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BEFORE THE  
FEDERAL HIGHWAY ADMINISTRATION  
UNITED STATES DEPARTMENT OF TRANSPORTATION

DOCKET NO. FHWA-98-3706 - 32

HOURS OF SERVICE OF DRIVERS;  
SUPPORTING DOCUMENTS

NOTICE OF PROPOSED RULEMAKING

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COMMENTS OF THE AMERICAN BUS ASSOCIATION, INC.

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The American Bus Association (“ABA”) is the national trade association of the intercity bus industry. ABA has about 3,000 members, some 700 of whom are bus operators. They offer a variety of bus services:

- \* regular route intercity service between fixed points on set schedules;
  - \* charter service, where a group of passengers (such as a church or organization) purchases all of the seats on a bus for exclusive use on a particular trip;
  - \* tour service, which usually includes stops for sightseeing and recreational purposes;
  - \* commuter bus services, generally from the suburbs into urban areas; and
  - \* special operations, which are scheduled services to enhance public transportation systems (such as bus service from a city to an airport), or which may be connected with a special event or attraction at the destination.
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The rest of ABA's members include representatives of the travel and tourism industry, and the manufacturers and suppliers of products and services used by the bus industry.

The FHWA has undertaken this rulemaking proceeding at the direction of Congress in section 113 of the Hazardous Materials Transportation Act of 1994, Pub. L. 103-311, 108 Stat. 1673 (August 26, 1994) (hereinafter "the HMTA" or "the Act"). Notwithstanding this congressional directive, ABA believes that this rulemaking proceeding is premature in light of the unsettled nature of the underlying hours of service ("HOS") requirements, which the rules in this proceeding would enforce. Additionally, ABA has several substantive concerns with the nature of this proposal itself.

## **I. THIS RULEMAKING IS PREMATURE**

The FHWA has proposed this rule as a mechanism to enhance enforcement of the hours of service regulations in 49 C.F.R. Part 395. Yet those very requirements are themselves subject to a comprehensive review and likely overhaul in a related rulemaking proceeding, Hours of Service of Drivers, FHWA Docket No. MC-96-28, 61 Fed. Reg. 57252 (November 5, 1996). Like this proceeding, the underlying HOS rulemaking was also mandated by Congress, in section 408 of the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (December 29, 1995).

Thus, it is impractical for the FHWA to issue a Notice of Proposed Rulemaking in this proceeding on measures to enforce the HOS requirements, when the FHWA has only issued an Advance Notice of Proposed Rulemaking on the underlying HOS regulations themselves.

Congress had mandated that the FHWA revise both the HOS regulations and the "supporting documents" that might be required to enforce those regulations, and it makes no sense for the FHWA to consider methods of enforcement before the FHWA and the regulated carriers **know**

exactly what regulations will be enforced. At best, proceeding with this rulemaking could require a major revision to any final rule issued herein once the HOS regulations are amended. At worst, the regulations resulting from this proceeding could affect or even dictate the final rule in the HOS proceeding, a truly inappropriate method of administrative lawmaking.

For example, the ANPRM in FHWA Docket No. MC-96-28 envisions a performance-based system of HOS regulations that would “recognize the use of technology to record and track a driver’s level of alertness at intervals each day.” 61 Fed. Reg. at 57253. The ANPRM notes that a driver’s HOS, hours of rest, fatigue-producing extra-curricular activities, and other activities would be recorded by a “device.” The “device” would then report the driver’s level of fatigue at a given time and the amount of additional time that might be worked before rest would be necessary for a particular driver. This type of technology-based system of tracking HOS compliance is completely at odds with the current proposal’s reliance on additional paperwork to enforce regulations that themselves are due for a comprehensive review.

Moreover, Congress has directed the FHWA to revise the existing HOS regulations in light of the overall transportation policy, which requires the FHWA to “ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States.” See the ANPRM in Docket No. 96-28, 61 Fed. Reg. 57252. Moreover, the FHWA recognized in that proceeding that it now has “much broader responsibilities” than mere enforcement of the Federal Motor Carrier Safety Regulations. Id. The FHWA “must now consider the economic vitality and productivity of the motor carrier industry in its economic regulation of motor carriers, drivers and [commercial motor vehicles].” Id.

