

## *Trucker hours of service: The wait continues*

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It's still not clear what will happen with rules governing truck drivers' hours of service. While it may sound like a motor carrier labor headache, this political hot potato could have far-reaching affects on our entire transportation infrastructure.

In 1995, Congress charged the Federal Highway Administration of the U.S. Department of Transportation (DOT) with revamping regs which limit the hours truckers may work. The Federal Motor Carrier Safety Administration (FMCSA) inherited the task in 1999 when DOT reorganized.

Hours of service rules have been on the books for over 40 years, but critics charged that legally mandated rest times, as well as when and how often they're taken, were medically inadequate. Strong evidence supporting the new science's conclusions was the timing of most commercial vehicle accidents. An alarmingly high percentage of them occur when drivers aren't well rested. This is despite the fact that, overall, trucking safety has improved dramatically over the past few decades. A study conducted by the American Trucking Associations showed a large percentage of truck/car crashes were caused by the car driver's negligence.

FMCSA got cracking and came up with guidelines affectionately known in the trucking world as "the new rules." Following federal administrative procedure, FMCSA ran a notice of proposed rulemaking in the Federal Register in May 2000, heard extensive public comment, and promulgated the new rules in April 2003.

Everyone holds minimized traffic accidents as a paramount concern. Who's going to urge that his bottom line trumps public safety? There wasn't much vocal opposition to reduced hours of service, but it's not like economic factors were ignored either. While the new rules actually extend the driving hours a trucker can sit behind the wheel (from 10 to 11), they also create broader requirements for short and long-term time off between shifts, and impose a 34-hour "restart" break between seven or eight day work cycles. This means motor carriers, especially ones who run long haul, now need more drivers when there's already a driver shortage. That could spell higher wages, more training efforts and, potentially, a decline in service options.

If you study how larger trucking companies have situated their LTL terminals across the country, you'll see a pattern of geographic distancing that contemplates driver on-duty times which the new rules prohibit. Now, the big boys might have to build new terminals in different locales, use driver teams or, again, hire more drivers from a limited pool of candidates. These options aren't well received in motor carrier accounting departments.

In addition to labor problems and financial issues motor carriers face under the new rules, the shipping public at large must pay some dues. If it costs truckers more to haul freight, guess whose freight charges rise accordingly. If an undermanned driver staff has to wait 34 hours to fill a cab, delivery of someone's car or trailer won't be promised for that much longer. Because surface transit connects with the vast majority of water carriage, the whole system could be impacted.

A number of transportation players dissatisfied with the new rules brought suit against FMCSA, complaining that the agency had failed to adhere to guidelines of the federal Administrative Procedure Act, 5 USC § 551 *et seq.* They claimed FMCSA, in its drafting and promulgation of the new rules, had been "arbitrary and capricious." This is a broadly defined, administrative law buzz word which basically means the government agency didn't jump all necessary hoops before issuing new regs. The U.S. Court of Appeals for the District of Columbia agreed, and wagged its finger at the trucking feds.

Specifically, Congress' mandate to DOT was to draft up new rules which accommodated various concerns, including driver health. Apparently, vehicle safety was the agency's only rationale and justification in designing the new rules. FMCSA thought the petitioners were drawing fine lines, given that driver health "permeated the entire rulemaking process." However, the court concluded the health issue couldn't just be in the background, given that it got high billing in Congress' list of concerns.

Of equal, or perhaps greater, significance, are the court's observations regarding the new rules' substance. The District of Columbia Circuit mentioned concern about the increase in maximum driving time, as well as an exception in the new rules to certain time restrictions for trucks with sleeper berths. The court also suggested FMCSA's failure to include rules regarding electronic on board recorders (the trucking equivalent of an aircraft's black box) was a no-no.

This isn't to say the court has knocked down the new rules altogether. FMCSA was allowed to keep the new rules in place for at least 45 days (pending its compliance with the court's administrative requirements or request for additional time), and might gain more time through procedural maneuvering. Meanwhile, we can't be sure what hours of service rules ultimately will control truckers, and motor carriers aren't able to prepare themselves for the long haul. Some might say that the court's decision threatens to impose even more stringent terms than those currently in place.

The court can't make trucking rules (that's FMCSA's domain), but it certainly can find FMCSA in violation of Congress' directive for failing to comply with each element of it. FMCSA might have to keep working at the new rules until they slip past the court.

Highway safety is not a luxury. It's an essential we simply must find a way to afford. But we can't really get started sorting out the issues until the current uncertainty is resolved.

***Ref: Public Citizen, et al v. FMCSA, pending before the United States Court of Appeals for the District of Columbia, No. 03-1165.***