



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

49 CFR Part 395

Hours of Service; Electronic Logging Devices; Limited 90-Day Waiver for the Transportation of Agricultural Commodities

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

ACTION: Notification; grant of waiver.

SUMMARY: FMCSA grants a limited 90-day waiver from the Federal hours-of-service (HOS) regulations pertaining to electronic logging devices (ELDs) for the transportation of agricultural commodities as defined in the Federal Motor Carrier Safety Regulations (FMCSRs). The Agency takes this action in response to a waiver request from the National Pork Producers Council (NPPC) on behalf of eight organizations representing transporters of livestock and other agricultural commodities, as defined in the FMCSRs. The Agency has determined that the waiver is in the public interest and would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption, based on the terms and conditions imposed. The waiver will also through notice and public comment, provide FMCSA with time to consider certain exemption applications from segments of the agricultural industry concerning the use of ELDs to document drivers' hours of service and clarify applicability of the requirements and the need for certain carriers to begin using ELDs by the December 18, 2017, deadline.

DATES: This waiver is applicable beginning December 18, 2017, and expires on March 18, 2018.

FOR FURTHER INFORMATION CONTACT: Thomas L. Yager, Chief, Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE, Washington, DC 20590. E-mail: MCPSD@dot.gov. Phone : (614) 942-6477.

SUPPLEMENTARY INFORMATION:

Legal Basis

The Transportation Equity Act for the 21st Century (TEA-21) (Public Law 105-178, 112 Stat. 107, June 9, 1998) provides the Secretary of Transportation (the Secretary) the authority to grant waivers from any of the FMCSRs issued under Chapter 313 of Title 49 of the United States Code or 49 U.S.C. 31136, to a person(s) seeking regulatory relief. (49 U.S.C. 31136(e), 31315(a)). The Secretary must make a determination that the waiver is in the public interest, and that it is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver. Individual waivers may be granted only for a specific unique, non-emergency event, for a period up to three months. TEA-21 authorizes the Secretary to grant waivers without requesting public comment, and without providing public notice.

The Administrator of FMCSA has been delegated authority under 49 CFR 1.87(e) to carry out the functions vested in the Secretary by 49 U.S.C. chapter 311, subchapters I and III, relating to commercial motor vehicle programs and safety regulation.

Background

The FMCSA received an application for an exemption and waiver from the NPPC on behalf of eight organizations that represent transporters of livestock and other agricultural commodities. Notice of the request for exemption from the requirement that a motor carrier require each of its drivers to use an electronic logging device (ELD) no

later than December 18, 2017, to record the driver's hours-of-service (HOS), was published in the **Federal Register** on October 31, 2017 (82 FR 50358). Comments to that document were due by November 30, 2017 (www.regulations.gov, Docket FMCSA-2017-0297).

The NPPC focused on the impact of the ELD requirement on its members, given unique aspects of its industry, including "exposed incompatibilities between the HOS rules and the ... industry ... causing disruption ... and endangering the health and welfare of ... animals transported ..."

FMCSA has also received from the Agricultural Retailers Association (ARA) an exemption, waiver, and petition document dated October 25, 2017, requesting that transporters of agricultural commodities and farm supplies not be required to use ELDs during an exemption period. That exemption request has not yet been published for comment. While this waiver is issued in response to the application submitted by the NPPC, it also applies to other eligible motor carriers, including ARA members, to the extent they are handling agricultural commodities as defined under 49 CFR 395.2, as discussed in the Terms and Conditions of the Waiver section below.

In addition to NPPC's request, FMCSA received numerous inquiries from parties involved in the transport of agricultural commodities about the correct application of the HOS agricultural exception in 49 CFR 395.1(k)(1), leading to an ongoing review of the exception. FMCSA is considering providing new guidance on the agricultural exception in the near future.

