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I. Compliance with New Hours-of-Service Rules

In 2011, the Federal Motor Carrier Safety Administration (“FMCSA”) promulgated new regulations governing the hours of service of commercial motor vehicle (“CMV”) drivers, requiring full compliance by July 1, 2013. The overarching purpose of the new hours-of-service regulations is twofold: (1) to prevent accidents related to driver fatigue, and (2) to protect the long-term health of drivers who may be chronically overworked. The net effect of the new rules is to reduce the total number of hours per day and per week that a driver may be on-duty.

In an effort to find evidence that drivers are exceeding their hours of service and are driving while fatigued (and also to set up spoliation claims), claimant attorneys routinely send document preservation letters to motor carriers, requesting the preservation of driver logs and other documents reflecting a driver’s hours of service. The recordkeeping requirements for a driver’s record-of-duty status remain the same, and driver logs are the primary method of recording a driver’s hours of service. This article sets forth the primary changes in the Federal Motor Carrier Safety Regulations (“FMCSR”) related to a driver’s hours of service, methods of proving compliance with the same, and the relevance of a driver’s hours of service to civil litigation arising out of a collision.

A. New Rules v. Old Rules

It remains the rule that a driver may not operate a CMV beyond the 14th consecutive hour after coming on-duty after a period
of 10 consecutive hours of off-duty and/or sleeper-berth time. It also remains the rule that a driver is limited to 11 hours of driving during that 14-hour period. The new regulations, however, redefine on-duty time and create more restrictive limitations on restarts and rest breaks. The provisions redefining on-duty time and the penalties for violations became effective on February 27, 2012, and the compliance date for the remaining provisions, including those governing restarts and rest breaks, began July 1, 2013. Consequently, counsel can expect the prior rules to be at issue for collisions occurring prior to the above dates. It is critical that any analysis of these and other regulations be placed in the context of the rules in effect on the date of the accident, and that corporate representatives, drivers, and counsel be fully aware of the applicable regulations during litigation, especially when presenting for depositions.

1. On-Duty Time

On-duty time is defined as “all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work.” Previously, the rules required a driver to count any time spent in a CMV, except any time in the sleeper berth, as on-duty time. This included time in a parked CMV and time in the passenger seat when traveling as a co-driver. Consequently, a driver could not count any of that time toward his rest breaks. The new rule, by contrast, does not permit a driver to count any time resting in a parked vehicle toward on-duty time. Otherwise, a driver may have no choice but to spend time out of the CMV when taking a required break, even if it is not feasible or safe to do so. This time is now considered off-duty and may be counted toward the required rest breaks. In addition to allowing time spent resting in a parked vehicle to be considered off-duty, the rules now allow a driver to count up to two hours in the passenger seat of a moving CMV as off-duty if that time immediately precedes and/or follows eight consecutive hours in the sleeper berth. Otherwise, a co-driver would be required to spend the entire ten-hour off-duty period in the sleeper berth. Any time in the passenger seat over that two-hour period is considered on-duty/not driving time.

2. Restarts

Under the new rules, a driver must be off-duty for a period of thirty-four consecutive hours before beginning a new period for purposes of calculating on-duty time (commonly known as a thirty-four-hour “restart”). The new rules limit 34-hour restarts to once per week or once per every 168 hours. For motor carriers that do not operate CMVs every day of the week, a driver is limited to an average of sixty hours of driving time in seven consecutive days. For motor carriers that do operate CMVs every day of the week, a driver is limited to an average of seventy hours of driving time in eight consecutive days. Previously,
a driver could conceivably take two thirty-four-hour restarts in a week, and therefore average eighty-two hours of driving time per week, potentially resulting in overwork and fatigue.

In addition, a thirty-four-hour restart must include at least two periods between 1:00 a.m. and 5:00 a.m.\(^ \text{10} \) Again, this provision is intended to prevent driver fatigue by forcing the thirty-four-hour restart period to encompass at least two full nights.

3. Rest Breaks

To further prevent driver fatigue, the new rules now require drivers to take at least one off-duty or sleeper-berth break of thirty minutes or more after on-duty time of up to eight consecutive hours.\(^ \text{11} \) This eight-hour period is not simply driving time; it encompasses all on-duty time, which may include such non-driving activities as attending, loading, unloading, or servicing the CMV, or simply waiting to be dispatched.\(^ \text{12} \) The new rule does not require a driver to “rest” during the thirty-minute break; the driver simply cannot be performing any activity that would be encompassed within the definition of on-duty time. Meal breaks are included as well as off-duty or sleeper-berth time. One notable exception to this rule applies to drivers who are required to attend the CMV at all times, so long as that is the only activity they perform.\(^ \text{13} \)

