

DEPARTMENT OF TRANSPORTATION**Federal Highway Administration**

[FHWA Docket No. FHWA-99-5880] \

Hours of Service of Drivers; Exemption Application From Hulcher Services, Inc.**AGENCY:** Federal Highway Administration (FHWA), DOT.**ACTION:** Notice of application for exemption and intent to deny exemption; request for comments.

SUMMARY: The FHWA is announcing its preliminary determination to deny the application of Hulcher Services, Inc. (Hulcher) for an exemption from the maximum driving time limitations in the Federal Motor Carrier Safety Regulations (FMCSRs). Hulcher requested an exemption because it believes the current requirements interfere with the efficiency and effectiveness of the company's core business, emergency and disaster response to railroad accidents. The FHWA intends to deny the exemption because Hulcher did not explain how it would ensure that it could achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the hours-of-service regulations. Also, Hulcher did not describe the impacts (e.g., inability to test innovative safety management control systems, etc.) it could experience if the exemption is not granted by the FHWA. The exemption, if granted, would preempt inconsistent State and local requirements applicable to interstate commerce.

DATES: Comments must be received on or before August 30, 1999.**ADDRESSES:** Submit written, signed comments to FHWA Docket No. FHWA-99-5880, the Docket Clerk, U.S. DOT Dockets, Room PL-401,400 Seventh Street, SW., Washington, DC 20590-0001. All comments received will be available for examination at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.**FOR FURTHER INFORMATION CONTACT:** Mr. Larry W. Minor, Office of Motor Carrier Research and Standards, HMCS-10, (202) 366-4009; or Mr. Charles E. Medalen, Office of the Chief Counsel, HCC-20, (202) 366-1354, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users may access all comments that were submitted to the Docket Clerk, U.S. DOT Dockets, Room PL-40 1,400 Seventh Street, SW., Washington, DC 20590-000 1, in response to previous rulemaking notices concerning the docket referenced at the beginning of this notice by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's home page at <http://www.nara.gov/fedreg> and the Government Printing Office's database at <http://www.access.gpo.gov/nara>.

Background

On June 9, 1998, the President signed the Transportation Equity Act for the 21st Century (TEA-21) (Public Law 105-178, 112 Stat. 107). Section 4007 of TEA-21 amended 49 U.S.C. 31315 and 31316(e) concerning the Secretary of Transportation's (the Secretary's) authority to grant exemptions from the FMCSRs for a person(s) seeking regulatory relief from those requirements. An exemption may be granted for no longer than two years from its approval date, and may be renewed upon application to the Secretary. The Secretary must provide the public with an opportunity to comment on each exemption request prior to granting or denying the exemption.

The TEA-21 requires the FHWA to publish a notice in the **Federal Register** for each exemption requested, explaining that the request has been filed, and providing the public with an opportunity to inspect the safety analysis and any other relevant information known to the agency, and to comment on the request. Prior to granting a request for an exemption, the agency must publish a notice in the **Federal Register** identifying the person or class of persons who will receive the exemption, the provisions from which the person will be exempt, the effective period, and all terms and conditions of the exemption. The terms and conditions established by the FHWA must ensure that the exemption will likely achieve a level of safety that is equivalent to, or greater than, the level

that would be achieved by complying with the regulation.

On December 8, 1998, the FHWA published an interim final rule implementing section 4007 of TEA-21 (63 FR 67600). The regulations at 49 CFR part 381 establish the procedures persons must follow to request waivers and to apply for exemptions from the FMCSRs, and the procedures the FHWA will use to process the requests for waivers and applications for exemptions.

Hulcher's Application for an Exemption

Hulcher applied for an exemption from 49 CFR 395.3, which provides requirements concerning the maximum driving time for drivers of commercial motor vehicles (CMVs). A copy of the application is in the docket identified at the beginning of this notice. Generally, under the current regulations drivers may not drive more than 10 hours following eight consecutive hours off duty, or for any period after being on duty (this includes all driving time, and all time spent working, but not driving) for 15 hours following eight consecutive hours off duty. In addition, drivers may not drive after being on duty 60 hours in any seven consecutive days if the employing motor carrier does not operate CMVs every day of the week (60-hour rule), or after being on duty 70 hours in any eight consecutive days if the employing motor carrier operates CMVs every day of the week (70-hour rule). Hulcher requested an exemption to all these requirements. If such an exemption is not possible, the company asked that the FHWA consider allowing its drivers a 24-hour restart for the 70-hour rule—after 24 consecutive hours off-duty, the driver would be allowed to drive a CMV irrespective of the number of days used to accumulate the previous 70-hours on-duty.

