

June 30, 2020

The Honorable James A. Mullen
Acting Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, SE
Washington, D.C. 20590

PETITION FOR RECONSIDERATION

Of The Final Rule On

Hours of Service of Drivers

Published at 85 Federal Register 33396, June 1, 2020, Docket FMCSA-2018-0248

This is a petition for reconsideration of the Final Rule promulgated by the Federal Motor Carrier Safety Administration (FMCSA or Agency) revising certain provisions governing the hours of service (HOS) for commercial motor vehicle (CMV) drivers (Final Rule).¹ This petition is filed by Advocates for Highway and Auto Safety (Advocates), International Brotherhood of Teamsters (IBT), Truck Safety Coalition (TSC), Citizens for Reliable and Safe Highways (CRASH) and Parents Against Tired Truckers (P.A.T.T.), Petitioners, pursuant to 49 C.F.R. Part 389.35 (Oct. 1, 2015). Petitioners renew their concerns contained in comments submitted to the Notice of Proposed Rulemaking (NPRM) and attached to this Petition, and delineate below the numerous reasons why the Final Rule is not in the public interest.² Moreover, the Final Rule violates the Agency's duty to place public safety as its highest priority.³

Recent Regulatory History

On August 23, 2018, FMCSA issued an Advanced Notice of Proposed Rulemaking (ANPRM) to revise certain provisions of the HOS rules.⁴ On August 22, 2019, the Agency issued a NPRM providing further details on its proposals to revise the HOS regulations.⁵ The Agency issued the Final Rule which is the subject of this Petition on June 1, 2020.⁶

Fatigued Commercial Motor Vehicle Drivers are a Serious Threat to Public Safety

Driver fatigue is a well-known commercial motor vehicle (CMV) safety problem. In fact, the National Transportation Safety Board (NTSB) has repeatedly cited fatigue as a major contributor to truck crashes and included reducing fatigue-related crashes on its 2019-20 Most Wanted List

¹ 85 FR 33396 (Jun. 1, 2020) (2020 Final Rule).

² See comments from Advocates for Highway and Auto Safety, International Brother of Teamsters and Truck Safety Coalition to the Notice of Proposed Rulemaking (84 FR 44190) attached hereto as Appendix A.

³ Motor Carrier Safety Improvement Act of 1999, Sec. 101, Pub. L. 106-159 (1999).

⁴ 83 FR 42631 (Aug. 23, 2018) (2018 ANPRM).

⁵ 84 FR 44190 (Aug. 22, 2019) (2019 NPRM).

⁶ 85 FR 33396 (Jun, 1, 2020).

of safety changes.⁷ Moreover, even self-reports of fatigue, which almost always underestimate the problem, document that fatigue in truck operations is a significant issue. In a 2006 driver survey prepared for FMCSA, “65 percent [of drivers] reported that they often or sometimes felt drowsy while driving” and almost half (47.6 percent) of drivers said they had fallen asleep while driving in the previous year.⁸ Fatigue and sleep deprivation, and the associated dangers of falling asleep at the wheel, inattention and loss of alertness, are responsible for 13 percent or more of heavy truck crashes.⁹ The Agency notes in the Final Rule that:

[m]any of the commenters who opposed the rule argued that the proposed rule would contribute to the prevalence of driver fatigue and threaten public safety through an increase in fatigue-related crashes. Among the commenters articulating variations on this theme were the National Transportation Safety Board (NTSB), the National Safety Council (NSC), the American Academy of Sleep Medicine (AASM), Advocates, Road Safe America, Senator Patty Murray, the International Brotherhood of Teamsters (IBT), and the Truck Safety Coalition (TSC).¹⁰

While the Agency gives a passing nod to these concerns in the Final Rule, it failed to adequately address this valid criticism by not revising many of the proposals in the NPRM.

Fatal truck crashes continue to occur at an alarmingly high rate. In 2018, the number of people killed in crashes involving a large truck increased to 4,951.¹¹ With the exception of 2014, the number of fatalities in crashes involving large trucks has been steadily on the rise since 2009. Since that time, the number of fatalities in large truck crashes has increased by 46 percent.¹² Further, according to the U.S. Department of Labor, truck driving is already one of the most dangerous occupations in the United States.¹³ Fatigue is also associated with elevated health risks including hypertension, diabetes, obesity, depression, heart attack, and stroke.¹⁴

The Final Rule

In eviscerating numerous critical provisions of the HOS rules, the Agency repeatedly relies on the baseless claim that driver fatigue and the crashes it causes will not increase because the Final Rule does not permit additional driving time beyond the limits provided in the current regulations.¹⁵ Objective research regarding fatigue reveals this assertion to be meritless.

⁷ National Transportation Safety Board, 2019-20 Most Wanted list, available at: <https://www.nts.gov/safety/mwl/Pages/default.aspx>

⁸ Hours of Service of Drivers, NPRM (2010 NPRM), FMCSA, 75 FR 82170 (Dec. 29, 2010), citing Dinges, D.F. & Maislin, G., “Truck Driver Fatigue Management Survey,” FMCSA (May 2006), FMCSA-2004-19608-3968.

⁹ 2010 NPRM, 75 FR 82176.

¹⁰ 2020 Final Rule, at 33402.

¹¹ 2018 Fatal Motor Vehicle Crashes: Overview, NHTSA, DOT HS 812 826, Oct. 2019.

¹² Large Truck and Bus Crash Facts 2017, FMCSA, May 2019, FMCSA-RRA-18-018.

¹³ Bureau of Labor Statistics, National Census of Fatal Occupational Injuries in 2017, USDL-18-1978 (Dec. 18, 2018).

¹⁴ Commercial Motor Vehicle Driver Fatigue, Long-Term Health, and Highway Safety: Research Needs, National Academy of Sciences, Mar. 10, 2016.

¹⁵ 2020 Final Rule, at 33402.

Nonetheless, the FMCSA has implemented these changes to the HOS regulations at the behest of certain segments of the trucking industry. In fact, the Agency acknowledges in the NPRM that:

The HOS regulations were identified as an area for potential modifications both as a result of the public comments received and due to changes in tracking HOS compliance through implementation of the ELD [electronic logging device] rulemaking. The accuracy of the electronic data provided to enforcement is much higher than the information that was previously provided on paper. While the ELD rule did not change the HOS rules, the accurate recording of driving time by ELDs highlighted the rigidity of HOS provisions and the practical ramifications drivers faced.¹⁶

These justifications ignore several important facts. First, regardless of the version of the HOS rules in effect over the past decades, segments of the motor carrier industry have continuously pushed for a waning of the rules in the name of “flexibility” or “efficiency.” Second, the striking and candid acknowledgment by the FMCSA that the introduction of ELDs, which did not change the HOS rules, is the main impetus for this rulemaking raises significant safety concerns. The falsification of paper log books has been long identified as a serious problem.¹⁷ Thus, if the primary justification the Agency can muster for further eviscerating the HOS rules is that CMV drivers now have to accurately record their driving time and can no longer falsify their logs, the Final Rule is fatally flawed and clearly in violation of the Agency’s mission of protecting public safety. Of further concern is the fact that the FMCSA has exempted a large swath of the industry from having to use ELDs as part of this rulemaking.

The revisions to the HOS regulations contained in the Final Rule are based on nothing more than unfounded claims, misinterpretations, and incorrect reinterpretation of research. In fact, a number of statements contained in the Final Rule and the NPRM directly contradict earlier Agency findings. The weakening of the HOS rules will undoubtedly endanger the lives of truck drivers and the citizens with whom they share the roads every day. The changes in the Final Rule will further require CMV drivers to shoulder the burden of fatigue to address operational inefficiencies in order to bolster profits. Despite claims that these revisions will empower drivers to make independent choices to address fatigue more efficiently, the repeated mention of traffic, foul weather, and detention time belies this claim as the agency’s actual justification for this proposed change to the HOS rules. To quote the FMCSA from less than a decade ago, “FMCSA has no obligation to allow drivers to work excessively long hours a week to compensate for delays in the supply chain.”¹⁸ Petitioners believe this statement is as true today as it was in 2011 (when it was issued as part of an earlier HOS rule), if not even more salient considering the massive rise in fatalities and injuries from CMV-related crashes that occurred since that time.

Short-Haul Operations

¹⁶ 2019 NPRM, at 44195.

¹⁷ Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations; Proposed Rule, May 2, 2000, 65 FR 25540, at 25558.

¹⁸ Hours of Service of Drivers, FMCSA, 76 FR 81134, Dec. 27, 2011; at 81144. (2011 Final Rule).

The Final Rule implements two changes to the short-haul exemptions specified under 49 CFR 395.1 (e)(1). First, short-haul carriers will now be permitted to return to their normal work reporting location within 14 hours instead of the present limit of 12 hours. Second, the operational area has been extended from 100 air miles to 150 air miles.

It is telling that the Agency notes in the Final Rule that those commenters supporting the 14-hour revision do so because it would “allow them more time to complete trips during peak periods.”¹⁹ In defense of the proposal to extend the 12-hour limit to 14 hours, the FMCSA cited in the NPRM an evaluation of carriers operating ready-mixed concrete delivery vehicles under the exemption granted as part of the Fixing America's Surface Transportation (FAST) Act.²⁰ The Agency based its conclusion that short-haul operations under the 14-hour exemption are safe on an analysis of a small sample of concrete mixers. They proffered that the percentage of crashes of these vehicles occurring later in the day were lower in 2017 than in 2013. Similarly, the Agency noted that the number of concrete mixers involved in crashes as a percentage of all large trucks involved in crashes increased insignificantly from the two-year period before the exemption compared to the two-year period after the exemption. However, the conclusions drawn from the Agency’s evaluations are egregiously flawed as Petitioners noted in response to the NPRM because this sample is less than representative of the possible future operations which could occur under the expansion. Yet, the Agency, once again, dismisses in the Final Rule a sound and thoughtful analysis conducted by the well-renowned and well-respected Insurance Institute for Highway Safety (IIHS) which identified that a sample of trucks actually using the short-haul exemption exhibited an increased crash risk of 383 percent.²¹ The Agency is applying a double standard when it claims that the IIHS study was not nationally representative while blatantly ignoring the severe limitations and shortcomings of its own narrow and limited analyses. Furthermore, it is disingenuous at best for the Agency to focus on the IIHS’s acknowledgement that outside factors may have contributed to the results of their study as a ground for dismissal of the findings while ignoring the fact that the Agency’s own analysis makes no account for the specific operations of ready mix trucks.

With respect to the extension of the radius from 100 to 150 air miles, the FMCSA essentially provides no evidence or analysis in response to Petitioners’ concerns that that extending the driving window from 12 hours to 14 hours and extending the radius from 100 to 150 air miles will likely encourage longer and further trips under the exemption. Thus, such a change will result in additional driving hours occurring late in the duty period, an occurrence which has been associated with increases in crash risk according to previous research.²² The Agency has failed to provide sufficient and credible analysis in the Final Rule of how these factors could interact and their effect on road safety.

¹⁹ 2020 Final Rule, at 33405.

²⁰ Sec. 5521, Pub. L. 114-94 (2015).

²¹ 2019 NPRM at 44198; discussing Teoh, E.R., Carter, D.L., Smith, S., & McCartt, A.T. (2017). Crash risk factors for interstate large trucks in North Carolina. *Journal of Safety Research*, 62, 13–21.

²² Advocates Comments to the 2018 HOS NPRM, 2018-09-23-HOS ANPRM Final, FMCSA-2018-0248-4877, at pages 2-5. (Advocates 2018 Comments).

The combined proposals effectively carve out a large portion of the industry as short-haul operations which would increase the number of carriers able to be exempt from the ELD and rest break requirements. In fact, the FMCSA states in the Final Rule that:

FMCSA also agrees with commenters who stated that the proposed changes to the short-haul exception [sic] this final rule would allow more drivers to be consistently eligible for the short-haul exception. Thus, they will be excluded from the requirement to take a 30-minute break or prepare daily RODS, potentially with an ELD if the carrier exceeded the short-haul limits more than 8 days within a 30-day period.²³

FMCSA acknowledges this result even though its own data has shown that ELDs have been effective in reducing HOS violations.²⁴

For the reasons listed above, Petitioners oppose all of the proposed changes to the short-haul exemption, which will likely expand drivers' duty hours, extend driving hours later into the duty period, increase the number of carriers operating under the exemption (which will result in a larger number of drivers not provided adequate rest breaks), and impair enforcement. The reasons presented for these revisions are limited, at best, and blatantly ignore historical precedent and the science of fatigue.

Adverse Driving Conditions

The Final Rule also drastically alters the HOS exemption for adverse driving conditions specified in 49 CFR 395.1(b)(1). Previously, the exemption allowed drivers two additional driving hours beyond the 11-hour daily limit but did not extend the 14-hour driving window, a critical safeguard against abusing the exemption. The Final rule eliminates this important and reasonable provision and extends the driving window from 14 hours to 16 hours when faced with such conditions.

From the outset, the FMCSA acknowledged that it had no data or research on the impact of the adverse driving condition rule on crash risk or how often it is used by drivers.²⁵ In fact, in the Final Rule the Agency states that it “does not believe the changes adopted today are likely to increase significantly the use of the exception, *but is unable to estimate changes in the frequency on an industry-wide level*” (emphasis added).²⁶ Despite this, the Agency has extended the driving window so that additional driving can occur later in the duty period, which is already associated with documented increases in crash risk,²⁷ in response to adverse driving conditions (including snow, sleet, fog and ice, conditions which also increase crash risk).²⁸ FMCSA's view

²³ 2020 Final Rule, at 33405.

²⁴ FMCSA, Electronic Logging Device Hours-of-Service Violation Information Graphic (July 2019); available at: <https://www.fmcsa.dot.gov/regulations/enforcement/electronic-logging-device-information-graphic>

²⁵ 2019 NPRM, at 44199.

²⁶ 2020 Final Rule, at 33415.

²⁷ Advocates Comments to the 2018 HOS ANPRM, 2018-09-23-HOS ANPRM Final, FMCSA-2018-0248-4877, at pages 2-5. (Advocates Comments to the 2018 HOS ANPRM).

²⁸ Stevens, S.E., C.J. Schreck, S. Saha, J.E. Bell, and K.E. Kunkel, 2019: Precipitation and Fatal Motor Vehicle Crashes: Continental Analysis with High-Resolution Radar Data. *Bull. Amer. Meteor. Soc.*, 100, 1453–1461,

of the limitation on the driving window as a penalty, as opposed to an acknowledgement of the dangers of driving later in the duty day, and the need for the present limits as established by previous rulemakings, are deeply misguided and mistaken and should not have been used as justification for this dangerous and needless revision to the regulation.

As with the FMCSA's commentary on other proposals in the Final Rule, the Agency's statement that this revision that would not allow an increase in driving time is misleading.²⁹ By extending the driving window, the Final Rule allows drivers to make use of more of the extended driving hours, at periods potentially later in the duty period, during periods of unsafe driving conditions, that are presently curtailed by the previous exemption. In the Final Rule, the Agency admits that the "proposal could allow drivers who experience adverse driving conditions to operate later into the duty day."³⁰ Further, the Agency acknowledged in the NPRM that the proposal "might shift when the miles are driven"³¹ yet provided no analysis of the impact this could have on crash risk. In addition, the Agency provided no analysis of how increasing the driving window could increase the incentive to abuse the exemption at inappropriate times. The Agency itself strongly opposed the extension of the driving window in the 2011 Final Rule when it cited historical precedent stating:

As FMCSA discussed at length in the 2003, 2005, 2007, and 2008 rulemakings, allowing off-duty time to extend the work day results in drivers being allowed to drive long past the time when fatigue becomes extreme. The 14-consecutive-hour rule was adopted to prevent that and to help drivers maintain a schedule that is consistent with circadian rhythms. Breaks will count against the 14-hour period.³²

Despite FMCSA's clear statements on this issue in the past as well as its admission in the Final Rule that it is unable to quantify the number of drivers that would make use of this expanded exemption, the Agency has decided to drastically alter this provision of the HOS rules without any regard for public safety.

30-Minute Break

The Final Rule enshrines two changes to the rest break requirement in 49 CFR 395.3(a)(3)(ii), which specifies that driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes. The Final Rule modifies the requirement to specify that driving would not be permitted if more than 8 hours of *driving* have occurred since the last change in duty status of at least 30 minutes and allows the break to be met while using on-duty not-driving time, in addition to off-duty or sleeper-berth periods. In the Final Rule, the Agency once again makes the specious claim that because this revision does not increase driving time such a change will not increase fatigue while simply casting aside the

<https://doi.org/10.1175/BAMS-D-18-0001.1>; Malin, F., Norros, I., & Innamaa, S. (2019). Accident risk of road and weather conditions on different road types. *Accident Analysis & Prevention*, 122, 181–188. doi: 10.1016/j.aap.2018.10.014.

²⁹ *Id.*

³⁰ 2020 Final Rule, at 33414.

³¹ *Id.*

³² Hours of Service of Drivers: Final Rule, FMCSA, 76 FR 81134, Dec. 27, 2011, FMCSA-2004-19608. (2011 Final Rule).

serious concerns involving the lost guarantee of any real break time for drivers already experiencing high levels of fatigue.³³

In support of the proposal to allow on-duty not-driving time to qualify as a break, the Agency cites in the NPRM its own subsequent review of a study by Blanco, et al.,³⁴ a study on which the Agency previously relied to establish the 30-minute rest break requirement.³⁵ Based on this review, the FMCSA noted that “[t]his calculation results in a 33 percent SCE [safety critical event] reduction, which is lower than the 51 percent for Type 4 [off-duty] breaks alone, and very close to the 30 percent reduction for break Type 2 [work during duty period, or on-duty not-driving work].”³⁶ The issue here is that being “very close” is not a statistically rigorous conclusion, and the Agency admits as much when it states in the very next sentence that it “acknowledges that this result is not precise due to the limitations of the available data.”³⁷ Yet, the Agency concludes that:

[W]hat is clear is that the magnitude of SCE reduction that Blanco attributed to off-duty breaks is larger than the SCE reduction that would be attributable to the off-duty 30-minute breaks required under the 2011 HOS rule (those that would be made up of Type 1, Type 3, Type 4 breaks as defined by Blanco). In light of this recent review, it appears that FMCSA placed too great a value on off-duty breaks, compared to other types of breaks described above. What seems to be consistent in the Blanco study was that breaks of any type reduced SCEs.³⁸

This questionable conclusion is reached with no consideration or explanation as to why breaks which Blanco et al. classified as off-duty would have such a greater reduction in SCEs compared to rest during duty period breaks or rest during duty/off-duty breaks. Rather than examining this dichotomy, the Agency has lumped the types of breaks together to achieve the conclusion sought. It should be noted that the Agency’s own results found that the off-duty breaks (Types 1, 3, and 4) when combined resulted in a ten percent greater reduction in SCEs compared to the work during duty period breaks. In light of the Agency’s statements made in defense of the short-haul exemption proposal dismissing the work of IIHS as non-representative, it is disturbing to see the Agency use a calculation with no context or in-depth analysis to justify effectively eliminating the one off-duty break carriers are required to provide their drivers. In response to these concerns, the FMCSA states in the Final Rule that “...changes to the 30-minute rule are not likely to have an adverse impact on safety because the changes would not significantly decrease the number of breaks being taken by drivers.”³⁹ Yet, the Agency fails to recognize that these breaks will no longer be off-duty but taken while working which amounts to no real break at all.

³³ 2020 Final Rule, at 33416.

³⁴ Blanco, M., Hanowski, R., Olson, R., Morgan, J., Soccolich, S., Wu, S.C., & Guo, F. (2011) “The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations.”

³⁵ FMCSA Analysis of 2011 Blanco Study Table 40, FMCSA-2018-0248-6556.

³⁶ 2019 NPRM, at 44201.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 202 Final Rule, at 33418.

The FMCSA’s claims in support of attaching the break requirement to driving time rather than to time on-duty are similarly spurious. The Agency states in the NPRM that it “believes that on-duty breaks can have essentially the same SCE reduction as off-duty breaks. Tying the break requirement to driving time is in line with this finding.”⁴⁰ However, these statements defy logic and suggest that the Agency considers all on-duty work (including loading/unloading vehicles, stocking shelves, making deliveries) non-fatiguing. Under this objectionable and ill-advised change to the regulation, a driver could conduct on-duty non-driving work for 10 hours straight without any break and then get behind the wheel of an 80,000-pound CMV and drive for four hours (or more if “adverse driving conditions” were encountered). Based on this faulty logic, the Agency further concludes in the NPRM that it “continues to believe that a break from driving is important for safety, but acknowledges that the changes in today’s proposed rule would be less burdensome for carriers and drivers while achieving the same goal—a *break from the driving task*”⁴¹ [emphasis added]. However, this incorrectly represents the goal of the current rest break, which is to provide *a break from work* in order to combat acute fatigue resulting from time-on-task, not just driving time, and the increased crash risk associated with driving longer and later in the duty period as evidenced by the very same research the Agency has reexamined in support of their proposal.⁴² The Agency also provides no analysis in the Final Rule to support the conclusion in the NPRM that “[t]hese proposed changes may result in a decrease in off-duty breaks, but FMCSA anticipates that any potential effect on fatigue from fewer off-duty breaks will be offset or minimized by continuing to require a break from the driving task.”⁴³ As noted above, both the original authors and the Agency have identified that off-duty rest breaks present an increased reduction in crash risk compared to on-duty not-driving breaks.

