effectiveness for the agency to mandate them.³³ The agency cites as support comments from the Owner-Operator Independent Driver’s Association that there was no evidence that small fleets could cost effectively install EOBRs, and that furthermore, there was no benefit from saving drivers’ time if they pay them by the mile.³⁴ This conclusion does not so much support that EOBRs have no benefit, but that by-the-mile pay for interstate truck drivers is an exploitative practice. That driver time is worthless merely encourages motor carriers to disregard hours-of-service violations and view driver hours as being an effectively boundless resource. This argument also cruelly stacks the deck against drivers: Although improved compliance with hours-of-service is cost-effective to drivers, in large part because it would disincentivize invisible wasted time, these benefits are undercut by the assumption that drivers’ time is valued at zero.

The Notion that EOBRs Would Result in Unjustifiable Costs Is Questionable.

FMCSA must confront many problems when addressing hours-of-service noncompliance and the resulting fatigue-related crashes. A 1995 study by the National Transportation Safety Board (NTSB) found that fatigue was a probable cause in 58 percent of single-vehicle large truck crashes.³⁵ This same study found that 19 of 107 drivers admitted falling asleep while driving.³⁶ The allowable hours-of-service have increased 28 percent since 1995. Drivers are subject to pay schemes that promote unsafe driving practices. Scheduling and dispatch practices promote driver falsification of records, as well as promoting hours-of-service noncompliance by punishing drivers for being late. These same schedulers often cause drivers to waste 33 to 43 hours per week waiting for trucks to be loaded and unloaded. Conditions for interstate truckers are so bad that turnover is famously high. FMCSA has a small budget for compliance reviews, which results in the review of only a small number of carriers. The small number of reviews, in turn, make it easy for carriers to evade being caught violating hours-of-service. The agency simultaneously admits that falsification of paper logs is widespread, while estimating that less than one-tenth of one percent of carriers will be required to install EOBRs for safety remediation.

EOBRs have the potential to address all of these problems. The devices could improve highway safety, while simultaneously improving conditions for interstate drivers. The agency estimates the cost of EOBRs to be between \$534 and \$989 per unit per year; however, at a March 12, 2007, public listening session on the subject of EOBRs, Brad Larschan, president and CEO of Report on Board, a company that manufactures the devices, testified to the fact that his company had produced a \$500 unit that was fully compliant with the proposed rules, and widespread use of the devices would undoubtedly bring the cost down even further.³⁷ The agency estimates the burden due to records of on-duty status or RODS was 161 million hours and \$63.3 million annually – costs that would be virtually wiped out if EOBRs were used by all interstate carriers.³⁸ A 2006 study by the American Transportation Research Institute found that installation of EOBRs improve morale, productivity, and driver retention.³⁹

The potential safety benefits have also been shown by a number of studies. A 2001 Office of the Inspector General report stated that “use of electronic recorders and other technologies to manage the hours-of-service requirement has significant safety benefit.”⁴⁰ A Federal Highway Administration report in 1999 noted that carriers that have used automated on-board recorders have improved hours-of-service compliance.⁴¹ FMCSA has predicted that electronic recorders would reduce crashes, and it has agreed with NTSB that such devices would make record falsification more difficult and would change attitudes about compliance.⁴²

Mandatory EOBRs would still make sense if the only benefit they had to offer was improved hours-of-service compliance. A large motor carrier, J.B. Hunt, the California Highway Patrol and the Commercial Vehicle Safety Alliance have all called for mandatory installation of the devices.⁴³ Considering that there are benefits that extend to truck drivers in the form of improved working conditions, and motor carriers in

the form of increased productivity and scheduling efficiency, these devices are a win-win for every stakeholder. Instead, the agency has been beholden to an industry that had profited on the backs of overworked, overtired drivers in “rolling sweatshops,” handing down excuse after excuse for why it has ignored petitions, congressional actions, and judicial orders to act on this issue.

It is time for the excuses to stop. Twenty years and 100,000 large truck fatalities have occurred in the time this argument has been ongoing. Europe and 11 other countries have already installed the devices. The “questionable rationality” of the FMCSA is at issue once again. The agency has failed deplorably to fulfill its basic responsibility to improve highway safety, and furthermore has provided inexplicable, contradictory evidence to support this blunder.

