

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration**

[Docket No. FMCSA-2003-15818]

Exemption To Allow Werner Enterprises, Inc. To Use Global Positioning System (GPS) Technology To Monitor and Record Drivers' Hours of Service

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Grant of exemption.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) grants to Werner Enterprises, Inc. (Werner) an exemption from the requirement that drivers of commercial motor vehicles (CMVs) operating in interstate commerce prepare handwritten records of duty status (RODS). The exemption allows Werner to document its drivers' hours of service through the use of GPS technology and complementary computer software programs. The terms and conditions for the exemption are the same as those proposed in the agency's December 11, 2003, notice and request for comments, with the exception of the elimination of requirements for quarterly status reports and driver-specific violation reports. FMCSA has monitored closely Werner's use of the GPS technology and complementary computer software programs since June 1998. Based on this experience, the agency believes the terms and conditions of the exemption achieve a level of safety equivalent to, or greater than, that provided by complying with the current RODS requirements.

DATES: The exemption is effective on September 21, 2004. The exemption expires on September 21, 2004.

ADDRESSES: *Docket:* For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> and/or Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's complete Privacy Act Statement in the *Federal Register* (65 FR 19477, Apr. 11, 2000). This statement is also available at <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Larry W. Minor, Chief of the Vehicle and Roadside Operations Division (MC-PSV), (202) 366-4009, FMCSA, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:**Background**

On April 6, 1998, FMCSA published a notice of interpretation (63 FR 16697, Apr. 6, 1998) and a request for motor carriers to participate in a "pilot demonstration project" (the Project). The Project was a voluntary program under which motor carriers with GPS technology and related safety management computer systems could enter into an agreement with the agency to use such systems to record and monitor drivers' hours of service in lieu of complying with the handwritten RODS requirement of 49 CFR 395.8. The agency indicated that it believes GPS technology and many of the complementary safety management computer systems being used by the motor carrier industry provide at least the same degree of monitoring accuracy as automatic on-board recorders allowed by 49 CFR 395.15. The original deadline for submitting applications was October 5, 1998, with subsequent extensions to June 30, 1999 (63 FR 71791, Dec. 30, 1998) and December 31, 1999 (64 FR 37689, Jul. 13, 1999). The extensions were provided because numerous motor carriers contacted the agency to express an interest in participating in the Project. Although participation in the Project was open to all interested motor carriers, Werner was the only company to sign a memorandum of understanding (MOU) with the agency to allow the use of GPS technology.

Status of Werner's Participation in the Project

On June 10, 1998, Werner entered into an MOU with the agency to use GPS technology and related safety management computer systems as an alternative to handwritten driver RODS. A copy of the MOU is included in the docket referenced at the beginning of this notice. Over the course of the pilot demonstration project, FMCSA conducted onsite reviews and investigated a complaint. The reviews and complaint investigation identified potential improvements to Werner's system that would increase the accuracy of the electronic RODS and thereby raise the level of hours-of-service compliance.

In March 2002, Werner and FMCSA entered into a revised MOU to amend the terms of the June 1998 agreement. A copy of the revised MOU is in the

docket. The revised MOU contains specific provisions related to system modifications and internal hours-of-service compliance monitoring reports agreed to by Werner and FMCSA.

FMCSA Notice of Intent To Grant Exemption

On December 11, 2003, FMCSA published a notice of intent to grant Werner an exemption from the requirement that drivers of CMVs prepare handwritten RODS (68 FR 69117, Dec. 11, 2003). The agency indicated that it believes it is appropriate to make a transition from a pilot demonstration project to an exemption, as authorized by 49 U.S.C. 31315(b) and the implementing regulations under 49 CFR part 381. We explained that although Werner expressed an interest in using GPS technology and complementary computer systems to monitor and record its drivers' duty status on a permanent basis, FMCSA cannot permit this without initiating a notice-and-comment rulemaking proceeding to amend 49 CFR 395.8. The agency does not believe it is appropriate to amend the safety regulations based on a technology that is currently being used by only one motor carrier. Therefore, the agency proposed to exercise its authority under 49 U.S.C. 31315(b) to make a transition from the Project to an exemption that can be renewed through a notice-and-comment process every two years.

