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December 16, 2005

**Hours of Service of Commercial Drivers – United States Post Service
Application for Exemption for Contract Drivers, Notice with Request
for Comments, 70 FR 69625 *et seq.*, November 16, 2005**

Docket No. FMCSA-2005-22660
U.S. DOT Dockets, Room PL-401
U.S. Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

Advocates for Highway and Auto Safety (Advocates) submits the following comments in response to the notice filed with the Federal Motor Carrier Safety Administration (FMCSA, the agency) by the United States Postal Service (USPS) for an exemption (USPS Request) from the current hours of service (HOS) requirements set forth at 39 CFR Pt. 395. Specifically, the USPS asks the agency to exempt its short-haul, contracted carriers of the U.S. mails from the regulation adopted on April 28, 2005 at 68 FR 22456 *et seq.*, and to allow it to operate under the regulation in effect prior to the effective date of the final rule, June 27, 2003. Advocates strongly opposes this exemption request because the petition as filed has several procedural and substantive defects that require that it be denied.

I. The United States Postal Service Exemption Request Is Indexed to a Superseded Regulation.

The USPS HOS exemption request, filed with FMCSA by letter dated August 11, 2004, anchors its request to the HOS regulation published on April 28, 2005, *op. cit.* However, that regulation has been superseded by a new final rule currently in effect that was published on August 25, 2005, at 70 FR 49978 *et seq.* The USPS exemption request is therefore defective in that it seeks an alternative regulatory scheme for a regulation that is no longer in effect. At a minimum, the USPS needs to perfect its exemption request to accord with the regulation currently in effect at 49 CFR Pt. 395.

II. The United States Postal Service Exemption Request Misunderstands the Hours of Service Regulation for Short-Haul Motor Carrier Operations.

In its letter requesting a HOS exemption for its contracted, short-haul motor carriers of the U.S. mails, the USPS seeks HOS operating requirements similar or identical to those that govern motorcoach operations because FMCSA, in its final rule of April 28, 2003, decided to allow passenger carrier drivers to use the “old” HOS

regulation (*i.e.*, the HOS regulation in effect prior to its enforcement beginning January 1, 2004) which permitted “split shift” driving and working hours. *See*, USPS Request at 2; 68 FR 22456, 22462. That permission to the motorcoach industry to continue to operate under the pre-2004, or “old,” HOS regulation was continued in the subsequent final rule issued on August 25, 2005. *See*, 70 FR 49978, 50073; 49 CFR § 395.5. The USPS also states that:

Under the old regulations, drivers who worked split shifts were able to take advantage of the 100-air-mile radius exemption if they returned to [their] work-reporting location, they operated within a 100-air-mile radius of their work-reporting location, spent less than 12 hours, in the aggregate, on duty each day, are off duty for more than 8 consecutive hours before reporting for their first shift of the day, and did not exceed a total of 10 hours of driving time.

USPS Request at 2.

The USPS does not parse these multiple features of the “old” regulation so that the agency or a commenter to this docket can determine which aspects are being alleged as no longer applicable under the 2003 and 2005 regulations. It appears that the USPS believes that the 100-air-mile radius exemption was dispensed with in the first HOS final rule of April 28, 2003. This is incorrect. In fact, the agency actually expanded the boundaries of this exemption in the 2003 rule to allow commercial drivers in short-haul operations not only to continue to operate within the 100-air-mile radius without the requirement, for example, to maintain log books showing their hours worked, driven, and off-duty, but also permitted them to have one work day in each tour of duty that could be 16 hours long rather than only 14 hours long. 68 FR 22501, 22516.