Hulcher is a business that provides assistance in restoring rail service after train accidents, including hazardous materials incidents. The company responds to emergencies, makes necessary repairs to tracks and switches, and lifts locomotives and rail cars back onto the tracks. Its equipment is maintained and staged strategically throughout the United States in order to respond quickly and efficiently to railroad emergencies. The company claims that its average movement of equipment and personnel is less than 200 miles. Hulcher states:

The company's dilemma concerns, the interpretation by the company, of the requirement of [49 CFR 395.31. The company's heavy equipment operators, and laborers, who are CDL qualified, and who would occasionally operate a CMV, maintain

a daily record of duty status. These personnel are performing daily activities other than operating a CMV, and not necessarily associated with a CMV. The company's practice has been to record hours worked daily as, on duty not driving, in a driver's daily log. The duties being performed are no different from the duties of a heavy equipment mechanic. A mechanic whose daily job function, and classification, is to maintain the equipment at a company owned location and, on occasion, if CDL qualified, may be needed to operate a CMV. The mechanic would not be required to maintain a driver's daily log record, but would be accountable for seven days prior plus the day he would be operating a CMV. Because of this company's current practice to record a duty status of all hours of every day, available hours of service have been significantly reduced, when needed to respond to an emergency. These personnel may go for days or weeks, without operating a CMV, but may report daily to a company owned facility. These personnel are relieved from duty daily for at least fifteen hours while at these locations. In the event, our operators and laborers have been operating heavy equipment at an emergency scene, they are still showing a daily record of duty status as "on duty not driving." Once the job is finished, and prior to transporting the equipment back to its staged location, all heavy equipment operators, and laborers, who will be operating a CMV, for the return trip, will be housed at a motel or other accommodations in order that they be rested before operating the CMV. Several of these personnel may have exhausted all available hours of service during this job. In order to comply with the requirements of [49 CFR 395.31, they will need to stay off duty up to an additional two days before regaining available hours. These operators and laborers can not possibly be more rested after forty-eight or more hours off duty, and away from home, than after having been off duty for at least twenty-four hours and returning home, and being placed off duty. The company, and its Managers, will not allow a fatigued individual to operate any company owned vehicle, and or equipment.

Hulcher submitted information on its "Safety Recognition Program" which is intended to reward employees who have been successful in preventing both accidents and injuries. One point (each point has a cash value) is earned for each month that an employee works without having a "chargeable" accident or injury. If the employee has a chargeable accident or injury he or she loses points (two points per accident or injury). Bonus points may be earned based on the number of consecutive months or years the employee works without an incident, and based on the performance of the employee's division. The information provided does not show any discernible linkage between the recognition program and compliance with safety regulations or company guidelines.

Basis for Preliminary Determination to Deny the Exemption

The FHWA has carefully reviewed Hulcher's application for an exemption to the maximum driving time regulation and its alternate request for the use of a 24-hour restart to the 70-hour rule, and does not believe there is scientific or safety-performance data to support granting either request. Hulcher has failed to explain how it would ensure that it could achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the hours-of-service regulations. Also, Hulcher did not describe the impacts (e.g., inability to test innovative safety management control systems, etc.) it could experience if the exemption is not granted by the FHWA. Although Hulcher argues that regulatory relief is necessary to respond to disasters and emergencies, there is no discussion of specific disasters or emergencies the company has been unable to respond to because of compliance with the hours-of-service regulations. The FHWA does not believe that an exemption granted under the authority of section 4007 of the TEA-21 is necessary for motor carriers to obtain regulatory relief to respond to legitimate emergencies.

The FMCSRs include an emergency relief exemption (49 CFR 390.23) from almost all of the FMCSRs, including the hours-of-service requirements, for any motor carrier or driver operating a CMV to provide relief during an emergency (as defined¹ in 49 CFR 390.5) subject to certain limitations. For regional emergencies, the emergency relief exemption is effective when an emergency has been declared by the President, the governor of a State, or their authorized representatives having authority to declare emergencies; or certain officials in one of the FHWA's Resource Centers have declared that a regional emergency exists which justifies an exemption from parts 390 through 399. In the case of local

emergencies, the exemption is effective when an emergency has been declared by a Federal, State or local government official having authority to declare an emergency; or certain officials in one of the FHWA's Resource Centers have declared that a local emergency exists which justifies an exemption from parts 390 through 399 of the FMCSRs.

