

February 10, 1999

Kenneth R. Wykle, Administrator  
Federal Highway Administration  
400 Seventh Street, SW  
Washington, DC 20590

Dear Administrator Wykle:

I want to express our appreciation for the meeting we had with you and your staff on January 6th to discuss our concerns about the direction and effectiveness of motor carrier safety programs. During the meeting we raised several issues that illustrated why we support transferring the Office of Motor Carriers (OMC) and its functions to the National Highway Traffic Safety Administration.

Two examples of these issues are the ongoing efforts by OMC staff to change commercial driver hours-of-service (HOS) rules and the implementation of a pilot program demonstrating the value of Global Positioning System (GPS) technologies for monitoring commercial driver record of duty status (RODS). In both instances, OMC staff during the meeting questioned our position on these issues and our interpretations of their actions.

With regard to the first issue, we stated that the recent report of the Expert Panel on HOS scenarios failed to examine a reduction in continuous driving hours as a policy option. OMC staff who were present replied that the report did include such a scenario of fewer driving hours. As we explain later in this letter, that statement by OMC staff was incorrect.

In the second instance, we indicated that the current pilot program testing GPS technology for monitoring RODS included allowing drivers regularly to exceed current maximum driving hours (for lowspeed driving and for short trips), a practice which is prohibited by current HOS regulations. OMC staff again disagreed with this claim, pointing out that current regulation permits exceptions for adverse driving conditions. As we also explain in detail below, this exception provided by the HOS regulation cannot be invoked to justify the HOS practices approved by OMC for use in the current GPS pilot program.

As you may remember, we indicated our dismay in the meeting over the status of HOS rulemaking because none of the scenarios presented by FHWA to the Expert Panel, as represented in its report released by the agency on September 10, 1998, contemplates the safety advantages of reducing current HOS limits, especially the number of permitted continuous driving hours. In the meeting, your staff challenged the accuracy of our statement about the report.

Accordingly, we reviewed the September 10, 1998, report to verify the claim we had made. Indeed, of the five scenarios offered to the Expert Panel for its evaluation and the Expert Panel's own proffered, or sixth, scenario, none considers the possibility of reducing continuous driving hours below the currently allowed

maximum of 10 hours. In fact, only two scenarios of the six considered maintain maximum driving time at 10 hours, with the remaining four allowing anywhere from 12 to 14 hours of driving before a rest period. Even the scenario constructed by the Expert Panel permits 12 hours of driving.

Advocates would like to take this opportunity to state its strongest disagreement with the adequacy of the review performed by the Expert Panel. The literature review conducted by the Panel, and the arguments based on it, is incomplete and important studies and articles are left uncited in the report. Of most importance are studies and articles which clearly have demonstrated a substantial reduction in alertness and an elevation of crash risk for commercial drivers following the eighth hour of continuous driving, research results which Advocates and other safety organizations have repeatedly drawn to the agency's attention. Similarly, although the Panel rejected the five scenarios offered by OMC for review, its own scenario was substituted as the preferred baseline approach to HOS amendments and this scenario recommended allowing 12 hours of driving.

Not only is this stance by the Panel not adequately supported by the literature and arguments which it marshalled, it confounds the basic safety logic of extending driving hours beyond the current 10 hours: in order to adopt longer driving hours, OMC would have the heavy burden of showing that the additional risk exposure of more hours behind the wheel was nevertheless as safe as, or safer than, the currently maximum permitted 10 hours. It is beyond argument that the Panel has not accomplished this, nor has the agency to date been able to demonstrate that this could be true. Most especially, the general argument that providing more time off, including available time for sleep and recovery, offsets this increase in risk, has not been proved either by the Panel or OMC, and a considerable body of research literature directly challenges any reliance on such an argument. We draw your attention to the substantial body of research literature which we cited and relied on in our 1997 comments to the advance notice of proposed rulemaking docket on potential HOS revisions.

As a final observation on this issue, investigations and reports by a variety of public and private institutions over the last several years have pointed to a virtual epidemic of fatigue-related crashes among commercial drivers. FHWA has an enormous responsibility to pursue HOS revisions that guarantee improved health and safety for commercial drivers and for the occupants of other vehicles sharing the road with large trucks and buses. So far, there are strong indications that FHWA is prepared to increase driving hours and rationalize any negative safety consequences to highway safety.

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The second issue that arose in the course of our meeting with you concerns the use of GPS as a "paperless" logbook approach to RODS.