The FMCSA also states that “this proposal would allow drivers to take an off-duty break when they believe it would be most helpful at preventing them from driving while fatigued, as opposed to requiring a break regardless of the warning signs of fatigue, without impacting their 14-hour driving window.”⁴⁴ Once again, in the Final Rule the Agency states, “The changes will give drivers greater ability to plan their breaks...”⁴⁵ However, no rules prevent drivers from taking breaks at any time they feel fatigued. Additionally, the previous version of the rule included a significant amount of flexibility as noted by the Agency in the 2011 final rule when it stated “[d]rivers will have great flexibility in deciding when to take the break.”⁴⁶ The Agency provides no explanation in the Final Rule as to how allowing an on-duty not-driving period to qualify as a break would alleviate any impact on the 14-hour driving window when both on-duty not-driving periods and off-duty driving periods are counted toward that window. The Agency’s own example presented in the NPRM illustrates the serious safety impact in their revision in the Final Rule. Under this scenario a driver could work for two hours, drive for eight hours, work (but not drive) for 30 minutes, and then drive again for three hours, thus resulting in a driver having driven 11 hours and worked for 13.5 hours straight with no actual *rest* break. The Agency in the NPRM admitted that it has not actually conducted the necessary analysis to support its

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Blanco et al. 2011

⁴³ 2019 NPRM, at 44201.

⁴⁴ *Id.*

⁴⁵ 2020 Final Rule, at 33418.

⁴⁶ 2011 Final Rule, at 81146.

conclusions, stating that it “cannot say how this temporal shift in the break would alter the frequency of SCEs before the required break is taken as compared to driving fewer hours after the break.”⁴⁷

In further support of the proposal, the FMCSA noted in the NPRM 11 instances where it has granted exemptions from the 30-minute rest break requirement.⁴⁸ Regardless of the appropriateness of these exemptions, the Agency fails to acknowledge that in seven of the 11 cases, the ability to substitute on-duty not-driving time for the rest break is only acceptable for drivers when monitoring their load (attendance) and requires drivers to perform no other on-duty work during that period.⁴⁹ In two of the 11 cases, the exemption is limited to only when the driver is hauling livestock (pigs or bees) which could perish if the vehicle were stopped. In both of those cases, the 30-minute rest break requirement still stands whenever the vehicle is not loaded with livestock.⁵⁰ In the remaining two cases, the exemption was limited to only when carrying a particular product (specific petroleum products) or cited the frequent downtime which the drivers are already afforded.⁵¹ Moreover, the Agency failed to include any additional relevant examples in the Final Rule. Regardless, none of these cases are fitting examples to justify the blanket revision made by the Agency in the Final Rule, allowing drivers to substitute all forms of on-duty not-driving work, under any conditions of operation, for the currently required off-duty rest break.

The public comments received in response to the NPRM reveal the true intent of this dangerous change to the HOS rule. As the Agency notes in the Final Rule, industry groups believe the added “flexibility” will allow for more vehicle miles traveled and more deliveries during a shift.⁵² Thus, it is clear to all that this revision will result in an already fatigued work force being afforded less opportunities for meaningful rest to the detriment of safety.

Sleeper Berth

The FMCSA in the Final Rule modifies the present requirements that an “equivalent of at least 10 hours off-duty” for sleeper berth operations consist of a period of at least eight hours in the sleeper berth and a second period of at least two hours in the sleeper berth or off-duty as specified in 49 CFR 395.1(g)(1)(ii)(A). The Agency will now permit the two sleeper berth periods to consist of a period of no less than seven hours and a second period of no less than two hours, thus reducing the length of time afforded drivers for their anchor (longer) rest period.

⁴⁷ 2019 NPRM, at 44201.

⁴⁸ *Id.*

⁴⁹ American Trucking Associations, granted August 21, 2015 (80 FR 50912); the Department of Energy, granted June 22, 2015 (80 FR 35703); the National Asphalt Pavement Association, granted January 26, 2018 (83 FR 3864); R&R Transportation, granted October 2, 2015 (80 FR 59848); the Department of Defense (DOD) Surface Deployment & Distribution Command (SDDC), granted October 28, 2013 (78 FR 64265); the American Concrete Pumping Association, granted March 21, 2017 (82 FR 14595); and the American Concrete Pavement Association, granted February 6, 2019 (84 FR 2307).

⁵⁰ National Pork Producers Council, granted June 11, 2014 (79 FR 33634); the California Farm Bureau Federation for bee transporters, granted June 19, 2015 (80 FR 35425).

⁵¹ National Tank Truck Carriers, granted April 9, 2018 (83 FR 15221); and the Specialized Carriers & Rigging Association, granted November 1, 2016 (81 FR 75727).

⁵² 2020 Final Rule, at 33419.

Additionally, the FMCSA will now permit the second, shorter rest period to be excluded from the calculation of the 14-hour driving window extending the available duty-period by two hours or more to at least 16 hours. Once again, the Agency states in the Final Rule that this dangerous revision is being made to “provide drivers greater operational flexibility” and fails to conduct a proper analysis of the substantial impacts to public safety that will result from such a drastic departure from the current regulation.⁵³

For the reasons listed above regarding the dangers associated with driver fatigue, Petitioners oppose the proposed changes to the split sleeper berth provision. Lowering the minimum length of the anchor (longer) split sleeper berth period from eight to seven hours risks reduces the opportunity for drivers to obtain the rest necessary to combat fatigue. The studies cited by the FMCSA in the NPRM do not support the proposal. In fact, in the Final Rule “FMCSA acknowledges that the studies cited above do not focus on the specific parameters of the NPRM’s sleeper berth proposal.”⁵⁴ Instead of simply concluding that due to a lack of applicable research a drastic revision of the sleeper berth provision would be unwise, the Agency simply concludes it is uniquely qualified make such a determination no matter how unsubstantiated the conclusion.⁵⁵

In addition, the Final Rule fails to adequately address the concerns raised by drivers that these changes could allow carriers to demand or coerce drivers to maintain fatiguing schedules. Despite the fact that the potential for coercion of drivers is drastically increased because of these revisions, the FMCSA concludes the current protections for drivers is sufficient without any further substantive review of the matter.⁵⁶ Likewise, the Agency has provided no applicable analysis to support the proposal to exclude the shorter split sleeper berth period from the calculation of the driving window, potentially extending the driver’s duty day to 16 hours or more.

Conclusion

Petitioners request a stay of the effective date of the Final Rule until the Administrator can render a decision on this Petition for Reconsideration. The Agency repeatedly justifies these drastic changes to the HOS rule, which will result in longer work days for drivers, by claiming that the revisions will provide greater operational flexibility to the industry while not increasing fatigue because the daily driving limits remains unchanged. This claim is contradicted by research on fatigue and the Agency’s own previous conclusions on this issue. In sum, the Final Rule is not in the public interest and does not meet the agency’s statutory mission in carrying out its duties to assign and maintain safety as the highest priority. The agency had failed to address the significant risk to public safety posed by fatigued drivers of CMVs at a time when large truck crashes continue to increase.

⁵³ 2020 Final Rule, at 33421.

⁵⁴ *Id.*

⁵⁵ 2020 Final Rule, at 33423.

⁵⁶ 2020 Final rule, at 33425.

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Appendix



ADVOCATES
FOR HIGHWAY
& AUTO SAFETY

November 13, 2019

DOT Docket No. FMCSA-2018-0248

Docket Management Facility
U.S. Department of Transportation
West Building, Ground Floor
Room W12-140
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590-0001
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**Hours of Service of Drivers
Notice of Proposed Rulemaking
84 Federal Register 44190, August 22, 2019**

Advocates for Highway and Auto Safety (Advocates) files these comment in response to the Federal Motor Carrier Safety Administration's (FMCSA) Notice of proposed rulemaking (NPRM, Notice) to revise certain provisions of the regulations that govern the hours-of-service (HOS) of commercial motor vehicle (CMV) drivers.¹ Advocates opposes this dramatic and ill-advised weakening of the HOS rules especially at a time when fatal truck crashes continue to increase and driver fatigue remains a substantial safety issue within the industry.

In 2018, the number of individuals killed in crashes involving a large truck increased to 4,951.² With the exception of 2014, the number of fatalities in crashes involving large trucks has been steadily on the rise since 2003. Since that time, the number of fatalities in large truck crashes has increased by 46 percent.³ Moreover, the National Transportation Safety Board (NTSB) has included driver fatigue on its Most Wanted List for 2019-2020⁴ and has included this critical safety issue on its list since 2016.⁵ Fatigue is also associated with elevated health risks including hypertension, diabetes, obesity, depression, heart attack, and stroke.⁶ Further, according to the U.S. Department of Labor, truck driving is already one of the most dangerous occupations in the United States.⁷

¹ Hours of Service of Driver, Notice of Proposed Rulemaking, FMCSA, 84 FR 44190, Aug. 22, 2019. (2019 NPRM).

² 2018 Fatal Motor Vehicle Crashes: Overview, NHTSA, DOT HS 812 826, Oct. 2019.

³ Large Truck and Bus Crash Facts 2017, FMCSA, May 2019, FMCSA-RRA-18-018.

⁴ National Transportation Safety Board (NTSB), Most Wanted List of Transportation Safety Improvements 2019-2020 (Feb. 2019).

⁵ NTSB, Most Wanted List of Transportation Safety Improvements, 2016-2020.

⁶ Commercial Motor Vehicle Driver Fatigue, Long-Term Health, and Highway Safety: Research Needs, National Academy of Sciences, Mar. 10, 2016.

⁷ Bureau of Labor Statistics, National Census of Fatal Occupational Injuries in 2017, USDL-18-1978 (Dec. 18, 2018).

Despite these facts, the FMCSA has proposed these changes to the HOS at the behest of certain segments of the trucking industry. In fact, the Agency acknowledges that:

The HOS regulations were identified as an area for potential modifications both as a result of the public comments received and due to changes in tracking HOS compliance through implementation of the ELD [electronic logging device] rulemaking. The accuracy of the electronic data provided to enforcement is much higher than the information that was previously provided on paper. While the ELD rule did not change the HOS rules, the accurate recording of driving time by ELDs highlighted the rigidity of HOS provisions and the practical ramifications drivers faced.⁸

These justifications for the initiation of this rulemaking ignore several important facts. First, regardless of the version of the HOS rules in effect over the past decades, segments of the motor carrier industry have continuously pushed for a waning of the rules in the name of “flexibility” or “efficiency.” Second, the striking and candid acknowledgment by the FMCSA that the introduction of ELDs, which did not change the HOS rules, is the main impetus for this rulemaking raises significant safety concerns. The falsification of paper log books has long been identified as a serious concern.⁹ Thus, if the primary justification the Agency can muster for further eviscerating the HOS rules is that CMV drivers now have to accurately record their driving time and can no longer falsify their logs, this action is fatally flawed and clearly in violation of the Agency’s mission of protecting public safety. Of further concern is the fact that the FMCSA is proposing to exempt a large swath of the industry from having to use ELDs as part of this rulemaking.

The comments below address each of the proposals included in the current Notice. In each case, the comments address the baseless claims, misinterpretations, or incorrect reinterpretation of research used in a feeble and transparent attempt to bolster the FMCSA’s arguments. In fact, a number of statements contained in the proposals directly contradict earlier Agency findings. Advocates continues to oppose a weakening of the HOS rules which will endanger the lives of truck drivers and citizens who share the roads with them every day. The proposals in the NPRM will further require drivers to shoulder the burden of fatigue to address operational inefficiencies in order to bolster profits. Despite claims that these proposals will empower drivers to make independent choices to address fatigue more efficiently, the repeated mention of traffic, foul weather, and detention time belies this claim as justification for this proposed change to the HOS rules. To quote the FMCSA from less than a decade ago, “FMCSA has no obligation to allow drivers to work excessively long hours a week to compensate for delays in the supply chain”.¹⁰ Advocates believes this statement is as true today as it was in 2011 when the final rule was issued by the Agency, if not even more salient considering the massive rise in fatalities and injuries from CMV-related crashes.

⁸ 2019 NPRM, at 44195.

⁹ Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations; Proposed Rule, May 2, 2000, 65 FR 25540, at 25558.

¹⁰ Hours of Service of Drivers, FMCSA, 76 FR 81134, Dec. 27, 2011; at 81144. (2011 Final Rule).

Short-Haul Operations

The FMCSA proposes two changes to the short-haul exemptions specified under 49 CFR 395.1 (e)(1). First, the Agency proposes to allow short-haul carriers to return to their normal work reporting location within 14 hours instead of the present limit of 12 hours. Second, the Agency proposes to extend the operational area from the present limit of 100 air miles to 150 air miles.

In defense of the proposal to extend the 12 hour limit to 14 hours, the FMCSA cites an evaluation of carriers operating ready-mixed concrete delivery vehicles under the exemption granted as part of the Fixing America's Surface Transportation (FAST) Act.¹¹ The Agency bases its conclusion that short-haul operations under the 14 hour exemption are safe since the percentage of crashes of these vehicles occurring later in the day were lower in 2017 than in 2013. Similarly, the Agency notes that the number of concrete mixers involved in crashes as a percentage of all large trucks involved in crashes increased insignificantly from the two year period before the exemption compared to the two year period after the exemption. However, the conclusions drawn from the Agency's evaluations are flawed. The Agency provides limited information on how the analysis was conducted, the possible limitations of the study, its source information and the applicability to the overall population of carriers that currently do or would operate under the short-haul exemption both now and in the future.

The analysis of the proportion of concrete mixers in crashes occurring between 5:00 p.m. and 11:59 p.m. provides no explanation of how that analysis accounted for scheduling of concrete mixers. Specifically, concrete is not loaded into the fleet of trucks all at one time, nor is it delivered to a site all at once. Due to the very nature of ready mix concrete, deliveries are scheduled throughout a work day to account for work progress, traffic, production and other logistical factors. In fact, scheduling and the perishable nature of the products are at least in part the very reason that the National Ready Mix Concrete Association (NRMCA), the American Concrete Pumping Association (ACPA) and National Asphalt Pavement Association (NAPA) applied for exemptions from the short-haul exemption.¹² In their application for exemption, the NRMCA stated:

Every day is different in the construction field, thus companies need the flexibility to deliver concrete when the customer needs it. Drivers also have flexible start time where one day they start at 7 a.m. and the next at 12 p.m. Ready mixed concrete deliveries do not happen on a regular 9 a.m. to 5 p.m. schedule, nor do concrete customers always plan deliveries. Often customers order concrete on an 'as soon as possible' basis.¹³

¹¹ Sec. 5521, Pub. L. 114-94 (2015).

¹² Hours of Service of Drivers: National Ready Mixed Concrete Association; Application for Exemption, FMCSA, 78 FR 51267, Aug. 20, 2013; Hours of Service of Drivers: National Asphalt Pavement Association, Inc.; Application for Exemption, FMCSA, 82 FR 42415, Sep. 7, 2017; Hours of Service of Drivers: American Concrete Pumping Association (ACPA); Application for Exemption, FMCSA, 83 FR 28898, Jun. 21, 2018.

¹³ National Ready Mixed Concrete Association – Application for Exemption from 49 CFR 395.3(a)(3)(ii), FMCSA-2013-0317-0001.

This fact, stated by the NRMCA as part of an exemption proceeding conducted by the FMCSA, calls into question the conclusions drawn from the limited analysis conducted by the Agency. The FMCSA has provided no evidence that the crashes targeted, namely those occurring between 5:00 p.m. and 11:59 p.m., actually occurred “when drivers are more likely to be close to their maximum hours for the day”.¹⁴ Furthermore, the Agency provides no comparison with other trucking operations over the same time frame to illustrate that the trend exhibited in the concrete mixers was in any way different from the experience of other short-haul operators or all truck operations in general. Finally, there is no explanation of whether or not the Agency identified trucks operating under the short-haul exemption at the time of their crash.

The analysis of the proportion of concrete mixers involved in crashes as compared to the total number of large trucks suffers from similar shortcomings to those noted above. The analysis provides no context in terms of how all short-haul operations compared over this same time period or how representative this sample of concrete mixers is of the overall population of carriers and trucks that would be able to use the expanded exemption.

Yet, the Agency is willing to dismiss a sound and thoughtful analysis conducted by the Insurance Institute for Highway Safety (IIHS) which identified that a sample of trucks actually using the short-haul exemption exhibited an increased crash risk of 383%.¹⁵ The Agency is applying a double standard when it claims that the IIHS study was not nationally representative while blatantly ignoring the severe limitations and shortcomings of its own analyses. Furthermore, it is disingenuous at best for the Agency to focus on the IIHS’s acknowledgement that outside factors may have contributed to the results of their study as a ground for dismissal of the findings while ignoring the fact that the Agency’s own analysis makes no account for the specific operations of ready mix trucks. This fact is something of which the FMCSA was aware in proceedings conducted in 2013. Moreover, this should have always been a well-known fact to the Agency as it is tasked with overseeing the safe operations of such vehicles. Finally, even if the operation of “older or more poorly maintained trucks” used in local operations contributed half of the increase identified by IIHS, these findings would still amount to a substantially large increase in crash risk.

With respect to the extension of the air mile radius from 100 to 150 air miles, the FMCSA essentially provides no evidence or analysis to support their conclusions. Again, the Agency fails to see the contradiction in the conclusion that increasing the radius would “allow carriers to reach customers farther from the work reporting location” while “not increas[ing] market demand for services”.¹⁶ Reaching more customers is a method of increasing market share. The Agency has provided no analysis to support their conclusions that vehicle miles traveled (VMT) would not increase as a result of the proposal. In addition, the FMCSA also cannot account for how any changes of VMT would interact with the increased risk of short-haul operations. The Agency’s statement that “[e]xtending the air-mile radius and the work day would not extend the

¹⁴ Draft Regulatory Impact Assessment, NPRM, FMCSA-2018-0248-5543, p. 54.

¹⁵ 2019 NPRM at 44198; discussing Teoh, E.R., Carter, D.L., Smith, S., & McCartt, A.T. (2017). Crash risk factors for interstate large trucks in North Carolina. *Journal of Safety Research*, 62, 13–21.

¹⁶ 2019 NPRM, at 44198.

maximum allowable driving time”¹⁷ ignores the reality that extending the driving window from 12 hours to 14 hours and extending the radius from 100 to 150 air miles will likely encourage longer and further trips under the exemption and result in additional driving hours occurring late in the duty period, an occurrence which has been associated with increases in crash risk according to previous research.¹⁸ The Agency has provided no analysis of how these factors could interact and their effect on road safety.

The FMCSA also asks for response to several specific questions with respect to the proposed changes to the short-haul exemption.

Q. How will this change impact motor carrier’s ability to enforce HOS rules? What enforcement difficulties may arise from expanding both the time and distance requirements?

The short-haul exemption only requires a carrier to maintain limited records such as the time the driver reports for duty, the time the driver is released from duty and the total number of hours on-duty. Without the requirement for an ELD, it will be laborious if not nearly impossible to determine if the short-haul driver is in violation of the 11-hour limit on driving hours per day. Further, as noted in Advocates’ comments to the ANPRM, extending the exemption from 12 hours to 14 hours could expand the opportunity to abuse the exemption from ELD requirements to drive longer hours. Expanding the air mile radius to 150 miles would also encourage operations which would likely increase driver time behind the wheel and similarly expand the opportunity to abuse the exemption.

Q. Will the elimination of the 30-minute break requirement for drivers that are potentially driving later in their duty period impact safety?

Advocates’ comments below on the proposed elimination of the rest break discuss the hazards presented by elimination of the restorative off-duty rest break which carriers are required to provide to drivers under the current rule. It should be noted that in posing this question, the FMCSA is admitting that its proposed changes to the short-haul exemption could result in drivers being scheduled to drive later in their duty period.

Q. What cost savings are expected from not having to comply with the ELD requirements?

Advocates is concerned with the absence of any analysis of the costs associated with safety risks of the proposed changes beyond unsubstantiated claims made by the FMCSA. The Agency must complete a thorough analysis of the proposed changes accounting for the likely real-world impacts of the proposals contained in the Notice.

Q. ...some commenters to the ANPRM requested that drivers using the short-haul exception be allowed to end the work shift at a different location than one from which they were dispatched. FMCSA requests public comment about this request...

¹⁷ *Id.*

¹⁸ Advocates Comments to the 2018 HOS NPRM, 2018-09-23-HOS ANPRM Final, FMCSA-2018-0248-4877, at pages 2-5. (Advocates 2018 Comments).

Extending the driving window to 14 hours and allowing carriers to not return to their dispatching location would effectively make these operations traditional long-haul operations without having to comply with the rest break requirement and ELDs. As with many other of proposals contained in the Notice, the Agency has provided no context or evidence as to why short-haul operations were granted the exemption they have historically enjoyed, why they were limited in terms of driving window, air mile radius, ELDs, and rest break and why the justification previously used to implement these sensible limits should no longer apply to this segment of the industry. Absent this explanation, any expansion of the exemption is completely unfounded.