In light of this broader mandate to consider the economic health of the motor carrier industry as well as safety, the FHWA should not propose a new administrative cost on carriers

when the proposal is unlikely to produce significant safety benefits and when the FHWA is likely to change the entire regulatory scheme in the foreseeable future.

In addition, the FHWA should not feel compelled to proceed with this rulemaking in advance of the HOS rulemaking merely because of the statutory deadlines for this proceeding.<sup>1</sup> First, the FHWA has already missed the deadline for a final rule by over two years. Moreover, Congress has subsequently required the FHWA in the ICC Termination Act to revise not merely the supporting documents requirements but the entire HOS regulatory scheme itself. This later requirement, although not specifically repealing the statutory deadlines for the supporting documents rulemaking as contained in the HMTA, changes the context for the FHWA's comprehensive review of the HOS requirements and the enforcement thereof. The proceeding on supporting documents should come after, not before, the proceeding on the HOS requirements.

This proceeding is especially premature for ABA members, as the FHWA does not have any data on fatigue in the intercity bus industry on which to base any regulatory proceeding regarding HOS requirements. The FHWA's "Driver Fatigue and Alertness Study," which the FHWA termed "one of the most technologically and logistically complex field research activities concerning [commercial motor vehicle] drivers ever conducted – in either the U.S. or the world," 61 Fed. Reg. at 57263, did not include any research into fatigue in intercity bus operations. Thus, the FHWA has no current data upon which to base conclusions about the advisability of revising the HOS regulations for intercity bus drivers. Moreover, the FHWA's planned research

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<sup>1</sup> In the HMTA, Congress directed the FHWA to issue a proposed rule to address the supporting documents for the HOS regulations by August 26, 1995, and to issue a final rule in such proceeding by February 26, 1996. Obviously, the FHWA has not met those deadlines.

efforts in this area, see id. at 57265, does not include any mention of fatigue research specific to the intercity bus industry.<sup>2</sup>

The lack of any scientific data precludes the FHWA from considering the intercity bus industry in any rulemaking proceeding to revise the HOS regulations. ABA has filed comments in FHWA Docket No. 96-28 opposing any efforts to review or revise the HOS regulations for intercity bus drivers until such time as FHWA has conducted sufficient research to develop an adequate scientific data base to support its conclusions on driver fatigue and possible regulatory solutions.<sup>3</sup>

ABA also has a number of comments on the substance of the rulemaking proposal as well.

## **II. THE PROPOSED RULE WOULD ADD A LAYER OF PAPERWORK REQUIREMENTS WITHOUT CONTRIBUTING TO OPERATIONAL SAFETY**

The FHWA's proposal is intended to increase compliance with the existing HOS regulations by requiring motor carriers to (1) develop a management system to audit compliance

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<sup>2</sup> This lack of fatigue data specific to the intercity bus industry directly contravenes the FHWA's stated purpose in the HOS rulemaking to base any changes in the HOS requirements on "sound scientific research and factual data," and not upon "anecdotal information or intuitive opinions." 61 Fed. Reg. at 57253.

<sup>3</sup> The ABA comments to FHWA Docket No. MC-96-28 set out a list of the significant operational differences between driving an over-the-road tractor-trailer and driving an intercity motorcoach. These differences, along with the documented excellent safety record of the intercity bus industry, led ABA to request that FHWA not include intercity bus drivers in the overall revision of the HOS requirements until the FHWA had completed scientific research on fatigue factors in the bus industry specifically.

with the HOS regulations by reviewing documents generated pertaining to vehicle trips in the normal course of business; or (2) collect and maintain all supporting documents coming into a carrier's possession for all trips. This proposal will not improve highway safety, but instead will impose a new layer of paperwork requirements, and paperwork violations, on an already overregulated industry.

