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The Latest on the Hours of Service Crisis

Owner Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration, 2007 WL 2089740 (C.A.D.C.)

For the past several years, the trucking industry's "800 pound gorilla" has been the FMCSA's efforts to amend its hours-of-service rules (HOS). Logistics planning for motor carriers and their shippers depends on availability of a driver. If a driver is not available, the carrier will not be able to move freight. U.S. Department of Transportation regulations on the number of hours that a driver can drive is one of the key factors determining availability of a driver. Changes in the rules will significantly impact the entire logistics system.

The Interstate Commerce Commission, and more recently its successor agencies, the Federal Highway Administration and the Federal Motor Carrier Safety Administration, have been responsible for the HOS. In response to the requirements of the Interstate Commerce Commission Termination Act (ICCTA) in 1996 and following an extensive public comment process, FMCSA adopted a set of rules that became effective in 2003. These rules were challenged by the safety group, Public Citizen, and overturned by the D.C. Court of Appeals. [See *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Circuit 2004)]. The court rejected the rules principally on the basis that FMCSA's adoption of the rules was "arbitrary and capricious" because, in adopting the rules, FMCSA failed to follow the requirement in ICCTA that

the HOS take into consideration the health and safety of the drivers.

FMCSA adopted a revised set of rules in 2005, which is being challenged in the D.C. Court of Appeals by Public Citizen and the Owner-Operator Independent Drivers Association. Public Citizen's challenge focused on the provisions of the HOS that permitted increased driving time. Under these rules, drivers were permitted to drive 11 hours each day, rather than 10 hours as permitted before 2003. Although the weekly limit of 60 hours was retained, drivers were permitted to "restart" the weekly schedule at any time after they took off 34 consecutive hours.

The D.C. Court of Appeals found that, in adopting the 2005 rules, FMCSA did not follow the requirements of the Administrative Procedures Act. Specifically, FMCSA's public comment process did not give the public a complete explanation of the methodology used to support the 2005 rules or the opportunity to participate in the rule-making process as required. The court concluded that FMCSA failed to disclose the methodology of its research in time to give Public Citizen and other interested parties the opportunity to challenge the results, and that Public Citizen was prejudiced by FMCSA's failure to follow the requirements of the Administrative Procedure Act. Therefore, the court

vacated the portion of HOS that included the increased daily driving limit and 34-hour restart provision.

If the court's decision becomes final, the pre-2003 provisions, i.e., the 10-hour driving limit and the 15-hour on-duty limit with no restart, will again become effective. If this occurs, shippers and carriers will have to revise their logistics systems to take into account differences in availability of drivers. It will be difficult for the industry to adjust back to the old rules after five years, making higher costs for truck transportation likely.

The court has granted a stay until December 27. The new rules may still be implemented if FMCSA can use the additional time to propose a rule that meets the requirements of the court and of the Administrative Procedure Act. Third time's a charm?

For more information please contact Bob Spira at rspira@bfca.com or (216) 363-4413.

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Moving From SSRS to UCR: Are There Potholes Along the Way?

Interstate motor carriers are familiar with the Single State Registration System (SSRS) even if they do not live in a participating state. If a state charged or collected a fee for a vehicle identification stamp or a number prior to January 1, 1991, the state was eligible to participate in SSRS and receive fee revenue. All for-hire interstate motor carriers were required to register and pay filing fees in a participating state.

The SSRS was repealed effective January 1, 2007, and has been replaced by the Unified Carrier Registration Agreement (UCR Agreement).¹

Where SSRS applied only to for-hire interstate motor carriers, UCR applies to private motor carriers, brokers, freight forwarders and leasing companies as well. The UCR Agreement is a base-state system administered by federal and state governments and by the motor carrier industry to collect fees from interstate motor carriers and *other related entities*.²

Which States Participate in the UCR Agreement?

All states are allowed to participate in the UCR Agreement regardless of whether they participated in SSRS. For 2007, the UCR Agreement participating states are those who participated in SSRS. Participating states are Alabama, Arkansas, Colorado, Connecticut, Georgia, Iowa, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maine, Michigan, Mississippi, Montana, North Dakota, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and West Virginia. Ten states do not participate.

