

Comments to Docket No. FMCSA-2010-0167, RIN 2126-AB20

**Electronic On-Board Recorders and
Hours of Service Supporting Documents**

by William B. Trescott

The proposed rule published in the Federal Register on page 5537 of Vol. 76 is contrary to law because searching personal papers such as electronic documents when devices are available to prove compliance beyond doubt violates 4th Amendment rights. 5 U.S.C. § 706(2)(B). Once a device has automatically determined that a driver or carrier is in compliance with the rules, there can be no probable cause for law enforcement officers to obtain personal information or examine supporting documents.

The final rule must amend the Agency's policies and practices regarding its collection and storage of HOS records. HOS information recorded on EOBR's must be accessible to Federal and State enforcement personnel only when violations are detected by the device, not whenever compliance assurance activities are conducted at roadside. The Agency is required to ensure that such devices are not used to "harass vehicle operators" who are in compliance with the regulations. 49 U.S.C. 31137(a). 76 FR 5540.

This NPRM would significantly increase the likelihood of HOS data being abused. As admitted in the NOPR, "accessibility, accuracy, and reliability of geospatial location information has made electronically generated and preserved data attractive to a variety of audiences." 76 FR 5552. **The final rule must therefore ensure that information about drivers' personal locations (or activities) can only be obtained only by means of a court ordered search warrant.**

Almost one hundred years ago, the Supreme Court provided three tests to determine whether employees are on duty or off duty, ruling:

"Employees, though inactive, are none the less on duty...
[1]where they are under orders,
[2]liable to be called upon at any moment, and
[3]not at liberty to go away."

Missouri K.&T. Ry. Co. v. United States. 231 U.S. 112 (1913). Today, any driver with a cell phone is "liable to be called upon at any moment." Busses, taxis, and streetcars are rarely available. Hitchhiking is unsafe. Unless alternate transportation is nearby, drivers tracked by GPS who are "under orders" not to drive their trucks are no more "at liberty to go away" than an ex-con wearing an ankle bracelet! The Court also ruled that even if employees had nothing to do, they remained on duty if "their duty was to stand and wait." *id.* Therefore, **drivers must be able to drive their vehicles to go off duty.** In the past, off duty driving did not alter duty status. Under the proposed rule, off duty driving could be recorded as a violation—preventing some drivers from traveling to obtain adequate rest. Whether a break constitutes complete relief from duty is a question for a jury to decide. *United States v. Mississippi Export Railroad Co.*, 321 F. 2d 583 (1963).

49 U.S.C. § 31502(b) states:

“Motor Carrier and Private Motor Carrier Requirements. - The Secretary of Transportation **may** prescribe requirements for...hours of service of employees of...a motor carrier” (emphasis added).

There is nothing in this statute that could be construed as authorizing the Agency to monitor or record drivers’ locations. Selective Availability makes GPS undesirable for HOS enforcement. A driver parking overnight at a customer’s location could load or unload without any vehicle movement being detected—fraudulently logging on-duty-not-driving time as off duty. If Selective Availability was active, a GPS equipped EOBR might falsely report a vehicle violating the speed limit. An agency’s rule is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem.” *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43(1983). 49 U.S.C. § 113(b).

CONCLUSION

The Agency should consider a less expensive option. Smart card EOBR’s¹ are mechanically identical to inexpensive \$25 wireless bicycle cyclometers. They can be programmed to electronically broadcast alarm signals if hours of service violations are detected and erase personal information if a driver complies with the rules. As non-programmable solid state recording devices, they are tamper-proof. Since even small vehicle movements can be detected, such as moving from a driveway to a loading dock, EOBR’s can be fully automatic without any need for the driver to push buttons to record changes in duty status.

Respectfully Submitted,

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¹ A transmitting unit attached to the transmission of a truck detects motions of its drive shaft. If a valid driver’s license card is not present in the cab or if the data stored on the card reveals that a driver is in violation or not qualified to operate the vehicle, a silent alarm incorporating a record of duty status will be broadcast when the drive shaft begins to turn. If no violation is detected, an updated record of duty status will be wirelessly stored on the card. For a complete description, see www.truckingvideo.com/hos.htm.