

LAWYERS WEEKLY USA

Issue 2005-19 / 2005 LWUSA 521

September 12, 2005

A Bi-Weekly Newspaper From  DOLAN MEDIA COMPANY

<http://www.lawyersweeklyusa.com>

\$10.00 per copy

Federal Trucking Rules Reinstated

By Nora Lockwood Toohar

The Bush administration has reinstated rules extending the allowable driving hours for commercial, long-haul truckers, despite a D.C. Circuit decision last July finding the rules "arbitrary and capricious" and a threat to drivers' health.

Public safety advocates decried the action by the Federal Motor Carrier Safety Administration, which re-

instates hours-of-service rules issued in 2003.

The D.C. Circuit had vacated the 2003 rules and ordered the FMCSA to revise them to take into account drivers' health.

The new version, however, is almost identical to the old one. The rules, which go into effect Oct. 1, increase both the consecutive hours each day and the total number of hours each week that commercial, long-haul

truckers are permitted to drive.

The regulations:

- Increase the limit for consecutive driving for long-haul truckers to 11 hours, up from the 10-hour limit that had been in effect until 2003. However, they also shorten the total workday (including non-driving time) to 14 hours, down from 15.
- Allow up to 60 hours of interstate

driving over a seven-day period and 70 hours over an eight-day period. But the rules also allow a driver to restart a seven- or eight-day work week after 34 hours off-duty. That means that a driver could actually drive 77 hours in a seven-day period if he took 34 hours off before the close of the weekly limits, the D.C. Circuit noted in its decision.

Eliminate a requirement that short-haul drivers log the number of hours a day that they work.

However, the rules do include a change requiring drivers with sleeper berths to spend at least eight consecutive hours in the berth. Drivers were previously allowed to split up rest periods.

'Virtually Unchanged'

Public Citizen, a Washington-based public advocacy group, called the new regulations a "disappointment," and described them as "virtually unchanged" from the rules struck down by the D.C. Circuit.

"The danger that big rigs pose to America's drivers is growing," Public Citizen president Joan Claybrook said in a statement. "The Bush administration's own data show that fatalities stemming from large truck crashes are up 3.1 percent from 2003 to 2004."

Claybrook praised the new rule requiring drivers using sleeping berths to spend more time there, but said that increased driving time "is not supported by the vast body of scientific literature that exists about fatigue and driver safety."

"Nor does this proposal help drivers get on a 24-hour circadian schedule," she added.

In its decision, the D.C. Circuit determined that the 2003 rules were "arbitrary and capricious because the agency neglected to consider a statutorily mandated factor – the impact of the rule on the health of drivers." (*Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209; see "Federal Trucking Regs Are Overturned,"

Lawyers Weekly USA, Aug. 16, 2004. Search words for LWUSA Archives: organic and trucking.)

The court also questioned the justification for the 34-hour restart provision:

"The agency justified the restart on the ground that ... [it] will help drivers keep a regular schedule. ... For example, if a driver gets off work at 8 p.m. Saturday after starting work that day at 6 a.m. (a 14-hour day),

Public Citizen – along with Parents Against Tired Truckers and Citizens for Reliable and Safe Highways – had challenged the old rules, which were issued in April 2003. The organizations have not indicated whether they intend to challenge the latest version.

the 34-hour restart would allow him to restart work at 6 a.m. Monday, thus allowing him to start work at the same time of day he started on Saturday. Moreover, continued the agency, the restart provision will enable drivers the flexibility to take their sleep during the day, and enable them to drive at night, when the number of cars on the road is fewest. ... While the agency's explanation seems sound enough ... it does not even acknowledge, much less justify, that

the rule, as petitioners point out ... dramatically increases the maximum permissible hours drivers may work each week. That increase is likely 'an important aspect of the problem.' ... And the agency's failure to address it ... makes this aspect of the rule's rationality questionable."

FMCSA spokeswoman Patricia Lee told Lawyers Weekly USA that the agency had adequately addressed the court's concerns about driver health.

"In completing this new rule, FMCSA reviewed and evaluated the available and pertinent information concerning driver health, with emphasis on chronic conditions potentially associated with changes from the pre-2003 and 2003 rules," she said.

Lee said the agency consulted with driver health and fatigue experts and academic research institutions to identify and analyze relevant research. This included reviewing more than 1,000 health-related research articles and dozens of fatigue-related studies.

FMCSA said it also considered nearly 1,800 public comments, which referenced an additional 200 studies.

"Based on its findings, FMCSA has concluded that this final rule does not have a deleterious effect on the physical condition of drivers," Lee said.

FMCSA Administrator Annette Sandberg said at a news conference that the agency's priority was "reducing fatigue-related truck crashes," particularly in the long-haul sector. But she also noted that only 5.5 percent of all large truck crashes are fatigue-related.

Public Citizen – along with Parents Against Tired Truckers and Citizens for Reliable and Safe Highways – had challenged the old rules, which were issued in April 2003. The organizations have not indicated whether they intend to challenge the latest version.

How Unsafe?

Michael Leizerman, a plaintiffs' attorney in Toledo, Ohio, and the author of "Litigat-

ing Truck Accident Cases," slated for publication this fall by West Legal Publishing, called the new regulations "very unsafe."

"I'm disappointed that our government has pushed through these regulations and seemingly ignored the concerns of the court," he said. "They didn't even look at the safety of the drivers, and the court said you have to take that into consideration."

Leizerman, whose practice is devoted to litigating catastrophic truck accident cases, said increasing the allowable driving time per day from 10 to 11 hours "is not just a tenth more dangerous – it's much more dangerous."

Daniel T. Ramsdell, a Springfield, Mo. attorney who has represented many plaintiffs in trucking accident cases, agreed.

"I am shocked about, disappointed in, and fearful of the new rules that will permit – and force – the drivers of these gigantic, dangerous vehicles to drive an additional consecutive hour each day over the 10-hour period described in the previous rules," he said.

"Permitting drivers to operate a giant vehicle with 18 wheels, weighing up to 80,000 pounds and traveling 70 miles an hour for 11 consecutive hours puts that truck driver and everyone else sharing the road with him at an outrageously unacceptable and higher level of increased danger than ever before," he added.

But Lawrence J. Roberts, an attorney in Coral Gables, Fla., who represents commercial trucking clients, said allowing long-haul truckers to drive an extra hour a day is "not that big a change."

"The companies themselves are as interested in maintaining the health and safety of drivers as anyone else," he said. Roberts also said he reviewed comments made by both the trucking industry and drivers, and said that many drivers endorsed the 11-hour shifts.

"The extra hour gives them time to get home," he noted.

LWUSA

Questions or comments can be directed to the writer at: nora.tooher@lawyersweekly.com