For the reasons listed above, Advocates opposes all of the proposed changes to the short-haul exemption, which will likely extend drivers' duty hours, extend driving hours later into the duty period, increase the number of carriers operating under the exemption (which will increase the number of drivers not provided adequate rest breaks), and impair enforcement. The combined proposals effectively seek to carve out a large chunk of the industry as short-haul operations which would increase the number of carriers able to be exempt from the ELD and rest break requirements. The reasons presented for these proposals are limited, at best, and ignore historical precedent and the science of fatigue.

Adverse Driving Conditions

The FMCSA proposes a change to the HOS exemption for adverse driving conditions specified in 49 CFR 395.1(b)(1). The present exemption allows drivers two additional hours of driving time when encountering adverse driving conditions. The proposal would extend the driving window from 14 hours to 16 hours when faced with such conditions.

From the outset, the FMCSA acknowledges that it has no data or research on the impact of the adverse driving condition rule on crash risk or how often it is used by drivers.¹⁹ Despite this, the Agency is proposing to extend the driving window so that additional driving can occur later in the duty period (something already associated with increases in crash risk)²⁰ in response to adverse driving conditions (including snow, sleet, fog and ice, conditions which also increase crash risk).²¹ FMCSA's view of the limitation on the driving window as a "penalty" as opposed to an acknowledgement of the dangers of driving later in the duty day and the need for the present limits as established by previous rulemakings is deeply misguided and should in no way be used as justification for this dangerous and needless revision to the current regulation.

¹⁹ 2019 NPRM, at 44199.

²⁰ Advocates Comments to the 2018 HOS ANPRM, 2018-09-23-HOS ANPRM Final, FMCSA-2018-0248-4877, at pages 2-5. (Advocates Comments to the 2018 HOS ANPRM).

²¹ Stevens, S.E., C.J. Schreck, S. Saha, J.E. Bell, and K.E. Kunkel, 2019: Precipitation and Fatal Motor Vehicle Crashes: Continental Analysis with High-Resolution Radar Data. *Bull. Amer. Meteor. Soc.*, 100, 1453–1461, <https://doi.org/10.1175/BAMS-D-18-0001.1>; Malin, F., Norros, I., & Innamaa, S. (2019). Accident risk of road and weather conditions on different road types. *Accident Analysis & Prevention*, 122, 181–188. doi: 10.1016/j.aap.2018.10.014.

As with the FMCSA's commentary on other proposals in the NPRM, the Agency's statement that "this proposal would not increase available driving time beyond what is currently allowed by the exception"²² is misleading. By extending the driving window, the proposal will allow drivers to make use of more of the currently available driving hours, at periods potentially later in the duty period, that are presently curtailed by the existing exemption. The Agency acknowledges that the proposal "might shift when the miles are driven"²³ yet provides no analysis of the impact this could have on crash risk. In addition, the Agency provides no analysis of how increasing the driving window could increase the incentive to abuse the exemption at inappropriate times. The Agency itself strongly opposed the extension of the driving window in the 2011 Final Rule when it cited historical precedent stating:

As FMCSA discussed at length in the 2003, 2005, 2007, and 2008 rulemakings, allowing off-duty time to extend the work day results in drivers being allowed to drive long past the time when fatigue becomes extreme. The 14-consecutive-hour rule was adopted to prevent that and to help drivers maintain a schedule that is consistent with circadian rhythms. Breaks will count against the 14-hour period.²⁴

In support of the proposal, the FMCSA draws comparisons with duty period extensions from the Federal Aviation Administration (FAA) and the Federal Railroad Administration (FRA). However, these comparisons ignore the differences in regulatory and operational regimes in each of the modes. For example, under the FAA rules, any extended flight duty period of 30 minutes or more can only occur once, until a flight crew member receives "30 consecutive hours free from duty within the past 168 consecutive hour period".²⁵ Also, the flight duty period cannot be extended if the cumulative flight duty period exceeds 60 flight duty hours in a period of 168 consecutive hours or 190 flight hours in a period 672 consecutive hours.²⁶ Any extension also triggers requirements for extensive reporting as to the cause of the extension and corrective actions which could address the cause.²⁷ Moreover, the corrective actions must be taken within 30 days.²⁸ The proposed changes to the adverse driving conditions include no such limitations or additional requirements, nor has the Agency provided any analysis which would allow meaningful comparison.

With respect to the duty period extension under FRA cited by the Agency, the section cited refers to employees engaged in commuter or intercity rail passenger transportation,²⁹ not general blanket operation of all types of trains. The extension of duty hours for these individuals is limited to those on a wreck or relief train only, and not general operations.³⁰ Furthermore, the extension is only allowed for work related to the emergency and ends when the emergency

²² 2019 NPRM, 44199.

²³ *Id.*

²⁴ Hours of Service of Drivers: Final Rule, FMCSA, 76 FR 81134, Dec. 27, 2011, FMCSA-2004-19608. (2011 Final Rule).

²⁵ 14 CFR 117.19(a)(2) referencing 14 CFR 117.25(b).

²⁶ 14 CFR 117.19(a)(3) referencing 14 CFR 117.23(c).

²⁷ 14 CFR 117.19(a)(4)(i-ii).

²⁸ 14 CFR 117.19(a)(5).

²⁹ 49 CFR 228.405.

³⁰ 49 CFR 228.405(c).

concludes, a limited set of conditions compared to those of the adverse driving conditions rule for CMV operators.³¹ Similar to the comparison with FAA, the Agency has failed to account for differences in duty hour limitations, regulatory, and operational regimes and conditions in railroad operations compared to operation of a CMV on public roadways.

The FMCSA also asks for responses to several specific questions with respect to the proposed change to the adverse driving conditions exemption.

Q. Will this change cause drivers to travel further in adverse driving conditions? Will this change drivers' behavior when encountering adverse driving conditions? How so?

The FMCSA has provided no analysis of the possibility that abuse of the adverse driving conditions exemption could likely increase as a result of the proposed changes. Carriers could coerce drivers to complete trips under less than optimal conditions which would have been prevented as a result of the adverse driving condition and limit on the driving window. Similarly, drivers could adjust their evaluation of the risk posed by continuing to drive in adverse driving conditions in light of the opportunity to make use of the exemption given the proposed extended driving window. The Agency has provided no analysis of these possibilities and their effect on safety.

Q. ...the Agency requests input on the suggestion that knowledge of the existence of adverse conditions should rest with the driver rather than the dispatcher.

Advocates is concerned that the definition of adverse driving conditions is too vague and lends itself to abuse. The Agency has provided no analysis of the current use of the exemption let alone the extent of its appropriate use. Expanding the driving window will likely make use of the exemption more appealing and could increase abuse. The Agency should, to the extent possible, define as accurately and narrowly as possible what constitutes adverse driving conditions and the situations under which the use of the exemption is appropriate. Weather, including storms, and traffic, including congestion resulting from collisions, are a fact of driving a vehicle on our nation's roads and are to be expected by drivers and dispatchers alike and should not be grounds for use of the exemption. The Agency must also consider that expanding the definitions or operational boundaries of the exemption would likely further complicate enforcement, especially when coupled with a vague definition of applicable circumstances.

For the reasons listed above, Advocates opposes the proposed change to the adverse driving condition exemption which will likely extend drivers' duty hours, extend driving hours later into the duty period, increase driving under sub-optimal, if not treacherous, conditions, and impair enforcement. The reasoning presented for this proposal is far from sufficient to merit such a change in the regulation. The comparisons with duty hour extensions under FAA and FRA rules are clearly inapplicable and provide no reasonable justification for the proposal.

³¹*Id.*

30-Minute Break

The FMCSA proposes two changes to the rest break requirement in 49 CFR 395.3(a)(3)(ii), which specifies that driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes. The Agency proposes to modify the requirement to specify that driving would not be permitted if more than 8 hours of driving have occurred since the last change in duty status of at least 30 minutes and to allow the break to be met while using on-duty not-driving time, in addition to off-duty or sleeper-berth periods.

In support of the proposal to allow on-duty not-driving time to qualify as a break, the Agency cites its own review of a study by Blanco, et al.,³² a study on which the Agency previously relied to establish the 30 minute rest break requirement.³³ Based on this review, the FMCSA noted that “[t]his calculation results in a 33 percent SCE [safety critical event] reduction, which is lower than the 51 percent for Type 4 breaks alone, and very close to the 30 percent reduction for break Type 2 [work during duty period, or on-duty not-driving work].”³⁴ The issue here is that being “very close” is not a statistically rigorous conclusion and the Agency admits as much when it states in the very next sentence that it “acknowledges that this result is not precise due to the limitations of the available data.”³⁵ Yet, the Agency concludes that:

[W]hat is clear is that the magnitude of SCE reduction that Blanco attributed to off-duty breaks is larger than the SCE reduction that would be attributable to the off-duty 30-minute breaks required under the 2011 HOS rule (those that would be made up of Type 1, Type 3, Type 4 breaks as defined by Blanco). In light of this recent review, it appears that FMCSA placed too great a value on off-duty breaks, compared to other types of breaks described above. What seems to be consistent in the Blanco study was that breaks of any type reduced SCEs.³⁶

This conclusion is reached with no consideration or explanation as to why breaks which Blanco et al. classified as off-duty would have such a greater reduction in SCEs compared to rest during duty period breaks or rest during duty/off-duty breaks. Rather than examining this dichotomy, the Agency has lumped the types of breaks together to achieve the conclusion sought, which is the so-called justification of the proposal. It should be noted that the Agency's own results found that the off-duty breaks (Types 1, 3, and 4) when combined resulted in a 10% greater reduction in SCEs compared to the work during duty period breaks. In light of the Agency's statements made in defense of the short-haul exemption proposal dismissing the work of IIHS as non-representative, it is disturbing to see the Agency here use a frivolous calculation with no

³² Blanco, M., Hanowski, R., Olson, R., Morgan, J., Soccolich, S., Wu, S.C., & Guo, F. (2011) “The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations.”

³³ FMCSA Analysis of 2011 Blanco Study Table 40, FMCSA-2018-0248-6556.

³⁴ 2019 NPRM, at 44201.

³⁵ *Id.*

³⁶ *Id.*

context or in depth analysis to justify effectively eliminating the one off-duty break carriers are required to provide their drivers.

The FMCSA's claims in support of attaching the break requirement to driving time rather than to time on-duty are similarly spurious. The Agency states that it "believes that on-duty breaks can have essentially the same SCE reduction as off-duty breaks. Tying the break requirement to driving time is in line with this finding."³⁷ However, these statements defy logic and suggest that the Agency considers all on-duty work (including loading/unloading vehicles, stocking shelves, making deliveries) non-fatiguing. Under the proposal, a driver could conduct on-duty non-driving work for 10 hours straight, without any break and then get behind the wheel of an 80,000-pound CMV and drive for four hours (or more if "adverse driving conditions" were encountered). Based on this faulty logic, the Agency further concludes that it "continues to believe that a break from driving is important for safety, but acknowledges that the changes in today's proposed rule would be less burdensome for carriers and drivers while achieving the same goal—a *break from the driving task*."³⁸ [emphasis added] However, this incorrectly represents the goal of the current rest break, which is to provide a *break from work* in order to combat acute fatigue resulting from time-on-task, not just driving time, and the increased crash risk associated with driving longer and later in the duty period as evidenced by the very same research the Agency has reexamined in support of their proposal.³⁹ The Agency also provides no analysis to support the conclusion that "[t]hese proposed changes may result in a decrease in off-duty breaks, but FMCSA anticipates that any potential effect on fatigue from fewer off-duty breaks will be offset or minimized by continuing to require a break from the driving task."⁴⁰ As noted above, both the original authors and the Agency have identified that off-duty rest breaks present an increased reduction in crash risk compared to on-duty not-driving breaks. Despite this, the Agency provides no research or analysis to support this claim.

The FMCSA also states that "this proposal would allow drivers to take an off-duty break when they believe it would be most helpful at preventing them from driving while fatigued, as opposed to requiring a break regardless of the warning signs of fatigue, without impacting their 14-hour driving window."⁴¹ However, no rules prevent drivers from taking breaks at any time they feel fatigued. Additionally, the present rule already includes a significant amount of flexibility as noted by the Agency in the previous final rule when it stated "[d]rivers will have great flexibility in deciding when to take the break."⁴² The Agency provides no explanation as to how allowing an on-duty not-driving period to qualify as a break would alleviate any impact on the 14-hour driving window when both on-duty not-driving periods and off-duty driving periods are counted towards that window. Moreover, and in light of another proposal discussed later in these comments, if the Agency is considering allowing certain off-duty periods to be excluded from the calculation of the 14-hour driving window, then this argument is moot in at least some cases. The Agency's own example presented in the Notice illustrates the concern with the proposal.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Blanco et al. 2011

⁴⁰ 2019 NPRM, at 44201.

⁴¹ *Id.*

⁴² 2011 Final Rule, at 81146.

Under this scenario a driver could work for 2 hours, drive for 8 hours, work (but not drive) for 30 minutes, and then drive again for 3 hours, thus resulting in a driver having driven 11 hours and worked for 13.5 hours straight with no actual *rest* break. The Agency, as in the case of other proposals considered herein, also admits that it has not actually conducted the necessary analysis to support its conclusions, stating that it “cannot say how this temporal shift in the break would alter the frequency of SCEs before the required break is taken as compared to driving fewer hours after the break”.⁴³

In further support of the proposal, the FMCSA notes 11 instances where it has granted exemptions from the 30 minute rest break requirement.⁴⁴ Regardless of the appropriateness of these exemptions, the Agency fails to acknowledge that in 7 of the 11 cases, the ability to substitute on-duty not-driving time for the rest break is only acceptable for drivers when monitoring their load (attendance) and requires drivers to perform no other on-duty work during that period.⁴⁵ In two of the 11 cases, the exemption is limited to only when the driver is hauling livestock (pigs or bees) which could perish if the vehicle were stopped. In both of those cases, the 30 minute rest break requirement still stands whenever the vehicle is not loaded with livestock.⁴⁶ In the remaining two cases, the exemption was limited to only when carrying a particular product (specific petroleum products) or cited the frequent downtime which the drivers are already afforded.⁴⁷ None of these cases are fitting examples to justify the blanket proposal being made by the Agency, allowing drivers to substitute all forms of on-duty not-driving work, under any conditions of operation, for the currently required off-duty rest break.

Similarly, the FMCSA provides an analysis of data from vehicles operated under the exemption granted to the American Trucking Associations (ATA) for operators of vehicles transporting certain hazardous materials (HM). Based on this analysis, the Agency concludes that “the slight decrease in the HM placard share of the total large truck crashes may suggest that the exemption allowing attending time to satisfy the break requirement did not increase the crash risk of operators of vehicles transporting certain HM.”⁴⁸ However, once again, the Agency specifically only allowed these drivers to “count their on-duty attendance of HM cargo toward the required 30-minute rest break requirement provided they perform no other on-duty activity.”⁴⁹ Based on the Agency’s review of Blanco, and the Agency’s interpretation of Blanco’s break types, these attendance on-duty periods would clearly be considered as off-duty periods for any analysis of

⁴³ 2019 NPRM, at 44201.

⁴⁴ *Id.*

⁴⁵ American Trucking Associations, granted August 21, 2015 (80 FR 50912); the Department of Energy, granted June 22, 2015 (80 FR 35703); the National Asphalt Pavement Association, granted January 26, 2018 (83 FR 3864); R&R Transportation, granted October 2, 2015 (80 FR 59848); the Department of Defense (DOD) Surface Deployment & Distribution Command (SDDC), granted October 28, 2013 (78 FR 64265); the American Concrete Pumping Association, granted March 21, 2017 (82 FR 14595); and the American Concrete Pavement Association, granted February 6, 2019 (84 FR 2307).

⁴⁶ National Pork Producers Council, granted June 11, 2014 (79 FR 33634); the California Farm Bureau Federation for bee transporters, granted June 19, 2015 (80 FR 35425).

⁴⁷ National Tank Truck Carriers, granted April 9, 2018 (83 FR 15221); and the Specialized Carriers & Rigging Association, granted November 1, 2016 (81 FR 75727).

⁴⁸ 2019 NPRM, at 44202.

⁴⁹ American Trucking Associations, granted August 21, 2015 (80 FR 50912).

the crash risk of these HM carriers. Regardless, the results would in no way be proof that allowing any on-duty not-driving work would not be detrimental, let alone that it would be beneficial.

Furthermore, the HM exemption is limited to those operations requiring security plans which require constant attendance and excludes any carriers with conditional or unsatisfactory ratings.⁵⁰ Both conditions likely identify operations which already have a reduced risk relative to the general population of CMVs and operations. Again, despite the claims that other research is non-representative and therefore should be dismissed, the Agency has offered up an analysis which is clearly not representative, let alone justification for the proposal. In addition, the Agency admits additional flaws regarding its analysis, noting that it “has some limitations in that not all vehicles transporting HM are large trucks and that crashes cannot be attributed to the exemption.”⁵¹ Yet, despite these limitations and questions surrounding applicability, the FMCSA is willing to offer the results of its analysis (which included no evaluation of the statistical significance of the finding) as a basis for making the proposed change which contradicts the conclusions the Agency reached in the very last rulemaking.

The FMCSA also asks for responses to several specific questions with respect to the proposed changes to the 30 minute rest break requirement.

Q. What would be the safety impact of eliminating the required break, potentially allowing up to 11 consecutive hours of driving?

The answer to this question is clear and the very fact that the Agency is posing this question, considering the repeated rulemaking proceedings and the body of research presented therein regarding time-on-task, driving hours and crash risk, is in itself deeply troubling and indicative of the true intent of these proposals. As Advocates noted in our comments to the ANPRM:

Numerous researchers have stressed that long consecutive driving hours, long duty weeks, and inadequate and interrupted sleep are directly related to increased crash risks. In fact, many researchers, as well as the FMCSA, have shown that the risk of having a crash rapidly increases after the 8th or 9th consecutive hour of driving. Research conducted for the FMCSA confirms that crash risk increases as time spent driving increases for drivers from at least the 7th through the 11th consecutive hour of driving. An additional FMCSA study shows that driving towards the end of the 14-hour shift, that is, more than 10 hours after reporting for duty (i.e., during hours 10 through 14 in a driver’s work day) increases crash risk reflected in safety-critical events.⁵²

⁵⁰ *Id.*

⁵¹ 2019 NPRM, at 44202.

⁵² Advocates Comments to the 2018 HOS ANPRM, citing 65 FR 25539 (Apr. 2000); Saccomano, F., et al., “Effect of Driver Fatigue On Truck Accident Rates,” Urban Transport and the Environment for the Twenty-First Century (ed. L.J. Sucharov), Computational Mechanics Publications, Southampton, U.K., 439-446 (1995); Saccomano, F. and Shortread, J., “Truck Safety: Perceptions and Reality,” the Institute for Risk Reduction, Ontario, Canada, 157-174 (1996); Lin, T. et al., “Time of Day Models of Motor Carrier Accident Risk,” Transportation Research

For the reasons listed above, Advocates opposes the proposed change to the 30-minute rest break requirement. Eliminating the requirement that carriers provide drivers with a reasonable, off-duty rest break and decoupling the break from the on-duty hours will fail to combat acute fatigue and will likely force drivers to work entire duty-periods without a single off-duty break. The reasoning and examples presented for this proposal are deeply flawed and, as in many other cases, they are inapplicable or contradictory to the conclusions drawn by the Agency.

Sleeper Berth

The FMCSA proposes to modify the present requirements that an “equivalent of at least 10 hours off-duty” for sleeper berth operations consist of a period of at least 8 hours in the sleeper berth and a second period of at least 2 hours in the sleeper berth or off-duty as specified in 49 CFR 395.1(g)(1)(ii)(A). The FMCSA would permit the two sleeper berth periods to consist of a period of no less than 7 hours and a second period of no less than 2 hours, thus reducing the length of time afforded drivers for their anchor (longer) rest period. Additionally, the FMCSA proposes to allow the second, shorter, rest period to be excluded from the calculation of the 14-hour driving window extending the available duty-period by 2 hours or more to at least 16 hours.

In support of the proposed changes, the FMCSA cites several studies. The following sections address each of those studies as necessary.

Mollicone, et al. 2007

The FMCSA notes that Mollicone, et al.⁵³ found “split sleep schedules are feasible and can be used to enhance the flexibility of sleep/work schedules involving restricted nocturnal sleep due to scheduling.”⁵⁴ However, the Agency failed to mention several important mitigating statements in the discussion section of the study which undermine the Agency’s conclusions. Specifically, the authors note that the finding regarding “flexibility in sleep timing, including the use of split-sleep schedules... must be interpreted only for conditions of the current experiment, where anchor sleep occurred in the nocturnal portion of the circadian cycle and nap sleep in the diurnal portions, since circadian phase at which sleep is taken has a profound effect on both the

Record 1467: 1-8, Transportation Research Board, National Research Council, (1994); Frith, W., “A Case-Control Study of Heavy Vehicle Drivers’ Working Time and Safety,” Proceedings of the Australian Road Research Board Conference, 17(5): 17- 30 (1994); Jovanis, J.P., Wu, K.F., and Chen, C., “Hours of Service and Driver Fatigue – Driver Characteristics Research,” FMCSA (April 2011), DOT docket number FMCSA-2004-19608-27614; Blanco, M., Hanowski, R., Olson, R., Morgan, J., Soccolich, S., Wu, S.C., and Guo, F., “The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Vehicle Operations,” FMCSA (April 2011), DOT docket number FMCSA-2004-19608-27612.