The motor carrier or driver is subject to the requirements of parts 390 through 399 upon termination of direct assistance to the regional or local emergency relief effort. Direct assistance ends when a driver or CMV is used in interstate commerce to transport cargo not destined for the emergency relief effort, or when the motor carrier dispatches the driver or CMV to another location to begin operations in commerce. When the driver has been relieved of all duty and responsibilities after providing direct assistance to a regional or local emergency relief effort, the driver may not operate a CMV in commerce until all the requirements of § 395.3 are met and, the driver has had at least 24 consecutive hours off-duty when the driver has operated in excess of the 60- or 70-hour rules.

Hulcher has not explained why the current emergency relief exemption is not sufficient for the incidents to which they typically respond. Also, Hulcher has not provided an explanation of what it considers an emergency or disaster. The FHWA does not believe that the mere fact that a train accident occurs automatically constitutes an emergency necessitating regulatory relief from the hours-of-service rules. The exemption from all of the hours-of-service limits, as requested by Hulcher, provides no specific terms or conditions that could be evaluated by the agency beforehand to ensure that an acceptable level of safety would likely be achieved, nor does it offer a means to monitor the safety performance of Hulcher's drivers. Under these circumstances, it would be inappropriate to consider granting the request.

With regard to Hulcher's alternate request to use a 24-hour restart to the 70-hour rule, the FHWA is not aware of any research that would support such an exemption. The agency proposed allowing a 24-hour restart for all motor carriers in 1992 (57 FR 37504; August 19, 1992). Nearly 68,000 comments were received in response to the 1992 notice of proposed rulemaking. Virtually no substantive information was presented in these comments to support a change in the regulations. Except in very general terms, the FHWA received little discussion of potential impacts on highway safety that could result from increasing the available on-duty hours.

The FHWA, therefore, declined to make the proposed changes to the rule and, on February 3, 1993 (58 FR 6937), withdrew the proposal and closed the docket.

On November 5, 1996 (61 FR 57252), the FHWA published an advance notice of proposed rulemaking (ANPRM) on all aspects of the hours-of-service regulations. The agency indicated that it was nearing the completion of several research projects and was seeking the results of other relevant research to consider in revising the hours-of-service regulations. To assist the FHWA in gathering all pertinent data to make informed decisions based upon scientific evidence, the FHWA requested assistance in locating any other relevant information, including research, operational tests, or pilot regulatory programs conducted anywhere in the world, that may be used by the agency in developing a revised regulatory scheme for CMV drivers' hours of service. The agency has reviewed all the research reports submitted by commenters to the rulemaking docket, and scientific information obtained through other sources, and is not aware of any data that would support granting an exemption to use a 24-hour restart. Copies of all known research reports, as well as all comments submitted in response to the ANPRM, are available in FHWA Docket No. FHWA-97-2350.

The FHWA recognizes that Hulcher provides an important service needed to restore rail service after an accident or incident, but does not believe it is necessary to grant either a blanket exemption to the hours-of-service regulations or allow a 24-hour restart to the 70-hour rule. There are no reported instances of the hours-of-service regulations preventing Hulcher from responding to a legitimate emergency or a disaster.

Moreover, the FHWA has considered Hulcher's safety recognition program and does not believe it is relevant to the application. Based on the information submitted by Hulcher, drivers are rewarded for not having "chargeable" accidents or injuries or penalized for having such occurrences. The FHWA does not consider this to be an acceptable alternative to complying with well-defined, enforceable terms and conditions that the agency could attempt to evaluate during the period of the exemption.

Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), the FHWA is requesting public comment from all interested persons on the exemption application

¹ Emergency means any hurricane, tornado, storm (e.g., thunderstorm, snowstorm, icestorm, blizzard, sandstorm, etc.), high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, mud slide, drought, forest fire, explosion, blackout or other occurrence, natural or man-made, which interrupts the delivery of essential services (such as, electricity, medical care, sewer, water, telecommunication transmissions) or essential supplies (such as, food and fuel) or otherwise immediately threatens human life or public welfare, provided such hurricane, tornado, or other event results in: a declaration of an emergency by the President, the governor of a State, or their authorized representatives; or by certain officials in one of the FHWA's resource centers near the location in which the emergency occurs; or by other Federal, State, or local government officials having authority to declare emergencies.

from Hulcher. All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the address section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable, but the FHWA may deny the exemption at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Authority: 49 U.S.C. 31136 and 31315; and 49 CFR 1.48.

Issued on: July 22, 1999.

Kenneth R. Wykle,

Federal Highway Administrator.

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