4. Penalties

Motor carriers may be subject to the maximum penalties if drivers exceed the allowed eleven hours of driving time by a mere three hours. Exceeding this limit by only three hours may be considered an “egregious” violation. A motor carrier that violates the hours-of-service requirements may be subject to a civil penalty of not more than $10,000 for each offense, and an individual employee of a motor carrier may be subject to a civil penalty of not more than $2,500 for each offense.\(^ \text{14} \) The Secretary of Transportation may also order a vehicle or a motor carrier’s employee out of service or order a motor carrier to cease all commercial motor vehicle operations, if it makes a finding that any violation poses an “imminent hazard to safety.”\(^ \text{15} \) An out-of-service order must be narrowly tailored to abate the violation, and must be supported by a finding that the individual, vehicle, or motor carrier poses an imminent hazard.\(^ \text{16} \) A motor carrier may also be subject to criminal penalties for such violations, and for each offense, the penalty may not exceed $25,000 or imprisonment for a term not to exceed one year, or both.\(^ \text{17} \) Individual employees are subject to a fine not to exceed $2,500 only if their activities while operating a CMV “have led or could have led to death or serious injury.”\(^ \text{18} \)

B. Methods for Proving Compliance with Hours-of-Service Rules

In addition to driver logs, a motor carrier may have other documents available to prove that its driver complied with the hours-of-service requirements. Drivers often physically or electronically
punch time cards as they arrive to and from work or as they exit and enter a distribution facility. Trip reports or bills of lading may reflect the time a driver picks up a load, starts driving, or arrives at his destination. Automatic on-board recording devices are an alternative method for recording a driver’s hours of service. GPS may provide coordinates to track a CMV’s location at certain times, providing information about the movement of a particular CMV. Payroll records may also reflect a driver’s hours of service, depending on how that driver is paid. Fuel receipts, hotel bills, toll tickets, or other records of expenses may also allow a motor carrier or its counsel to reconstruct a timeline for a driver’s trip. These methods may be inexact and are not a perfect substitute for a properly completed driver log, but they may provide enough of an estimate of a driver’s hours of service to demonstrate that a driver was in compliance with the FMCSR and thereby rebut any inference that he was fatigued at the time of the collision.

II. Importance for Civil Litigation

A. Spoliation Letter

With increasing frequency, shortly after many collisions, claimant attorneys are serving onerous document-preservation letters on motor carriers, requesting the pre-suit preservation of broad categories of documents. Some of the documents that claimants are requesting are typical: the driver qualification file, daily vehicle inspection reports, driver logs and other documents reflecting a driver’s hours of service, maintenance and repair records for the subject CMV, documents related to the subject collision, and documents regarding any driver discipline. In some instances, however, claimant attorneys are requesting months’ and years’ worth of documents within each category, requests which are clearly overly broad in time and scope and which would elicit appropriate objections during formal discovery. In addition, most of these letters will request that a motor carrier preserve, sometimes indefinitely, the tractor and/or trailer involved in the collision, which can truly be a burden if a motor carrier has limited equipment available for use.

During the discovery period once suit has been filed, a motor carrier would have the benefit of various objections and motions practice to refine the permissible and appropriate areas of inquiry as applied to that particular case and would also have the benefit of a neutral judge to weigh the relative merits of each side’s position. Many of these requests would be objectionable as privileged under the work-product doctrine, irrelevant to the subject incident, overly broad, or unduly burdensome. Pre-suit, however, a prudent motor carrier has little choice but to err on the side of caution and preserve a fairly broad spectrum of the requested documents, regardless of relevance and regardless of the burden it must shoulder to undertake such document preservation. The
prospect of sanctions for spoliation during the ensuing litigation is too great.\textsuperscript{20}

Pursuant to the document retention requirements of the FMCSR, motor carriers would be permitted to purge many of these documents in the normal course of business. With respect to driver logs specifically, the FMCSR requires that “[e]ach motor carrier shall maintain records of duty status and all supporting documents for each driver it employs for a period of six months from the date of receipt.”\textsuperscript{21} Document-preservation letters, however, are efforts to effectively rewrite the FMCSR document-retention requirements and impose substantial burdens on motor carriers in the process. By imposing the burden of preservation of voluminous documents, many of which would have no bearing on the collision at issue, while threatening serious spoliation sanctions, these document-preservation letters place motor carriers between a rock and a hard place, and are setting them up for potential spoliation arguments if they do not comply with the requests.