⁵³ Mollicone, D.J., Van Dongen, H.P.A., Dinges, D.F. (2007) “Optimizing Sleep/Wake Schedules in Space: Sleep During Chronic Nocturnal Sleep Restriction With and Without Diurnal Naps,” *Acta Astronautica*, 60 (2007) 354–361. (Mollisone 2017).

⁵⁴ 2019 NPRM, at 44203.

efficiency and structure of sleep.”⁵⁵ Specifically, the anchor (longer) sleep period occurred during the night at a time when sleep efficiency is highest, the nap (shorter) sleep period occurred during the circadian low in the early afternoon, subjects were relatively young and healthy, and the tests were conducted in an environmentally controlled laboratory. These conditions do not mimic those experienced by the truck driving population, nor has the Agency made any attempt to account for these differences. The authors of the study additionally noted that “[i]t remains to be determined whether the split-sleep schedules in the current experiment afford any advantages in maintaining performance across days of limited sleep time, relative to sleep schedules in which TST [total sleep time] is obtained in a single sleep episode.”⁵⁶ This unambiguous statement specifically warns against the types of conclusions drawn by the Agency, given that the operations and sleep schedules of CMV drivers likely involve stretches of days with limited sleep time. The authors also identified that age was related to sleep efficiency and the cumulative sleep debt from restricted sleep, noting that:

We found a reduction of 0.24% per year that translates into an average difference in SE of 6.72% between a healthy 21-year old and a healthy 49-year old, which is a decrease of approximately half an hour during an 8-h TIB for sleep. Thirty minutes less sleep a day can accumulate to 6.5 h less sleep a week, which can mean that middle-aged adults are at greater risk for cumulative sleep debt if sleep periods are of inadequate duration in space flight.⁵⁷

Considering that the average age of the participant in the study was 29.3 while the average age of a truck driver is currently 46, this warning is directly applicable to the question of the appropriateness of further shortening the anchor sleep period of the sleeper berth provision.⁵⁸

There is also no justification in the paper for the conclusion drawn by the Agency that “[t]he researchers concluded that the results are generally applicable to any continuous industrial operation that involved sleep restriction, night operations, and shift work.”⁵⁹ This appears nowhere in the cited paper. However, this statement does appear, nearly word for word, in a later paper by the same authors from 2008.⁶⁰ Yet, in that paper the authors reiterated the caution that:

The results of this study suggest that splitting sleep up does not negatively affect daytime neurobehavioral performance compared to a consolidated sleep period of the same total duration. Since circadian phase has a profound effect on both the efficiency and structure of sleep [6], this finding must be interpreted only for

⁵⁵ Mollicone 2017, citing D.J. Dijk, C.A. Czeisler, Contribution of the circadian pacemaker and the sleep homeostat to sleep propensity, sleep structure, electroencephalographic slow waves, and sleep spindle activity in humans, *Journal of Neuroscience* 15 (5) (1995) 3526–3538.

⁵⁶ Mollicone 2017.

⁵⁷ *Id.*

⁵⁸ Truck Driver Shortage Analysis 2019, American Trucking Associations, Jul. 2019.

⁵⁹ 2019 NPRM, at 44203.

⁶⁰ Mollicone, D. J., Dongen, H. P. V., Rogers, N. L., & Dinges, D. F. (2008). Response surface mapping of neurobehavioral performance: Testing the feasibility of split sleep schedules for space operations. *Acta Astronautica*, 63(7-10), 833–840. doi: 10.1016/j.actaastro.2007.12.005 (Mollicone 2008).

conditions of the current experiment, where anchor sleeps occurred in the nocturnal portion of the circadian cycle and nap sleep in the diurnal portion.⁶¹

Once again, the results are limited to the conditions of the experiment, which the Agency has not proven in any way represent the experience of truck drivers. To use the Agency's own terms from the discussion of the IIHS study with respect to the short-haul exemption, both the Mollicone 2007 and the Mollicone 2008 studies are unlikely to be nationally representative of the population, operations and sleep experience of truck drivers.

Belenky 2012

The Belenky study⁶² examined the effect of three sleep schedules (nighttime consolidated, 5 hours/5 hours split, and daytime consolidated) on 53 participants in a laboratory setting. The FMCSA concluded that the study suggests “that split sleep is preferable to consolidated daytime sleep which is allowed under the current regulations.”⁶³ Again, as with the Mollicone 2007 study, the Agency is ignoring several important factors. First, consolidated daytime sleep is still possible under even the proposed modification to the sleeper berth exemption. The Agency is in no way requiring that the shortened anchor sleep period of at least 7 hours occur during the circadian lows or that it occur in the evening. Additionally, the Agency is focusing on the split sleep option as being preferred over daytime consolidated sleep. That comparison suggests only that split sleep is better than the worst condition available (consolidated daytime sleep during the circadian high when the natural drive for wakefulness is greatest). However, the Agency provides no comparison with consolidated nighttime sleep. The Agency also fails to mention the specific conditions of the split sleep period used in the study, which likely minimized the impact of the split sleep condition. Namely, the split sleep occurred between 3 a.m. and 8 a.m. and then between 3 p.m. and 8 p.m.,⁶⁴ both periods of which are in line with the circadian lows and the drive for sleep. Comparatively, the daytime consolidated sleep occurred from 10 a.m. to 8 p.m., which covers periods of increased alertness, which likely further impaired the subjects' ability to sleep. Thus, the study finding highlighted by the Agency was comparing the best possible split sleep schedule with a very poor alternative consolidated daytime option.

⁶¹ *Id.*

⁶² Belenky, G., Jackson, M.L., Tompkins, L., Satterfield, B., & Bender, A. (2012) “Investigation of the Effects of Split Sleep Schedules on Commercial Vehicle Driver Safety and Health,” Washington, DC: FMCSA. (Belenky 2012).

⁶³ 2019 NPRM, at 44203.

⁶⁴ Belenky 2012.

Short, et al. 2015

The FMCSA cites a literature review by Short, et al. of 20 studies of “maritime watch keepers, ship bridge officers, and long-haul train drivers”⁶⁵ in support of the proposed sleeper berth provision changes. The Agency notes that the “[f]indings indicate that limited wake shift work schedules were associated with better sleep and lower sleepiness in the case of (1) shorter time-at-work, (2) more frequent rest breaks, (3) shifts that start and end at the same clock time every 24 hours, and (4) work shifts commencing in the daytime (as opposed to night).”⁶⁶ However the Agency provides no explanation of how these findings are applicable to the individuals subject to the HOS, namely CMV drivers. Specifically, the study examined “limited wake shift work schedules” which “are fixed work/rest cycles where the time-at-work does [sic] is ≤ 8 hours and there is >1 rest period per day, on average, for ≥ 2 consecutive days.”⁶⁷ The Agency provides no explanation of how these schedules are representative of CMV drivers. Specifically, the Agency provides no evidence that CMV drivers would:

- a) Have a shorter time at work. The maximum shift of the study participants was 8 hours. The study found that 4 hours on-duty and 8 hours off-duty was associated with “better sleep and lower levels of sleepiness”⁶⁸ yet the Agency is not proposing that drivers be limited to work periods of 4 hours;
- b) Have more frequent breaks. Yet the Agency is proposing to eliminate the one off-duty break carriers are required to provide drivers;
- c) Have shifts that start and end at the same time every 24 hours, a condition which is not necessarily accurate for commercial truck operations; and,
- d) Have work shifts commencing in the daytime, another condition which does not necessarily occur in commercial truck operations.

The longer hours, limited rest breaks, varying start and ending times, and portion of the industry that drives at night would indicate that the population of CMV drivers is not represented in any way by the participants in the studies reviewed by Short et al. In addition, CMV drivers’ operations and schedules do not align with the beneficial conditions identified. Lastly, the Agency also appears to have missed the additional finding that “higher levels of sleepiness tended to be reported in schedules with longer time-at-work and shorter sleep opportunities,”⁶⁹ a conclusion which appears in direct opposition to a number of the HOS changes proposed by the Agency including the changes to the sleeper berth provision. The Short et al. study is not applicable in the context presented by the Agency and actually illustrates Advocates’ concerns with a number of the Agency’s present proposals.

⁶⁵ Short, M.A., Agostini, A., Lushington, K., & Dorrian, J. (2015) “A Systematic Review of the Sleep, Sleepiness, and Performance Implications of Limited Wake Shift Work Schedules,” *Scandinavian Journal of Work, Environment and Health*, 41(5):425440. (Short 2015).

⁶⁶ 2019 NPRM, at 44203.

⁶⁷ Short 2015.

⁶⁸ *Id.*

⁶⁹ *Id.*

Soccolich, et al.

Soccolich et al. examined naturalistic driving data from 100 drivers to compare the risks associated with use of the consolidated 10 hour off-duty period, the 34 hour restart, and a sleeper berth provision (8/2) to reset the duty day.⁷⁰ In support of the proposed changes to the sleeper berth provisions, the FMCSA states that the study “found that safety performance was comparable (*i.e.*, not significantly different) between drivers who used the sleeper berth provision and drivers who chose either the 10- or 34-hour restart method.”⁷¹ However, this study contains no evidence that the Agency’s proposed change to the sleeper berth provisions, namely allowing the sleeper berth period to be split into a minimum of a 7 hour period and a 3 hour period, would in any way be safe. The study did not examine the proposed change at all.

Despite the concerns with each of the studies cited above, the Agency concludes that the research “highlights the value of split-sleep scenarios in combating driver fatigue.”⁷² Furthermore, immediately after stating its conclusion, the Agency admits that the studies do “not directly speak to the changes proposed in this rule.”⁷³ As noted above, not only do the studies not speak to the proposed changes, but in many cases, the studies are actually indicative of the safety concerns with making the proposed changes. In addition, they provide no evidence that these changes will not degrade public safety.

In further support of the claims that the proposed sleeper berth provision change would not affect safety, the FMCSA cites another set of studies discussing the amount of sleep attained by drivers. This research is discussed below.

Mitler, et al.

The FMCSA notes that the Mitler et al. study⁷⁴ found that “commercial drivers were getting 5.18 hours of sleep per night, on average” prior to the 2003 final rule. However, the study noted that these measurements occurred at a time when the shortest off-duty period could be 8 hours.⁷⁵ The study also found that 56 percent of the drivers in the study had at least 1 six-minute interval of drowsiness while driving.⁷⁶ The study concluded that “[l]ong-haul truck drivers in this study obtained less sleep than is required for alertness on the job.”⁷⁷

⁷⁰ Soccolich, S., Hanowski, R., & Blanco M. (2015). Evaluating the Sleeper Berth Provision: Investigating Usage Characteristics and Safety - Critical Event Involvement. (Report No. 17–UI–046).

⁷¹ 2019 NPRM, at 44203.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Mitler, M.M., Miller, J.C., Lipsitz, J.J., Walsh, J.K., Wylie, C.D. (1997) “The Sleep of Long-Haul Truck Drivers,” *New England Journal of Medicine*, 337, 755–761. (Mitler 1997).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

Hanowski, et al.

The FMCSA highlights that the Hanowski, et al.⁷⁸ study found “that commercial drivers were getting more sleep under the revised HOS regulations, with an average of 6.15 hours of sleep per 24-hour period (compared to the average of 5.18 hours per night reported by Mitler, et al. in 1997).”⁷⁹ However, the FMCSA fails to acknowledge the distinction made by Hanowski et al. when they stated “[i]n comparing the mean sleep quantity of drivers in the current study to previously collected data, it appears drivers *may* be getting more sleep under the revised HOS regulations”[emphasis added].⁸⁰ This distinction is repeated when Hanowski et al. later stated that “[b]ased on the results of the current study, it *appears* drivers are getting more sleep per night, as measured over a 7-day period, as compared to data collected with drivers under the old HOS regulations over a 5-day period (Mitler et al., 1997) or while on the road (Dingus et al., 2002). This suggests that the new regulations *may* be working as anticipated by providing additional opportunities for drivers to get sleep” [emphasis added].⁸¹ These equivocations in the findings likely have to do with the limitations the authors discuss in the study but which are not mentioned or addressed by the Agency. For example, the authors note that “The current study did not discriminate between work and non-work days, and included an average of 61 days of data per driver in Method #1 (all data, as shown in Table 2) and 28 days of data per driver for Method #2 (only complete weeks of data).”⁸² Thus, the average rest calculated by the study included rest on non-work days when drivers likely obtain additional sleep. In addition, this study, like Mitler, does not discuss the specific impact of the split sleeper berth schedule and what amount of sleep those drivers were obtaining.

Van Dongen and Mollicone

The FMCSA states that a 2013 study by Van Dongen and Mollicone⁸³ “found that drivers obtained between 6.0 and 6.2 hours of sleep (on average) per 24 hours during duty cycles.”⁸⁴ However, as with the other studies cited, this study included no specific analysis of the comparative sleep obtained by drivers making use of the split sleeper berth provision.

⁷⁸ Hanowski, R.J., Hickman, J., Fumero, M.C., Olson, R.L., Dingus, T.A. (2007) “The Sleep of Commercial Vehicle Drivers Under the 2003 Hours-of-Service Regulations,” *Accident; Analysis and Prevention*, 39(6), 1140–5. (Hanowski 2007).

⁷⁹ 2019 NPRM, at 44204.

⁸⁰ Hanowski 2007.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Van Dongen, H.P.A. & Mollicone, D.J. (2013) “Field Study on the Efficacy of the New Restart Provision for Hours of Service,” (FMCSA–RRR–13–058). Washington, DC: FMCSA.

⁸⁴ 2019 NPRM, at 44204

Dinges, et al.

The FMCSA notes that Dinges et al. in 2017⁸⁵ studied the impacts of the HOS restart provision and “found that drivers obtained, on average, approximately 6.5 hours of sleep per day during duty periods.”⁸⁶ Again, the study did not speak specifically to the amount of sleep obtained by drivers using the split sleeper berth provision. Additionally, the Agency makes no mention of the statements by the authors in the conclusion that:

A recent comprehensive consensus report from a group of scientists from the American Academy of Sleep Medicine and the Sleep Research Society, as well as a report from the Centers for Disease Control and Prevention (CDC), concluded that “insufficient sleep” involves sleeping less than 7 hours per day. The studies of sleep in CMV drivers, including the extensive data in this study, indicate that drivers obtain 6–6.5 hours of sleep per day for 4–7 days straight (i.e., up to the 168-hour limit), before getting an opportunity to sleep long enough to recover from a sleep debt. There is a need to identify how to increase driver sleep time and avoid the risks that repeated chronic partial sleep loss pose to the health and safety of CMV drivers.⁸⁷

Sieber, et al.

The FMCSA concludes that, based on a 2014 study by Sieber et al.,⁸⁸ “drivers are likely getting more sleep than other working adults in the United States.”⁸⁹ However, the amount of sleep reported in the study was based on self-reported sleep from a survey of truck drivers at rest stops. The Agency provides no discussion of this possible bias in the results, nor does it attempt to explain how the other studies it has cited indicate that drivers are, on average, obtaining about 6 hours of sleep. The Sieber study indicates only that 73.5 percent of truck drivers self-reported that they were getting more than 6 hours of sleep per night. Further, this study did not characterize the amount of sleep reported by drivers using the split-sleeper berth specifically. Additionally, the study made no distinction in the data presented as to whether the self-reported sleep per 24 hour period was limited to only work days or included non-work days when drivers tend to obtain additional sleep. This reality could skew the results in terms of how the Agency is attempting to apply the same.⁹⁰ Lastly, it is important to note that this distribution of self-reported sleep in the last 24 hours highlighted by the Agency is not evaluated with respect to fatigue. Simply because some percentage of the population is getting a certain amount of sleep, whether it is more or less than another population, does not mean that that amount of sleep is

⁸⁵ Dinges, D.F., Maislin, G., Hanowski, R.J., Mollicone, D.J., Hickman, J.S., Maislin, D., Kan, K., Hammond, R.L., Soccolich, S.A., Moeller, D.D., & Trentalange, M. (2017) “Commercial Motor Vehicle (CMV) Driver Restart Study: Final Report,” (FMCSA–RRR–15–011). Washington, DC: FMCSA. (Dinges 2017).

⁸⁶ 2019 NPRM, at 44204.

⁸⁷ Dinges 2017.

⁸⁸ Sieber, K.W., Robinson, C.F., Birdsey, J., Chen, G.X., Hitchcock, E.M., Lincoln, J.E., Akinori, N., & Sweeney, M.H. (2014) “Obesity and Other Risk Factors: The National Survey of U.S. Long-Haul Truck Driver Health and Injury,” *American Journal of Industrial Medicine*, 57, 615–626.

⁸⁹ 2019 NPRM, at 44204.

⁹⁰ See Van Dongen 2013, and Dinges 2017.

adequate for combating fatigue, especially in a safety-critical occupation. As noted in other studies cited throughout this text, “insufficient sleep” involved sleeping less than 7 hours per day, thus placing what could be a critical distinction (less or more than 7 hours of sleep) squarely in the middle of the largest category used in the study for both the sample and reference population, namely 6 hours to 8 hours.

In the summary of the five studies, the Agency states that “[t]hese studies show that long-haul truck drivers are, on average, getting more sleep than they did prior to the HOS rule change in 2003. Further, it shows that drivers are likely getting more sleep than other working adults in the United States.”⁹¹ While drivers may be getting more sleep than they did prior to the HOS rule change in 2003, this is unrelated to the question of providing support for the proposed change to the sleeper berth provision. As noted above, none of the studies specifically examined the use of the split sleeper berth, the sleep obtained or the risks associated with such a practice. Moreover, as indicated by Dinges et al., it is abundantly clear is that drivers are still not obtaining the necessary amount of sleep. Also as noted above, the Agency’s conclusion that truck drivers are obtaining more sleep than other working adults is highly suspect and is unrelated to the question of dangerously modifying the sleeper berth provision.

Maislin et al.

The FMCSA cites a 2001 study by Maislin, et al.⁹² to support the changes to the split sleeper berth requirement, specifically the shortening of the anchor (longer) period from the current requirements of 8 hours to the proposed 7 hour minimum. The FMCSA claims that the study “showed that it is possible for a person to avoid physiological sleepiness or performance deficits on less than 7 hours of sleep” and “that a shorter restricted anchor sleep combined with longer naps can reduce sleepiness and performance deficits similar to longer duration anchor sleep alone. This study confirmed that total sleep time per 24-hour period is an important factor in reducing fatigue and improving performance.”⁹³ However, any claim that these findings support the proposed change is meritless considering the Agency’s viewpoint on this exact study as expressed in the 2005 Final Rule:

A study of chronic sleep restriction [Maislin, G., *et al.* (2001)] showed that it is possible for a person to avoid physiological sleepiness or performance deficits on less than 7 hours of sleep; however, the subjects in the study were obtaining their primary sleep period at night and were supplementing their sleep with longer naps later in the day. Maislin *et al.* found that subjects who slept for 6.2 hours at night combined with a nap of 1.2 hours had lower levels of sleepiness and higher levels of performance, compared to subjects who slept shorter periods without naps. While 6 hours of sleep at night with a nap may be the minimum needed to

⁹¹ 2019 NPRM, at 44204.

⁹² Maislin, G., Rogers, N.L., Price, N.J., Mullington, J.M., Szuba, M.P., Van Dongen, H.P.A., and Dinges, D., (2001) “Response Surface Modeling of the Effects of Chronic Sleep Restriction With and Without Diurnal Naps,”—Report.

⁹³ 2019 NPRM, at 44204.

maintain an adequate performance level, it is unrealistic to think that the Agency can regulate what time of day a driver goes off-duty or sleeps in a sleeper berth.⁹⁴

In citing Maislin in the present Notice, the Agency has not addressed its own interpretation of the Maislin study and its previous use of the same study to set the anchor sleeper berth period minimum at 8 hours. Furthermore, the Agency's comment following the discussion of Maislin, which states "[r]est breaks, and especially naps, are an important tool in combating fatigue, and FMCSA encourages their use,"⁹⁵ is particularly egregious when the Agency elsewhere in this proposal is eliminating the one off-duty rest break which carriers are required to ensure drivers have an opportunity to use.

Wylie

To support the proposal to shorten the anchor (longer) split sleeper berth period to 7 hours, the FMCSA cites a Wylie study from 1998.⁹⁶ The Agency cites the following: "[n]aps in trips with judged drowsiness appeared to result in recovery effect, compared to the relatively high levels of drowsiness seen in the hour prior to napping.' Research on napping indicates it does refresh a driver and improves performance in the near term."⁹⁷ However, the Agency failed to acknowledge the latter part of the conclusion from the study, which states: "[h]owever, signs of drowsiness remained substantially elevated for two hours after napping."⁹⁸ Further, other conclusions from the study support the need to ensure that drivers receive an adequate anchor (longer sleep period), specifically that "[a]fter time of day, the length of the last principal sleep had the next-strongest relationship to observed variations in drowsiness."⁹⁹ Moreover, regardless of the findings of the Wylie study or the Agency's interpretation, the Wylie study did not specifically examine these impacts for drivers using the split sleeper berth provision and thus is not applicable to the current proposal.