The USPS, therefore, is mistaken in its apparent belief that the short-haul exemption was not continued in the April 28, 2003, final rule. Furthermore, there is nothing in this regulation that prohibits the USPS or any other short-haul carrier from using “split-shift” working schedules. Moreover, FMCSA further expanded the short-haul exemption in its subsequent final rule of August 25, 2005, by allowing those commercial drivers who operate commercial motor vehicles less than 26,000 pounds gross vehicle weight rating (GVWR) (that is, trucks that can be operated without having to acquire commercial driver licenses (CDL)) to have a second 16-hour work day during a tour of duty and to operate within a 150-air-mile radius rather than a 100-air-mile radius, as well as to continue to benefit from the other distinct aspects of the exemption. 70 FR 50033-50035; 49 CFR §§ 395.1(e), (o). Since the USPS asserts that its contracted short-haul drivers of the U.S. mails drive far less time than this maximum permitted amount, USPS Request at 1,¹ it is clear on its face that the current regulation that further

¹ “[A] sampling of the routes for which we are seeking the exemption shows that the average round trip mileage per trip is only 61 miles (30.4 miles one-way). Even based on conservative driving speeds, this represents less than two hours of driving.” Presumably, there is some interim period where these drivers are waiting for mail to be loaded and unloaded, and, as a result, they repeat the average two hours of driving time throughout a work day. However, as is the case with all other particulars about a daily and weekly working and driving schedule for these contracted drivers, there is no specific information about the total amounts of time spent by these drivers working and driving during a work day or during a tour of duty

expanded the use of the short-haul exemption provides exceedingly generous amounts of time for drivers, especially those driving vehicles not requiring CDLs, to be able to perform the intermittent driving tasks indicated by the USPS in its petition.²

III. The United States Postal Service Hours of Service Exemption Request Does not Demonstrate That a Grant of the Exemption Would Achieve a Level of Safety Equivalent to or Greater than What Would Obtain under the Current Hours of Service Regulation.

Section 4007 of the Transportation Equity Act for the 21st Century (TEA-21) provided specific authority to the U.S. Department of Transportation to grant exemptions from motor carrier safety regulations. 49 U.S.C. §§ 31315, 31136(e). FMCSA implemented these statutory requirements in a final rule published on August 20, 2004, at 69 FR 51589 *et seq.* In that Federal Register notice, the agency emphasized that its “terms and conditions must ensure that the exemption will likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with the regulation.” *Id.* at 51590. FMCSA also stressed that “[t]o satisfy this statutory test, persons . . . applying for exemptions must present a credible alternative to the regulation and explain how that alternative would achieve an equivalent or greater level of safety.” *Id.* at 51591. In particular,

If the request or exemption were effectively less stringent than the applicable regulation, it would be difficult to demonstrate compliance with the statutory test. If there is insufficient information or data for FMCSA to conclude that the . . . exemption would satisfy the statutory test, the agency must not grant the exemption.

Id. at 51591-51592.

Further, in responding to requests from several commenters about a need to define the term ‘equivalent’ in determining “equivalent safety,” the agency said that such a definition, even if it were forthcoming, “would not serve as a substitute for an analysis of the potential safety impacts of a given request for . . . an exemption . . .” *Id.*

The petition from the USPS does not specifically demonstrate exactly how contracted commercial drivers transporting the U.S. mails operating under the regulations in effect prior to the new requirements in 49 CFR Pt. 395 would achieve hours of work, driving, and rest whose safety would be equivalent to or greater than achievable under the current HOS regulation. No detailed showing of how driver work and rest schedules under the “old” regulation are equal to or superior to the current HOS regulation can be

stretching over several days. This shows that the petition from USPS is deficient because there is no specific factual information about driver working, off-duty, standby, and rest time showing the safety adequacy or superiority of such an alternative regime from what is required under the current HOS regulation and, therefore, no basis for granting the exemption request.

² The USPS does not state in its exemption request to what extent its contracted drivers transporting the U.S. mails operate commercial motor vehicles that are 26,000 pounds or less GVWR.

found anywhere in the letter sent to FMCSA. Further, since the proposed return by these drivers to the “old” HOS regulation means that they no longer would have all work and rest time “on the clock,” but could have their work days extended indefinitely, including their daily shifts extended beyond either the 14 hours or 16 hours limits, as explained earlier, these drivers could in fact accrue daily on the job hours that are even longer than those provided for in the current HOS regulation.