A pilot program was initiated by FHWA through Federal Register notice on April 6, 1998, in which, among other things, the agency advised of an opportunity to participate in the program. 63 FR 16697 et seq. (FHWA reopened the program to application by additional potential participants on December 30, 1998, 63 FR 71791 et seq.) Approval of Werner Enterprises, Inc., as the sole participant in the pilot program was effected in a Memorandum of Understanding (MOU) between yourself and C.L. Werner, Chief Executive Officer for Werner Enterprises, on June 10, 1998, one day after President Clinton signed the Transportation Equity Act for the Twenty-First Century (TEA-21) into law. This pilot program participation by Werner Enterprises is also cited and its operation reviewed in a California Highway Patrol (CHP) Information Bulletin No. 98-98 (n.d.) which points out that Werner Enterprises' commercial drivers now rely upon a paperless system for determining RODS and, hence, HOS compliance.

There are two serious problems with this pilot program, one of which involves a violation of current HOS regulations in 49 CFR Part 395 and the other a violation of the spirit and intent, if not the letter, of Sec. 4007 of TEA-21 (49 U.S.C. § 31315, as amended).

Taken together, these violations both threaten public safety and undermine the methods and goals directed by Congress for FHWA to observe in administering pilot programs.

First, the system relied upon by Werner Enterprises, as documented in the CHP Bulletin but unaddressed in the MOU, operates through the use of several assumptions, among which are, first, that "[t]ruck movement of less than 15 miles with a trailer (25 without) is not recorded as driving time and, second, that

Speed . . . that is calculated less than 20 mph is not considered valid. In these instances, distance traveled is divided by average driver MPH or average state to state MPH to estimate 'driving' time. For example: if it took a driver three hours, because of construction and adverse weather, to drive from Baltimore, MD to Washington, DC . . . the system would record approximately one hour of driving time.

When we raised this issue at our meeting with you, we were told by your staff who were present that there is an existing exception in current regulation at 49 CFR § 395.1 which permit exceeding the 10 hours ceiling on continuous driving time. In fact, however, this exception is not germane to the HOS practices allowed by OMC in the GPS pilot program.

The automatic 3:1 reduction of hours of driving time practiced by Werner Enterprises, Inc., violates current Federal Motor Carrier

Safety Regulations (FMCSR). 49 CFR § 395.1 clearly establishes the conditions under which and the limitations on how a commercial driver may extend driving hours beyond the maximum 10 hours presently allowed. Under adverse driving conditions, drivers may extend their driving hours for an additional two (2) hours for the purpose of safely completing a trip. Similarly, under emergency conditions, drivers may complete their runs "without being in violation of the regulations in this part, if such run reasonably could have been completed absent the emergency." These judgments and actions extending driving time are ad hoc additions to the maximum permitted driving hours, not a routine, regularized substitution of fewer hours recorded for more hours driven.

Under the Werner operating assumptions, however, ordinary delays, such as those commonly encountered by heavy trucks in urban-area congestion, which result in driving speeds under 20 mph, automatically qualify reduction of each three units of time spent behind the wheel to one unit of driving time. Moreover, truck trips of 15-25 miles, depending upon configuration, are simply not counted as on-duty driving time, regardless of the length of time it took to complete the trip. Neither of these practices pass muster under the provisions of § 395.1.

It is clear that FHWA has approved a practice which could result in Werner drivers repeatedly and chronically accruing driving hours substantially in excess of the maximum 10 hours currently allowed by Part 395. In the MOU signed on June 10, 1998, FHWA recognized that "Werner may require its drivers to use the company's GPS technology and complementary safety management computer systems to record their hours-of-service in lieu of complying with the requirements of 49 CFR 395.8." MOU, p. 2. Hence, FHWA has directly approved the Werner practice of reducing recorded driving time by two-thirds when operating speeds fall below 20 mph.

Corroboration of this approval is also provided by a provision in the MOU in which FHWA directs Werner to ensure that each of its vehicles has an information packet on board containing, among other things, "(c) a copy of a letter, signed by the FHWA Administrator, authorizing Werner Enterprises, Inc., to use its 'paperless electronic logging system' in lieu of using the 'record of duty status' required by 49 CFR 395.8." MOU, p. 3. As indicated above, the two assumptions of short trip distances not counting as on-duty driving time and of speeds below 20 mph automatically qualifying a reduction of driving time by two-thirds are part of the operating protocol of the paperless RODS system used by Werner Enterprises.