Caldwell, et al.

The FMCSA cites a 1997 study by Caldwell et al.¹⁰⁰ in further support of the benefits of naps, highlighting that the study "found that [the study's] subjects performed better after napping compared to after only resting without sleep."¹⁰¹ However, the Agency fails to mention that the study also cautioned against the universal application of the finding highlighted by the Agency, noting that "[u]nfortunately, although naps have been proven effective in the laboratory, there may be problems in operational situations. For instance, it may not be possible to place naps at

⁹⁴ 2005 Final Rule, at 50030.

⁹⁵ 2019 NPRM, at 44204.

⁹⁶ Wylie, D. (1998) "Commercial Motor Vehicle Driver Drowsiness, Length of Prior Principal Sleep Periods, and Naps,"—Report. (Wylie 1998).

⁹⁷ 2019 NPRM, at 44204, citing Wylie 1998.

⁹⁸ Wylie 1998.

⁹⁹ *Id.*

¹⁰⁰ Caldwell, J.S., et al. (1997) "The Efficacy of Hypnotic-Induced Prophylactic Naps for the Maintenance of Alertness and Performance in Sustained Operations,"—Report. (Caldwell 1997).

¹⁰¹ 2019 NPRM, at 44204.

times when sleep will be optimal.”¹⁰² The Agency’s also fails to acknowledge that the authors also recommend that when naps cannot be placed at times when sleep will be optimal, “it may be useful to facilitate napping with short-acting sleep medication.”¹⁰³ This practice clearly is not acceptable for safe CMV operations and further calls into question the Agency’s reliance on this study. It should also be noted that the study’s conclusion that napping, as opposed to simply resting, was more beneficial is contraindicative of the Agency’s current proposal to allow on-duty not-driving work as an alternative to off-duty rest periods.

Garbarino

The FMCSA cites a 2004 study by Garbarino¹⁰⁴ to support the benefits of naps, noting that the study “found that, in addition to working as a short-term countermeasure to fatigue experienced during normal working hours, napping ‘before night work can be an effective countermeasure to alertness and performance deterioration.’”¹⁰⁵ However, the Agency fails to draw a correlation between the naps and schedule held by the subjects of the study as compared to CMV drivers under the split sleeper berth provision.

Sallinen et al.

In support of the proposed changes to the split sleeper berth provisions, the FMCSA cites a 1997 study by Sallinen et al.,¹⁰⁶ noting that the study “found that naps of less than 1 hour most influenced performance.”¹⁰⁷ However, the study abstract places a limitation on this finding, stating that “[t]he results show that a napbreak shorter than 1 hour in length is a potential countermeasure for sleepiness in night shifts, at least when taken between 0100-0400 h.”¹⁰⁸ This is generally around the time of the circadian low when the drive for sleep is greatest. As such, the benefits identified in the study may not reflect the actual consequences when such a nap is not taken at an optimal time. It should also be noted that both the present and proposed split sleeper berth requirements dictate that the secondary (short) period be at least 2 hours. Thus, both provide adequate time for a nap of 1 hour identified in the study, if a nap is actually taken during that time. Therefore, the study as minimal relevance to the proposal.

Moore-Ede

The FMCSA also cites a study by Moore-Ede, et al. from 1996¹⁰⁹ in support of the benefit of naps, noting that the “survey of train engineers found that 20-minute napping was effective for

¹⁰² Caldwell 1997.

¹⁰³ *Id*

¹⁰⁴ Garbarino, S., et al. (2004) “Professional Shift- Work Drivers Who Adopt Prophylactic Naps Can Reduce the Risk of Car Accidents During Night Work,”—Report Abstract. (Garabino 2004).

¹⁰⁵ 2019 NPRM 44204, citing Garabino 2004.

¹⁰⁶ Sallinen, Harma, M., A° kerstedt, T., Rosa, R., Lillqvist, O. (1997) “Can a Short Napbreak Improve Alertness in a Night Shift?”—Report (Sallinen 1997).

¹⁰⁷ 2019 NPRM, at 44205.

¹⁰⁸ Sallinen 1997.

¹⁰⁹ Moore-Ede, M., Mitchell, R.E., Heitmann, A., Trutschel, U., Aguirre, A., Hajamavis, H. (1996) “Can alert ’95—Alertness Assurance in the Canadian Railways,”—Report. (Moore-Ede 1996).

enhancing alertness.”¹¹⁰ However, in the study, the conclusion that a 20-minute nap was beneficial was stated in the NPRM with little background provided. In addition, the nap was strictly limited to 20 minutes in order to avoid sleep inertia,¹¹¹ a prospect which the Agency is unlikely to adopt in conjunction with the other changes to the split sleeper berth provision.

Additionally, the Agency fails to mention several of the other findings and statements in the study which are related to the split sleeper berth and other proposals made in the present Notice. Namely, the study noted that “[i]n addition to these circadian factors, alertness also tends to deteriorate as a function of time since the last sleep period” and that “[r]eductions in nocturnal sleep length cause systematic reductions in alertness levels on the following day. These reductions need not be extreme for their effect to be felt. For example even after 6 hours of sleep, the performance of a Driver is impaired when compared to that of a Driver sleeping 8 hours.”¹¹² The study also stated that “another factor affecting alertness is the timing of sleep periods. Daytime sleep is considerably less recuperative than nighttime sleep for a variety of reasons. Sleeping out of phase with your circadian clock results in shorted [sic] sleep episodes.”¹¹³ Moore-Ede et al. also concluded that “[t]he irregular work schedules of locomotive drivers cause disruption in their sleep regularity as well as in their waking performance and alertness levels. The circadian system is not able to adapt instantaneously to the changes imposed by work schedules” and that “[a]lertness is also reduced as a result of the cumulative effect of consecutive nights of sleep restriction (nights of shortened sleep). When sleep is reduced to 4 or 5 hours per night on a sequence of seven consecutive nights, the alertness gradually drops on each consecutive day from the first to the seventh.”¹¹⁴ Combined, all of these findings raise significant safety concerns about the various proposed changes to the HOS rules which would reduce the anchor sleep period in the split sleeper berth, eliminate the off-duty rest break and allow extensions of the driving window.

Based on the five aforementioned studies (Wylie, Caldwell, Garbarino, Sallinen, and Moore-Ede), the Agency concludes that “[t]he research discussed above demonstrates that drivers are getting adequate sleep, and that allowing a 7/3 split option would continue to provide the opportunity for a [sic] longer sleep period commensurate with current levels of sleep for truck drivers.”¹¹⁵ However, these studies neither spoke to the amount, appropriateness or risks associated with sleep being obtained by drivers using the split sleeper berth provision either under the current regulations or under the proposed 7/3 split. It should also be noted that these same studies were cited by the Agency in the 2005 Final Rule (using nearly identical descriptions of the findings of each study) where the Agency itself concluded that:

The Agency recognizes that drivers who are able to get 7 to 8 hours of sleep per day may not require additional sleep and it would be unreasonable to require the driver to stay in the sleeper berth for an additional two hours. For this reason, the

¹¹⁰ 2019 NPRM 44205.

¹¹¹ Moore-Ede 1996.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 2019 NPRM, at 44205.

FMCSA will permit drivers to accumulate the additional two hours as sleeper berth time, off-duty time, or a combination of both. Two hours are long enough to permit time for a nap, as well as time to attend to personal matters.

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Although this provision on the use of sleeper berths does reduce the total flexibility provided in the 2003 rule, it provides motor carriers and drivers with some operational flexibility while ensuring that drivers are afforded the opportunity of at least one 8-hour sleep period each 24 hours, with the additional benefit of providing the option for a nap or break.¹¹⁶

Thus, the Agency previously, citing the same studies and using nearly identical descriptions of the studies, concluded that the 8/2 split was appropriate and provided adequate flexibility and opportunity for rest contradicting the proposal put forth in the current Notice.

In addition to the conclusion regarding the alternative 7/3 split, the Agency also found that “by excluding the shorter rest period from the calculation of the 14-hour driving window, a driver has the ability to obtain needed rest without using available work time.”¹¹⁷ However, none of the studies presented by the Agency speak to the risks generated by allowing drivers to operate later into their duty period.

Lastly, the Agency notes that despite previously planning a pilot program study of split sleeper berth time and issuing a Notice in the Federal Register explaining the intent of the study was to “produce statistically reliable evidence on the question whether split sleeper berth time affects driver safety performance and fatigue levels,”¹¹⁸ it had “concluded that there was sufficient basis to support limited changes to the sleeper-berth provision without conducting a pilot program.”¹¹⁹ However, all of the studies cited by the Agency in the present Notice in support of the changes to the split sleeper berth provision were available to the Agency in 2017 when it concluded that it needed the pilot program to draw conclusions about split sleeper berth options beyond the current regulation of an 8/2 split. Therefore, the FMCSA has provided insufficient justification and data for such a dramatic shift in position for such a critical public safety issue at a time when more CMV-related crash fatalities are occurring on the nation’s roads.

In further discussion of the split sleeper berth proposal, the Agency notes that it has “received comments from motor carriers and industry associations that the current sleeper-berth provisions are too rigid and that drivers do not have enough opportunities to stop driving and take breaks when they are fatigued.”¹²⁰ Again, the HOS rules do not prevent a driver from taking a break nor do they prevent a carrier from allowing drivers to take a break any time they are fatigued. In fact, the FMCSRs specifically require that drivers not drive and that carriers may not require a

¹¹⁶ 2005 Final Rule, at 50031.

¹¹⁷ 2019 NPRM, as 44205.

¹¹⁸ Hours of Service of Drivers; Pilot Program To Allow Commercial Drivers To Split Sleeper Berth Time, FMCSA, Jun. 6, 2017, 82 FR 26232.

¹¹⁹ 2019 NPRM, at 44205.

¹²⁰ *Id.*

driver to drive when they are fatigued.¹²¹ The HOS rules do not require operators to drive at specific times or to use the entire driving window. The HOS regulations are intended to prevent carriers from requiring drivers to operate over long duty periods which can cause fatigue and raise the risk of crashes. Similarly, the HOS rules ensure that carriers must allow (most) drivers to take at least one off-duty break to address acute fatigue.

In the current Notice, the FMCSA uses questionable findings of the Sieber et al. study based on the self-reported amount of sleep for truck drivers as evidence that the current 8 hour minimum for the anchor (longer) split sleeper berth period may be too long. In further support of this argument, the Agency cites the Moore-Ede study of train engineers as indicating that “some [people / CMV drivers] may actually find it difficult to sleep more than 7 consecutive hours.”¹²² However, the Agency presents no actual analysis supporting their conclusions. The agency has also not justified their determination that these conclusions should potentially subject all CMV drivers using the split sleeper berth provision to a shortened anchor sleep period. The Agency also provides no clarification of how many people or CMV drivers “may” find it difficult to sleep more than 7 hours versus how many would be fatigued from having less than 7 hours of sleep. Moreover, the Agency provides no explanation of how a driver’s self-reported amount of sleep obtained in the last 24 hours (as according to Sieber et al.) is in any way equivalent to understanding if that amount of sleep was enough to prevent fatigue. A driver could have responded that they obtained 6 hours or less of sleep in the last 24 hours (which 26.5 percent did) and still have been suffering from fatigue.

The FMCSA also asks for responses to several specific questions with respect to the proposed changes to the split sleeper berth provision.

Q. Given the previous discussion of the research showing many drivers typically sleep a little more than 6 consecutive hours, FMCSA also requests comments and any supporting data on the possibility of a 6- and 4-hour split break.

Advocates is concerned that the FMCSA is confusing the amount of sleep drivers are able to regularly obtain under the current rules with the amount of sleep that is sufficient to combat fatigue. Specifically, the Agency’s question is predicated on studies of the amount of sleep drivers are obtaining under current operating conditions. It should be noted that some of the same studies the Agency has cited to establish that drivers are obtaining “a little more than 6 consecutive hours” of sleep showed that this was the amount of sleep during a work week but that during longer periods of time off-duty, such as during a restart, drivers were obtaining additional sleep. Van Dongen and Mollicone found that during duty cycles, drivers were averaging between 6.0 and 6.2 hours of sleep per 24 hours; however during restarts the same drivers were obtaining between 8.8 and 8.9 hours of sleep.¹²³ Likewise, Dinges et al. found that during duty periods, drivers were obtaining approximately 6.5 hours of sleep per 24 hours. However, during restarts the same drivers were obtaining between 8.32 and 8.86 hours of

¹²¹ 49 CFR 392.3, Ill or Fatigued Operator.

¹²² 2019 NPRM, at 44205.

¹²³ Van Dongen 2013.

sleep.¹²⁴ Both of these studies illustrate that when not constrained by work schedules, drivers tend to obtain more sleep which is counter to the basis FMCSA appears to be using to justify both the 7/3 and the 6/4 splits options.

Q. Would you expect to get the same amount of sleep in the 7 hour period as in the current 8 hour period?

As noted above, research cited by the Agency has proven that drivers, when given extended off-duty periods, tend to obtain additional sleep.¹²⁵ The HOS rules are intended to protect the opportunity for drivers to obtain restorative sleep to combat the fatigue of a demanding safety-critical job. Shortening the allowable rest period will enable and encourage the use of the shortest time possible when it is advantageous for the carrier. In fact, the Agency admitted such concerns were raised by drivers in comments to the ANPRM, noting that “[s]ome drivers stated that increased flexibility in split options would allow carriers to coerce drivers to operate when they would prefer not to do so. Unsurprisingly, these commenters are concerned that dispatchers would manipulate the hours to maximize productivity.”¹²⁶

For the reasons listed above, Advocates opposes the proposed changes to the split sleeper berth provision. Lowering the minimum length of the anchor (longer) split sleeper berth period from 8 to 7 hours risks reducing the opportunity for drivers to obtain the rest necessary to combat fatigue. The studies cited by the FMCSA do not support the proposal nor do they address the concerns raised by drivers that these changes could allow carriers to demand or coerce drivers to maintain fatiguing schedules. Likewise, the Agency has provided no applicable analysis to support the proposal to exclude the short split sleeper berth period from the calculation of the driving window, potentially extending the driver’s duty day to 16 hours or more.

Split-Duty Period

The FMCSA is also proposing in the current Notice to allow a single break of off-duty time, ranging from 30 minutes to no more than 3 hours, to extend the 14-hour driving window specified by 49 CFR 395.3(a)(2). In support of the proposal, the Agency cites the Blanco 2011 study, stating that it:

[S]howed that the SCE rate increased modestly with increasing work and driving hours. Blanco also found that ‘. . . breaks can be used to counteract the negative effects of time-on-task. The results from the break analyses indicated that significant safety benefits can be afforded when drivers take breaks from driving. This was a key finding in the current study and clearly shows that breaks can ameliorate the negative impacts associated with time-on task. The benefits from breaks from driving ranged from a 30- to 50-percent reduction in the rate of SCE

¹²⁴ Dinges 2017.

¹²⁵ See Van Dongen 2013, and Dinges 2017.

¹²⁶ 2019 NPRM, at 44203.

in the hour following a break, depending on the type of break from driving, with the most benefit occurring for off-duty (non-working) breaks.¹²⁷

However, the Agency's characterization of the findings is grossly misleading, considering that the authors stated with respect to the increase SCE risk with longer working and driving hours that:

A key take-away from the above analyses, as well as other analyses discussed in the report, is that *the risk of being involved in an SCE generally increases as the work hour increases. That is, driving time occurring later in the driver's workday due to performing non-driving tasks earlier in the workday, has a negative safety effect.* Therefore, though driving hour, in and of itself, may not show an increase in risk when comparing the 10th and 11th driving hours, *the combination of driving hour/work hour does show negative time-on-task effects for late driving hours. These results suggest that perhaps the important question is not whether drivers should be allowed to drive 10 or 11 hours, but rather: what are the safety implications of a 14-hour workday?* That is, though driving for 11 hours was not shown to increase the risk of an SCE as compared to the 10th driving hour, if drivers drove deep into their 14-hour shift, SCE risk increased.¹²⁸ [emphasis added]

Likewise, other research has illustrated the dangers of longer driving and working hours, as Advocates noted in comments to the ANPRM:

Numerous researchers have stressed that long consecutive driving hours, long duty weeks, and inadequate and interrupted sleep are directly related to increased crash risks. In fact, many researchers, as well as the FMCSA, have shown that the risk of having a crash rapidly increases after the 8th or 9th consecutive hour of driving. Research conducted for the FMCSA confirms that crash risk increases as time spent driving increases for drivers from at least the 7th through the 11th consecutive hour of driving. An additional FMCSA study shows that driving towards the end of the 14-hour shift, that is, more than 10 hours after reporting for duty (i.e., during hours 10 through 14 in a driver's work day) increases crash risk reflected in safety-critical events.¹²⁹

¹²⁷ 2019 NPRM, at 44206.

¹²⁸ Blanco 2011.

¹²⁹ Advocates 2018 Comments, citing: 65 FR 25539 (Apr. 2000); Saccomano, F., et al., "Effect of Driver Fatigue On Truck Accident Rates," Urban Transport and the Environment for the Twenty-First Century (ed. L.J. Sucharov), Computational Mechanics Publications, Southampton, U.K., 439-446 (1995); Saccomano, F. and Shortread, J., "Truck Safety: Perceptions and Reality," the Institute for Risk Reduction, Ontario, Canada, 157-174 (1996).; Lin, T. et al., "Time of Day Models of Motor Carrier Accident Risk," Transportation Research Record 1467: 1-8, Transportation Research Board, National Research Council, (1994); Frith, W., "A Case-Control Study of Heavy Vehicle Drivers' Working Time and Safety," Proceedings of the Australian Road Research Board Conference, 17(5): 17-30 (1994); Jovanis, J.P., Wu, K.F., and Chen, C., "Hours of Service and Driver Fatigue - Driver Characteristics Research," FMCSA (April 2011), DOT docket number FMCSA-2004-19608-27614.; and Blanco, M., Hanowski, R., Olson, R., Morgan, J., Soccolich, S., Wu, S.C., and Guo, F., "The Impact of Driving,

The FMCSA twice characterizes the results of the Blanco 2001 study as having shown “the SCE rate increased modestly with increasing work and driving hours” [emphasis added].¹³⁰ Elsewhere, the FMCSA acknowledges that is aware that this provision would allow driving up to 17 hours after the last longer rest period” and that “[s]ome research has found a higher risk of an SCE when driving later in the driving window.”¹³¹ The Agency then dismisses this finding without any proper analysis. The Agency characterizes the results of the Blanco 2001 study as having “showed that the SCE rate increased *modestly* with increasing work and driving hours” [emphasis added], acknowledges that the results of the study raise enough concern that they felt they needed to address it and dismiss the findings. Moreover, the selective use of research in this Notice to reach a predetermined conclusion unsupported by objective evidence is deeply concerning. For example, the Agency dismissed some findings of the Blanco 2011 study in the discussion of the proposal to eliminate the 30 minute off-duty rest break requirement yet cited the study as support for the split-duty period proposal. The FMCSA then in the safety rationale section of the discussion of the split-duty sleeper berth again dismissed the study as not providing opposition to the proposal on account that “that research did not examine a prolonged break within the driving window.”¹³² However, the proposal would permit a break as short as 30 minutes. Breaks of this length were in fact examined in the study as were breaks of an hour or more. This highlights how the Agency is selectively applying portions of research in this Notice.

Despite the Agency’s efforts to re-examine the study data in support of the elimination of the 30 minute off-duty rest break, the Agency does not appear to have conducted any such efforts to determine if the proposal for a split-duty period would be appropriate. Moreover, the claim by the Agency and the further statement that “FMCSA is not aware of research findings pointing to the optimal length of a pause, but considers 3 hours to be the right balance of flexibility and safety”¹³³ ignores the results of multiple studies, cited above, that indicate that extending the duty day and driving time increases risk. Likewise, despite citing the conclusion in Blanco that “[t]he benefits from breaks from driving ranged from a 30- to 50-percent reduction in the rate of SCE in the hour following a break, depending on the type of break from driving,”¹³⁴ the Agency ignores the fact that the benefits of the split-duty break in terms of risk would likely diminish quickly as the effect of increased risk with the longer work day accumulated. In short, the Agency ignores the concerns raised in available research while admitting a lack of evidence of benefits for the proposal.

FMCSA’s repeated efforts to characterize the split-duty proposal, and others, as affording flexibility to allow drivers to take breaks when they are fatigued are deeply concerning. Despite these claims, the Agency repeatedly cites the benefits of the proposal to addressing traffic congestion or detention time, neither of which is scheduled to coincide with when a driver is

Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Vehicle Operations,” FMCSA (April 2011), DOT docket number FMCSA-2004-19608-27612.

¹³⁰ 2019 NPRM, at 44206 and 44215.

¹³¹ 2019 NPRM, at 44206 citing to Blanco 2011.

