

PUBLICATION

“Supporting Documents” Regulation: Beware

November 27, 2007

Pursuant to 49 C.F.R. § 395.8(k), a motor carrier "shall maintain records of duty status and all supporting documents for each driver it employs for a period of six months from date of receipt." Following the introduction of global positioning systems and the availability of electronic tracking devices for motor carrier equipment, the so-called "supporting documents" regulation has been the subject of much controversy between the U.S. DOT and the industry it regulates.

Applying the hours of service supporting documents regulation to electronic tracking data compels the motor carriers utilizing such technology to maintain their satellite position history data for their entire fleet for a minimum of six months. Not only is the recordkeeping a practical burden and expense, but also it discourages motor carriers from utilizing the technology. In fact, a policy memorandum issued by the Federal Highway Administration on August 15, 1997 recognized that the use of electronic tracking technology "has the potential of changing the 'playing field' for those carriers using the technology" and that "in the interest of promoting the use of advanced technology as a monitoring tool" the Agency "[u]nder special circumstances" may enter into "agreements" with motor carriers utilizing the technology, "to provide relief from recordkeeping requirements in the regulations in return for the use of advanced technology that is patently adaptable for the purpose. . . . In all such agreements, the participating carriers should not be held to a higher compliance standard than nonparticipating carriers."

The Agency's "Policy on the Use of Advanced Information Technology" set forth in the August 15, 1997 memorandum was affirmed on April 24, 1998 in a letter from George Reagle, Associate Administrator for the Office of Motor Carriers, to Walter McCormick Jr., President and CEO of the American Trucking Association. Mr. Reagle advised that the policy memorandum "does not require motor carriers to acquire, install, use or maintain electronic tracking technology, *nor does it require carriers to retain electronic tracking data*" (emphasis added). Finally, FMCSA affirmed its policy regarding the use of electronic tracking data to verify hours of service records on December 5, 2001 in a letter from Joe Clapp, Administrator, to Bill Canary, Interim President and CEO of the ATA. Mr. Clapp advised that field inspectors "formally request such records only when other supporting documents are not sufficient to demonstrate compliance." He further advised that if a motor carrier refuses to produce the electronic tracking data, the refusal "neither triggers a formal request nor adversely affects the compliance review or safety rating."

Recently, the issue as to whether a motor carrier is required to maintain its electronic tracking data, or satellite position history, for six months as "supporting documents" pursuant to § 395.8(k) was presented to the United States District Court for the Middle District of Georgia, Columbus Division, in *Morgan v. U.S. Xpress, Inc.* Relying upon the Federal Highway Administration's decision in *In re: National Retail Transportation, Inc.* in 1996 that "supporting documents" include all documents that "could be used" to verify a driver's hours of service records and the decision of the United States Court of Appeals for the District of Columbia Circuit in 2002 in *Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Administration*, which held that the term "supporting documents" includes not only those documents that the motor carrier actually uses to audit its driver's daily logs but also documents that "can be used" to verify records of duty status, the District Court held that "[t]here is no logical reason to conclude that GPS data which can be used to verify driver's status records are not supporting documents to be retained for that purpose pursuant to the Regulation for the period required by the Regulation." (Order on *Motion in Limine* entered March 13, 2007.) The Judge charged the jury that

"global positioning satellite data is a supporting document which U.S. Xpress was required to maintain for six months under the Federal Motor Carrier Safety Regulations."

In its motion *in limine* prior to trial seeking exclusion of any evidence concerning the failure to retain the satellite position history data for the entire fleet for six months, U.S. Xpress argued that the Agency's policy since at least 1997 has been that a motor carrier may elect not to retain the data for six months without suffering any adverse consequences, so long as the motor carrier has in place an effective system of document retention for the verification of compliance and enforcement of the hours of service rules. In addition, U.S. Xpress argued that as a matter of law a motor carrier cannot be found liable for bad faith spoliation of its electronic tracking data based upon the Agency's policy statements if it chooses to retain the data for less than six months.

The District Court, however, ruled that the issue of bad faith destruction of the satellite position history data in less than six months presented a jury question. The Judge allowed U.S. Xpress to present the testimony of an expert witness who reviewed the history of the Agency's policy memoranda and letters to the industry concerning the applicability of the supporting documents regulation to electronic tracking data. Although the Judge charged the jury that U.S. Xpress "was required to maintain [the data] for six months under the Federal Motor Carrier Regulations," he further charged the jury that it "must still determine whether the destruction of such evidence was relevant to the Plaintiff's claims and was done in bad faith." There was no indication that the jury ever reached the issue in its deliberations.

The issue remains alive before the Federal Motor Carrier Safety Administration. Notwithstanding the literal wording of the Regulation, it appears that most of the motor carriers utilizing electronic tracking systems do not routinely retain the data for six months. The motor carriers rely upon the governing Agency's policies and practices. A body of law is continuing to develop, however, that exposes the motor carriers to potential liability for failing to maintain the data despite the Agency's announced policies. Until the FMCSA adopts a regulation specifically addressing the issue, the supporting documents regulation is likely to be an increasing source of disputes in trucking accident litigation. Motor carriers beware!