



**AMERICAN BUS ASSOCIATION**

*Representing the motorcoach, tour and travel industry*

United States Department of Transportation  
Federal Motor Carrier Safety Administration  
Docket No. FMCSA-2010-0167  
RIN 2126-AB20

Comments of the American Bus Association  
Electronic Logging Devices and Hours of Service Supporting Documents  
Supplemental Notice of Proposed Rulemaking, Request For Comments

June 26, 2014

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The American Bus Association (hereinafter “ABA”) appreciates this opportunity to comment on the Federal Motor Carrier Safety Administration’s (hereinafter “FMCSA” or “Agency”) request for comments in the matter of the Supplemental Notice of Proposed Rulemaking (SNPRM) on Electronic Logging Devices and Hours of Service Supporting Documents. Specifically, the FMCSA proposes to amend the Federal Motor Carrier Safety Regulations (FMCSRs) to establish: 1. Minimum performance and design standards for hours-of-service (HOS) electronic logging devices (ELDs); 2. Requirements for the mandatory use of these devices by drivers currently required to prepare HOS records of duty status (RODS); 3. Requirements concerning HOS supporting documents; and 4. Measures to address concerns about harassment resulting from the mandatory use of ELDs (SNPRM at p. 1). This rulemaking supplements the Agency’s February 1, 2011, Notice of Proposed Rulemaking (76 Fed. Reg. 5537) (NPRM) and addresses issues raised by the United States Court of Appeals for the Seventh Circuit in its 2011 decision in the case of *Owner-Operator Independent Drivers Ass’n v. Federal Motor Carrier Safety Administration*, 656 F.3d 580 (7<sup>th</sup> Cir. 2011) which vacated the Agency’s April 5, 2010, final rule (April 2010 rule) concerning ELDs and subsequent statutory developments. The SNPRM proposes to require ELDs for all commercial motor vehicle operations where the driver is required to complete RODS under 49 CFR 395.8 (SNPRM at p. 6).

ABA is the premier private bus and motorcoach industry trade association in North America and has existed for almost 80 years. ABA is home to some 3,800 member companies and organizations and approximately 850 bus operator companies. ABA motorcoach or over-the-road bus members represent 65% of all over-the-road buses (OTRBs) in operation. Bus operator members provide all manner of transportation services to the public, including fixed-route scheduled service, charter and tour, dedicated employee transportation, airport shuttle, and commuter services. ABA members include the largest scheduled service operators as well as the smallest tour and charter operators. On average, however, each ABA bus operator member owns eight motorcoaches. In addition, there are ABA members which provide service to bus companies. Finally, ABA membership includes many tour, travel and tourist companies, convention and visitors’ bureaus (CVBs), destinations, hotels, restaurants and attractions.

ABA and its members have been at the forefront of the effort to ensure that motorcoach travel is the safest mode of passenger transportation, a goal that has been obtained and maintained, in part, through ABA's efforts. Specifically, with respect to the effort to integrate ELDs in the motorcoach industry, ABA commented on the prior NPRM and supported the use of ELDs, but only with the proviso that ELDs be used by carriers whose operations and practices were not in accord with FMCSA safety regulations. In short, ABA believed that only motorcoach operators who were deemed as "Conditional" or "Unsatisfactory" should have been required to utilize ELDs.

One reason for ABA's conclusion was, and remains, cost. The motorcoach industry is, by and large, a small business industry. As noted above, ABA's motorcoach operators on average own eight motorcoaches. While each motorcoach costs \$550,000 or more, even with ABA's largest members included in the total, the capitalization of the industry is far less than that of any of the nation's so-called Fortune 500 companies. The SNPRM acknowledges the cost of ELDs. FMCSA gathered cost information on ELDs. That information led the Agency to conclude that "Although the prices of some models (ELDs) have not significantly declined in recent years, manufacturers have been introducing less expensive...systems with fewer features...as well as in cab units that resemble a stand-alone ELD" (SNPRM at p. 8). The Agency's examination of the cost information found that the cost of an ELD could cost a carrier \$800 per CMV to purchase and install ELDs. In addition to purchase costs, carriers would also spend \$25 per month per CMV for monthly service fees. (SNPRM at p. 109).