Improving compliance with the HOS regulations would be a laudable goal if the HOS regulations were directly related to reduced highway collisions, injuries and fatalities. Yet the FHWA has already recognized in Docket No. 96-28 that "changes in many elements of the motor carrier industry" indicate that a "comprehensive review" of the HOS regulations is "appropriate." 61 Fed. Reg. at 57252, 57253. Improving compliance with the HOS requirements will not markedly improve highway safety if the regulations have not kept pace with the state of technology in the industry. Once again, the FHWA should focus its efforts on revising the HOS regulations themselves before considering means of improving compliance with the regulations.

Instead, the proposed rule would only add another layer of paperwork for the motor carrier industry. The substantive HOS regulations are designed to prevent drivers from operating beyond their physical limits. The record of duty status (driver's log) requirements in 49 C.F.R. § 395.8(k) are a paper devise designed to ensure compliance with the log requirements. Now the FHWA, believing that logs themselves are not sufficiently reliable documents, is proposing that carriers generate and retain yet another set of documents to validate the logbooks.

The problem with this proposal for supporting documentation, however, is the same as the problem for the log books, *i.e.*, the documents are in many cases self-generated. Enforcement officials historically have voiced concerns that drivers have incentive to falsify log books, and there have been a number of enforcement actions brought by FHWA in which

carriers have been found guilty of allowing or even directing drivers to falsify their logs. To the extent that driver logs are unreliable, however, the exact same incentive to falsify exists for the supporting documents contemplated in his proceeding.

The proposal would require that a carrier have a system in place to verify, with documents generated in the normal course of business, the accuracy of the beginning, intermediate and ending times of each working day on each trip, as well as the beginning, ending and intermediate mileage for each trip. 63 Fed. Reg. at 19460. The FHWA has identified some 46 documents that could serve to verify these data points, and therefore verify the accuracy of the driver's logbook entries. Yet many, if not most, of the documents cited by the FHWA as potential supporting documents do not normally set out the driver's name or vehicle identification number as well as the time, date and place of the vehicle. In such instances, the driver would have to add the missing information, and the exact same incentive to falsify information would exist here as it does with the logbooks themselves. A driver or carrier that intends to violate the HOS requirements will accomplish that end whether it entails falsifying one document or several.

The FHWA proposal would impose a significant additional cost on carriers to generate new supporting documentation. Yet these new documents would not dramatically improve compliance with the HOS regulations. There is nothing in the NPRM herein that suggests an additional layer of paperwork will be more effective than the current log book method to record a driver's duty status. Nor is there any evidence of substantial noncompliance with the HOS regulations in the intercity bus industry. Therefore, the proposal violates the FHWA's own policy to base changes in the HOS requirements on scientific research and factual data rather than anecdotes or intuition. 61 Fed. Reg. at 57253. The FHWA should attempt to develop a

record in support of a cost-effective enforcement mechanism for HOS requirements in the context of the overall HOS rulemaking proceeding.

ABA strongly opposes violations of the HOS requirements, and supports efforts to enforce those requirements on carriers. But ABA does not support regulatory burdens that add new paperwork requirements while retaining the self-reporting characteristic that provides a fundamental incentive to violate the regulations.

### **III. THE PROPOSED REQUIREMENTS ARE SUBJECTIVE AND VIOLATE THE STATUTORY REQUIREMENTS**

In addition, the proposed requirements are subjective and therefore subject to uneven enforcement by FHWA safety auditors. The proposed regulations would simply require a motor carrier to have a written system of verifying HOS compliance using supporting documents. The proposal does not say what, or how many, supporting documents would be necessary or sufficient to comply, however. Nor does the proposal indicate the criteria or basis the FHWA auditor will use to evaluate whether the monitoring system is adequate. The proposal simply states that the auditor will review:

- \* the carrier's handbook or manual setting out the monitoring policy;
- \* how the carrier is complying with its self-enforcing record of duty status system;
- \* how audit-responsible personnel obtain, audit, and store inspected supporting documents;
- \* how many violations the motor carrier has found on its own, and corrective actions the carrier has taken;<sup>4</sup> and

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<sup>4</sup> The proposal does not state whether an auditor will assume that a carrier that has found no HOS violations is not properly monitoring compliance (on the assumption that all carriers will have some violations), or whether lack of violations found will be viewed as evidence of compliance with the HOS requirements.