¹³² *Id.*

¹³³ 2019 NPRM, at 44207.

¹³⁴ 2019 NPRM, at 44206, citing Blanco 2011.

fatigued. Even the example provided by the Agency in the Notice regarding the split-duty period illustrates this point when the Agency states:

An example under which a driver uses the split duty period might prove helpful. Assume a driver starts a new workday on-duty at 7:30 a.m. and begins driving at 8:00 a.m. At 9:00 a.m., she arrives at a warehouse and experiences a 3-hour wait. The driver elects to use the split duty period, recording this time as “off-duty,” given she isn’t performing any type of work. At noon, the driver begins to load, a process that takes 1 hour which she records as on-duty, not-driving time. At 1:00 p.m., the driver starts driving for a consecutive 8 hours (1:00 p.m.–9:00 p.m.), at which point she must take a 30-minute break under today’s proposal. At 9:30 p.m., however, she may still drive an additional 2 hours under today’s split duty day proposal. She would need to stop driving at 11:30 p.m. because she would run up against her maximum driving time—11 hours (even though she would have another hour available on her maximum driving window). At 11:30 p.m., she starts a 10-consecutive hour off-duty period.¹³⁵

In this example, the driver is using the split-duty period to take a break at 9:00 in the morning (which will extend her duty day), only 2 hours after coming on-duty and at time in the circadian cycle when the propensity for sleep is low. This break is taken to address detention time, as indicated by the Agency, and not fatigue. Moreover, the example schedule would have the driver behind the wheel as many as 16 hours after having first come on-duty, with the only off-duty break having occurred early in the day, almost immediately after having come on-duty (under the proposal that the 30 minute *rest* break can now be met with an on-duty not-driving period).

In the Notice, the Agency continues the example into a second day where a driver would complete their first 12 duty hours with no off-duty break and would have the driver completing their 14th hour of work / 9th hour of driving in the 17th hour after having come on-duty and occurring during the early morning (12:30 a.m. to 2:30 a.m.) when the natural drive for sleep is approaching its greatest. Both parts of the example provided by the Agency illustrate the safety concerns with not only the split-duty proposal but of all the proposals which will reduce the amount of dedicated off-duty time and increase the ability for drivers to be scheduled later into their duty period. The combined impacts of these proposals will significantly weaken public safety by increasing driver fatigue.

Several statements made by the FMCSA in the “Safety Rationale” section of the split-duty proposal discussion are once again misleading and must be addressed. First, the Agency states that “[e]xcept under the sleeper berth option, current regulations do not allow drivers to pause the 14-hour clock to take a prolonged break regardless of how they feel. By not providing credit for a break taken during a duty period, the existing rules may disincentivize drivers from voluntarily taking any additional rest breaks beyond those required by regulation.”¹³⁶ The 14-hour driving

¹³⁵ 2019 NPRM, at 44206.

¹³⁶ *Id.*

window was established to prevent drivers from driving longer into the duty period, a practice which is associated with increased crash risks due to fatigue. Justifying a “pause” in the clock based on how a driver “feels” earlier in the duty day does not address the fact that driving later in the duty day is associated with this increased risk and that breaks have been shown to have limited effectiveness at curbing this increased risk. Moreover, the Agency has provided no data to support the claim that the current regulatory regime is disincentivizing breaks.

In the Notice, the Agency states that:

For drivers who voluntarily take additional rest breaks, the existing rules may incentivize these drivers to speed in order to complete their driving prior to the end of the 14-hour driving window, resulting in increasing crash risk. The split-duty provision would alleviate these unintended consequences by allowing drivers to take a break if they feel fatigued, or if their work day straddles a time period that doesn’t provide for meaningful work to be accomplished (*e.g.*, long detention times).¹³⁷

The Agency provides no analysis of data illustrating that the present regulations have impacted, let alone increased the occurrence of speeding. For example, the percentage of large truck drivers in single vehicle fatal crashes assigned a driver related factor of “driving too fast for conditions or in excess of posted speed limit” was 18.4% in 2002, just before the 14 hour driving window was first established.¹³⁸ In 2017, the percentage of large truck drivers in single vehicle fatal crashes assigned a driver related factor of “speeding of any kind” was 11.4%.¹³⁹ While this comparison is not definitive, it raises questions as to the validity of the conclusion drawn by the Agency without any supporting evidence.

The FMCSA further states that “[t]he intent [of the split-duty proposal] is to give drivers the flexibility to shift their work and drive time commensurate with the length of a voluntary off-duty period.”¹⁴⁰ However, the conclusion that the break taken would be “voluntary” is speculative at best considering the Agency’s acknowledgement that a break could be taken to address traffic or detention time including at the direction of the carrier. Both scenarios are not voluntary nor do they necessarily fall in line with when a driver would be fatigued.

The Agency then states that it “bases this proposal on the same logic which allows the 10-hour off-duty period to be split for drivers using sleeper berths. Research, as described in section VII. D., indicates benefits of mitigating time on task fatigue through a shorter rest period combined with a required sleeper berth period. Both provisions are based on a shorter break paired with a longer rest period.”¹⁴¹ However, as noted earlier in these comments, the justifications put forth to support the split sleeper berth provision changes are woefully inadequate and thus do not support modifying the split duty provision. Additionally, in neither case did the Agency address

¹³⁷ 2019 NPRM, at 44206.

¹³⁸ Large Truck and Bus Crash Facts 2002, FMCSA, Apr. 2004, FMCSA-RI-04-021.

¹³⁹ Large Truck and Bus Crash Facts 2017, FMCSA, May 2019, FMCSA-RRA-18-018.

¹⁴⁰ 2019 NPRM, at 44206

¹⁴¹ 2019 NPRM, at 44207.

the impact of extending work and driving time later into the duty day and the increase risk associated with such operations.

The Agency attempts to justify the split duty proposal by noting that “[u]nder current rules, drivers are not required to go off-duty at the end of the 14-hour period. They must stop driving, but may remain on-duty to perform other tasks.”¹⁴² However, this statement ignores the intent of the HOS rules which is to prevent fatigued driving. HOS regulations are intended to prevent disadvantageous schedules from a fatigue and rest point of view as well as prevent drivers from extending their on-duty day and increasing the risk of crashes while behind the wheel and sharing the road with the public. The Agency further states that “[n]either of the current alternatives to a 24-hour cycle—post-driving work and compressed schedules—requires the driver to take compensatory off-duty time, yet that is precisely the added value provided by the proposed split duty day.”¹⁴³ However, the proposed split-duty would not require any additional compensatory off-duty time. Under the proposal, after extending a work day by up to three hours, a driver would still only be required to take 10 hours off-duty before getting back behind the wheel. Moreover, and as the Agency is apt to point out in other circumstances, the HOS do not mandate rest nor that breaks be taken at times of optimal use (during circadian lows). Furthermore, as the Agency notes, the proposed split duty period could be used to compensate for traffic and detention time which would make the breaks non-voluntary and likely not correlated with times of peak fatigue. The Agency also states that “[t]he off-duty time required by this provision would enable drivers to take restorative rest that would counteract, if not eliminate, the effects of a longer duty day.”¹⁴⁴ However, the split duty proposal does not require a rest break at all but only permits a driver to take an off-duty break and use it to extend the driving window. Additionally, the FMCSA, in the current Notice has stated that the Agency does not have research on the effectiveness of breaks of the length envisioned by the proposal.

The FMCSA also asks for responses to several specific questions with respect to the proposed split duty provision.

Q. How will this provision impact the number of driving hours during a single driving window? How will this provision impact your total driving hours during a given week or year?

The proposed provision would likely permit the scheduling of more driving hours in a single driving window. Advocates’ specific concern is that these additional hours (beyond what would be possible under the current rules for a given schedule) would also be occurring later in the duty period when crash risk from fatigue is greatest. The Agency has provided no analysis of how this increase in risk would be addressed and offers no evidence that the split duty break would be adequate to achieve a safe outcome.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

Q. What are the expected benefits from utilizing the 3-hour pause?

It is deeply concerning that the Agency's inquiry does not also ask for details from research nor is the Agency providing any indication of accounting for the cost resulting from crashes as a result of the elevated risk when driving a vehicle later in the duty period.

Q. Do you anticipate any fatigue impacts on driving up to the 17th hour of a duty day? How would the up to 3-hour break impact that fatigue level?

This question incorrectly assumes that carriers and drivers' expectations regarding fatigue are a comparable substitute to research and scientific fact. As noted multiple times throughout these comments, evidence shows that fatigue and crash risk increase with increasing length of the duty day.

Q. FMCSA seeks additional information on whether the pause should be allowed to be divided and total up to 3 hours.

Advocates opposes the split duty provision in any incarnation which increases the length of the driving window and would allow driving later in the duty period. The Agency has provided no data or evidence that the split duty proposal would ensure safety either in a consolidated or multi-period format.

For the reasons listed above, Advocates opposes the proposed split duty period. The proposal will result in an extension of the driving window and hence driving later in the duty period which is associated with an increased risk of fatigue and crashes. With no evidence to support claims that the provision will not be abused to address operational inefficiencies from traffic or detention time, as opposed to being used to address fatigue itself, there is no valid justification for the proposal.

TruckerNation Petition

Advocates concurs with the FMCSA's denial of the petition and conclusion that the "petition has the potential to allow drivers to operate for long periods of time without a sufficient longer sleep period. The FMCSA believes it is important that CMV drivers have an opportunity for a longer sleep period."¹⁴⁵ It must be noted that this conclusion should be applied to the proposed change to the split sleeper berth provision as outlined previously in these comments.

Other Petitions

Advocates concurs with the FMCSA's denial of the petitions of the United States Transportation Alliance (USTA) and the United Drivers Association (UDA) and its conclusion that "[b]oth petitions would result in the potential of drivers operating for long periods of time without a sufficient sleep period. For example, both petitions would allow a driver to operate for an entire

¹⁴⁵ 2019 NPRM, at 44208.

week without a rest period longer than 5 hours.”¹⁴⁶ Likewise, Advocates believes this conclusion should apply to the Agency’s proposed change to the split sleeper berth provision, both under the 7/3 proposal and the questions surrounding the proposal to permit a 6/4 split.

Regulatory Impact Assessment

30-Minute Break

The FMCSA notes that “[t]he proposed rule would result in cost savings to carriers in the form of avoided losses in driver productivity.”¹⁴⁷ This is premised strictly on the savings based on eliminating the one half hour minimum off-duty rest break which carriers must provide for drivers. In order to realize all of the benefits of this proposal, the drivers would need to be conducting some form of revenue generating work during their on-duty not-driving (read as working) break from driving. The Agency also states that “[t]ime is a scarce resource, and FMCSA recognizes that forced off-duty time is not always the drivers’ best alternative. Some commenters claimed that the rigid off-duty requirement forces drivers to rest when they are not tired and penalizes them for resting.”¹⁴⁸ However, as discussed in the comment earlier, the proposal for the 30 minute break does not require that these breaks or any break be given when a driver is fatigued. It is also illogical to assume that allowing the one break which carriers are required to provide drivers to consist of on-duty not-driving (working) time would in some way adequately address fatigue.

The Agency also states that “it is reasonable to assume that the current HOS regulations are imposing an opportunity cost on drivers that could be alleviated by providing drivers greater flexibility.”¹⁴⁹ However, the Agency has provided no analysis to support this conclusion. As the U.S. Department of Labor notes, CMV drivers are usually paid by the mile, which could indicate that whether a break is taken off-duty, as presently required, or taken on-duty but not-driving, either way, the driver is not earning during that time period.¹⁵⁰ Towards the end of the discussion of the 30-minute break in the Regulatory Impact Assessment (RIA), the Agency notes, “Elimination of the break requirement would seem to provide additional flexibility beyond the preferred alternative; however, it would not impact driver behavior relative to the preferred alternative, and thus would result in an equivalent motor carrier cost savings.”¹⁵¹ However, this statement seems to imply that allowing the 30 minute break to be met while on-duty not-driving (working) is equivalent to eliminating the break all together. In which case, the Agency has not addressed the fatigue and commensurate increased crash risk which will be introduced back into the industry by the proposal and the costs associated with that occurrence.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 2019 NPRM, at 44211.

¹⁴⁹ *Id.*

¹⁵⁰ Bureau of Labor Statistics, Occupational Outlook Handbook, Heavy and Tractor-trailer Truck Drivers.

¹⁵¹ *Id.*

In the RIA itself, the FMCSA acknowledges a lack of evidence regarding the impact of the additional proposal to tie the 30-minute break to the driving time rather than time on-duty.¹⁵² Despite this, the Agency concludes that the proposal to tie the break requirement to driving hours “would result in a shift in the timing of the break, and would provide increased flexibility for drivers to take their break when it is most beneficial.”¹⁵³ However, the Agency provides no analysis to support this finding, specifically that the required break (which the proposal converts to on-duty not-driving, i.e. working) after 8 hours of driving would somehow fall in line with driver fatigue or the circadian lows any more so than the off-duty breaks required under the current rule. At worst, this change would enable those drivers who fall into the Agency’s second category of drivers used in the analysis, those working more than 8 hours in an average shift but not driving more than 8 hours, to effectively eliminate the need for any break at all. Moreover, the Agency acknowledges that “there is uncertainty in the number of drivers who would voluntarily elect to take the break even though they are not required to do so.”¹⁵⁴ This fact would cut into the benefits estimated by the Agency.

Split-Duty Period

In the RIA, the Agency predicates its conclusion that the proposed split-duty periods would provide a benefit because under the current rule:

[T]aking a break penalizes drivers because their available work hours were spent resting. The 14-hour window was intended to prohibit drivers from extending their work day by continuing to drive after taking repeated breaks. However, many commenters to the ANPRM have stated that the 14-hour driving window does not comport with the inconsistent and sometimes unpredictable working conditions encountered during a duty period. Thus, the current rule leads to unintended consequences of added stress and potential speeding that result from the need to finish a run prior to the end of the 14-hour window.¹⁵⁵

As discussed earlier in these comments, the Agency has provided no evidence that the current 14-hour window has resulted in speeding or crashes as a result of such behavior. The Agency also clearly indicates through this statement that despite the intent of the 14-hour window as established by the previous rule, this proposal (and some others in the NPRM) would in fact extend the work day. Perhaps the most concise argument against undermining the limits on extending the 14-hour window is the statement made by the Agency in the 2011 Final Rule when it stated the following with respect to complaints about the 14-hour window:

Carriers stated that the shortening of wait time or detention that occurred after the 2003 rule has eroded and that wait times have increased again. If the drivers and carriers are correct the supply chain includes inefficiencies that regularly absorb

¹⁵² Draft Regulatory Evaluation of the 2019 Hours of Service Notice of Proposed Rulemaking, FMCSA, Aug. 2019. (2019 RIA).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

more of drivers' on-duty time than all of the changes adopted in this final rule. The relatively small impacts of the rule could be offset and the utilization of trucks and drivers improved if shippers and receivers set and kept appointments for loading and unloading instead of expecting drivers to put in long unpaid hours waiting. **FMCSA has no obligation to allow drivers to work excessively long hours a week to compensate for delays in the supply chain.** [emphasis added]¹⁵⁶

Advocates concurs with the Agency's 2011 statement, that it is not the Agency's job to permit drivers to work long hours to compensate for delays in the supply chain. In addition, drivers should not be expected to relinquish the only required off-duty rest period, shorten their consolidated sleep opportunity in the split-sleeper berth condition, or extend their duty day to account for traffic or detention time. This concern is illuminated by the Agency's statement that the proposal "would allow for additional flexibility by giving drivers the ability to make informed decisions about their work and driving time."¹⁵⁷ In support of this conclusion, the Agency cites an industry sponsored study by the American Transportation Research Institute (ATRI).¹⁵⁸ The ATRI study specifically examined the benefit of the split duty periods for addressing congestion, which is not necessarily determined by any driver's "informed decision" nor does it necessarily correlate with the time when a driver is suffering from fatigue. Moreover, the benefits noted by the study are largely limited to those for the carrier in terms of operational cost as opposed to benefits accrued by the drivers themselves.

The Agency describes the benefits of the proposal based on the ATRI study by noting that "[t]he technical memorandum demonstrated that avoiding congestion could result in moving freight the same number of miles in fewer work hours."¹⁵⁹ However, the implications of this statement are that while fewer work hours would be needed to move the same freight, this would still equate to a longer duty period on the part of the drivers. Another dangerous byproduct of this proposal, as discussed earlier in these comments, is that these extended duty periods would have drivers operating vehicles later in the duty period at times when the risk of fatigue and resulting crashes is elevated. Lastly, the Agency itself highlights a drawback of the study, namely that the estimated "impacts hinge on the availability of CMV parking, which the ATRI technical memorandum implicitly assumes is ubiquitous."¹⁶⁰ However, the FMCSA acknowledges that it is "aware that parking is not always available, especially in urban areas or heavily travelled truck corridors."¹⁶¹ What the Agency does not acknowledge is that the ATRI has identified truck parking as an issue for many years yet presented an analysis which "implicitly assumes [parking] is ubiquitous." Despite these obvious and fatal flaws, the Agency is relying upon this advocacy group's policy position as a support for the benefits of the proposal.

¹⁵⁶ Hours of Service of Drivers, FMCSA, 76 FR 81134, Dec. 27, 2011; at 81144. (2011 Final Rule).

¹⁵⁷ 2019 NPRM, at 44212.

¹⁵⁸ American Transportation Research Institute, "Technical Memorandum: Hours-of-Service Flexibility". August 2018. (ATRI 2018).

¹⁵⁹ 2019 RIA.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Sleeper Berth

As with the RIA analysis of other proposals, the FMCSA states that “[t]he proposed changes could result in efficiency gains for drivers as they would be given increased flexibility to make the most individually optimal decisions related to their schedules on a given day.”¹⁶² Again, the Agency has failed to evaluate the extent to which reducing the time for which carriers must provide the anchor (longer) sleeper berth period or the extension of the 14 hour window by excluding the shorter sleeper berth period from its calculation will be abused by carriers for operational efficiency to the detriment of drivers, fatigue and risk. That this concern is justified is illustrated clearly by the very next sentence in the RIA, where the Agency cites the 2018 ATRI technical memorandum, noting that it “demonstrated how split sleep periods of 7 and 3 hours can increase efficiency of drivers in major urban areas by allowing them to avoid peak travel times and to use these times as rest periods.”¹⁶³ The Agency provides no analysis to prove that “peak travel times” would correlate with time of fatigue or periods in the circadian rhythm when a rest break would be efficient and most beneficial. As noted above, there are other concerns with the ATRI study as it is based on an assumption of ubiquitous parking, which does not exist in many areas (as has been acknowledged by both the FMCSA and ATRI), particularly in “major urban areas.” Furthermore, the FMCSA also states in the analysis of the cost or benefits of the rule that it does “not know the number of drivers who use the sleeper berth provision today, nor the numbers who would use it under the proposed rule.”¹⁶⁴

Short-Haul Operations

As noted earlier, the FMCSA proposed to extend the allowable time for drivers operating under the short-haul exemption to return to their work reporting location from 12 hours to 14 hours. Additionally, the Agency proposes to extend the allowable air mile radius from 100 air miles to 200 air miles. With respect to the extension of the air mile radius, the Agency notes that the extension would be “consistent with the radius requirement for the other short-haul exceptions in §395.1(e)(2).”¹⁶⁵ Specifically, 49 USC 395.1(e)(2) defines the short-haul exemptions for “operators of commercial motor vehicles not requiring a commercial driver’s license [CDL].”¹⁶⁶ However, the Agency has provided no comparisons of the types of vehicles and operations which would fall under 49 CFR 395.1(e)(2) [those not requiring a CDL] and those falling under 49 CFR 395.1(e)(1) [those requiring a CDL]. Notably, those drivers operating under 49 CFR 395.1(e)(2) [those not requiring a CDL] are exempt from the 14 hour driving window and are permitted to extend the driving window up to 16 hours during 2 days in any 7 consecutive day period. Additionally, the Agency defends the expansion by highlighting that “[e]xtending the air-mile radius would not extend the driving time.”¹⁶⁷ However, this claim ignores the fact that extending the driving window for these operations will likely increase the amount of driving conducted later in the duty period, which increases the risk of fatigue and related crashes.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ 2019 NPRM, at 44212

¹⁶⁶ 49 USC 395.1(e)(2).

¹⁶⁷ 2019 NPRM, at 44213.

With respect to the extension of the 12 hours return to base limit, the Agency notes that “[d]ue to the uncertainty surrounding the driver’s eligibility at the beginning of the workday, the carrier may choose to have their driver operate as though he or she is not eligible for the short-haul exemption. This results in unnecessary ELD expenses.”¹⁶⁸ However, such a conclusion is without merit. As the Agency notes, drivers using the short-haul exemption who comply with the limitations 73% of the time (22 days in a 30 days period) would not need an ELD. The only expense would be for those drivers that exceed the short-haul requirements more than 8 days in a 30 day period. It would appear that a short-haul driver/carrier needing to exceed the limits more than 27% of the time would be characterized as having more than just “some occasions when drivers need an additional 2 hours in their workday.”