Again, the motorcoach industry is a small business industry. Taking the average ABA member's equipment roster as a guide, this proposal would add approximately \$6,600 to the cost of a small businessman or woman operating a bus company in the industry. This cost is a direct cost and will fall with more affect upon the smallest bus operating companies. As noted above, the bus industry is small, generally family-owned and without the major financial resources to undertake a major addition to their equipment. In addition, with the proposal's call for a two-year implementation period, it is certain that the smaller bus operators will have to wait for some period of time before they will be able to fit the ELDs to their equipment. The larger bus companies will likely get ELDs first as the ELDs manufacturers are able deliver them. This confluence of events may see the prices of ELDs rise not fall as the SNPRM seems to suggest (SNPRM, pg. 8-9) thus putting even more financial pressure on small operators.

Moreover, the SNPRM does not account for all of the costs that bus operators will bear with the implementation of the ELD rule. Bus operators are also required to pay separate charges for monitoring the ELD system and a per-driver fee for the system. Even small operators are obligated to pay a \$25 monthly service charge and a \$25 per-driver fee. In addition, it is certain that all bus operators will have to add staff to ensure that the operator is in compliance with the rule. Today, bus operators who use ELDs report that extra staff, full and part time, is needed to monitor and respond to the data from the ELDs. Thus the costs on bus operators will mount year by year.

The costs of the ELD implementation were thrown into sharper focus at a June 2014 meeting of ABA's Bus Industry Safety Council (BISC), which is composed of the safety and maintenance directors of motorcoach operators. The question was asked of approximately one hundred bus

operators: how many operators have ELDs on their coaches? Only approximately ten operators raised their hands in an affirmative answer. Assuming that that percentage of operators with ELDs is the same industry-wide as in the BISC meeting, then only 10% of the industry uses ELDs. What the answer to that question also revealed was that the use of ELDs is confined to the larger bus operators, those operators who need many ELDs for their buses and whose purchasing power will allow them to take delivery of ELDs faster than smaller operators. Therefore, (for carriers with no ELDs currently) 90% of the industry will need the vast majority of the available ELDs. But the majority of those bus operators seeking ELDs will be the smaller bus operators who will need fewer numbers of ELDs. This cohort of operators will be able to obtain them only after the larger, more financially able carriers will receive them given the larger carriers' more robust purchasing power. In such economic circumstances the prices of ELDs, particularly for smaller operators with little purchasing power, are more likely to rise and not fall.

To minimize the costs of the rule on small businesses and to ensure that the ELDs are distributed evenly among the bus industry, ABA agreed with the proposal in the 2011 NPRM to allow a compliance date three years after the effective date of the final rule. ABA believes that three years is the absolute minimum needed for an ELD implementation into the motorcoach industry. To do otherwise puts more financial and regulatory pressure on a hard-pressed industry and on an industry that is among the safest transportation modes.

It should be noted that the Agency did consider an alternative five-year implementation schedule for small business in the previous NPRM. This proposal was rejected in the SNPRM for the stated reason that "...a considerably longer implementation period could compromise the consistency of compliance-assurance and enforcement activities, and thereby diminish the rule's potential safety benefits. Therefore, the Agency's proposal includes a single compliance date for all motor carriers that would be subject to the new rule's requirement" (SNPRM, pg. 108). With all respect, the Agency's reason for rejecting a longer implementation schedule is conclusory. It lacks any specificity as to what "compliance-assurance and enforcement activities" would be compromised by a longer implementation schedule. Additionally, ABA contends that the Agency's "one size fits all" implementation timeline is likely to hamper the Agency's enforcement and compliance efforts.