- \* other motor carrier records not used in the motor carrier's system, to determine whether the system is effectively verifying the accuracy of the driver logs.

63 Fed. Reg. at 19461.

The proposal sets out options for the FHWA auditor to use if the auditor finds that the “supporting documents identified in the motor carrier’s system are not effective for verifying the accuracy of the [driver’s logs],” *id.*, but the proposal does not indicate what any standards, if any, the auditor will use to make such a determination. ABA opposes any requirement where the carriers have to guess at what is expected of them, and where the enforcement officials have unfettered discretion to determine whether a carrier is in compliance.

Such ambiguity also violates the specific requirements of the HMTA. Section 113(b)(2) of the Act requires the FHWA to set out the “number, type and frequency” of the documents “that must be retained by the motor carrier” to verify the accuracy of the driver’s logs. By leaving the specifics of this requirement up to the FHWA safety auditor, the FHWA has failed to meet the statutory standard. The FHWA must set out the “number, type and frequency” of the documents necessary to meet this requirement.

#### IV. SUPPORTING DOCUMENTS MAY NOT ACCURATELY REFLECT THE REQUIRED INFORMATION

Furthermore, the supporting documents required to be used to verify the accuracy of the log book entries might not accurately reflect the time, date, and location of the driver involved. For example, a bus carrier might use dispatch records to show a change in duty status, such as arrival or departure at a particular point. But there might be a significant difference between the time noted on the dispatch record and the time noted on the driver’s log for the same activity, because the driver might sign onto the automated dispatch system and then have to load

additional passengers or baggage. This might cause a discrepancy of up to 45 minutes.

Similarly, a driver might find the automated system is busy for an extended period of time, so the driver will delay entering the data until the next stop. Again, this will result in a discrepancy with the driver's logbook entries.

Also, a carrier's pay system might typically be based solely on origin and destination points and times, and not intermediate points or times. In short, with existing records, a bus carrier might be able to show only that a driver went from Point A to Point B on a given day, within 30 to 45 minute's accuracy. This is not enough information to verify the accuracy of driver's logs within the context of the proposed rule. Thus, carriers would have to generate additional supporting documents merely to verify the accuracy of the logbooks. The additional costs of this proposal are enormous, and are not justified by the dubious nature of the information to be provided.

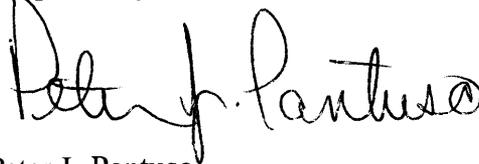
## **V. THE ALTERNATIVE TO THE SELF-MONITORING SYSTEM IS PUNITIVE AND VIOLATES THE STATUTORY REQUIREMENTS**

If a carrier does not implement a self-monitoring system to verify the accuracy of driver's logs using selected supporting documents, then "possession and retention of all supporting documents that could have been obtained on any given trip would be presumed and required." 63 Fed. Reg. at 19460. This "alternative" is punitive in nature and violates the statutory mandate that the costs of any such regulations imposed on the driver and the motor carrier be "reasonable."

The FHWA has identified some 46 documents that might be generated in the normal course of business by a motor carrier. Id. at 1945 8. If an FHWA safety auditor, for whatever reason, determines that a carrier's self-monitoring system is not adequately verifying the

accuracy of the carrier's driver's logs, then the FHWA would require the carrier to obtain and retain all of the documents that could have been generated on any given trip. This is an extremely expensive requirement that has no basis other than to intimidate carriers into adopting a self-monitoring system. As such, this punitive measure violates the requirement in section 113(b)(2) of the HMTA that the supporting document system impose a "reasonable cost" on the driver and motor carrier. There is nothing reasonable in requiring a carrier to maintain every conceivable document generated on every trip taken by every driver, when both Congress and the FHWA agree that the intent of the rule may be met by maintaining only a handful of selective documents.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter J. Pantuso". The signature is written in a cursive style with a large initial "P" and a circled "o" at the end.

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