We want to emphasize that neither the public notice on the pilot program (published in the *Federal Register* on April 6, 1998), any subsequent notice, nor the cited MOU indicate or discuss that Werner has been awarded an exemption from maximum on-duty driving

time requirements contained in Part 395 which authorizes Werner drivers routinely to exceed the maximum 10 hours of driving currently permitted in the hours of service regulations, a practice which can have serious safety consequences. Werner Enterprises is therefore not simply applying a GPS-based "paperless" logbook system of recording RODS, but is also systematically operating its fleet on the basis of an HOS regime which goes beyond what is permitted by current federal regulation. However, no federal acknowledgement or documentation of this practice exists in the record of this pilot program.

We are also concerned about the OMC's attempt to evade the will of Congress expressed in Sec. 4007 of TEA-21 on the procedures necessary for conducting experimental pilot programs. Although the sole GPS pilot program participant, Werner Enterprises, was approved for use of a paperless RODS system one day following the effective date of TEA-21, FHWA has thoroughly failed to apply any of the requirements and criteria for conducting a pilot program contained in Sec. 4007. This includes a failure by OMC to acknowledge the need to apply these procedures even in its December 30, 1998, Federal Register notice reopening the program to more applicants.

Among the procedures is Sec. 4007(c)(1) which asserts that "the Secretary shall publish in the Federal Register a detailed description of each pilot program, including the exemptions to be considered, and provide notice and an opportunity for public comment before the effective date of the program." Neither of the two notices published in the Federal Register provide a description of how GPS monitoring of RODS will occur and what protocol, including any regulatory exemptions, will govern driver on-duty, driving, and off-duty time to conform to the limits and requirements of Part 395. Further, there is no request for public comment on the merits, goals, and safety effects of the GPS pilot program, especially with regard to the automatic substitution of fewer recorded driving hours for more hours spent behind the wheel below 20 mph.

In addition, Sec. 4007(c)(2), Program Elements, directs that "the Secretary shall require, as a condition of approval of the project, that the safety measures in the project are designed to achieve a level of safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved through compliance with the regulations . . ." Despite the fact that Werner Enterprises, Inc., is being permitted to exceed maximum driving hours because of FHWA approval of its GPS protocol for RODS, FHWA has not shown how routinely longer driving hours produce as much or more safety than adherence to the 10 hours limit. In like manner, there is no indication of the scheduled life of the pilot program although Sec. 4007 limits pilot programs to a maximum to three (3) years; there

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is no statement of a specific data collection and safety analysis plan identifying a means for comparison; control of the number of participants for generating statistically valid data is not addressed; and no countermeasures are adopted to protect the health and safety of both program participants and of the general public. With regard to the last mentioned, the agency has not addressed how does allowing a driver routinely and frequently to exceed more than 10 hours of driving protect his or her health and safety and the safety of the public, including those who share the road with large trucks.

It is evident that OMC perceives no need to observe any of the Congressional direction of Sec. 4007, particularly the need to make a determination of how the pilot program as approved produces equivalent or greater safety for both Werner's commercial drivers and the general public. OMC also sees no need to provide a statement of how it will oversee the safety of Werner's operations under the program and no need to discuss what counts as a successful outcome of the pilot program. In short, OMC has evaded every one of the public participation and safety protection requirements established by Congress in TEA-21 for conducting pilot programs and for controlling the award of exemptions, lapses which can have a substantially adverse effect on highway safety. OMC must recognize that it has an obligation to fulfill both the intent and the spirit of the laws enacted by Congress in a fair, reasonable, and substantive manner.

As a result, Advocates requests that you take immediate action on two fronts in connection with this pilot program. First, OMC must apply the mechanisms of Sec. 4007 to ensure public review on the merits and to guarantee the safety of participants and the general public. OMC cannot rely on a technical argument that attempts to grandfather the existing GPS program and hence argue its immunity from the numerous public participation and safety requirements Congress enacted into law. Second, the current practice of Werner drivers regularly to exceed maximum permitted driving hours must be immediately revoked. If OMC believes that permitting this practice is consonant with equal or greater safety, it can only demonstrate this satisfactorily in a public notice and comment proceeding.

We look forward to your response to these concerns as well as to continuing our dialogue with you on improving OMC operations which will, in turn, benefit motor carrier and highway safety.

Sincerely,

Judith Lee Stone  
President