

# HOURS OF SERVICE RULES: The problem with measuring fatigue.

By Henry E. Seaton, Esq.

Although the American Trucking Association's appeal of the new hours of service regulations was just argued before the Court of Appeals on March 16, so far the FMCSA has stubbornly refused to delay its implementation past the July 1, 2013 effective date. Maintaining the current hours of service is the centerpiece of the ATA's litigation efforts. There is general agreement in the industry that the new rules will further hamstring driver flexibility, further reduce productivity, and interfere with reasonable dispatch. This is particularly true of the proposed new restart provisions which will require a driver to be off duty for two consecutive overnight periods, assuring that drivers coming off the current 34 hour restart will miss morning pickups and deliveries and fight commuter congestion.

Virtually everybody in the industry, including CVSA (state enforcement officials) and many influential members of Congress have urged the agency to postpone the effective date until the court acts, but so far the agency has been unmoved.

Although the court action is largely a defensive measure to keep out more restrictive provisions of the proposed new rules, part of Petitioner's argument is that the scientific premises relied upon by the agency do not support the agency's conclusions.

The heart of the matter goes back to 2003 and two sleep study concepts which continue to underlie the agency efforts to restrict hours of service to treat the problem of fatigue.

Circadian rhythms is the notion that workers are more alert during daylight hours and that drivers should be

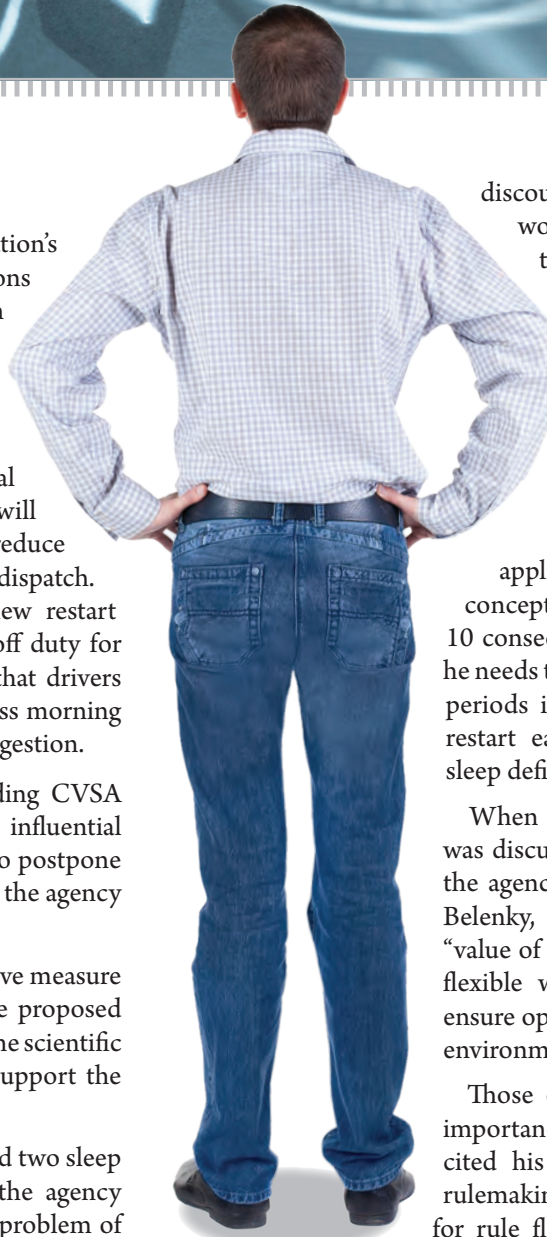
discouraged from night shift work to avoid wrecks, even though nighttime driving facilitates reasonable dispatch and optimum utilization of uncongested highways and the industry has been traditionally based on overnight dispatch.

Restorative Sleep as applied to the new rules, is the concept that even if a trucker has 10 consecutive hours off each day, he needs two consecutive overnight periods in addition to a 34 hour restart each week to rebuild his sleep deficit bank.

When all of this sleep science was discussed 10 years ago, one of the agency's own experts, Colonel Belenky, was a proponent of the "value of a power nap" as a natural, flexible way to fight fatigue and ensure optimum alertness based on environmental conditions.

Those of us who recognize the importance of split sleeper berths cited his studies in the agency's rulemaking, pointed out the need for rule flexibility to allow drivers the freedom to rest when tired and to avoid congestion and inclement weather.

The FMCSA did not listen back then and



apparently is still not listening 10 years later. Combating fatigue and not requiring, permitting or encouraging a driver to drive while tired is the issue, not measuring with increased precision the driver's activity based upon vehicle movements and miles traveled.

Apparently, the petitioners at oral argument in the current HOS suit, argue again that the sleep science used by the agency does not support the proposed new rule. In response, the agency offers the "nevermind" defense, suggesting that the court should not examine the merits of the rule or whether it is fit for its intended purpose.

Hopefully the court will not find that industry has lost its opportunity to address whether rules promulgated by the FMCSA are arbitrary and capricious under the doctrine of judicial deference to the agency's professed expertise.

Ten years ago there were already being developed cost effective fatigue measuring devices, including wristwatch size biorhythm measuring systems, ocular devices to measure eye movement, and steering wheel devices to measure drowsiness. All of these measures address the real issue—measuring fatigue—and if implemented consistent with more flexible driving parameters including flexible sleeper berth could offer 21<sup>st</sup> century solutions to an age old problem.

Instead, the industry seems committed to mandating over-restrictive work rules, regardless of its cost, effects on productivity or ultimate safety benefit.

Almost 40 years ago, Hal Richter of Carl Subler Trucking, met with the ICC, which then regulated highway safety, and suggested the use of tachographs (an early stage EOBR) as an alternative to paper logs. Four decades later, regulators have committed to the idea that the modern day tachograph, which has been used in Europe for years, should be mandated for all commercial motor vehicles.

Maybe it is actually time we start measuring fatigue with devices designed to tell the driver, his employer and the regulators when a driver is alert or fit to drive, while encouraging, allowing and permitting a driver sufficient flexibility in driving time to get miles and get home safely.



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A close-up photograph of a bald eagle's head, looking directly forward. Below the eagle's beak is a stylized logo consisting of a blue and red shape resembling the letters 'USA'. Below the logo, the text "USA LOGISTICS, INC." is written in a bold, sans-serif font. At the bottom of the advertisement, the text "AGENTS WANTED 800-872-5999" is displayed in a white font against a dark blue background.

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# Time for an Upgrade?

An advertisement for Network F.O.B., Inc. The background is a light-colored, textured surface. On the left is a vintage wooden telephone with two silver bells and a black handset. On the right is a black smartphone. The smartphone screen displays the text "NETWORK F.O.B. INC." in a red, stamp-like font, with "F.O.B." in a larger, bolder font. Below this, it says "Patent # 61/592,186". At the bottom of the advertisement, the text "Network F.O.B., Inc. Elite Agent Corps" is written, followed by the website "www.NetworkFOB.com" and the phone number "(239) 330-4752".

**Time for an Upgrade?**

**NETWORK F.O.B. INC.**  
Patent # 61/592,186

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