Before detailing ABA's other objections to the SNPRM, it should be noted that this SNPRM is just one of several current and future rulemakings that will adversely impact the bus industry financially and then adversely impact the traveling public with a reduction in the number of carriers able to remain in business and a reduction in the service and service options the private bus industry can provide.

Recent federal agency rulemaking proceedings begun and contemplated are clear and uniform in one respect: they will increase the costs for bus operators to remain in business. The recent Drug and Alcohol Clearinghouse rulemaking, the new rule on three-point safety belts, the proposed rulemaking to raise insurance limits for bus operators, the FMCSA's research program into bus drivers' hours of service (HOS), the proposed rule on bus and motorcoach vehicle leasing and marking, changes to bus roof and window designs, requirements for fire suppression

systems, stability control systems, and now this SNPRM will all, if allowed to come to fruition, greatly increase the costs on this small business industry.

It is worth repeating what ABA and its members have said and testified to for years. The industry is one of the safest modes of passenger transportation. As the Agency admits "...passenger carriers tend to have above average safety ratings" (SNPRM pg. 7). While every fatality in a bus accident is one too many, the industry's annual average fatality rate is twenty deaths. This in an industry that provides 635 million passenger trips per year. Even more to the point, the ABA's analysis of accidents demonstrates that 60% of the accidents involve unsafe or illegal carriers, which should not have been allowed to operate at all. What we have said is that enforcement of current regulations is the key to reducing bus and motorcoach accidents, not the imposition of more regulations and additional costs on the industry.

ABA and its members have several significant issues with the SNPRM. Just as important, however, are several issues that the SNPRM does not address and which ABA and its members need to have resolved before the imposition of this rule. These comments will review several provisions of the SNPRM that raise both questions.

One significant issue concerning the SNPRM is the requirement for "supporting documents" to aid enforcement of the final rule. As pointed out, the definition of a supporting document is "any document...generated or received by a motor carrier... in the normal course of business that could be used, as produced or with additional identifying information, to verify the accuracy of a driver's record of duty status" (SNPRM p. 68). While ABA is in agreement that some supporting documents are necessary with an ELD we find that the proposal of 10 supporting documents for every 24 hour period a driver is on duty is excessive and burdensome.

The SNPRM proposes ten documents from five categories. The list of allowable documents is certainly comprehensive (SNPRM pg. 70-71). However, there is no demonstrated need for the drivers to maintain ten documents from five categories. ABA proposes that the required supporting documents be limited to 5 documents from three categories. It appears to ABA that this would not harm compliance or enforcement of the ELD rule and would in fact ease compliance.

Another issue is raised by the SNPRM's explanation of an "ELD Failure" (SNPRM pg. 50). There appears to be a lack of specificity of what would constitute an ELD Failure. The SNPRM requires the driver to give the motor carrier written notice of the ELD Failure within 24 hours. However, there seems to be a lack of information as to what should be determined to be a "failure" of the ELD. One example, the arrival of buses to New York City's Port Authority indoor bus terminal is usually accompanied by the loss of the ELD signal. Does this constitute a "failure" of the ELD and if so, how may it be coded in accordance with the SNPRM's coding requirements in Table 4 (pg. 190) of the SNPRM? If this loss of signal is not a failure, how will the ELD code this time? Related to this issue is the fact that, at times, Wi-Fi signals interfere with ELD performance. Most notably, the Wi-Fi signal somehow causes the ELD to change the drivers' status into the "off duty" category. So far, ELD vendors have not been successful in eliminating this malfunction. The industry must know how the Agency plans to code this

circumstance: is it a “failure” of the ELD or some other “malfunction,” and how will the malfunction’s coding affect the motorcoach driver’s operational status?