Thank you for your consideration of our comments.

Sincerely,

Joan Claybrook
President, Public Citizen

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- ¹ Comments by Daphne Izer at National Drowsy Driving Summit, Nov. 20 and 21, 2002, available at <http://www.trucksafety.org/National_Drowsy_Driving_Summit.php>
- ² 72 FR 2340, 2394 (Jan. 18, 2007) at 2345.
- ³ Remarks of Warren E. Hoemann, June 10, 2004, available at: <http://www.fmcsa.dot.gov/about/news/speeches/statehighway-061004.htm?printer=true>
- ⁴ Remarks of Annette Sandberg, May 15, 2005, available at: <http://www.fmcsa.dot.gov/about/news/speeches/tca-remarks-2005.pdf>
- ⁵ 72 FR 2343.
- ⁶ *Ibid.*
- ⁷ *Ibid.*
- ⁸ 72 FR 2340.
- ⁹ Insurance Institute for Highway Safety. 1986. Petition to require automatic on-board recording devices for motor carriers. Submitted to the Bureau of Motor Carrier Safety, October 1. Washington, DC: U.S. Department of Transportation.
- ¹⁰ Pub. L. 103-311, Aug. 26, 1994, 108 Stat. 1673 at 1676.
- ¹¹ Pub. L. 104-88, Dec. 29, 1995, 109 Stat. 803, 958.
- ¹² 65 FR 25539, 25611 (May 2, 2000) at 25540, 68 FR 22455, 22517 (April 28, 2003) at 22456.
- ¹³ 374 F.3d. 1209, Fed. Carr. Cas. P84, 348, 362 U.S. App.D.C. 384, 150 Lab. Cas. P 34, 866.
- ¹⁴ 72 FR 2343.
- ¹⁵ Lehmann, Dr. Gerhard. "Highway Recording Systems: A Report on European and US Experiences." May 1999.
- ¹⁶ 374 F.3d. 1209
- ¹⁷ see <http://www.cvsa.org/programs/roadcheck2006.cfm>
- ¹⁸ 65 FR 25558.
- ¹⁹ Remarks of Annette Sandberg, September 14, 2004., available at: <http://www.fmcsa.dot.gov/about/news/speeches/busassociation-091404.htm>
- ²⁰ 72 FR 2365.
- ²¹ *Ibid.* at 2380.
- ²² *Ibid.* at 2358.
- ²³ *Ibid.* at 2358.
- ²⁴ 65 FR 25567.
- ²⁵ *Ibid.*
- ²⁶ C. Caruso, *et al.*, *Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries, and Health Behaviors*, National Institute for Occupational Safety and Health, Centers for Disease Control, Department of Health and Human Services, April 2004.
- ²⁷ ²⁷ P. Orris and S. Buchanan, Literature Review on Health and Fatigue Issues Associated with Commercial Motor Vehicle Driver Hours of Work, Transportation Research Board Synthesis 9, MC No. 08, 2005.
- ²⁸ 65 FR 25539.
- ²⁹ 70 FR 3339, 3354 (January 24, 2005) at 3348.
- ³⁰ 72 FR 2358.
- ³¹ "Report to Congress on the Large Truck Crash Causation Study," Federal Motor Carrier Safety Administration, March 2006.
- ³² *Ibid* at 2379.
- ³³ 72 FR 2340.
- ³⁴ *Ibid.* at 2359.
- ³⁵ *Factors that Affect Fatigue in Heavy Truck Accidents. Volume 1: Analysis.* NTSB Number SS-95/01. National Transportation Board. 1995.
- ³⁶ *Ibid.*
- ³⁷ Larschan, Brad. "Comments Before FMCSA Listening Session," March 12, 2007.
- ³⁸ 69 FR 53386-53397 (September 1, 2004) at 53396.
- ³⁹ Electronic On-Board Recorder Adoption in the Trucking Industry: Issues and Opportunities, 25 (Am. Transp. Res. Inst., Sept. 2006).

⁴⁰ PT-2001-017. January 18, 2001.

⁴¹ Thomas, Neill L. and Deborah M. Freund. *On-Board Recording for Commercial Motor Vehicles and Drivers: Microscopic and Macroscopic Approaches*, 1999.

⁴² 65 FR 25585-25596.

⁴³ 72 FR 2355.