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BEFORE THE FEDERAL HIGHWAY ADMINISTRATION
UNITED STATES DEPARTMENT OF TRANSPORTATION

In the matter of:
Docket No. FHWA -- 98 -- 3706 - 31
Hours of Service of Drivers; Supporting Documents

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Before the Administrator:

National Tank Truck Carriers, Inc. (NTTC) is a trade association the (approximately) 200 members of which specialize in cargo tank transportation throughout the continental United States, Alaska and in international transportation. Since virtually all of our members are subject to the Federal Motor Vehicle Safety Regulations, issued by the Administrator, the interest of our membership in this matter is substantial.

At the outset, it must be noted that NTTC has no objection to regulatory mandates, dealing with drivers' hours of service (HOS) compliance, which: 1) Are reasonable (in terms of the regulated parties' ability to comply); 2) Are objective (in that they are enforced equally throughout the regulated community); and, 3) Do not impact the competitive balance within the economic structure of the industry.

Regrettably, even a cursory reading of the April 20, 1998 NPRM reveals that the Administrator has crossed these lines in two specific areas. First, at (proposed) 49 CFR 395.10 (c)(1) and later at (proposed) 49 CFR 395.10(i).

In examining both the overall content and specifics of the proposal (from the standpoint of the three "tests" noted above), it is apparent that certain important "specifics" are missing. For instance, the NPRM contains language to the effect that "Every motor carrier must have a self-monitoring auditing system.. .", and sets certain conditions "If the audit systems can be demonstrated to be effective" (emphasis supplied). Importantly, no definition is suggested for the term "self-monitoring" and nowhere is it noted who or what process is involved in determining whether or not a given carrier "system" is "...demonstrated to be effective".

Of course, the entire tank truck industry knows how the compliance system works. Individual FHWA compliance officers will make judgments (about demonstrated "effectiveness" and the efficacy of a "self-monitoring" system), and those judgments will be largely subjective. This subjectivity is the core of NTTC's concerns about the proposal.

On the one hand, FHWA is proposing a regulatory system which could easily lead to a carrier being subjected to significant monetary penalties (to the point of being put out of business); while, on the other hand, FHWA leaves relevant and critical decision-making

to the discretion of field personnel (some of whom may be trained better than others, some of whom may have more experience than others, and some of whom may have a bias, etc.).

Instead of proposing definitive standards, the Administrator suggests a “shopping list” of documents that may (or may not) be available to the carrier and may or may not be deemed adequate in verifying HOS compliance (again, depending on the subjective opinion of the FHWA inspector).

As an example of this “lack of standards”, we see (proposed) 395.10(c)(1) stating that (in some circumstances) the carrier would be required to produce documents which would (in part) “...detail intermediate points in the trip.”

Surely, the Administrator knows that, in the tank truck industry, such documents rarely exist. Over 75 percent of all tank truck activities involve the distribution of middle distillate petroleum products (e.g. gasoline, fuel oil, etc.) from bulk distribution points to retail facilities and other large quantity consumers. These are typical “turn key” operations. Yes, the driver will probably have some time/date record as to when he/she arrived at a loading point (e.g. bulk plant); but, that same driver will likely be unable to produce any consistently accurate record as to when the vehicle was actually loaded and/or when he/she departed the loading point. In some cases, the driver may gain access to the loading rack immediately. Conversely, that same driver may have to wait in line for an extended period of time. The same is true with unloading (delivery) of petroleum products. Deliveries may be made “after hours” to service stations and other retail facilities and no representative of the consignee is present to “sign off” on the delivery.

In the case of bulk chemical and food grade transportation the situation is no different. Today (for reasons of workplace safety and/or quality control), it is common for tank truck drivers to arrive at a loading point and turn over custody of the vehicle to plant personnel who drive the cargo tank to another location for inspection and loading. The driver may sit for hours waiting to regain custody of the (then) loaded vehicle. In such cases, the shipper is under no obligation to document this hiatus, and FHWA has no jurisdiction with which it can compel a shipper’s production of such documentation. Simply stated, the “paperwork just doesn’t exist”, whereby a tank truck carrier could document the drivers’ duty status during “intermediate points”; yet FHWA would cause the carrier to produce it in order to verify compliance.

Of course the absence of such documentation leads NTTC members to the ultimate penalty proposed in 395.10(i). Therein, FHWA says that it may “use any evidence, whether or not in the carrier’s possession...” (to determine compliance) (emphasis supplied). Moreover, the same subparagraph reserves for FHWA the power to compel the carrier to “...**modify** its system” (emphasis supplied).

NTTC interprets these proposals to be little more than veiled threats aimed at ultimately forcing the entire trucking industry into the costly realm of so-called “satellite tracking”.

Let us advance our argument by example.

Allow us to assume that "Carrier A" has a portion (or all) of its fleet equipped for satellite tracking via an agreement between the carrier and a service provider. In its normal business practice, the carrier retains the electronically "downloaded" information (which is quite specific in terms of vehicle status, location and time) in its records for 60 hours after completion of the trip. The proposal at 395.10 would allow the Administrator to either: 1) have access to all information retained by the service provider (much of which may have nothing to do with HOS compliance); or, 2) compel the carrier to modify its internal policies in terms of the time of retention of electronic records. We believe that triggering any of these alternatives raises serious questions about FHWA statutory jurisdiction.

Now, let us further assume that "Carrier B" has no vehicles equipped for satellite tracking. In this case, the proposal would allow the FHWA to simply dictate to the carrier that (in order to stay in business) it must "...modify its system" by installing satellite tracking and providing information, gleaned from that system, to the government. Again, serious concerns about jurisdiction arise.

SUMMARY

Whether intended or unintended, the Administrator has proposed a system wherein the subjective judgment of Federal employees can be used as a tool which would allow government to invade the private business relationships between carriers and service providers; or, worse yet, compel carriers to expend scarce resources needlessly.

The proposed system is designed to trap carriers into failure. It proposes to mandate the retention of documents which may not exist. Then, this administrative felony is compounded when the failure to produce non-existent documents results in draconian penalties (e.g. civil forfeitures, carrier shutdowns or a mandated investment in technology).

Carriers which have invested in satellite tracking face the prospect of being forced to retain, process and divulge information which may be proprietary and/or be retained in FHWA files subject to public disclosure. Additionally, those same carriers may be mandated to produce compliance-related data (and absorb the costs of that data production) when competitors (in the same marketplace) who choose not to invest in tracking technology are free of such burdens. By the same token, carriers which have chosen not to invest in satellite tracking see the prospect of being forced to invest in this technology for no other reason than administrative fiat based on the subjective opinion of a DOT field inspector.

In either case, the essence of the proposal is flawed and cedes to the Administrator the power to render arbitrary decisions with neither checks nor balances.

Respectfully submitted,



Clifford J. Harvison, President