The HOS regime permitted under the “old” rule that could result in drivers being put “off the clock” for indefinite amounts of time is, in fact, a less stringent regulation than both the April 2003 and August 2005 regulations published in those final rules.³ The FMCSA went to considerable lengths in both of these final rules to anchor its amendments in the change from a regulation permitting indefinitely working time to one where drivers were confined to a specific, maximum number of duty hours under for all non-driving and driving time. The agency also argued that it wanted to ensure that drivers adhered more closely to a circadian schedule in their work-rest cycles, and the cardinal feature of the final rules to achieve this closer adherence to a 24-hour work-rest shift cycle was placing all time “on the clock” from the moment a driver began a tour of duty. Although the “new” rule also allows a driver to remain on-duty indefinitely as long as the driver does no more driving, any time spent on-duty without further driving must count against the total number of hours permitted over a tour of duty: a maximum of 60 hours over a nominal 7 days or 70 hours over a nominal 8 days before a minimum 34-hours taken as a tour of duty restart layover. *See*, 68 FR 22504; 70 FR 49980, 49992.⁴ This tolling of all time spent on the job was not required under the “old” HOS regulation, and it was a major goal of FMCSA to stop this practice and to require all time on the job to count against the maximum work week hours allowed by both the 2003 and the 2005 HOS final rules.

Furthermore, both the 2003 and the 2005 regulations adopted a second major change designed to further driver and motor carrier safety, the expansion of off-duty rest time from the minimum 8 hours allowed under the “old” HOS regulation to a minimum 10 hours. FMCSA repeatedly emphasized that its goal in increasing daily shift off-duty rest time by 25 percent was to provide a better opportunity for commercial drivers to get sufficient sleep, sleep whose adequacy the agency admitted was not possible under the

³ Advocates notes that the USPS in its petition points out that its exemption for approximately 30 percent of its contracted mail route carriers covers drivers whose contracts are awarded and paid based on annual rates. USPS Request at 2. Although rate compensation for the amount of work done rather than payment by mileage accrued over a given time frame is a preferable approach to commercial driver pay, the USPS proposal to switch contracted short-haul drivers from the current regulation where all time is “on the clock” to the “old” rule where drivers could be placed “off the clock” for periods of time could result in drivers receiving lower pay because annual rate compensation levels could be based on only the amounts of time the driver is “on the clock.” This practice can have uncertain effects on worker morale and, consequently, on the quality of drivers contracted and their safe driving capabilities. Moreover, as indicated earlier, it could result in drivers taking part-time jobs that ultimately result in very long, irregular work days with little rest taken to recover from fatigue and sleep deprivation.

⁴ Also *see*, 70 FR 50014: “it is the best judgment of the Agency that a 14-hour *non-extendable* duty tour period, in conjunction with 11 hours driving and 10 hours off duty, will reduce driver fatigue, promote driver health, and improve CMV [commercial motor vehicle] transportation safety.”

previous, “old” regulation. *See, e.g.*, 68 FR 22469-22470; 70 FR 50038. But a return to the “old” regulation would eliminate 2 hours of off-duty rest time for each driver’s daily shift.

None of these considerations and their impacts on driver and motor carrier safety is evaluated in the USPS’s exemption letter to FMCSA. No careful analysis and comparison of competing driver working, driving, and rest schedules is offered for agency consideration in their comparative effects on safety. There is, in fact, no “analysis of potential safety impacts,” of the USPS’s request to return to the “old” regulation. The USPS provides only a bare, conclusory statement in its exemption application that granting the exemption “would succeed in achieving a level of safety that is ‘equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation.’” USPS Request at 2. Following this statement is an unsupported assertion that somehow by allowing a driver a 15-hour work day under the “old” rule will ensure that the driver can “sleep in his or her own bed.” However, there is nothing in the new HOS regulation preventing any commercial driver, including – most especially – short-haul drivers, from sleeping in his or her own bed at the end of each work day.

