



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 390, and 395

[Docket No. FMCSA-2010-0167]

RIN 2126-AB20

Electronic On-Board Recorders and Hours of Service Supporting Documents

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of public listening session

SUMMARY: FMCSA announces that it will hold a public listening session to solicit information, concepts, ideas, and comments on Electronic On-Board Recorders (EOBRs) and the issue of driver harassment. Specifically, the Agency wants to know what factors, issues, and data it should consider as it addresses the distinction between productivity and harassment: what will prevent harassment from occurring; what types of harassment already exist; how frequently and to what extent harassment happens; and how an electronic device such as an EOBR, capable of contemporaneous transmission of information to a motor carrier will guard against (or fail to guard against) harassment. This session will be held in Louisville, Kentucky (KY), and will allow interested persons to present comments, views, and relevant new research that FMCSA should consider in development of the final rule. This listening session will be recorded and a transcript of the session will be placed in the docket for FMCSA's consideration. The listening session will also be webcast via the Internet.

DATES: The listening session will be held on Friday, March 23, 2012, at the Mid-America Trucking Show in Louisville, KY. The listening session will run from 10 a.m. – 12 p.m., with a

break between 12 p.m. and 2 p.m., and continue from 2 p.m. – 4 p.m. local time, or earlier, if all participants wishing to express their views have done so.

ADDRESSES: The listening session will be held at the Kentucky Exposition Center (KEC), 937 Phillips Lane, Louisville, KY 40209, South Wing, Meeting Room C-101.

Internet Address for Live Webcast. FMCSA will post specific information on how to participate via the Internet on the FMCSA web site at: <http://www.fmcsa.dot.gov> in advance of the listening session.

You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA-2010-0167 using any of the following methods:

- Federal eRulemaking Portal: Go to www.regulations.gov. Follow the on-line instructions for submitting comments.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- Fax: 1-202-493-2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to www.regulations.gov, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to www.regulations.gov at any time or visit Room W12-140 on the ground level of the West Building, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., ET,

Monday through Friday, except Federal holidays. The on-line Federal document management system is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System published in the Federal Register on January 17, 2008 (73 FR 3316), or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

FOR FURTHER INFORMATION CONTACT: For information concerning the listening session or the live webcast, please contact Ms. Shannon L. Watson, Senior Advisor for Policy, FMCSA, (202) 385-2395, Shannon.Watson@dot.gov.

Should you need sign language interpretation or other assistance to participate in this listening session, also contact Ms. Shannon L. Watson, at the above phone number, by Thursday, March 8, 2012, to allow us to arrange for such services. There is no guarantee that services requested on short notice can be provided.

SUPPLEMENTARY INFORMATION:

I. Background

On February 13, 2012, FMCSA published a notice of intent in the **FEDERAL REGISTER** announcing the Agency's plan for the Electronic On-Board Recorders and Hours of Service Supporting Documents rulemaking (EOBR 2) by working towards preparing a Supplemental Notice of Proposed Rulemaking (SNPRM) (77 FR 7562). In this notice, FMCSA

stated it would do the following: (1) hold listening sessions on the issue of driver harassment; (2) task the Motor Carrier Safety Advisory Committee (MCSAC) to assist in developing material to support this rulemaking, including technical specifications for EOBRs and their potential to be used to harass drivers; and (3) conduct research by surveying drivers, carriers, and vendors regarding harassment issues.

The following discussion summarizes the recent regulatory history of the agency's EOBR program:

EOBR 1

On April 5, 2010, the Agency issued a final rule (EOBR 1) (75 FR 17208) that provided new technical requirements for EOBRs. The EOBR 1 final rule also required the limited, remedial use of EOBRs for motor carriers with significant hours-of-service (HOS) violations. The EOBR 1 final rule required a motor carrier found to have a 10 percent violation rate for any HOS regulation listed in Appendix C of 49 CFR part 385 during a single compliance review to install and use EOBRs on all of its CMVs for a period of 2 years. The compliance date for the rule was June 4, 2012.

The Owner-Operator Independent Drivers Association (OOIDA) challenged the final rule in the United States Court of Appeals for the Seventh Circuit. OOIDA raised several concerns relating to EOBRs and their potential use for driver harassment. On August 26, 2011, the Court vacated the entire final rule. Owner-Operator Indep. Drivers Ass'n et al. v. Fed. Motor Carrier Safety Admin., 656 F.3d. 580 (7th Cir. 2011). The Court held that, contrary to statutory requirements, the Agency failed to address the issue of driver harassment, including how EOBRs could potentially be used to harass drivers and ways to ensure that EOBRs were not used to

harass drivers. The basis for the decision was FMCSA's failure to directly address a requirement in 49 U.S.C. § 31137(a) which reads as follows:

USE OF MONITORING DEVICES. If the Secretary of Transportation prescribes a regulation about the use of monitoring devices on commercial motor vehicles to increase compliance by operators of the vehicles with hours of service regulations of the Secretary, the regulation shall ensure that the devices are not used to harass vehicle operators. However, the devices may be used to monitor productivity of the operators.