The agency proposed that the terms and conditions for the exemption be the same as those used for the Project, with a few exceptions based on discussions between FMCSA and Werner. FMCSA made a preliminary determination that, used in lieu of the "record of duty status" required by 49 CFR 395.8, Werner's GPS technology and complementary safety management computer systems would achieve the requisite level of safety under 49 U.S.C. 31315(b), provided certain conditions are satisfied.

Discussion of Comments

FMCSA received comments from Advocates for Highway and Auto Safety (Advocates), Mr. William J. Alexander, Mr. Mark Benja, the Insurance Institute for Highway Safety (IIHS), J. B. Hunt, Mr. Chuck Mosqueda, Mr. Timothy G. Trotter, and Werner Enterprises (Werner).

J.B. Hunt, Chuck Mosqueda, and Werner commented in support of FMCSA's proposed exemption. However, J. B. Hunt and Werner expressed concern about certain terms and conditions of the proposed exemption.

IIHS did not comment specifically on the proposed exemption. Rather, it requested that FMCSA publish a summary of the results of the pilot demonstration project with Werner, including an assessment of the benefits and costs of the technology.

Advocates and the three remaining individuals who submitted comments to the docket were opposed to granting the exemption to Werner for various reasons, most of which were discussed in greatest detail by Advocates. Advocates believes the GPS technology-based RODS system used by Werner allows drivers operating for several hours at very low speeds in congested traffic conditions to regard such driving time as off-duty time. Advocates believes this practice promotes sleep-deprived, fatigued drivers who are a risk to themselves and other motorists, and that it also provides Werner with productivity advantages over motor carriers relying on handwritten RODS.

Advocates argues that FMCSA has not demonstrated that Werner's use of GPS-based technology achieves a level of safety equivalent to or greater than the level that would be achieved through compliance with 49 CFR 395.8.

Advocates believes that inaccurate recording of prolonged low-speed operations of CMVs as off-duty time permits drivers to exceed maximum driving hours. Therefore, Advocates asserts the proposed exemption has no safety basis in the administrative record fulfilling the statutory safety test for exemptions under 49 U.S.C. 31315 and 31136(e).

Advocates also believes the merits of the Werner exemption should be evaluated only after a decision has been issued in the current Federal court case concerning the hours-of-service rulemaking and the agency has taken any necessary action in response to the court ruling.

Finally, Advocates argues that FMCSA's December 11, 2003, notice does not explain how GPS data are converted to RODS, or whether the agency seeks and evaluates the actual GPS data to compare with RODs from Werner. For example, there is no information on the extent to which FMCSA independently verifies that actual driving times of Werner's drivers match information from the GPS-based records.

FMCSA Response to Comments Opposed to Granting the Exemption

FMCSA believes Advocates' concerns about flaws in the programming algorithms or assumptions about drivers' duty status under certain circumstances have been adequately

resolved as a result of the agency's oversight of Werner during the pilot demonstration project. Werner has cooperated completely in working with FMCSA to evaluate its use of GPS-related technology.

It is true that the original programming algorithms made it possible for certain routine driving and work activities to be inaccurately recorded as off-duty time. However, we believe this flaw in programming or assumptions was simply an error. While the error resulted in inaccurate RODS, there is no basis for concluding it was an intentional effort to violate the applicable Federal hours-of-service regulations. The terms and conditions in the March 2002 MOU between FMCSA and Werner required system modifications to correct the programming algorithms. Based on the agency's continued oversight and monitoring of Werner, we have verified that the corrections have been implemented and the issue resolved.

Furthermore, the new hours-of-service regulations published on April 28, 2003 (68 FR 22456, Apr. 28, 2003) and implemented on January 4, 2004, counter the most likely motive for falsely recording off-duty periods of less than 10 hours. Whether the CMV operator is driving the CMV; on duty, not driving; off duty; or otherwise moving very slowly in the CMV, the driver is prohibited from operating the vehicle for any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty [49 CFR 395.3(a)]. Miscellaneous off-duty periods do not extend the 14-hour limit.