Who is Required to Pay UCR Fees?

The UCR Agreement will apply to the following types of operations of passenger and property in interstate commerce:

1. Motor carrier
2. Motor private carrier
3. Freight forwarder
4. Broker
5. Leasing company

Where SSRS applied only to for-hire interstate motor carriers, UCR applies to private motor carriers, brokers, freight forwarders and leasing companies, as well.

In addition to interstate motor carriers, a state may elect to apply the provisions of the UCR Agreement to motor carriers, motor private carriers and freight forwarders subject

to its jurisdiction that operate solely in intrastate commerce within the borders of the state.

For the purpose of the UCR agreement, "motor carrier" includes for-hire carriers that are otherwise exempt, such as farmers, ranchers and school bus operators. Motor carriers are now subject to the fees in connection with the filing of proof of financial responsibility under the UCR agreement.³

Where are Fees Paid?

Fees are paid to the applicable base state only. Each motor carrier or related entity must choose a base state from the list of participating states in which to register and pay UCR Agreement fees. If a principal place of business is in a participating state, that is the base state.

Otherwise, any participating state in which an office or operating facility is maintained can be the base state. If an office or operating facility is not maintained in any participating state, then the nearest participating state will be the base state.

What Forms are Required?

The Unified Carrier Registration Form is a simple form that can be found at www.ucr.in.gov/MCS/ucrProcedures.htm. Please note that it asks for the number of trailers, as well as the number of straight trucks and tractors.

How Much are the Fees?

The UCR fees are to be determined by the Secretary of the U.S. Department of Transportation (USDOT) based upon the recommendation of the UCR Board. Initial fees for 2007 for exempt or non-exempt motor carriers, motor private carriers or freight forwarders are:

Number of commercial motor vehicles	Fee per company
3-5.....	\$116
6-20	\$231
21-100	\$806
101-1,000	\$3,840
1,001 and above.....	\$37,500

The fee per company for a broker or leasing company for Registration Year 2007 is \$39.⁴

How is the Number of Vehicles Calculated?

1. The number of commercial motor vehicles⁵ owned or operated as reported on the most recently filed MCS-150 with the USDOT, or the total number of commercial motor vehicles owned or operated for the 12-month period ending on June 30 immediately prior to the beginning of the registration year. NOTE: This includes trailers as well as trucks, vehicles and/or power units.
2. Include those vehicles under a long-term lease (over 30-day duration).
3. There are options regarding vehicles used only in intrastate transportation.

How Long Must a Carrier Retain UCR Records? Must They be Paper Records?

Each entity is required to preserve the UCR records upon which the annual applications and renewals are based for three (3) years from the due date or filing date, whichever is later, plus any time period included as a result of state decisions or inquiries. The three (3) year period is the current calendar year and the prior two (2) calendar years.

Records may be kept on paper, microfilm, microfiche or other computerized or condensed record storage system as required by the base state.

What About Enforcement?

The Attorney General may bring a civil action in the U.S. district court in the state in which compliance is required. The court may issue a temporary restraining order or a preliminary or permanent injunction requiring compliance.

A state may issue citations and impose reasonable fines and penalties pursuant to its applicable laws and regulations for failure to submit accurate documentation and information as required under the UCR Agreement, failure to pay the UCR fees required or failure to operate as an interstate motor carrier without being compliant with the UCR Act.

¹ 49 U.S.C. 14504a, enacted by section 4305(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)

² 49 U.S.C. 14504a(a)(8)).

³ 49 U.S.C. 14504a(a)(5)

⁴ Federal Register Vol 72, NO 164/ Friday, August 24, 2007/ Rules and Regulations

⁵ The statute defines "commercial motor vehicle," in general, as including both self-propelled and towed vehicles. 49 U.S.C. 14504a(a)(1)(A) and 31101(1).

For more information please contact Martha J. Payne at mpayne@bfca.com or (541) 764-2859.

Mexican Trucks: Can They Be Safe?