The court's expectation about how the Agency should address harassment and productivity under the statutory directive included the following:

"In addition, an adequate explanation that addresses the distinction between productivity and harassment must also describe what precisely it is that will prevent harassment from occurring. The Agency needs to consider what types of harassment already exist, how frequently and to what extent harassment happens, and how an electronic device capable of contemporaneous transmission of information to a motor carrier will guard against (or fail to guard against) harassment. A study of these problems with EOBRs already in use, and a comparison with carriers that do not use these devices, might be one obvious way to measure any effect that requiring EOBRs might have on driver harassment" (Id. at 588-89).

As a result of the vacatur, carriers relying on electronic devices to monitor HOS compliance are currently governed by the Agency's previous rules regarding the use of automatic on-board recording devices (49 CFR 395.15). The requirements set forth in 49 CFR 395.15 were not affected by the Seventh Circuit's decision regarding the technical specifications set out in 49 CFR 395.16 in the EOBR 1 Final Rule.

Meeting Participation and Information FMCSA Seeks From the Public

The listening session is open to the public. Speakers' remarks will be limited to five minutes each. The public may submit material to the FMCSA staff at the session for inclusion in the public docket, FMCSA-2010-0167. FMCSA will docket the transcription of the listening session that will be prepared by an official court reporter.

FMCSA tasked the Motor Carrier Safety Advisory Committee (MCSAC) with addressing harassment through Task 12-01, titled, “Measures to Ensure Electronic On-Board Recorders (EOBRs) Are Not Used to Harass Commercial Motor Vehicle (CMV) Operators”. MCSAC held public meetings on this task on February 7-8, 2012, and based on its deliberations, submitted a report to the FMCSA Administrator on February 8, 2012. This report is available for review at: <http://mcsac.fmcsa.dot.gov/meeting.htm> and the public docket, FMCSA-2010-0167. The questions posed to MCSAC will be used as a template for public comment and discussion at the listening session.

The comments sought from the questions below may be submitted in written form at the session and summarized verbally, if desired:

1. In terms of motor carriers’ and enforcement officials’ monitoring or review of drivers’ records of duty status (RODS), what would constitute driver harassment? Would that definition change based on whether the system for recording HOS is paper or electronically based? If so, how? As a starting point, the Agency is interested in potential forms of harassment, including but not limited to those that are: (1) not prohibited already by current statutes and regulations; (2) distinct from monitoring for legitimate business purposes (e.g., efforts to maintain or improve productivity); and (3) facilitated or made possible solely by EOBR devices and not as a result of functions or features that motor carriers may choose to purchase, such as fleet management system capabilities. Is this interpretation appropriate? Should it be broader? Or narrower?
2. Are there types of driver harassment to which drivers are uniquely vulnerable if they are using EOBRs rather than paper logs? If so, what and how would use of an EOBR rather

than a paper log make a driver more susceptible to harassment? Are there ways in which the use of an EOBR rather than a paper log makes a driver less susceptible to harassment?

3. What types of harassment are motor carrier drivers subjected to currently, how frequently, and to what extent does this harassment happen? How would an electronic device capable of contemporaneous transmission of information to a motor carrier guard against (or fail to guard against) this kind of harassment? What experience have motor carriers and drivers had with carriers using EOBRs as compared to those who do not use these devices in terms of their effect on driver harassment or complaints of driver harassment?
4. What measures should the Agency consider taking to eliminate the potential for EOBRs to be used to harass drivers? Are there specific functions and capabilities of EOBRs that should be restricted to reduce the likelihood of the devices being used to harass vehicle operators?
5. Motor carriers are often responsible for managing their drivers and equipment to optimize efficiency and productivity and to ensure transportation services are provided in accordance with a planned schedule. Carriers commonly use electronic devices, which may include but are not limited to EOBRs, to enhance productivity and optimize fleet operation. Provided such devices are not used to coerce drivers into violating Federal safety regulations, where is the line between legitimate productivity measures and inappropriate oversight or actions that may be construed as harassment?

**II. Alternative Media Broadcasts During and Immediately After the Listening Session on
March 23, 2012**

FMCSA will webcast the listening session on the Internet. Specific information on how to participate via the Internet and the telephone access number will be on the FMCSA web site at <http://www.fmcsa.dot.gov>. FMCSA will docket the transcripts of the webcast and a separate transcription of the listening session that will be prepared by an official court reporter.

Issued on: February 24, 2012

William A. Bronrott
Deputy Administrator

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