Adding to the complexity of the SNPRM and its consequences is the problem of cross-border operations by motorcoaches. One place where this problem is likely to surface is in motorcoach operations across the U.S. and Canadian border. Currently, Canadian motor carrier authorities have not instituted a change in their regulations in line with the U.S. ELD proposed rule. As ABA understands the situation, Canada will await a final U.S. rule before considering any changes to Canadian law and regulations. However, at the point the U.S. rule is effective the two year implementation schedule will require that Canadian motor carriers abide by the new rule when those carriers cross into the United States. Again, the two year implementation period may well be an insufficient amount of time for Canadian domiciled carriers to obtain ELDs that are certified by the Agency. As is true with the smaller American bus operators, smaller Canadian operators will find it difficult if not impossible to find suitable ELDs within the required implementation period.

Another omission in the SNPRM concerns the Agency’s enforcement of anti-coercion provisions in MAP-21. The SNPRM (pg. 81) states that “... FMCSA will publish an NPRM that proposes regulations that would prohibit motor carriers, shippers, receivers, or transportation intermediaries from coercing drivers to operate CMVs in violation of certain provisions of the FMCSRs...” Missing from the equation is the possible coercion by motorcoach and bus tour operators or tour group leaders who might want to coerce bus drivers into violation of the hours of service regulations. This could be accomplished by tying a driver’s gratuity to an illegal time schedule, tying the driver’s performance rating to an illegal or unworkable schedule, or threatening the loss of future business for failure to accept and meet such a schedule. ABA proposes that the focus of such anti-coercion efforts also include those who use bus and motorcoach services.

There also appears to be some confusion with respect to the SNPRM requirement that only drivers are able to “edit” the drivers’ hours of service records (SNPRM, pg. 78). “Edit” in the SNPRM is held to mean a change to an electronic record that does not overwrite the original record. The example given in the SNPRM is “...revising a duty status designation from ‘off-duty’ to ‘on duty not driving.’” (SNPRM, pg. 78). While ABA agrees with the Agency that drivers should have the ability to revise a duty status designation, we are confused as to whether the SNPRM means to allow drivers to revise records that do not reflect a change in duty status. ABA contends that the driver should be allowed to revise only the duty status designation and that the final rule should reflect that determination.

The SNPRM’s provisions with respect to a malfunctioning ELD (section 395.34) (pg. 145-148) raises another issue. That is the question of whether a motorcoach with a malfunctioning ELD may still be used by the bus operator during the eight day period allowed for the operator to repair the ELD. In such an instance the supporting documents would be the only way to ensure compliance, on the other hand, not allowing a motorcoach operator to use an otherwise functional motorcoach would be a significant hardship on many bus and motorcoach operators. Again, the average ABA member only has eight motorcoaches. There are times during the year, for example, spring, summer and Fall seasons, where all operators’ motorcoaches are committed,

leaving every operator without a “spare” to exchange for the bus with the malfunctioning ELD. Forcing an operator to provide service with one bus missing, will cause that operator to lose customers and perhaps subject him to unnecessary litigation. While ABA assumes, given the eight-day period allowed for an operator to repair an ELD (SNPRM, pg. 147), that an otherwise regulatorily compliant motorcoach would be allowed in interstate commerce, at a minimum clear guidance from the Agency on this issue is necessary.

The SNPRM’s explanation (SNPRM pg. 121-124) of Section 386.12 regarding complaints of substantial violations raises another issue. That section requires that a complaint against a carrier for a “violation may be filed with the FMCSA Division Administrator for the State where the incident...occurred” (SNPRM pg. 121). The question unanswered is whether the complaint may be transferred to the FMCSA Division Administrator for the State where the motor carrier is domiciled. The reason for this change is simple. Again, for the small business bus operator members of the ABA, the costs associated with defending any complaint can be substantial. The defense would be significantly more costly if the carrier is required to hire an out-of-state attorney and bear the costs of the proceeding in a state that could be thousands of miles away from home.

It is ABA’s opinion that the SNPRM is flawed in several material respects. ABA and its 3,800 member companies, organizations and attractions, respectfully requests that the SNPRM not move forward unless and until the Agency can examine and resolve the issues noted herein. ABA appreciates the opportunity to comment on the SNPRM and looks forward to continuing to work with the Agency for safer trucks and buses.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Clyde J. Hart, Jr.", written in black ink.

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