Safety Determination

In an October 6, 2010, **Federal Register** document (75 FR 61626), FMCSA granted a limited 90-day waiver from the HOS requirements for the distribution of an

agricultural supply—anhydrous ammonia. At that time, the Agency compared safety performance data for agricultural carriers then operating under the statutory HOS agricultural exception in 49 CFR 395.1(k) to non-agricultural carriers that were not exempt from HOS regulations to determine whether the waiver would be likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver. The data were collected as part of a study, “Agricultural Commodity and Utility Carriers Hours of Service Exemption Analysis.” The final report from the study is available online.¹

The study was conducted in two phases. Phase 1 compared the safety performance of agricultural and non-agricultural carriers for the period 2005 through 2008, and also examined two additional industries, livestock and utility carriers, whose operations were not exempt from HOS regulations prior to the passage of SAFETEA-LU. The Phase 1 analysis used carrier registration, inspection and crash data from FMCSA’s Motor Carrier Management Information System (MCMIS). The study used cargo classification information on the FMCSA Motor Carrier Identification Report (Form MCS-150)² in MCMIS to identify the carrier’s industry group (agricultural, livestock, or utility carrier), and used MCS-150 information to identify carriers operating within and beyond a 100-air-mile radius. The operating radius information was used to create two agricultural carrier subgroups: 1) agricultural carriers with 100 percent of drivers operating within a 100-air-mile radius; and 2) agricultural carriers with 100 percent of

¹ <https://ntlrepository.blob.core.windows.net/lib/42000/42700/42776/FMCSA-RRA-10-048.pdf>

² This registration form has subsequently been replaced with Form MCSA-1.

drivers operating beyond a 100-air-mile radius. The analysis used the first subgroup as representative of agricultural carriers exempt from the HOS requirements, and the second subgroup as representative of agricultural carriers not exempt from the HOS requirements.

For the Phase 2 analysis, inspection data of agricultural commodity and utility carriers (which are also exempt from HOS regulations) were collected during an FMCSA special study of a sample of States. These data included only those inspections occurring during the States' planting and harvesting seasons and indicated both the commodity being transported and whether the driver was operating within or beyond the 100-air-mile radius exempt from HOS regulations. The Phase 2 analysis assessed the safety performance of the HOS exempt agricultural commodity and utility service carriers identified in the survey in comparison with non-HOS exempt carriers based on their out of service (OOS) violation rates and crash rates.

For the purposes of considering whether to issue a limited waiver, FMCSA focused on the crash rate data from the study. The Agency placed less emphasis on the out-of-service (OOS) rates because there were no HOS violation data to consider given that the agricultural carriers for which data were available were operating under a statutory exemption from the HOS rule. Differences between the OOS rates for other issues such as driver qualifications and vehicle defects and deficiencies, while important in considering overall safety management controls of the carriers, were not necessarily related to the potential safety impact of the waiver.

The Phase 1 analysis indicated that nationally, agricultural carriers operating within a 100-air-mile radius had lower crash rates per 100 power units than those

operating beyond this radius, except in 2008, when there was no difference in the crash rates.

To provide additional validation of the crash analysis, which uses power unit data reported on the Form MCS-150, a separate analysis was performed using data only for carriers domiciled in States participating in the Performance and Registration Information Systems Management (PRISM) program that enforces MCS-150 updating. PRISM links State motor vehicle registration systems with carrier safety data in order to identify unsafe commercial motor carriers. The PRISM State carriers are required to update their MCS-150 annually. By contrast, non-PRISM State carriers are required by FMCSA to update their MCS-150 biennially. As a result, the PRISM State data are considered more current and reliable than non-PRISM State data where there is no direct implication for not updating the data. Data from PRISM States that enforce MCS-150 updating show that agricultural carriers operating within a 100-air-mile radius had more varied results, with crash rates higher than carriers operating beyond a 100-air-mile radius in 2008, lower in 2006 and 2007, and nearly the same in 2005.

The Phase 2 analysis indicated that in the four States participating in the survey (ID, KS, MD, MI), agricultural carriers that were subject to the HOS requirements had higher crash rates per 100 power units than agricultural carriers exempt from the HOS requirements.