The pilot demonstration project concerned the use of technology to document drivers' RODS. No aspect of the project signified that drivers would be allowed to exceed hours-of-service limits in effect during the project. The proposed exemption likewise should not be construed as involving consideration of alternatives to the new hours-of-service regulations for drivers of property-carrying commercial motor vehicles. The exemption concerns an alternative to handwritten RODS, not a compromise to the minimum safety performance requirements.

FMCSA believes the exemption satisfies the statutory test that the level of safety be equivalent to or greater than the level that would be achieved by complying with the regulation in question, 49 CFR 395.8. In the case of RODS, what matters is whether the GPS technology-based RODS system provides accurate documentation of drivers' duty status. There is no discernible reason to conclude that

safety would be compromised by allowing the use of GPS technology-based RODS as implemented by Werner. Since the exemption follows the requirements concerning maximum driving or on-duty time and minimum off-duty periods, the safety performance criteria under the exemption are essentially the same as for all other motor carriers of property. Therefore, FMCSA believes the exemption satisfies the statutory safety test.

Advocates' request to defer the decision on the exemption until after a ruling on the legal challenge to the new hours-of-service regulations has been granted. On July 16, 2004, the U.S. Circuit Court of Appeals for the D.C. Circuit held that the new rules were arbitrary and capricious because the agency failed to consider their effect on the physical condition of drivers, as required by 49 U.S.C. 31136(a)(4). The court therefore vacated the new regulations [*Public Citizen, et al., v. Federal Motor Carrier Safety Administration*, No. 03-1165]. For purposes of the Werner exemption, however, the court's decision is largely irrelevant. The hours-of-service rules applicable to motor carriers and drivers—whether the old regulations or the new rules vacated by the court—have no bearing on the question whether Werner should be allowed to use advanced technology to document compliance with those limits. For purposes of the exemption, the question is the accuracy and reliability of Werner's GPS-based RODS system, not the content of the hours-of-service regulations.

With regard to Advocates' questions about the operation of the GPS technology-based RODS system used by Werner, and whether the agency reviews "raw" data to verify drivers' duty status, the agency believes there is sufficient information in the public domain to inform interested parties about the basic operating principles of GPS technology. Furthermore, converting location and time data from points A and B to the distance between points A and B, the average speed required to travel between points A and B, and the total driving time between points A and B requires only the most basic calculations. Although the programming algorithms did not adequately address situations in which small deviations between GPS location information were automatically—and incorrectly—recorded as off-duty time rather than on-duty or driving time, this did not diminish the accuracy of basic time-of-day, location, and distance-between-locations information. Nor did it mean that the basic methods for

performing certain calculations were inappropriate.

Werner's programming algorithms included certain assumptions about drivers' duty status for vehicle movements that occur between data collection cycles, or "polling intervals" (instances when vehicle location information is captured, along with the date and time). If, based upon a comparison of location information gathered at the beginning and end of the polling intervals, the vehicle appeared not to have moved (or to have moved only a very short distance) between these data collection cycles, the system automatically recorded the driver's duty status as off duty rather than as driving. Under these circumstances the driver would need to provide input to ensure documentation of the correct duty status. In the absence of input from the driver, the system failed to automatically and accurately record driving and on-duty time information. FMCSA believes this programming issue has been resolved satisfactorily. System defaults now record truck stationary time as on duty, not driving and vehicle movements greater than two miles as driving time.

FMCSA has reviewed raw data from Werner's system, compared RODS information with supporting documents, and had Federal safety investigators ride with Werner drivers for certain trips to verify the accuracy of its RODS system. The agency believes the information it reviewed is sufficient proof that Werner's GPS technology-based RODS accurately document drivers' duty status.

Finally, as requested by IIHS, we will prepare a report on the results of the pilot demonstration project with Werner.

Discussion of Comments About the Terms and Conditions of the Exemption

As mentioned earlier in this notice, J. B. Hunt and Werner commented about the specific terms and conditions of the exemption. Werner indicated it has worked closely with FMCSA during the design, implementation and testing phases of its paperless log project. Werner explained that it has been subject to various onsite reviews of its paperless RODS system, which resulted in numerous changes in the program design. Werner argues that these efforts have enabled it to develop an efficient paperless RODS system that exceeds the capabilities of a handwritten system. Werner believes the proposed reporting requirements under the headings "Quarterly Reports," "Reporting of Violations of Hours-of-Service Rules," and "FMCSA Access to Safety

Management Information System" place unnecessary burdens on Werner.

