

Legal Challenges Have Followed Previous HOS Proposals

By Eric Miller
Staff Reporter

Since they were granted an 11th hour of driving time initially in 2003, motor carriers have been fighting to keep it.

Now that the Federal Motor Carrier Safety Administration has issued another hours-of-service rule — the fourth one in eight years — it's a pretty sure bet that the legal battles aren't over.

The court fight began after Annette Sandberg, then acting FMCSA administrator, introduced an HOS rule in April 2003 that extended allowable driving hours to 11 from 10 but cut drivers' overall workday to 14 hours from 15.

However, since 2003, the 11-hour driving standard has been rejected twice by a federal appeals court, although it has remained in effect.

American Trucking Associations President Bill Graves called the April 2003 rule a "good mixture of common sense and sound science."

Once the rule was announced, it didn't take long for Public Citizen and several other organizations to take their opposition to the federal courts. They initially argued before the U.S. Court of Appeals for the District of Columbia that long and irregular driving hours would impair driver health.

In July 2004, the appeals court ejected the 2003 HOS rule as "arbitrary and capricious," mostly because FMCSA did not consider the rule's effect on driver health. The court also noted in its decision that FMCSA did not cite the research needed to justify the increase in daily driving time and suggested it would reject any subsequent rule that was too similar.

But, in January 2005, FMCSA issued a proposed rule that looked almost identical to the one the appeals court had rejected.

"When the court ruled the way it did in 2003, it really didn't deal with the merits of the case," former FMCSA administrator John Hill recalled in an interview with TT last month. "They really invalidated the rule based on driver fitness."

Hill watched the rule wind through the courts as FMCSA's chief safety officer from 2003 to 2006 and as administrator from 2006 to 2009. He is now a transportation consultant.

"The agency at that time felt like the rule was still a good rule and, therefore, they only needed to address the driver fitness issue," Hill said. "That's why the agency moved ahead with basically the same rule."

The 2005 rule, finalized in August, maintained the 11-hour daily driving limit, contending that it was economically beneficial to carriers and that all available research data indicated that the additional hour did not "pose a significant risk."

However, Henry Jasny, general counsel for the Advocates for Highway and Auto Safety, called the agency's action in reintroducing the same rule as "in your face."

"But on technical grounds, they can get away with it. That's the power of agencies," Jasny recently told TT. "FMCSA can pretty much do what it wants, and the court doesn't have any police power. All the court can do is say, 'You should do what we told you.'"

In January 2006, the Owner-Operator Independent Drivers Association asked the appeals court to review the rule. The process took more than a year, but the court again rejected the rule in mid-2007, this time more on procedural than safety grounds.

It wasn't until November 2008 that FMCSA published its third rulemaking, one that still retained



Annette Sandberg, who headed FMCSA in 2003, announced an hours-of-service rule that year granting truck drivers an 11th hour of driving time.

the 11-hour limit. The interim final HOS rule went into effect two months later, in January 2009.

Since then, a third court challenge was put on hold after a settlement in October 2009 between the agency, the Teamsters union and the Advocates for Highway and Auto Safety.

"We actually filed a suit, but we also sent a letter and said let's talk about this," Jasny said.

"They asked for a time out to talk about what can be done. That talk led to a discussion about 'why don't you take a new look at it.'"

"We never thought, never suggested, that they have to do it our way," he said. "We have never had any understanding that the rule would be different."

The settlement simply gave the Obama administration time to create its own rule, Jasny said. The administration's new proposed rule was made public in December 2010, and the final rule was announced on Dec. 22.

Hill is convinced that the issue could potentially bounce around the courts for years before it's finally settled.

He said he feels the most judicious solution would be for Congress to pass legislation that better spells out specific hours requirements.

"It's a symptom of what's wrong with our legislative process," Hill said. "I think Congress has a responsibility to step into this process, because it's very clear that whatever rule is published by any agency in this matter, it's going to be litigated. I just don't see that either side is going to give up."