Although this study was conducted in 2010 and relied upon data from 2005 through 2008, FMCSA has no reason to believe that the conclusions would be different if updated using more recent data. Although these studies did not focus on benefits achieved by use of ELDS, given the limited population of motor carriers affected by the waiver and the brief period of time a waiver is in effect, FMCSA believes that the level of

safety maintained by haulers of agricultural commodities will be equivalent to the safety of operations that would be obtained absent the granting of a waiver. Furthermore, the Agency believes the sense of urgency in this matter requires a decision based on the best available data, albeit dated, rather than delaying a decision until a new study can be conducted.

FMCSA Determination

Considering the above study, the ongoing review of the HOS agricultural commodities exception, and the pending exemption request from NPPC, FMCSA has determined that it is in the public interest to provide a limited waiver from the use of ELDs for interstate motor carriers engaged in the transportation of agricultural commodities as defined in 49 CFR 395.2. This waiver will allow FMCSA time to evaluate the HOS exception applicable to the transport of agricultural commodities and review the concerns unique to the agricultural industry identified by NPPC and others. FMCSA grants the waiver requested by NPPC, but also extends it to all motor carriers transporting an agricultural commodity.

Terms and Conditions of the Waiver

(1) *Duration of the waiver.* This waiver is applicable December 18, 2017, through March 18, 2018.

(2) Motor carriers transporting agricultural commodities under the provisions of 49 CFR 395.1(k)(1), are exempt from the ELD requirements in 49 CFR 395.8(a) during the period of this waiver, regardless of the distance traveled.

(3) Carriers operating under this waiver must comply with all other applicable requirements of the Federal Motor Carrier Safety Regulations (49 CFR parts 390 through 399), including the preparation of records of duty status (RODS) for operations which are

currently considered to be subject to the HOS rules and the record retention requirements associated with those RODs and supporting documents.

(4) Motor carriers operating under this waiver must have a “satisfactory” safety rating from FMCSA or be unrated; motor carriers with “conditional” or “unsatisfactory” safety ratings are prohibited from taking advantage of the waiver.

(5) Drivers operating under this waiver must carry a copy of this **Federal Register** notification and present it to motor carrier safety enforcement officials upon request.

(6) *Crash Notification to FMCSA*

Carriers operating under this waiver must notify FMCSA within 5 business days of any accident (as defined in 49 CFR 390.5), involving any of the motor carrier’s drivers operating under the terms of this waiver. The notification must include the following information:

- (a) Identity of Waiver: “AG”
- (b) Date of the accident,
- (c) City or town, and State, in which the accident occurred, or closest to the accident scene,
- (d) Driver’s name and license number,
- (e) Co-driver’s name and license number (if applicable),
- (f) Vehicle number and State license number,
- (g) Number of individuals suffering physical injury,
- (h) Number of fatalities,
- (i) The police-reported cause of the accident,

(j) Whether the driver was cited for violation of any traffic laws, motor carrier safety regulations, and

(k) The total driving time and total on-duty time period prior to the accident.

Accident notifications must be e-mailed to MCPSD@dot.gov.

Safety Considerations

Considering the limited period of this waiver and that it does not alter any of the HOS regulations other than the method of recording HOS, and the Agency's previous review of data concerning the safety performance of motor carriers engaged in the transportation of agricultural commodities, the Agency has determined that the waiver from the ELD requirements for 90 days is likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation.

FMCSA expects that any drivers and their employing motor carrier operating under the terms and conditions of the exemption will maintain their safety record. Should any safety problems be discovered, however, FMCSA will take all steps necessary to protect the public interest. Use of this waiver is voluntary, and FMCSA will immediately revoke the waiver for any interstate driver or motor carrier for failure to comply with the terms and conditions of the waiver.

Preemption of State Requirements

Consistent with 49 U.S.C. 31315(d), this waiver preempts inconsistent State or local requirements applicable to interstate commerce.

Issued on: December 13, 2017.

Cathy F. Gautreaux,
Deputy Administrator.

[FR Doc. 2017-27311 Filed: 12/19/2017 8:45 am; Publication Date: 12/20/2017]