Werner believes these recordkeeping burdens would discourage other motor carriers from participating in similar pilot programs or developing their own paperless RODS system. J. B. Hunt expressed similar concerns.

FMCSA Response to Comments About the Terms and Conditions of the Exemption

FMCSA agrees with Werner that the proposed requirements for quarterly reports and reporting of violations of hours-of-service rules (68 FR 69117, at 69118 and 69119, respectively) are unnecessary, given the transition from a demonstration project to an exemption program.

We included the quarterly reporting requirement in the March 2002 MOU between FMCSA and Werner to compensate for the inaccurate reporting of drivers' duty status caused by the programming algorithms or assumptions discussed earlier in this document. Also, there were instances when drivers did not accurately input their duty status when loading and unloading vehicles. Werner used the information from these quarterly reports to make appropriate changes to its programming algorithms and its supervision of certain drivers. Since Werner has essentially resolved the problems that the quarterly reports were intended to address, we no longer believe it is necessary to impose this requirement under the exemption. FMCSA retains full authority to conduct investigations and compliance reviews of Werner's operations and to take enforcement action against violations.

For essentially the same reasons, FMCSA believes the driver-specific report of hours-of-service violations is no longer necessary. The proposed requirement was intended to address a problem that has been resolved, and is unrelated to FMCSA's exercise of its enforcement authority.

However, FMCSA is retaining under the terms and conditions of the exemption the requirement that Werner allow FMCSA enforcement personnel reasonable access to its safety management information systems. This provision requires Werner to provide driver dispatch message histories and detailed position histories associated with their RODS. This information is essential for independent verification of hours-of-service information by FMCSA. Although the agency has the statutory authority to request that Werner provide such information regardless of whether it is required under the exemption, we are including an explicit provision to make this authority clear and ensure

timely responses to any such information requests.

FMCSA Decision

FMCSA has considered all the comments received in response to its December 11, 2003, notice of intent to grant an exemption, and has decided to grant Werner an exemption from the requirements of 49 CFR 395.8. As a result of this exemption, Werner may use its GPS technology and complementary safety management computer systems to document drivers' duty status in lieu of pen-and-paper RODS. FMCSA has determined Werner's GPS technology-based RODS will achieve the requisite level of safety under 49 U.S.C. 31315(b), provided the terms and conditions in this notice are satisfied.

Terms and Conditions of the Exemption *System Operation*

(a) System defaults must record truck stationary time as "on duty, not driving."

(b) Movements of the vehicle greater than two miles must be recorded as driving time.

(c) Speed (which is determined by time and distance between truck location updates) that is calculated to be below 10 miles per hour (mph) may be considered invalid. In these instances, distance traveled may be divided by average driver mph or average State-to-State mph to derive a rough estimate of the driving time. Werner must discontinue the use of driving time modeling entirely if its GPS provider improves the satellite positioning frequency or incorporates other technology that makes the modeling unnecessary.

(d) With the exception of automatically recording the driver's status as "on duty, not driving" when the driver's fuel card is inserted into the card reader, no system defaults are authorized for routine stops (i.e., deliveries, pickups, rest). Drivers must make the correct duty status entry into the electronic system.

(e) The system must not allow drivers to manipulate the system to conceal driving hours.

Documentation of System Failures

Werner must require each driver to note immediately any failure of the GPS technology or complementary safety management computer systems, and to immediately begin preparing hard-copy driver logs during the period that the technology is inoperative. Werner must maintain a centralized record of each separate failure, including the date, time

periods, individual driver or operating division(s) impacted, and type of failure. Upon request by Federal or State enforcement officials, Werner must provide facsimile copies of its records of duty status for the current day and the previous seven days for the driver(s) affected by the failure. In the event Werner is unable to produce these facsimile copies within two hours, the driver(s) must manually prepare a driver record of duty status for the current day and reconstruct his or her duty hours for the previous seven (7) days. When the system becomes operational, a fax of the missing records of duty status must be forwarded to the agreed-upon site as soon as possible. Failure to produce either of these two types of documents within two hours constitutes a violation of this exemption and 49 CFR 395.8(a).

