

using the five categories of operations as an example. The complexity would adversely affect enforcement.

Wal-Mart recommended improving enforcement activities while waiting for a new rule.

The IBT said the complexity of the proposed rule, particularly regarding the five categories of operations, would be a challenge for the enforcement community and a problem for the regulated community as well.

#### Law Enforcement Groups

CVSA and the Connecticut Department of Motor Vehicles argued that the complexity of the NPRM would create problems with training and application at the roadside. They state that FMCSA's estimate of four hours needed to train investigators in the proposed rules is very much understated and is likely to be two to four times as long. One CVSA member estimated that the time required to complete a Level 1 inspection at the roadside would be increased by one-third. Finally, CVSA opposed the requirement for EOBRs as premature, and recommended more study to ensure standardization.

The New York State Police noted that the proposal, as written, was very difficult to understand for enforcement purposes, which is likely to diminish enforcement actions taken on the roadside and therefore would minimize the likelihood of widespread carrier compliance.

The Wisconsin Department of Transportation (WisDOT) believed the five categories would create confusion: the distinction between types 1 and 2 is not precise enough, and roadside enforcement for types 3, 4 and 5 would be virtually impossible. Substantial training for both drivers and enforcement personnel would be necessary. Enforcement personnel would need to know how to deal with both paper and EOBR systems. WisDOT also believes the removal of the Tolerance Guidelines is premature without accurate and extensive crash data.

The Minnesota Department of Transportation and the Minnesota Department of Public Safety filed joint comments. They performed a section-by-section critique, noting that significant modifications and clarifications that would be needed so that enforcement could be effective and consistent.

The Maine Department of Transportation concluded that requiring EOBRs would set back enforcement because of lack of standardization of the devices.

PennDOT recommended regulations that are easily understood by all, enforceable at the roadside, provide for safer operations, and meet the needs of the public, particularly the uninterrupted continuity of utility services.

#### Safety Advocacy Groups

AHAS contended that difficulty in enforcing the provisions of the NPRM would provide opportunities for drivers to violate the "already inadequate" weekend rest period the proposal would mandate. The AHAS agreed with most commenters that enforcement must be improved, and strongly supported the proposed requirement of EOBRs for Type 1 and 2 operations. It strongly recommended the agency consider requiring them for Types 3 and 4 drivers as well.

CRASH believes that making a distinction among the five different categories of drivers would present enormous problems for police. CRASH also believes relaxing the record carrying requirements by using the DOL records and supporting documents in all categories further complicates enforcement.

PATT, on the other hand, supported the use of DOL time records, but recognized need for vigorous enforcement, and recommended retention of records for 24 months. The NSC, however, believes that the use of the DOL timecard may not be practical for roadside enforcement.

#### FMCSA Response

The rule being made final today is significantly simpler than the NPRM and should be much easier to understand and enforce. The agency is modifying the existing rules and exemptions to update them with the appropriate off-duty, on-duty, and driving times, as well as adding a restart provision for truck drivers. The agency is retaining the paper-based record of duty status system, including retention of supporting documents and allowing, but not requiring, continued use of § 395.15-compliant automatic on-board recording devices.

The motor carrier's responsibility for compliance with the HOS regulations remains clear. The motor carrier is responsible for and must police the actions of its employees. This obligation under the FMCSRs was affirmed by the Associate Administrator for what was then the Office of Motor Carriers (of the FHWA) *In the Matter of Horizon Transportation, Inc.*, 55 FR 43292 (October 26, 1990) (Final Order February 12, 1990). A motor carriers' responsibility for the actions of

independent contractors and owner operators they use was outlined *In re R.W. Bozel Transfers, Inc.*, 58 FR 16918 (March 31, 1993) (Final Order August 6, 1992); and more recently *In the Matter of Commodity Carriers, Inc.*, (Order Appointing Administrative Law Judge March 25, 1997). Likewise, each motor carrier must have a system in place that allows it to effectively monitor compliance with the FMCSRs, especially those aimed at the issue of this final rule—driver fatigue (See *In re National Retail Transportation, Inc.*, (Final Order: Decision on Review September 12, 1996.)) The United States Court of Appeals for the Sixth Circuit affirmed in *A.D. Transport Express Inc. v. Federal Motor Carrier Safety Administration*, 290 F. 3d 761 (6th Cir. 2002) that supporting documents must be maintained in a common sense manner so that FMCSA investigators can "verify dates, times, and locations of drivers recorded on the RODS." More recently, the D.C. Circuit agreed that the term "supporting documents" in the current rule encompasses any document that *could be used* to support the RODS. That decision also found an FMCSA requirement that supporting documents must be maintained in a fashion that permits the matching of those records to the original drivers' RODS as a reasonable interpretation of 49 CFR 395.8(k)(1). In fact, the Court concluded that all the FMCSA is asking is that carriers refrain from destroying the agency's ability to match records with their associated drivers (*Darrell Andrews Trucking v. Federal Motor Carrier Safety Administration*, 296 F. 3d 1120 (D.C. Cir. 2002).

#### Regulatory Impact Analysis

The NSC, ABA, ATA, and DLTCA petitioned FMCSA to retain an independent consulting firm to study the safety and economic impacts of any final rule. The FMCSA selected a large, well-respected contractor with extensive experience in transportation and the regulatory process.

After reading and analyzing the 53,750 written comments, the FMCSA identified three potentially effective and reasonably feasible regulatory models within the scope of the NPRM for further consideration. The analysis of these alternatives is entitled *Regulatory Impact Analysis and Small Business Analysis for HOS Options*, December 2002 (RIA) and is in the docket.

The benefits and costs of each alternative must be measured against a baseline, as AHAS pointed out in its comments. The Office of Management and Budget's (OMB) guidance to federal agencies has been that the baseline