

Federal Motor Carrier Safety Administration
Comments on Policy on the Retention of Supporting Documents
(Docket # FMCSA-2010-0168)

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July 8, 2010

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Introduction

The American Trucking Associations, Inc. (ATA) submits the following comments in response to the Federal Motor Carrier Safety Administration's (FMCSA) *Policy on the Retention of Supporting Documents and the Use of Electronic Mobile Communication/Tracking Technology in Assessing Motor Carriers' and Commercial Motor Vehicle Drivers' Compliance with the Hours of Service Regulations* (75 Federal Register page 32984, hereinafter "Supporting Documents Guidance").

ATA is the national trade association representing the American trucking industry.¹ ATA is vitally interested in matters affecting the nation's trucking fleet, including requirements regarding compliance with the hours of service (HOS) regulations.

Overview

ATA supports FMCSA's efforts to provide clarity to the requirement in 395.8 (k) that every motor carrier "...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." As we have stated on a number of occasions, and as Congress mandated in Section 113 of the Hazardous Materials Transportation Act of 1994² ("HMTA"), the agency has an obligation to specify by regulation "...the number, type, and frequency of supporting documents that must be retained by a motor carrier so as to allow verification of the accuracy of such documents at a reasonable cost, to the driver and the motor carrier, of record acquisition and retention." Hence, short-term guidance prior to issuance of a long

¹ ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and indirectly through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation.

² Pub. L. No. 103-311, § 113, 108 Stat. 1673, 1676.

overdue rule is appropriate since it better defines and more narrowly focuses the number and type of supporting documents that must be maintained.

ATA supports the agency's long-standing policy that the supporting documents regulation relates only to the retention of documents and defines those documents as records maintained in the ordinary course of business which the carrier **may use** to verify the information recorded on its drivers' records of duty status. As the agency is aware, neither the Federal Motor Carrier Safety Regulations nor any previously issued guidance has ever specified which of the supporting documents retained by the carrier must then be used by the carrier to verify its records of duty status. Instead, existing agency guidance requires carriers to have management systems that effectively prevent hours of service violations, but does not specify which records must be employed by these systems. This position was confirmed in this new Supporting Documents Guidance when the agency characterized supporting documents as records maintained in the course of business that may be used by the motor carrier to verify drivers' records of duty status (page 32985, column 3).³

As explained below, ATA has serious concerns with portions of the proposed Supporting Documents Guidance that we believe depart substantially from prior agency policy and go well beyond the bounds of what the agency may do in guidance. **Because the guidance is due to go into effect on July 9th, the FMCSA should stay the guidance entirely - prior to the effective date - to allow time for the agency to modify the document to meet our concerns as outlined below.**

ATA's Concerns and Objections

Our primary concern is that the guidance states that carriers using electronic communication and tracking systems are "expected" to **use** the information and records from these systems in their hours of service oversight activities. This mandated use departs from the agency's long-standing regulatory directive, as confirmed on page 32985 of the Federal Register Notice announcing this guidance, that 395.8 (k) speaks only to document retention and does not mandate the use of any particular document or set of documents in carrier log-verification efforts. Therefore, for the first time, this guidance proposes to create a use requirement that will greatly affect motor carriers' substantive rights and which could significantly increase their compliance costs.

Fundamental principles of administrative law require that when an agency is establishing new legal duties or responsibilities for the regulated community, it do so only through an appropriate notice and comment rulemaking procedure. *See American Mining Cong. V. Mine Safety & Health Administration*, 995 F.2d 1106, 1110 (D.C. Cir. 1993) (noting that an "agency's actual establishment of rights and duties" is legislative in nature and requires formal rulemaking); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) ("Substantive rules are ones which grant rights, impose obligations, or produce other significant effects on private interests . . ." (citation omitted)). Moreover, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). *See also Alaska Professional Hunters Association v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("When an agency has given its regulation

³ 75 Federal Register, No. 111, page 32985.

a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”).

There can be no serious dispute that the agency’s Guidance will substantively affect motor carriers by imposing upon them a new obligation to use a particular supporting document in their hours-of-service oversight activities. Creation of this new duty can be accomplished, if at all, only through a proper rulemaking process. The fact that FMCSA is so clearly changing its longstanding policy by transforming the supporting-document regulation from a retention requirement to a use requirement underscores the substantive impact it will have on motor carriers and the need for any such transformation to come through a proper rulemaking proceeding. Therefore, the Guidance should be amended to state that the use of data from electronic tracking systems in motor carriers’ oversight activities remains only one of the options available to motor carriers to fulfill their oversight responsibilities.

Even if the agency had the authority to create a new supporting-document **use** standard by way of a guidance, there would be no justification to extend that standard to the use of electronic records from non-qualifying systems in their oversight programs, as the guidance appears to mandate. Specifically, the Supporting Documents Guidance states that: “A motor carrier that uses electronic mobile communications/tracking technology in the ordinary course of business for any purpose is expected to include the use of records and information generated by that technology in its HOS oversight activities.” This statement is not limited to data from systems that qualify for relief from keeping a number of documents that must otherwise be retained. In other words, it seems to include data from non-qualifying systems.

In effect, this means that carriers must somehow use what the agency regards as unqualifying and perhaps untrustworthy information in their HOS oversight systems. As evidence that the data is considered untrustworthy, the agency itself does not believe it is reliable enough to qualify for relief from the requirement to retain several categories of supporting documents, and (unlike data from qualifying systems) the motor carrier may challenge the reliability of this data in enforcement proceedings. Requiring **use** of non-qualifying electronic data creates not only a new legal obligation that can be created only by a rule, but it creates a legal obligation that is inherently arbitrary, capricious and otherwise contrary to the purpose of the underlying rule.