Sandberg said that fighting rules in the courts drains time and money that could be otherwise better directed. It also frustrates the agency's staff, many of whom believe that the science indicates there are better ways to reduce fatalities than fighting over an hours rule.

"What's frustrating from an administrator's standpoint is you've got limited people and limited financial resources," Sandberg said. "You only have some much time to work your regulatory agenda. You only have a chance to get a couple of big rules out."



In 2000, DOT's Slater and FMCSA's Cirillo proposed limiting drivers' on-duty time to 12 hours.

Service

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ay be used only once every seven days. Must clude two periods between 7 a.m. and 5 a.m. thin the 34 hours.

ay not drive if it has been more than eight ours since driver's latest 30-minute off-duty riod.

es not include any time resting in a parked ck. In moving truck, does not include up wo hours in passenger seat immediately ore or after eight consecutive hours in eeper berth. Provision counting time in e sleeper berth as off-duty remains.


Source: FMCSA

Sandberg said that Congress had been pressuring trucking regulators to get it on the books since 1999.

"We just had to make a decision and get one out," Sandberg told TRANSPORT TOPICS in a recent interview.

And the administration felt that if it was going to shrink drivers' allowable on-duty time, there would have to be some sort of offset, like allowing the 11th hour of driving, she said.

"It's one of those rules that has been very contentious since the get-go," Sandberg said. "It has been extremely difficult to sort out."



<ul style="list-style-type: none"> • April 28, 2003 • FMCSA increases the allowable drive time to 11 hours from 10 hours but also reduces the total on-duty to 14 from 15. The new rule also allows drivers to reset their weekly 70 hours after a 34-hour break. 	<ul style="list-style-type: none"> • Sept. 30, 2004 • Congress gives FMCSA until September 2005 to rewrite the rule but keeps rule in place. 	<ul style="list-style-type: none"> • July 24, 2007 • Court rejects 2005 rule's 11-hour maximum and 34-hour restart, giving FMCSA until the end of the year to revise rule. 	<ul style="list-style-type: none"> • Dec. 22, 2011 • FMCSA final rule keeps 11 hours of drive time but limits the 34-hour restart to once a week and requires two 1-5 a.m. periods within those 34 hours.
<ul style="list-style-type: none"> • June 12, 2003 • Safety groups sue in federal court to overturn the new rule. 	<ul style="list-style-type: none"> • Oct. 1, 2005 • The new rule takes effect. 	<ul style="list-style-type: none"> • Jan. 23, 2006 • The Owner-Operator Independent Drivers Association challenges 2005 rule in court over the sleeper berth restriction. 	<ul style="list-style-type: none"> • Oct. 26, 2009 • FMCSA agrees to rewrite rule. Plaintiffs agree to delay legal action to allow for rewrite.
<ul style="list-style-type: none"> • July 16, 2004 • Calling the 2003 rule "arbitrary and capricious," U.S. Court of Appeals for the District of Columbia Circuit overturns it. 	<ul style="list-style-type: none"> • Aug. 25, 2005 • FMCSA publishes final rule nearly identical to the 2003 and restricts the use of the sleeper berth. 	<ul style="list-style-type: none"> • Feb. 27, 2006 • Public Citizen challenges the 2005 rule for maintaining the 11-hour driving time. 	<ul style="list-style-type: none"> • March 9, 2009 • Safety and labor groups sue to have the 2007 rule invalidated.
<ul style="list-style-type: none"> • Dec. 17, 2007 • FMCSA issues interim rule that preserves the 11-hour driving limit and 34-hour restart. 	<ul style="list-style-type: none"> • Dec. 23, 2010 • Saying it favors 10 hours, FMCSA proposes a rule that could either roll the driving time back to 10 hours or keep it at 11. The rule would also restrict the 34-hour restart. 	<ul style="list-style-type: none"> • Nov. 19, 2008 • FMCSA finalizes December 2007 rule. 	<ul style="list-style-type: none"> • Dec. 23, 2010 • Saying it favors 10 hours, FMCSA proposes a rule that could either roll the driving time back to 10 hours or keep it at 11. The rule would also restrict the 34-hour restart.