Additionally, the Agency does not characterize or indicate what portion of a carrier’s fleet would meet this limit regularly such that the cost burden would be significant. If a carrier’s operations are such that a majority of their drivers exceed the short-haul exemption limits more than 27% of the days they operate, then the carrier should likely not be afforded the short-haul exemption. The appropriate inquiry for the Agency is at what percentage of noncompliance should a driver/carrier no longer be considered a short-haul carrier? Moreover, the Agency again cites “detention time, longer-than expected customer service stops, traffic, or other unforeseen events”¹⁶⁹ as justifiable situations for extending the driving window for short-haul operations, which already enjoy exemptions from the traditional HOS. As the Agency has stated previously, it is not part of the FMCSA’s mission to allow drivers to work longer hours to compensate for delays in the supply chain.¹⁷⁰

In the case of both the extension of the driving window and the expansion of the air mile radius, the FMCSA has stated that it has not quantified a number of impacts of the proposals. Of specific concern, the Agency has conducted no evaluation of the possible abuse of the present short-haul exemption or the impacts that could result from expanding the universe of carriers and drivers who could make use of the exemption under the proposed changes. As the Agency notes, under the short-haul exemption, motor carriers must retain records “showing: The time the driver reports for duty each day; the total number of hours the driver is on-duty each day; the time the driver is released from duty each day; and the total time for the preceding 7 days in accordance with 49 CFR 395.8(j)(2) for drivers used for the first time or intermittently.”¹⁷¹ Notably absent from this list is any record of driving time or when that driving is occurring. Under the present rules, in theory, a driver using the short-haul exemption and returning to their reporting location within 12 hours would at most be able to drive 1 hour beyond the 11-hour driving limit. This situation could be exacerbated by extending the driving window to 14 hours, which would enable bad actors to abuse the exemption and accrue as many as 3 hours of driving beyond the 11 hour driving limit. In addition, drivers may continue to use the short-haul exemption despite exceeding its limitations for up to 8 days in every 30-day period, allowing them to accrue even more additional hours behind the wheel. The Agency should consider whether such abuse could

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 2011 Final Rule.

¹⁷¹ 2019 NPRM, at 44212.

be contributing to the 383% higher crash risk of short-haul operations as identified by IIHS.¹⁷² In combination the proposed extension of the driving window and the expansion of the air mile radius will only result in the reclassification of long haul operations as short-haul operations thus making them exempt from the ELD requirements.

Adverse Driving Conditions

The FMCSA proposes to allow a 2 hour extension of the driving window in response to adverse driving conditions to coincide with the current extension of the driving hours permissible under this provision. The Agency states that the proposed changes are necessary because “[t]he current provision does not allow for the extension of the 14-hour driving window (or 15 hours on-duty for drivers of passenger-carrying CMVs), and thus cannot be used if the adverse condition is encountered towards the end of that period.”¹⁷³ The Agency notes that “[t]he proposed changes would provide drivers with additional options to determine the best solution based on their situation.”¹⁷⁴ Finally, the Agency states that the “proposal would not increase the available driving time.”¹⁷⁵ As noted earlier, extending the driving window clearly allows additional driving, later into the duty period, potentially during conditions which result in additional increase in risk.

The fact is that the permitted extension of the driving time for adverse conditions and the limit on not extending the driving window have been in place for decades. The stated purpose of the extension of the driving window is strictly “to complete that run or to reach a place offering safety for the occupants of the commercial motor vehicle and security for the commercial motor vehicle and its cargo.”¹⁷⁶ The regulation places no preference on one condition or the other, and should defer to the safest options, which in time of adverse driving conditions is likely to get off the road and to a safe place. Furthermore, current rules and guidance already allow for the use of personal conveyance operations in order to locate a safe parking area.¹⁷⁷ Thus, it is likely that the additional driving window hours allowed under the proposal would increase the use of the adverse driving conditions provision for additional driving time for furtherance of the trip, as opposed to enabling drivers to get off the road, out of the adverse driving condition, and to a safe place.

The FMCSA once again admits the Agency has no data on the present or possible future use of the adverse driving conditions, particularly any current fraudulent use of that exception and how that may increase under the proposal. The Agency also admits in the RIA that they lack “information on the actual increase in efficiency that drivers experience when using the provision.”¹⁷⁸ In short, it appears that the Agency has little information on the actual costs and

¹⁷² Teoh, E.R., Carter, D.L., Smith, S., & McCartt, A.T. (2017). Crash risk factors for interstate large trucks in North Carolina. *Journal of Safety Research*, 62, 13–21.

¹⁷³ 2019 NPRM, at 44213.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ 49 CFR 395.1(b)(1).

¹⁷⁷ Hours of Service of Drivers of Commercial Motor Vehicles: Regulatory Guidance Concerning the Use of a Commercial Motor Vehicle for Personal Conveyance, FMCSA, Jun. 7, 2018, 83 FR 26377.

¹⁷⁸ 2019 RIA.

benefits of a provision which has been in effect (regardless of the varying limits on driving time and driving window) for decades but for some reason the Agency is now proposing to drastically expand as a result of drivers being required to accurately record their work hours through ELDs.

Non-quantified Costs

As part of the non-quantified costs, the FMCSA mentions that a savings to carriers and the Agency could be realized by eliminating the exemption application and processing of those exemptions. However, the Agency provides no information, for example historical evidence, that when changes are made to the HOS that a meaningful reduction in the number of exemption applications occurs. While the industry may no longer apply for exemptions for the operations addressed by the proposed changes, this does not eliminate the exemption process. There is nothing stopping carriers or drivers from continuing to request exemptions from other parts of the HOS or even from the subject part of the HOS even if the proposed changes are adopted.

Summary of Benefits

The Agency cites a number of the benefits related to dealing with congestion and detention time which are factors not necessarily aligned with fatigue and rest needs of drivers. Throughout the Notice, the Agency suggests that the proposals will benefit drivers by affording them flexibility to rest when tired. However, as noted throughout these comments, the proposals will likely lead to breaks that will be organized in response to logistical concerns and not necessarily to the benefit of the driver in terms of fatigue.

Health Impacts

The FMCSA largely relies on the specious argument that the “proposed rule does not affect the reinstated original 34-hour restart provision, and thus the health benefits estimated in the 2011 RIA would not be affected.”¹⁷⁹ The Agency also argues that the proposals will allow “drivers’ flexibility to rest, without penalty, when they are tired or in times of heavy traffic” and that “these proposal would continue to allow for an adequate consolidated time period.”¹⁸⁰ As discussed in the comments above, the Agency’s conclusions are without merit and the proposal may very well lead to the opposite result, with reduced consolidated sleep, schedules adjusted to fit carrier logistics over driver fatigue and health, and other detrimental changes to CMV operations. Most disconcerting is the Agency’s justification for the proposals in that they would allow drivers to take breaks when “tired or in times of traffic” or that “[t]he flexibilities in this proposal are intended to allow drivers to shift their drive and work time under the HOS rules in an effort to mitigate the impacts of uncertain factors (e.g., traffic, weather, and detention times)”.¹⁸¹ This is precisely part of the concerns raised by Advocates and others to the previous ANPRM.¹⁸² The likely real word consequences of these proposals will result in many carriers maximizing productivity over driver fatigue. Moreover, the Agency has given no real

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 2019 ANPRM, at 44216.

¹⁸² 2019 ANPRM, at 44203.

consideration to the possible health impacts on drivers that would be caused by these revisions to the HOS rules.

Conclusion

Further weakening of the HOS rules in response to the implementation of the ELD rule will substantially weaken public safety and is not supported by consistent, compelling and objective research showing the debilitating effects of long working and driving hours on CMV operators. In addition, these dangerous proposals come at time when large truck crashes continue to increase and driver fatigue is a factor in far too many of these tragedies. Instead of entertaining meritless applications and putting forth dangerous proposals that will further erode the HOS regulations, FMCSA should be undertaking actions that fulfill its mission to reduce crashes, injuries and fatalities involving large trucks and buses.¹⁸³



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¹⁸³ FMCSA, Our Mission, available at: <https://www.fmcsa.dot.gov/mission>.



The International Brotherhood of Teamsters

Comments On

Hours of Service of Drivers Notice of Proposed Rulemaking (NPRM)

**[Docket No. FMCSA–2018–0248]
[RIN 2126–AC19]**

**Federal Motor Carrier Safety Administration (FMCSA)
U.S. Department of Transportation**

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Introduction

The International Brotherhood of Teamsters (IBT) welcomes the opportunity to submit comments in response to the Notice of Proposed Rulemaking (NPRM), Docket Number FMCSA-2018-0248 concerning Hours of Service (HOS) of Drivers. More than 600,000 members of the Teamsters union turn a key in a truck to start their workday; these members are involved in short-haul operations, drive a tractor-trailer, a concrete truck, deliver fuel, beer, bakery goods, or drop a package at your door. Due to the large number of persons involved in motor transportation, the IBT has a strong interest in ensuring that changes to applicable regulations do not adversely affect the health, safety, or economic well-being of its membership or the safety of the driving public.

Drivers today are under pressure by carrier demands for greater flexibility and efficiency, and for the most part, are paid by the mile and work the longest hours in any industry. Previous research by Ouellet¹ in 1994 and most recently by Viscelli² in 2016 document how truck drivers continue to be subjected to long working hours, in some cases, more than 70 hours per week perhaps by logging non-driving work time as off duty. Changes to Hours of Service regulations as proposed in this NPRM only serve to increase commercial motor vehicle (CMV) driver fatigue levels with the extension of the duty-day by up to 17 hours in some cases. A 2016 study by the National Academy of Sciences revealed that the amount of sleep obtained by drivers on workdays averaged 5.0 to 6.2 hours per 24 hours period, while their sleep on off-duty days averaged 6.5 to 8.9 hours per day which attests to drivers' long working hours and lack of restorative sleep. Inadequate sleep leads to fatigue, obesity and a host of other comorbidities.³

Further, changes to this NPRM only serve to weaken the current HOS rules, nullify the positive impacts of the current ELD rule, and dangerously increase the levels of fatigue experienced by CMV drivers on our nation's roads. The US National Transportation Safety Board (NTSB) in its September 2018 comments to FMCSA's HOS Advanced Notice of Proposed Rulemaking (ANPRM) stated:

“Currently, there is no evidence to suggest that the modifications to the HOS regulations discussed in the ANPRM will improve safety...Fatigue is a significant problem in every mode of transportation, and "Reducing Fatigue-Related Accidents" is currently on the NTSB Most Wanted List. HOS regulations alone are not sufficient to prevent driver fatigue, but they are a necessary part of the overall safety system. We urge the FMCSA not to make any modifications to the HOS regulations that have the potential to reduce drivers' daily sleep, extend their time awake or driving, or foster inverted or unpredictable schedules.”

¹ Ouellet LJ (1994) *Pedal to the Metal: The Work Lives of Truckers*. Philadelphia, PA: Temple University Press.

² Viscelli S (2016) *The Big Rig: Trucking and the Decline of the American Dream*. Oakland: University of California Press.

³ Commercial Motor Vehicle Driver Fatigue, Long-Term Health, and Highway Safety: Research Needs (2016), National Academy of Sciences.

The Teamsters Union has historically been involved in numerous iterations (2003, 2005, 2008, 2011, and 2013) of the Hours of Service regulations. The scientific studies and sound data referenced in previous iterations on driver fatigue relative to longer duty days and shiftwork has not changed. Reinterpretation or recalculation of published and peer-reviewed data by FMCSA would be imprecise, introduce bias, and generally not considered best practice. Further, when extrapolating data from one group to another, the reference group should have a similar profile to the comparative group. In this NPRM, FMCSA incorrectly extrapolated MCMIS crash data from a study of Ready Mix⁴ concrete drivers to form a basis for short-haul HOS regulation changes that affect CMV drivers in a host of dissimilar industries. The assumption that crash risk data from concrete truck operators can be used to estimate the crash risk for CMV operators in other industrial sectors is not scientifically valid as the scope of work between concrete truck operators and other CMV drivers is incomparable. Additionally, in contrast to FMCSA's conclusion, interviews of Teamster membership who work in the Ready-Mix industry indicate that working 14-hour days in a 6-7day operation significantly increased driver fatigue levels which have already been shown to also have a negative effect on crash risk. Initiating changes to HOS regulations that affect the health and safety of hundreds of thousands of CMV drivers based on imprecise data analysis would be contrary to FMCSA's mission "to reduce crashes, injuries and fatalities involving large trucks and buses."⁵

The Federal Motor Carrier Safety Administration (FMCSA) states, in part, that the "Legal Basis for the Rulemaking", includes authority granted pursuant to the Motor Carrier Safety Act of 1984. Within this regulatory authority, the FMCSA is obliged to consider that, "[4] the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators [.]", (U.S.C. 31136(a)). An increase to the driver's duty day across the board as proposed in this NPRM does not consider the deleterious effect that change will have on the physical condition of the operator and the serious safety consequences to both drivers and the motoring public.

Discussion

The IBT Safety and Health Department conducted a survey of affected Teamster membership regarding FMCSA's proposed changes to Hours of Service regulations affecting short-haul operations for CDL qualified drivers (§ 49 CFR 395.1(e)(1)), the adverse driving conditions rule (§ 395.1(b)(1)), the 30-minute rest break requirement for drivers who do not qualify for the short-haul exemption (§ 49 CFR 395.3(a)(3)(ii)), the sleeper berth regulation (§395.1(G)(1)), and regulations governing the split duty period (§ 395.3(a)(3)(iii)). Survey responses represent a cross-section of our membership located across the United States in a myriad of transportation sectors, including short-haul and long-haul operations.

⁴ "The Agency analyzed concrete mixer crashes before and after the FAST Act allowed ready-mix concrete operators up to 14 hours to return to their work reporting location under the short-haul provision. A review of the MCMIS crash data found that extending the short-haul exemption from 12 to 14 hours did not statistically increase the share of concrete mixers involved in crashes."

⁵ <https://www.fmcsa.dot.gov/mission>

Below you will find our response to this NPRM including responses to specific questions posed by FMCSA, which are largely based on an analysis of the survey responses from our membership.

A. Short-Haul Operations

The trucking industry ranks among the industries having the highest occupational illness and injury rates in the United States and the worker's compensation costs to motor carriers are tremendous. According to Bureau of Labor Statistics (BLS) data for 2017, the non-fatal occupational incidence rate for truck transportation, nationally, was 4.2 injuries per 100 workers as compared to 2.8 injuries per 100 workers for private industry.⁶ Several studies show that the majority of work-related injuries occurring among truck drivers result from non-driving work activities.⁷ When researchers further investigated these findings they found that the types of injuries experienced by truck drivers varied by industry sector but were generally associated with falling from heights, trips, slips, falls, and overexertion due to manual materials handling.

Drivers who are involved in short-haul operations experienced occupational injuries primarily while performing three activities: "(1) Operating the truck; (2) lifting/cranking; and (3) maneuvering into/out of the truck cab⁸." Chandler, et.al, in further describing injuries, indicated that incidents which occurred while operating the truck included losing control of the truck, being struck from behind by another vehicle, and musculoskeletal injuries associated with extended routine driving. With respect to lifting/cranking related injuries, the researchers found that drivers were injured while manually handling cargo, connecting dollies, and lifting/adjusting ramps to the trailers. Researchers also reported that drivers experienced injuries due to trips, slips, and falls as they entered or exited the truck cab and trailer.

Commercial drivers, including short-haul drivers, disproportionately experience musculoskeletal injuries and illnesses. The National Institute for Occupational Safety and Health (NIOSH) conducted a review of over forty studies that investigated the relationship between low-back pain/disorders and determined that there is strong evidence that correlates physical workplace factors such as heavy physical work, lifting, bending and twisting, whole-body vibration (WBV), and static work postures with low back pain/disorders.⁹ All of these contributing factors to low-back pain/disorders are present in commercial driving, particularly in short-haul operations. This is critical when one considers that according to the American Industrial Hygiene Association (AIHA) a survey conducted by the organization in 2003, MSDs cost the trucking industry approximately \$4 billion dollars each year.¹⁰ The Bureau of Labor Statistics reported that

⁶ Bureau of Labor Statistics, 2017.

⁷ Friswell, Williamson, Accident Analysis and Prevention, 2010 Nov; 42(6): 2068-74.

⁸ Chandler, M., Bunn, T.L., Slavova, S., International Journal of Injury Control and Safety Promotion, 2017, Vol. 24, No. 1, 120-130.

⁹ <https://www.cdc.gov/niosh/docs/97-141/pdfs/97-141.pdf?id=10.26616/NIOSH/PUB97141>

¹⁰ American Industrial Hygiene Association, 2003, "American Industrial Hygiene Association position statement on ergonomics [online]. Available from: <http://www.aiha.org/1documents/Government> Affairs/P-ergonomics 091403.pdf

workers in truck transportation experienced work-related musculoskeletal disorders at a rate of 62.3/10,000 workers as compared to 28.6/10,000 for private industry.¹¹

Short-haul drivers will experience increased fatigue as a result of having to work an extended number of hours and concurrently experience more fatigue-related occupational injuries and crashes. The National Institute for Occupational Safety and Health (NIOSH) published a report that summarized over 50 studies that investigated the impact that long working hours have on illnesses, injuries, health behaviors, and job performance.¹² Studies showed that workers who worked long shifts, i.e., 12 or more hours, each day and more than 40 hours per week experienced an increase in occupational injuries and “a pattern of deteriorating performance on psychophysiological tests.”¹³ This is of significant concern when considering the fact that short-haul commercial drivers perform safety-sensitive job functions such as operating large trucks in oftentimes congested areas that are shared with passenger vehicles and pedestrians.

In 1996, NIOSH conducted an ergonomic study for drivers in the soft beverage delivery industry during which the researchers evaluated drivers over a four month period.¹⁴ Researchers found that drivers had to routinely lift products that exceeded the recommended weight limit per the NIOSH Lifting Criteria.¹⁵ In addition, researchers collected data on the driver’s heart rates to estimate metabolic output and determined that such drivers worked in a job that required a high level of energy. Drivers in this physically demanding job also experienced twice as many lost workdays when compared to workers in general manufacturing jobs. Although the study was conducted over twenty years ago, members of the Teamsters Union who have high tenure in the industry reported that not much has changed and that the changes that have occurred are generally not an improvement. For example, these drivers reported that traffic conditions are much worse; parking for large vehicles is more limited; they continue to have to manually deliver large quantities of heavy products such as cases and kegs while negotiating stairs, curbs, ramps, narrow entrances and exits to buildings, and having to perform these job tasks in inclement weather (heat, cold, ice).

Q&A:

- ***Will drivers drive farther or longer in the driving window under the short-haul exception?***

The proposed change extending the maximum allowable workday for property and passenger carrying CDL drivers under § 395.1(e)(1) short-haul exception from 12 to 14 hours as well as an extension of the air-mile radius from 100 to 150 air miles would in fact increase both the driver’s vehicle miles traveled (VMT) and actual hours of on-duty time leading to an increased number of fatigued drivers on the road.

¹¹ Bureau of Labor Statistics, 2018.

¹² <https://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf>

¹³ Ibid, p. 27

¹⁴ <https://www.cdc.gov/niosh/docs/96-109/pdfs/96-109.pdf?id=10.26616/NIOSH PUB96109>

¹⁵ <https://www.cdc.gov/niosh/docs/94-110/pdfs/94-110.pdf>

A vast majority of property-carrying CDL drivers who currently qualify for the short-haul exception indicated in survey responses that they are already performing or will likely be assigned work that will either increase VMT or be required to perform more non-driving tasks that extend the workday to 14 hours. As FMCSA is already aware, and stated above, this increased workload and extended 14hr workday has a negative effect on driver fatigue and safety which leads to an increase in Safety Critical Events (SCEs). Survey respondents had this to say about productivity pressures and the effects proposed changes to the Short Haul exception would have on the workday:

“This is happening now. The company is bringing drivers in early to shift (yard jockey) prior to performing their road assignment. This includes “local drivers” who start earlier and end up being sent out “on the road” ending up with 14-hour days [vs 12hr days under short-haul exception] due to INADEQUATE STAFFING.”

“Drivers will be forced into performing more work such as unloading, reloading and more driving due simply to the extension in the workday under the proposed changes. Five days per week at 12 hours per day is more than enough, let alone 5 days at 14 hours per shift. Creating a family-sustaining lifestyle is absolutely not conducive under this initiative; this proposal needs to go away.”

“It will increase our double turn locations. They [carriers] will be able to require us to travel more miles per day when I am already tired.”

Survey respondents stated that an increase in the duty day from 12 to 14 hours will lead to an increase in on-duty/ non-driving tasks as described below:

- a. loading/unloading (typically performed prior to performing driving duties),
- b. increase in the number of stops per route,
- c. dock work,
- d. yard work,
- e. dropping and hooking trailers,
- f. vehicle shifting,
- g. warehouse work,
- h. stocking,
- i. paperwork.

The FMCSA is incorrect in the assertion that extending the air-mile radius from 100 to 150 air miles will not increase market demand for services, and thus would not result in increased vehicle miles traveled (VMT). Public demand for two-day shipping or “just in time” delivery has served as the impetus for the movement of freight volume from rail transport to trucking to fulfill this need. This new market coupled with the proliferation of mileage runs as a result of the burgeoning gig economy would most definitely ensure an increase in VMT by CMV drivers. Thus, extending the driving window to 14 hours will further encourage shippers to increase

CMV freight volume while having a stagnant effect on increasing staffing levels to maximize profits resulting in increased driver fatigue and elevated crash risk.