ATA also is concerned with the provision that prohibits carriers that use the electronic communications and tracking data in their hours of service oversight activities from then challenging the accuracy of a particular record. Simply put, these systems are not perfect; they are sometimes subject to drift, synchronization and other problems. Appropriately, the agency has set forth certain criteria that must be met for the data from these devices to be considered acceptable (e.g., capable of tracking location once an hour and setting forth minimum content for positioning reports). However, just because the data system meets these criteria does not ensure that each data point will be error-free. These devices and the corresponding data are still subject to accuracy and reliability issues. Motor carriers must be given the latitude to exclude data that they believe to be inaccurate and to show the agency during compliance reviews why such data was not relied upon in their internal review.

Use of flawed data in enforcement proceedings - especially when a carrier has clear evidence that certain records are inaccurate or invalid - is plainly unjust. The carriers and drivers would be subject to civil penalties, diminished safety scores/ratings and the corresponding negative business impact (e.g., loss of shipping contracts) based on invalid records. This is poor public policy. The Guidance should be modified to allow a carrier to demonstrate how a particular record is unreliable and should not be considered in an enforcement proceeding.

Finally, the standard list of records the agency will continue to require (for carriers not taking advantage of the electronic tracking system relief) is still far too comprehensive and expensive. ATA believes this list goes far beyond what Congress intended when it directed the agency to specify the number and types of documents that carriers must keep at a reasonable cost. The agency only removed six categories of records from the list of documents in its previous guidance on this matter; many of these documents are already obsolete. We also believe the list goes well beyond what documents are necessary for the agency to verify hours of service compliance.

In short, this list of required documents (for carriers not taking advantage of the electronic tracking system relief) and the shorter list of required documents for carriers using qualifying electronic tracking and communication systems should meet two criteria:

1. Can reasonably allow motor carriers and FMCSA investigators to verify the accuracy of the motor carrier's records of duty status; and
2. Can be retained at a reasonable cost.

ATA has reviewed the list of documents contained in FMCSA's previous guidance on supporting document retention and has developed recommendations on supporting documents that the agency should continue to require carriers retain. These recommendations, shown in the chart below, are based on the two criteria noted above.

ATA's Recommended Supporting Documents Retention Requirements

Supporting Document	Should Be Required If Carrier Has A Qualifying Electronic Tracking/Communication System	Should Be Required If Carrier Does NOT Have A Qualifying Electronic Tracking/Communication System	Retention Should Not Be Required
Bills Of Lading	✓	✓	
Carrier Pros			✓
Freight Bills			✓
Dispatch Records			✓
Gate Record Receipts		✓	
Weight/Scale Tickets			
Fuel Receipts			
Fuel Billing Statements	✓	✓	
Toll Receipts			✓
Toll Billing Statements			✓
Port Of Entry Receipts		✓	
Delivery Receipts			
Lumper Receipts			✓
Interchange And Inspection Reports			✓
Lessor Settlement Sheets			✓
Over/Short And Damage Reports			
Agricultural Inspection Reports			✓
Driver/Vehicle Examination Reports ⁴	✓	✓	
Random Drug/Alcohol Tests	✓	✓	
Crash Reports	✓	✓	
Telephone Billing Statements			✓
Credit Card Receipts			✓
On-Board Computer Reports	✓		
Border Crossing Reports			✓
Custom Declarations			✓
Traffic Citations		✓	
Overweight/Size Reports & Citations		✓	

It is worth noting that the majority of documents that ATA recommends be retained are generated by third parties, not the motor carriers themselves. As such, their integrity can be independently verified. Further, they are also kept for reasons other than simply log verification, generally as components of other internal safety management controls. Hence, the cost to retain them is not increased by the need to do so for log verification.

⁴ Carriers must still retain driver vehicle inspection reports for three months as required by 396.11 and roadside inspection reports for 12 months as required by 396.9.

Conclusion

ATA supports FMCSA's efforts to clarify the supporting documents retention requirements in the very near term until the agency completes a long overdue rulemaking. Further, it is appropriate to limit the categories of documents that carriers using qualifying electronic systems must maintain. These systems are capable of generating extensive records of vehicle movement that render other supporting documents both redundant and unnecessary.

However, the provision of this guidance mandating that certain documents must be used by motor carriers in their oversight efforts is a substantive departure from current regulations and long-standing agency policy. This proposed requirement on motor carriers steps far beyond the boundaries of what an agency may clarify by guidance. Such a change should only be mandated, if at all, through a proper rulemaking proceeding.

Also, FMCSA's requirement that carriers using data the agency considers unqualifying and perhaps untrustworthy (e.g., does not qualify for supporting document relief) must use that same data in their verification efforts is particularly inappropriate. In addition, ATA cannot support the provision that prohibits carriers from challenging the accuracy of an inaccurate or invalid record during enforcement proceedings. Absent the ability to challenge the use of flawed data, motor carriers and drivers will potentially be subject to unjust consequences.

Accordingly, ATA is respectfully requesting that FMCSA promptly suspend the effective date of the guidance so it will have opportunity to follow the required notice and comment procedures prior to issuance of a final document. In the meantime, the agency will have the opportunity to make the aforementioned modifications with respect to mandating carrier use of certain documents in their oversight activities and the ability of carriers to challenge invalid data in enforcement proceedings.

Thank you for the opportunity to comment on this important matter.