Information Required on All CMVs Operated by Werner

Werner must ensure that each commercial motor vehicle it operates has on board and available for review by Federal or State enforcement personnel an information packet containing the following three items:

(a) An instruction sheet describing in detail how hours-of-service data may be retrieved from the on-board GPS equipment;

(b) A supply of blank record of duty status graph-grids sufficient to record the driver's duty status and other related information for the duration of each trip; and

(c) A copy of the exemption issued by FMCSA authorizing Werner to use GPS technology and complementary computer software programs in lieu of the "record of duty status" required by 49 CFR 395.8.

FMCSA Access to Safety Management Information System

Werner must allow FMCSA personnel reasonable access to its safety management information system(s). If FMCSA requests access to the system(s), agency personnel will determine the scope and nature of the assessment. At a minimum, access to records will include:

(a) Driver records of duty status created by Werner's GPS and related safety management computer systems;

(b) Driver-dispatch "message histories" and detailed position histories associated with driver records of duty status;

(c) Driver payroll records associated with driver records of duty status;

(d) Driver shipping document records; and

(e) Miscellaneous trip expense records.

Reporting of Corrections or Amendments To Records

Werner must furnish upon request information indicating the number of times the "driving" time on driver records of duty status was changed for each driver, and identifying who authorized each altered record.

Documenting Distance Traveled

Werner must ensure the system for monitoring and recording drivers' hours of service has a means of determining that the mileage each driver travels is based on data from the vehicle's electronic control module or other on-board vehicle system, rather than on less accurate methods such as GPS-based (point-to-point) calculations that may underestimate the distance traveled.

Enforcement of Hours of Service While the Exemption Is in Effect

Under the terms and conditions of this exemption, Werner may require its drivers to use the company's GPS technology and complementary safety management computer systems to record their hours of service in lieu of complying with the requirements of 49 CFR 395.8. FMCSA will, to the greatest extent practicable, communicate with State, Provincial, and local enforcement agencies regarding the terms and conditions of the exemption. FMCSA will continue its policy of not divulging to any third party proprietary information related to Werner's GPS technology or related safety management computer systems.

In the event FMCSA conducts a compliance review or any other type of motor carrier safety management investigation of Werner, FMCSA will review, using its automated hours-of-service assessment system, 100 percent of the applicable operating division's hours-of-service records for compliance with the maximum driving time limitations set forth in 49 CFR 395.3. The 100 percent sampling would not extend to any other portion of the regulations reviewed. With respect to the investigation of the accuracy of hours-of-service records (49 CFR 395.8(e)), FMCSA reserves the right to sample records in accordance with FMCSA policies applicable to all motor carriers, and Werner retains the right to contest the validity of the sample used.

The agency does not intend to hold Werner to a higher standard of compliance than the rest of the industry, nor would it treat Werner differently in conducting complaint investigations or other types of investigations. At any time during the exemption period,

FMCSA may conduct compliance reviews of Werner, consistent with standard operating policies applicable to all motor carriers. These compliance reviews would result in the assignment of a safety rating, and the agency could initiate enforcement action against Werner for serious violations.

Werner's drivers and vehicles continue to be subject to roadside inspections conducted by FMCSA or State enforcement personnel during the period of the exemption. The exemption does not preclude States from continuing to enforce applicable State requirements concerning on-duty and driving-time limits. Werner must ensure that its drivers cooperate with Federal and State enforcement personnel who request information, during roadside inspections, concerning its drivers' hours of service.

Authority: 49 U.S.C. 31136 and 31315; 49 CFR 1.73.

Issued on: September 13, 2004.

Annette M. Sandberg,
Administrator.

[FR Doc. 04-21139 Filed 9-20-04; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA-2004-19141]

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Federal Transit Administration (FTA) to request the Office of Management and Budget (OMB) to extend the following currently approved information collection: 49 U.S.C. 5309 and 5307 Capital Assistance Programs.

DATES: Comments must be submitted before November 22, 2004.

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the United States Department of Transportation, Central Dockets Office, PL-401, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 10 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of