B. Causation

Plaintiffs are requesting hours-of-service documents in part to attempt to set up a claim for punitive damages directly against the motor carrier. They may attempt to demonstrate a driver’s or motor carrier’s willful and wanton disregard for the safety of others by showing that a driver is chronically fatigued or repeatedly exceeding his hours of service. In order to prevail on a claim for punitive damages, plaintiffs must show that motor carriers and drivers have a “pattern or policy” of hours-of-service violations.\textsuperscript{22} In addition, in order to prevail on a claim for punitive damages against a motor carrier for the negligent entrustment and supervision of a driver, plaintiffs must show not only that the driver had a tendency to drive while fatigued, but also that the motor carrier was aware of this tendency.\textsuperscript{23} The mere fact of an isolated hours-of-service violation at the time of the collision will not entitle a plaintiff to an inference of driver fatigue, nor is it alone sufficient to demonstrate a pattern or policy of such violations.\textsuperscript{24}

Repeated violations of hours-of-service requirements, however, coupled with destruction of the documents that evidence a driver’s hours of service, even when such destruction is permitted by the applicable regulations, may support an award of punitive damages. In \textit{J.B. Hunt Transp. v. Bentley}, the defendant driver continuously weaved in traffic in a construction zone for ten to twenty miles and failed to apply his brakes prior to colliding with a vehicle parked on the side of the roadway.\textsuperscript{25} The court upheld a jury verdict awarding the plaintiff punitive damages in part because of J.B. Hunt’s evidentiary problems related to retention of driver logs and in part because of evidence that J.B. Hunt’s drivers habitually violated the hours-of-service requirements of the Georgia Public Service Commission.\textsuperscript{26} J.B. Hunt had taken advantage of the
rule allowing the destruction of the defendant driver’s driver logs after six months, in the normal course of business.\textsuperscript{27} Within that six months, however, J.B. Hunt had also undertaken an investigation of the plaintiffs “in anticipation of litigation.”\textsuperscript{28} J.B. Hunt also operated a “forced dispatch” system, whereby drivers could lose their jobs if they refused to drive, and nearly one-third of its drivers were penalized for driving in excess of the hours-of-service requirements. Given J.B. Hunt’s history of habitual violations, and given that J.B. Hunt destroyed the defendant driver’s driver logs from the date of the incident despite itself preparing for litigation, the court found that it was reasonable to presume that fatigue was either a contributing factor or a cause of the collision.\textsuperscript{29}

If driver fatigue or hours-of-service violations are not the cause of the collision, however, then documentation reflecting a driver’s hours of service become largely irrelevant. Causation remains an essential element, and a court may not infer causation; rather, a plaintiff must set forth evidence to prove it.\textsuperscript{30} A plaintiff must connect driver fatigue to any alleged hours-of-service violations, and those violations must also connect with evidence of the cause of the collision.\textsuperscript{31} In \textit{Bennett v. McGriff Transp., Inc.}, the plaintiffs sought to amend their complaint shortly before the end of the discovery period to add a claim for punitive damages based solely on the driver’s alleged violation of the hours-of-service requirements.\textsuperscript{32} The undisputed evidence of record showed, however, that the accident was caused because the defendant driver was looking to the right at the time of the rear-end collision.\textsuperscript{33} There was no evidence to suggest that the driver was fatigued, and the plaintiffs were not entitled to that inference simply because the driver had violated the hours-of-service requirements.\textsuperscript{34} These facts stopped “well short” of demonstrating a pattern or policy of driving while fatigued sufficient to support a claim for punitive damages.\textsuperscript{35}

The analysis extends to other alleged violations of the FMCSR, in addition to hours-of-service violations. Where a collision was caused by a negligent act other than the violation of a particular statute or regulation, any such FMCSR violations will not be germane to the question of whether a driver exhibited a pattern or policy of dangerous driving.\textsuperscript{36} In \textit{Highsmith v. Tractor Trailer Serv.}, the defendant driver had reported prior mechanical problems with the vehicle, and pulled over to the side of the road for a few minutes when he experienced additional problems. When he pulled over, part of the trailer extended five feet into the lane of traffic.\textsuperscript{37} The plaintiff alleged that the defendant motor carrier violated applicable state and federal regulations with respect to the maintenance and service of the defendant’s vehicle, including failing “to inspect or service the truck and trailer, assure that the truck had an adequate towing capacity, determine whether the truck and trailer’s equipment was working properly, or
ensure that it was properly equipped” with safety devices required by the FMCSR.\textsuperscript{38} The accident was not caused by any such violations, however, but rather by the fact that the stopped trailer extended approximately five feet into the travel lane.\textsuperscript{39} Punitive damages were not authorized in that case because the plaintiff could not show that the negligent act proximately causing the injury, parking a vehicle on the side of the highway such that it encroached into the lane of travel, occurred because of a pattern or policy of dangerous driving or was done with a conscious indifference to the consequences.\textsuperscript{40}

III. Options for the Motor Carrier in Response to Document Preservation Letters

Upon receipt of a spoliation letter requesting preservation of documentation that would evidence a driver’s hours of service, a motor carrier is not without options. A motor carrier should, of course, make good faith, reasonable efforts to preserve those documents that have not already been destroyed in the normal course of business pursuant to the applicable regulations. Once a motor carrier is put on notice that an injured person is contemplating litigation, anything a motor carrier does going forward will be considered in anticipation of litigation, triggering \textit{de facto} obligations to preserve evidence the motor carrier knows will be relevant, while at the same time triggering work-product protections.

