



# TECHNOLOGY, THE LAW, AND POLITICS

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**E**very trucking trade publication contains advertisements from technology vendors touting their product as the latest invention to meet the felt needs of carriers and their customers. Our industry is captivated by the technology revolution and an increasing array of federal regulations have been initiated in the name of safety to measure drivers' hours of service (ELD) and to control speeding (speed limiters).

Aldous Huxley wrote *Brave New World* predicting a controlled society in which only a few remaining "savages" would value independent action. George Orwell wrote 1984 predicting that Big Brother (the government) would use technology to monitor private activities and restrain personal freedom. Yet the amount of personal data and the surveillance capabilities which the government and third parties have now readily available to profile every citizen, and truck drivers in particular, was never predicted and is truly staggering.

## TECHNOLOGY AND THE RIGHT TO PRIVACY

There is a legal and constitutional right to privacy which is threatened by the right to surveil, electronically capture, regulate and control an individual's every action. There is an argument to be made that as technology costs fall, increased surveillance and data monitoring techniques, like DNA evidence, are ways to enhance highway safety, "cut to the chase," and determine and monitor driver performance with better certainty. To its credit, OOIDA has recognized that the ends may not justify the means when it comes to government mandated technological encroachments on the right of privacy.

As a result of its efforts, the Agency's initial ELD mandate was rejected on court appeal and on March 12, the Agency issued a new rule including 8 ways to help prevent E-Log harassment. Ironically, accompanying a recent internet article on the new rule was an advertisement by a vendor touting the advantages of carriers mandating onboard surveillance cameras!

In sum, there is a building libertarian backlash to the use of technology to infringe on the right of privacy. As new technology is increasingly imposed in the name of safety on truck drivers, expect continuing political and legal issues concerning the proper role of surveillance and monitoring to arise.

## TECHNOLOGY AND RULEMAKING

In addition to privacy concerns, increased use of technology involves other legal and political consequences which must be examined. Any new gadget for a truck mandated in the name of safety or the environment has a cost component which must be examined. As part of rulemaking,

regulators are required to perform a cost benefit analysis and to examine the cost of any new rule on small businesses in particular. The so-called Paperwork Reduction Act and the Reg Flex Act require this type of analysis which is judicially appealable. (The cost of new technology falls disproportionately on small carriers and owner-operators due to retrofitting costs and trade associations representing small truckers must be particularly vigilant to ensure regulatory exceptions and phase-in periods.)

In this context, the E-Log device is now a fairly cost effective third generation technology which primarily measures engine performance for hours of service compliance, not driver fatigue. The first generation tachograph technology was available in the '70s and a proposal for its use in lieu of a paper log was rejected by the ICC back then.

Forty years later the technology has improved and the cost has been reduced. Politically, Congress is on board. SMS methodology has placed those who operate with a paper log at a competitive disadvantage and with the Agency listening to privacy concerns, an E-Logging rule is all but inevitable.

Yet, all the bells and whistles aside, the technology is calibrated to measure productivity, not fatigue. It will be a rigid enforcement tool that trumps any driver flexibility, resulting in drivers driving while tired and being forced to stop for protracted periods of time when and where it is inconvenient to do so.

Ironically, over 10 years after the new HOS rules were implemented, we are still arguing over hours of service rules which the ELD is intended to enforce. Yet while all the research shows there are a variety of devices to measure

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fatigue rather than engine RPMs in real time, we are arguing over prescriptive hours of service, updated tachograph technology and extensive sleep apnea testing.

One could certainly argue that technological advances are disconnected from wise policies.

## TECHNOLOGY, CONTROL, AND LIABILITY ISSUES

Proponents of use of technology for greater control and monitoring of driver performance and truck location are carriers, shippers and brokers. Real time monitoring through GPS and other tracking devices of drivers and independent contractors as well as industry's fascination with the technology can have a wicked backlash.

Two of the hot button legal issues affecting the trucking industry are (1) the so-called "misclassification" of owner-operators; and (2) the vicarious liability issue.

Pending in Congress and in state legislatures are 22 separate bills aimed at reclassifying independent contractors as employees for federal and state taxation and worker's compensation purposes. The heart of the existing federal law is a "control test" which requires the owner-operator to be an independent businessman with flexibility to control the manner and method of his work.

Requiring an independent contractor to have onboard surveillance in the absence of a federal regulatory mandate certainly would be an indicia of control that could be difficult to overcome. The desire of shippers and brokers for real time access to the location of their freight in

transit is understandable. Yet, to better plan the inventory and cross-dock freight, shippers have increasingly demanded scheduled appointments which are frequently too tight to be made due to congestion or inclement weather.

When shippers and brokers start using technology to check on and micromanage driver delivery windows, they only increase their vicarious liability. In this regard, the FMCSA has announced in a 5 year plan that it wants the authority to extend its regulations up the supply chain. Plaintiff's bar is already actively pursuing shippers and brokers in accident litigation under the theory they exercise so much control over the carrier they become liable for its negligent actions.

Traditionally, carriers are required pursuant to the bill of lading to provide service with "reasonable dispatch" and are not bound to transport property in time to meet any particular market. The potential increased liability issues for shippers and brokers tightly scheduling carriers and using technology to micromanage delivery of the load enhances the vicarious liability risk and must be carefully considered.

In sum, the use of technology must be placed in context and not simply endorsed as the neatest "must have" invention. Installing technology on new equipment may be far simpler and more cost effective than retrofitting older equipment and participating in rulemaking to ensure a proper cost benefit analysis is important. ■

WITH RESPECT TO LEGAL AND POLICY ISSUES, THE FOLLOWING QUESTIONS ARE IMPORTANT:

1. Are there privacy concerns?
2. Will use of the technology result in unwanted control and legal liability issues?
3. Does use of the technology enhance productivity and flexibility?
4. With increased surveillances involved, are we measuring the right data for the right purpose?



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