To the contrary, use of the “old” rule by USPS would tend to allow drivers to have longer work days because of time on the job that is not tolled as duty time and for those drivers also to be confined to only an 8-hour minimum off-duty rest period rather than a 10-hour minimum rest period. A return to the “old” regulation would in fact undermine the very purposes and rationale of FMCSA’s final rules of keeping all work time for a tour of duty “on the clock” in order to increase motor carrier and driver conformity to more regular, circadian work-rest schedules. In addition, use of the “old” HOS regulation allowing the USPS to place drivers “off the clock” but essentially on “stand-by” would also provide an incentive for commercial drivers to take part-time jobs in addition to their contracted mail delivery responsibilities. This could easily result in drivers putting in very long hours with even more irregular working hours. Combined with less off-duty rest time under the “old” regulation – a minimum of 8 hours rather than 10 hours as required under the “new” HOS regulation – this HOS regime would promote more driver sleep deprivation, fatigue, and reduced alertness while operating trucks hauling the U.S. mails, a result directly conflicting with the purposes and rationale of FMCSA in adopting the current HOS regulation.

IV. The Proposed Exemption Would Undermine Motor Carrier Safety Enforcement.

Comments filed with the initial notice of proposed rulemaking docket on amending the HOS requirements contained numerous statements by enforcement officials that the multiple types of drivers operating under different HOS regimes would make meaningful enforcement of the regulation extremely difficult if not impossible. This argument was made, for example, in the comments of the Commercial Vehicle Safety Alliance and also voiced by the American Trucking Associations in its docket comments. These objections to the complexity of enforcement efforts were summarized by FMCSA in its April 2003 final rule. 68 FR 22489-22490. In response, the agency stressed in its

preamble discussion that the rule being adopted was being made much simpler in order to increase the ease and effectiveness of enforcement. *Id.* at 22490.

Creating two different short-haul driver HOS regimes, one covered by the exemption in effect in the “old” regulation and another under the exemption as modified finally in the August 2005 regulation, would substantially complicate law enforcement efforts. Further, since the FMCSA has seen fit in the August 2005 regulation to create yet another short-haul HOS exemption for drivers operating commercial motor vehicles not requiring drivers to have CDLs, there would be three different short-haul HOS regimes. When added to other exemptions that have been continued in the final rules of 2003 and 2005, and further expanded by the HOS exemptions enacted as part of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU, Pub.L. 109-59 (Aug. 10, 2005)), short-haul motor carrier operations are now governed by several different HOS criteria. Allowing ordinary motor carriers of property – in this case, of U.S. mails – to diverge from the short-haul HOS provisions of the 2005 final rule to abide by yet another, different variation of that exception, would unnecessarily further complicate efficient and effective law enforcement of the new regulation.

V. Conclusion.

This petition requesting another, special short-haul HOS exemption should be denied. The petitioner has not carried its burdens to satisfy the statutory and regulatory criteria requiring it to demonstrate clearly and in detail exactly why and how a return to the HOS regulation in effect prior to June 27, 2003, would achieve a level of safety equivalent to or greater than that secured by adherence to the short-haul HOS regime adopted by FMCSA and currently in effect as set forth in 49 CFR Pt. 395. The petition as offered to the agency is clearly less stringent than the applicable regulation currently in effect, and there is a dearth of relevant, detailed information and data in the two-page petition about the different safety impacts that would result of having short-haul drivers of the U.S. mails revert to the “old” HOS regulation. Further, the proposed petition directly contradicts the fundamental goals and the rationale set forth by the agency for eliminating a central feature of the “old” HOS regulation, *viz.*, to put an end to the practice of placing commercial drivers off-duty so that their time related to job responsibilities is not tolled. Such untimed, off-duty periods, according to the agency’s own argument, leads to longer and more irregular work days, an undesirable outcome that militates against the superior safety benefits of drivers adhering more closely to regular, circadian schedules in their alternation of working and rest time.

For these reasons, Advocates recommends that FMCSA reject the petition for an exemption from the current HOS regulation.

Respectfully submitted,
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