The FMCSA is correct in assessing that changes to the short-haul exception would allow more drivers or more trips to be eligible for the short-haul exception and thus excluded from the requirement to take a 30-minute break, prepare daily RODS, or use an Electronic Logging Device (ELD). One of the most effective tools in monitoring driver compliance with HOS regulations is the use of ELDs. It is widely known throughout the industry that prior to implementation of the ELD rule there was an epidemic of falsifying HOS records. FMCSA reports that since the implementation of the ELD rule the percentage of driver inspections with an HOS violation has decreased 39 percent.¹⁶ The National Transportation Safety Board has consistently promoted ELD use in its comments and routinely relies on ELD data in its investigations to help ensure drivers are not driving fatigued. NTSB also notes that the ELD requirement has not been in place long enough to yield meaningful data. FMCSA should wait until after full implementation of the ELD rule before recommending any changes. Adding two additional hours to the driving window under the short-haul provision could lead to misuse of the exception and greater undocumented noncompliance as ELDs are not required under the short-haul exception. Expanding this provision beyond its limited scope as proposed in the NPRM will likely turn the exception into standard operating procedure for some carriers and independent operators. Such a change would put driver health and safety and the safety of the motoring public at increased risk.

- ***Would this be different than these loads being hauled by drivers complying with the ELD requirements?***

The current Hours of Service Regulation for non-CDL qualified commercial drivers who use the short-haul exception allow drivers to work 14 hours each day, extend the workday to 16 hours two times each week and drive up to 11 hours each day. According to BLS data these drivers have a higher rate of injury and severity of injury (based on the number of lost workdays per injury) than other commercial drivers, i.e., non-CDL drivers who do not use the Short-Haul provision and CDL qualified drivers. It should be noted that CDL qualified drivers operate larger trucks that are able to carry more freight that is larger and heavier than what is typically transported and delivered by non-CDL drivers. Therefore, one can reasonably expect injury rates to increase among CDL qualified short-haul drivers if the number of hours that they are permitted to work increases.

- ***Will the elimination of the 30-minute break requirement for drivers that are potentially driving later in their duty period impact safety?***

¹⁶ FMCSA, Electronic Logging Devices: Improving Safety Through Technology; available at: <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/regulations/enforcement/406471/eld-info-graphic-6-month-update-f2508621.pdf>

The Agency is incorrect in its conclusion that extending the air-mile radius and the workday would not have an adverse impact on safety. The Advocates For Highway & Auto Safety in their response to the August 2018 ANPRM (Hours of Service of Drivers) stated,

“Many researchers, as well as the FMCSA, have shown that the risk of having a crash rapidly increases after the 8th or 9th consecutive hour of driving.¹⁷ Research conducted for the FMCSA confirms that crash risk increase as time spent driving increases for drivers from at least the 7th through the 11th consecutive hour of driving.¹⁸ An additional FMCSA study shows that driving towards the end of the 14-hour shift, that is, more than 10 hours after reporting for duty (i.e., during hours 10 through 14 in a driver’s workday) increases crash risk as reflected in safety-critical events.”¹⁹

The science has not changed. The IBT believes that eliminating the requirement for a 30-minute break after 8 hours of coming on-duty would have a severe impact on safety; as data already proves crash risk significantly increase after the 7th consecutive hour of a driver’s workday.

B. Adverse Driving Conditions

The IBT recommends that there be no changes to the “Adverse Driving Conditions” definition. However, if a driver encounters a situation that meets the current definition of “Adverse Driving Conditions” and elects to use the provision, it is reasonable to allow the driver to extend his/her “Driving Window” time by two hours. It is critical that after using the provision and working up to 16-hours on that particular day, the driver has at least 10 consecutive hours of off-duty time prior to performing safety-sensitive job functions.

Q&A:

- ***Will this change drivers' behavior when encountering adverse conditions? How so?***

A majority of survey respondents indicated that driver behavior would change when encountering adverse conditions if the driving window was extended by two hours. Drivers indicated that the extra time would enable them to drive slower and not feel the pressure of the 14-hour clock in an effort to get home or to a safe location.

¹⁷ 65 FR 25539 (Apr. 2000); Saccomano, F., et al., “Effect of Driver Fatigue On Truck Accident Rates,” Urban Transport and the Environment for the Twenty-First Century (ed. L.J. Sucharov), Computational Mechanics Publications, Southampton, U.K., 439-446 (1995); Saccomano, F. and Shortread, J., “Truck Safety: Perceptions and Reality,” the Institute for Risk Reduction, Ontario, Canada, 157-174 (1996); Lin, T. et al., “Time of Day Models of Motor Carrier Accident Risk,” Transportation Research Record 1467: 1-8, Transportation Research Board, National Research Council, (1994); Frith, W., “A Case-Control Study of Heavy Vehicle Drivers’ Working Time and Safety,” Proceedings of the Australian Road Research Board Conference, 17(5): 17-30 (1994).

¹⁸ Jovanis, J.P., Wu, K.F., and Chen, C., “Hours of Service and Driver Fatigue –Driver Characteristics Research,” FMCSA (April 2011), DOT docket number FMCSA-2004-19608-27614.

¹⁹ Blanco, M., Hanowski, R., Olson, R., Morgan, J., Soccolich, S., Wu, S.C., and Guo, F., “The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Vehicle Operations,” FMCSA (April 2011), DOT docket number FMCSA-2004-19608-27612.

“The driver will have more time to get the miles in and be safer doing it instead of less time and have to be rushed”

- *Understanding adverse conditions cannot be predicted, will drivers utilize this provision more often after this change?*

65% of survey respondents indicated that they do not anticipate using this provision more often.

- *Should the knowledge of the existence of adverse conditions rest with the driver rather than the dispatcher?*

There should be no change in the rule. Carriers/dispatchers have access to technology that provides real-time alerts, has the ability to predict road conditions/ traffic congestion, and forecast adverse weather conditions. Drivers also have the capability of communicating with dispatch to alert them of immediate or unforeseen changes in road conditions. Further, drivers currently retain the right to make decisions regarding the safe operation of their vehicles as afforded by their right to refuse dangerous or unsafe work processes under the FMCSA’s “Prohibiting Coercion of Commercial Motor Vehicle Drivers” Final Rule.²⁰

C. 30-Minute Break

This International Union strongly supports the regulatory provision that requires drivers to take a rest break of at least 30 minutes within the first 8 hours of coming on duty and this break should not stop the 14-hour clock. The Union regularly negotiates language into collective bargaining agreements with motor carriers requiring mandatory rest breaks and lunch periods. This requirement is particularly important for drivers such as those who use the short-haul exception because these drivers are required to operate large commercial motor vehicles (CMVs) in congested areas that are shared by passenger cars, other large trucks, and pedestrians. These drivers are also required to perform heavy work that demands high metabolic energy output, such as loading, unloading, and delivering freight. This fatiguing work is often completed prior to commencing driving duties; therefore it is particularly important for these drivers to have the opportunity to take off-duty rest breaks after 8 hours, regardless of driving time, especially during periods when there are temperature extremes. In contrast to what FMCSA described in the “Safety Rationale”, drivers taking a 30-minute break in an on-duty/non-driving status would not receive the intended benefit afforded in the current requirement as on-duty/non-driving tasks can be fatiguing as described above. Eliminating the 30-minute rest break will result in an increase in driver fatigue and crash risk. Research conducted by Belenky, et.al demonstrates that crash risk increases as time spent driving increases for drivers from at least the 7th through the 11th consecutive hour of driving.²¹

²⁰ Prohibiting Coercion of Commercial Motor Vehicle Drivers authorized by section 32911 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Motor Carrier Safety Act of 1984 (MCSA) . <https://www.govinfo.gov/content/pkg/FR-2015-11-30/pdf/2015-30237.pdf>

²¹ 76 FR 81154.

Q&A:

- *Do you expect to still take a 30-minute break if you have less than 8 hours of drive time? If so, would you take that break on-duty or off-duty?*

More than half of survey respondents would take their 30-minute break as off-duty even if less than 8 hours of driving time has passed since their last change in duty status.

- *If you no longer need to take a 30-minute break, how do you expect to spend this additional time?*

Survey respondents overwhelmingly indicated that the 30 min break is necessary to reduce fatigue and if eliminated would contribute to driver discipline for taking “unscheduled breaks” when they felt fatigued. Respondents also reported that the carriers are likely to pressure drivers to increase productivity by requiring drivers to perform additional on-duty/ non-driving tasks.

- *What would be the safety impact of eliminating the required break, potentially allowing up to 11 consecutive hours of driving?*

Belzer, et.al. discuss the link between compensation and safety in a paper titled “Why Do Long Distance Truck Drivers Work Extremely Long Hours?”²²

“While previous research has shown the relationship between compensation and safety, research has not explained why higher pay leads to greater safety. This research, supporting the target earnings hypothesis, has shown that as pay increases above target earnings, drivers prefer a job package associated with fewer work hours. As driver hours decrease, at the margin, trucking becomes safer. In other words, truckers drive fewer miles and work fewer hours, are less likely to change jobs, and are less likely to have a crash.”

Compensation structures and negotiated language regarding driver break periods at unionized motor carriers have a proven positive effect on CMV driver safety. Eliminating the regulatory requirement for a rest break would, therefore, have a deleterious effect on CMV driver safety.

D. Sleeper Berth

The IBT had numerous discussions with Teamster team drivers regarding their work practices concerning on-duty and off-duty and time spent in the sleeper berth. The majority of Teamster team drivers who were contacted indicated that they preferred having more flexibility in the time that they can obtain restorative rest periods while using a sleeper berth. Therefore, the IBT supports allowing drivers to split sleeper berth time into two time periods as described in the

²² Michael H. Belzer, Stanley A. Sedo. Why do long distance truck drivers work extremely long hours? The Economic and Labour Relations Review Volume: 29 issue: 1, page(s): 59-79. September 18, 2017.

study conducted by Belenky, et.al.²³ In this study, the researchers determined that commercial drivers can obtain restorative sleep when allowed to use a split sleeper berth rest period ranging from 10 consecutive hours in the sleeper berth to 5 hours in the berth and 5 hours of driving time.

E. Split-Duty Period

Scientific research documented in the 2003 and 2008 HOS rule changes detail the deleterious effects of split duty provisions on driver fatigue levels. The IBT believes that if drivers are permitted to use a split duty period, which will effectively extend the workday, the consequence will be a decline in the safety of these drivers and the motoring public with whom they share the road.

“To enhance the effect of increased off-duty time, the Agency also reduced the driving window. Before 2003, the misnamed “15-hour rule” allowed driving within a 15-hour window after coming on duty—but off-duty time taken during that work shift was not included in the 15 hours. The result was drivers possibly being at the wheel 18 or 20 hours after coming on duty, without having had any significant rest. The 2003 rule, therefore, allowed driving only within a fixed 14-hour window after coming on duty; off-duty time no longer stopped the clock. The combination of 10 hours off duty and a 14-hour driving window greatly increased the number of drivers who would maintain something close to a 24-hour schedule. Circadian regularity contributes to fatigue-avoidance; the longer off-duty requirement and the shorter driving window combined to improve significantly the likelihood that truck drivers would be adequately rested before taking to the highway.”²⁴

We believe that allowing up to a 3-hour pause in the driving window does not necessarily translate to a decrease in driver fatigue levels. Further, survey respondents cautioned that shippers and receivers would use the provision to further exploit drivers as it would contribute to longer detention times.

“In 2001, a Federal Motor Carrier Safety Administration (FMCSA) sponsored study found that drivers with more loads with longer-than-expected load times were associated with more driver fatigue (Crum, M. & Morrow, P., 2001). In this study, drivers reported that about 18 percent of their work time was used for schedule delays due to long wait times. Additionally, the study found a strong positive relationship between the percent of time spent loading and unloading and crash involvement.”²⁵

²³ Gregory Belenky, MD, Melinda L. Jackson, PhD, Lindsey Tompkins, Briann Satterfield, and Amy Bender, “Investigation of the Effects of Split Sleep Schedules on Commercial Vehicle Driver Safety and Health”, 2012, U.S. Department of Transportation, Federal Motor Carrier Safety Administration.

²⁴ 73 FR 69567

²⁵ FMCSA-RRR-13-060. <https://rosap.ntl.bts.gov/view/dot/193>

Q&A:

- *Do you anticipate any fatigue impacts on driving up to the 17th hour of a duty day?*

Over half of all respondents indicated that fatigue levels would be negatively impacted by driving up to the 17th hour of a duty day. Respondents further indicated that this would severely impact their family life by giving them less time to be at home during waking hours to spend time with their family and less time to attend to personal business. A survey respondent provided the following comment:

“I am TIRED and this will increase my fatigue level. I am over 60 years old and I need seven to nine hours of sleep to be safe. I live 35 minutes from work that is a 1hr 10min commute that detracts from my 10 hours off-duty. So now I only have 8 hours and 50 min left of my 10 hours off-duty to rest. It takes us 15 minutes to clock-out and clock-in, so that is another 30 minutes subtracted from my 10 hours off-duty leaving me with 8hrs 20min to rest. I shower when I get home and before leaving for work which subtracts about another 20 minutes leaving me with only 8 hours to rest. But, I have not eaten yet. So, changing this rule to extend the workday will add to my fatigue level because as you can tell I already don’t get enough sleep. This is not just my situation but many of us drivers. Instead of increasing the workday drivers need an increase in off-duty time from 10 hours to 12 hours.”

- *How would the up to 3- hour break impact that fatigue level?*

Survey respondents indicated that having a 3-hour pause in the driving window would not equate to a decrease in fatigue levels as off-duty pauses can be more fatiguing than being active. Drivers of non-sleeper berth equipped trucks further indicated that there is no real way for them to rest during a 3-hour pause and it would increase stress levels.

Conclusion

In previous revisions to the Hours of Service regulations, the IBT supported modifications to Hours of Service rules that reduce continuous duty or driving time, encourage break-taking, promote nighttime sleep, and scheduling patterns that are predictable and consistent. The proposed revision to the Hours of Service regulations as detailed in this Notice of Proposed Rulemaking is an attempt to effectively “rollback” many of the regulatory improvements thus far and in our opinion will have a deleterious effect on the safety and health of our driver members and to the motoring public who share the road with other CMV truck drivers.

The IBT appreciates the opportunity to submit comments regarding this NPRM and will continue to actively engage with the FMCSA and stakeholders in the trucking and safety advocacy communities to promote regulatory policies that are protective of our driver membership and the driving public.



October 21, 2019

Docket DOT-FMCSA-2018-0248
 Docket Management Facility, M-30
 U.S. Department of Transportation
 West Building
 Room W12-140
 1200 New Jersey Avenue, S.E.
 Washington, D.C. 20590-0001

Proposed Changes to Hours of Service Rules; Notice of Proposed Rulemaking
83 Federal Register 42631, August 23, 2018

These comments are filed jointly by the Truck Safety Coalition (TSC), Citizens for Reliable and Safe Highways (CRASH), Parents Against Tired Truckers (PATT) and our volunteers, who are the family and friends of truck crash victims and survivors seeking truck safety advances. We write these comments in response to the Federal Motor Carrier Safety Administration's (FMCSA, Agency) notice of proposed rulemaking (NPRM) requesting comments on unstudied, unsafe proposed changes to the Hours of Service (HOS) regulations, including:

- Extending the driving window from 12 hours to 14 hours and extending the distance from 100 air miles to 150 air miles;
- Extending by two hours the maximum window during which driving is permitted under the adverse driving conditions exemption to the HOS rules;
- Requiring a break after eight hours of driving time instead of on-duty time, and allowing the requirement to be satisfied by an on-duty break from driving, rather than requiring an off-duty break;
- Allowing drivers to split their required 10 hours off-duty into two periods: one period of at least seven consecutive hours in the sleeper berth and the other period of not less than two consecutive hours, either off-duty or in the sleeper berth; and
- Allowing one off-duty break of at least 30 minutes, but no more than three hours, that would pause a truck driver's 14-hour working window, provided the driver takes 10 consecutive hours off-duty at the end of the work shift.

The FMCSA should immediately withdraw all five of these proposals. By themselves, each will have a deleterious effect on truck safety by increasing the already long work day of truck drivers. However, if they are used in concert and without restrictions on which carriers may employ them, the results could be devastating and do nothing to reverse the rising number of truck crash deaths, which are up 41 percent since 2009.

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There is compelling research that found lengthening a work day results in increased injury risk to a worker. One study found that injury risks go up after eight hours on task, with a 30 percent increase on a 12-hour task.² This corroborates the findings from an earlier major meta-analysis of relative risk of performance lapses over the course of various shift durations that found risk was approximately doubled after 12 hours of work and trebled after 14 hours of work.³ More recently, a study was performed to identify associated factors with multidimensional driving risks, specifically focusing on fatigue, sleep quality, daytime sleepiness, and health status among Korean occupational drivers; one of the key findings: “those working for longer than 12 hours per day... were a vulnerable group.”⁴

The reality is that even if the same number of hours are logged on duty or driven, they would result over a longer elapsed time which would result in a longer day overall.

30-Minute Break

FMCSA’s Proposed Change:

- **Require a break after eight hours of driving time instead of on-duty time, and**
- **Allow the requirement to be satisfied by an on-duty break from driving, rather than requiring an off-duty break.**

At a time when truck crash deaths are up 41 percent and truck occupant deaths are at their highest levels since 1989, the FMCSA’s cannot advance these changes based on “[anticipating] that the same level of safety can be achieved by (1) allowing the driver to take a break while on-duty but not driving.” The Agency should instead provide persuasive evidence that removing the requirement of a 30-minute break after 8 hours of on-duty time will improve safety. As noted above, the agency’s acknowledgement that these proposed “changes to the 30-minute break provision... do not involve any increase to the 11-hour driving limit” does not discount the research that shows “that time-on-task across 14 hours of work impacts risk. The risk of being involved in an SCE generally increased as work hour increased. That is, driving time that occurred later in the driver’s workday, due to performing non-driving tasks earlier in the workday, had a negative safety effect.”⁵

In fact, Simo Salminen, a senior researcher at the Finnish Institute of Occupational Health, reviewed eight studies that showed the “risk of occupational injury was 41 percent higher for 10-hour working days compared to 8-hour working days... [and] when working more than 12 hours per day, three studies showed a 98% increase in involvement in occupational injury. The results

² Folkard, Simon, and David A. Lombardi. “Modeling the Impact of the Components of Long Work Hours on Injuries and ‘Accidents.’” *American Journal of Industrial Medicine*, vol. 49, no. 11, Nov. 2006, pp. 953–963., doi:10.1002/ajim.20307.

³ Folkard, Simon. Time On Shift Effects In Safety: A Mini-Review, Abstract in the Shiftwork International Newsletter, May 1995, 12:1, Timothy Monk, ed., presentations from the 12th International Symposium On Night- and Shiftwork, Ledyard, CN, June 13-18, 1995.

⁴ Kwon, S., Kim, H., Kim, G.S., Cho, E., 2019. Fatigue and poor sleep are associated with driving risk among Korean occupational drivers. *J. Transp. Health* 14, 100572. <https://doi.org/10.1016/j.jth.2019.100572>.

⁵ Susan A. Soccolich, Myra Blanco, Richard J. Hanowski, Rebecca L. Olson, Justin F. Morgan, Feng Guo, Shih-Ching Wu. An analysis of driving and working hour on commercial motor vehicle driver safety using naturalistic data collection, *Accident Analysis & Prevention*, Volume 58, 2013, Pages 249-258,

above but is worth reiterating: “driving time that occurred later in the driver's workday, due to performing non-driving tasks earlier in the workday, had a negative safety effect.”⁸

The proposal also does not limit the use of the 17 hour window throughout the workweek. We urge the Agency to study the effects this will have on cumulative fatigue, which has been acknowledged as a serious, but ultimately preventable, safety concern.

We have concerns that this may be used by high risk carriers and/or in concert with existing exceptions, like the one that exists for the transportation of livestock. Used together by a high risk carrier, this could allow an unsafe truck driver to operate well over 24 hours continuously because “time spent working within the 150 air-mile radius does not count toward the driver’s daily and weekly limit.”⁹

Conclusion

We take this opportunity to remind the FMCSA that their statutory mission is to have “Safety as [its] Highest Priority.” None of the proposed changes demonstrate a commitment to that mission because the Agency has failed to provide proof that any of the changes will actually improve safety. All five proposals should be withdrawn.

⁸ Susan A. Soccolich, Myra Blanco, Richard J. Hanowski, Rebecca L. Olson, Justin F. Morgan, Feng Guo, Shih-Ching Wu. An analysis of driving and working hour on commercial motor vehicle driver safety using naturalistic data collection, *Accident Analysis & Prevention*, Volume 58, 2013, Pages 249-258

⁹ <https://www.fmcsa.dot.gov/hours-service/elds/eld-hours-service-hos-and-agriculture-exemptions>