However, a motor carrier need not accept that it is without defenses at this stage or that it must acquiesce to every demand as written. The motor carrier or its counsel may draft an objection letter in response, setting forth documents it feels are reasonable and relevant to preserve, and noting objections to the relevance or discoverability of the items requested to be preserved and the burden it must undertake if a document preservation letter includes particularly onerous requests. Counsel should also state that, by complying with the request for preservation of documents, they do not necessarily agree that any of the documents requested are either relevant or calculated to lead to the discovery of admissible evidence, or even that the request itself is reasonable. The motor carrier should also strongly consider allowing an inspection of the involved CMV within a time-certain if it has been preserved. Additionally, counsel may invite the claimant to file suit if they disagree with the scope of what is being preserved so that a judicial determination may be had, rather than the increasingly common practice of immediately sending a document preservation letter and waiting an extended time to file suit (sometimes with the hope that documents or evidence will not be maintained, thus setting up a spoliation claim). Lastly, counsel should craft a document-preservation letter of their own directed to the claimant, requesting preservation of any physical evidence, including the claimant’s vehicle, GPS data (from a cell phone
or navigation system), documentary evidence, photographs, social media and email accounts, and cell phone records.

IV. Conclusion

The new FMSCR governing a driver’s hours of service are intended to prevent driver fatigue and reduce the number of accidents related to fatigue. With respect to civil litigation, although evidence that a driver violated the hours-of-service requirement will provide support for a claim that driver fatigue caused a collision, it is not sufficient to show a pattern or policy of driving while fatigued. Further, for driver logs or other documentation of a driver’s hours of service to be relevant, a plaintiff must show that driver fatigue caused the accident. The increasing pre-suit use of onerous document-preservation letters by claimant attorneys requesting such documentation places motor carriers in a difficult position. If the motor carrier does not undertake a good faith effort to preserve the requested documents, it may face severe sanctions for alleged spoliation many years later. Motor carriers should not only preserve the documents, but also lay out their objections to what are often burdensome and irrelevant document requests. It remains clear, however, that the most prudent course of action for the motor carrier is to place itself in a position to affirmatively prove compliance with the regulations once suit is filed and remove that potentially damaging issue from the lawsuit.

End Notes

7 49 C.F.R. § 395.3(b) (2013).
10 49 C.F.R. § 395.3(c) (2013).
13 49 C.F.R. § 395.1(g) (2013) (“Operators of CMVs containing Division 1.1, 1.2, or 1.3 explosives subject to the requirements for a 30-minute rest break in § 395.3(a)(3)(ii) may use 30 minutes or more of attendance time to meet the requirement for a rest break, providing they perform no other work during the break” and providing they record “remarks or annotations to indicate the specific on-duty periods that are used to meet the requirement for break.”).
18 Id.
citing Chapman v. Auto Owners Ins. Co., 220 Ga. App. 539, 469 S.E.2d 783 (1996) (sanctions for spoliation include a jury charge of a rebuttable presumption that the evidence would have been harmful to the spoliator, dismissal of the case, or exclusion of testimony about the evidence).


26 Id.

27 Id. at 253, 427 S.E.2d at 502.

28 Id.

29 Id.


32 Id. at 1315.

33 Id. at 1316.

34 Id.

35 Id. See also Frey v. Gainey Transportation Services, Inc., 2006 U.S. Dist. LEXIS 90639 at *9-11 (N.D. Ga. Dec. 14, 2006) (no evidence that fatigue caused accident, and no evidence to connect any alleged falsifying of driver logs to any alleged fatigue; rather, the defendant driver stated that the plaintiff was in his blind spot as he attempted to change lanes); MasTec North America v. Wilson, 2014 Ga. App. LEXIS 88 (Feb. 28, 2014) (reversing the trial court’s denial of a motion for summary judgment on punitive damages, since the record did not support an inference that the collision was caused a “pattern or policy of dangerous driving”).


37 Id. at *36.

38 Id. at *35.

39 Id. at *36-37.

40 Id.