Federal Motor Carrier Safety Administration

Following the mandate of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007, FMCSA is obligated to publish data regarding pre-authorization safety audits conducted with respect to motor carriers domiciled in Mexico that have been granted authority to operate beyond border commercial zones. Mexican trucks operating in the U.S. have been a persistent issue in the trucking industry since the NAFTA treaty went into effect in the 1990s. According to the NAFTA treaty, U.S. trucks are supposed to be able to operate in Mexico, and Mexican trucks are supposed to operate in the U.S. So far, neither has happened.

FMCSA has been responding to requirements imposed by NAFTA in the face of persistent political opposition. FMCSA is managing a demonstration project to determine if trucks and drivers working for motor carriers domiciled in Mexico could operate safely on U.S. highways. The project includes

inspections and testing of the carriers by FMCSA.

As of the date of the Notice, five carriers have been granted authority to operate in the U.S. under the demonstration project. The

Notice includes data on the results of the FMCSA approval process for the successful carriers. In

addition, the Agency published data regarding carriers who have applied but have not obtained authority to conduct general operations in the U.S. and requested comments on the data.

Under the demonstration project, no motor carrier domiciled in Mexico will be granted authority to operate in the U.S. unless FMCSA can verify five elements: (1) a controlled substance and alcohol policy in compliance with 49 CFR Part 40; (2) a system for compliance with the DOT hours of service rules, (3) proof of financial responsibility

(i.e., insurance); (4) records of periodic vehicle inspection; and (5) the qualifications of each driver as required by 49 CFR Parts 383 and 391.

The information in the notice is intended to show the Agency's efforts to establish high standards for Mexico-domiciled carriers who wish to apply for authority to operate in the U.S. under

the demonstration project. Data regarding the successful applicants is included. Also, to show the difficulty of meeting the standards, the Agency included the data on the many

carriers who failed to meet the standards.

Notwithstanding FMCSA's efforts, the 2,500 comments filed between May and October have been almost universally negative. Commenters appear to be skipping the review of the data published in the Notice and voicing their objections to the concept of Mexican trucks and Mexican drivers operating on U.S. highways.

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Benesch Transportation Attorneys Named Best Lawyers in America®



Marc Blubaugh



Eric Zalud

Marc Blubaugh and Eric Zalud were named in the recently released 2008 edition of *The Best Lawyers in America*®, a referral guide of United States attorneys, for excellence in the field of transportation law.

Published biennially since 1983, and now an annual publication, *The Best Lawyers in America* is universally regarded as the definitive guide to

legal excellence in the U.S. The 2008 edition includes attorneys representing 57 specialties in all 50 states and Washington, DC. Results are compiled through an extensive peer-review survey in which more than 18,500 of the leading lawyers in the U.S. confidentially evaluate their professional peers. For more information, please visit www.bestlawyers.com.

On the Horizon

Eric Zalud and Martha Payne will be attending the **Conference of Freight Counsel Meeting** in Atlanta, GA on January 6 & 7, 2008.

Eric Zalud, Marc Blubaugh and Bob Spira will be attending the **Transportation Lawyers Association Regional Conference** in Chicago, IL on January 12, 2008.

For further information and registration, please contact Lindsay Wise, Client Services Coordinator at lwise@bfca.com or (216) 363-4174.

Recent Speaking Engagements

Eric Zalud presented *Containing Container Liability: Legal Issues and Pitfalls Specific to Containers* at the **NITL 100th Annual Meeting and Transcomp** in Atlanta, GA, November 9–14, 2007.

Bob Spira was the leader of **SMC's 2007 Contract Law Seminar** in Seattle, WA, on November 6, 2007.

Marc Blubaugh and Eric Zalud spoke at the **Transportation Law Institute** in Washington, D.C., on November 2, 2007. Mr. Blubaugh presented *3PL Potpourri: Breaking News From The Courts in 2007* and Mr. Zalud presented *Hot Topics in Transportation Law*.

Marc Blubaugh presented *Supply Chain Contracts: What Not To Do* at the **Council of Supply Chain Management Professionals' Roundtable** in Columbus, OH, on October 18, 2007.

Eric Zalud presented *Catastrophic Tank Truck Accidents: Actions to be Taken by the CEO* at the **McLeod Software Users Conference** in Birmingham, AL, on October 5, 2007.

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