

High Technology in the Transportation Industry: Is the New Data We Gather Worth All the Costs?

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INTRODUCTION

High technology, as the term is applied to motor carrier transportation, embraces a multitude of sins and unleashes a torrent of opinions, fears, and predictions. Those who fall somewhere between the category of e-commerce evangelist and card carrying Luddite may be among the best positioned to view the technological changes confronting transportation and identify some of the legal issues which technology intensifies, if not necessarily creates.¹

For those engaged in transportation—particularly for those providing legal counsel—few concepts focus the attention quite so fixedly as a government edict, violation of which, or perhaps even compliance with which, might cost thousands of dollars in fines, millions of dollars in judgements, and possible jail time.

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1. This paper focuses exclusively on the U.S. motor carrier laws and rules. Whatever the safety rules which apply to intra-Canadian operations, once a Canadian (or Mexican) carrier crosses the border into the United States, it becomes subject to the same safety rules as U.S. carriers. Thus, for Canadian carriers engaged in international operations who subject themselves to lawsuit in the U.S. by designating agents for service of process, 49 U.S.C. § 13303(a) (Supp. IV 1994), the legal issues raised by new uses of technology are essentially the same as those for U.S. carriers.

Technology is already here; more is on the way. The government edict is not yet a reality, but after May 2, 2000, it is as much a certainty as presidential voting procedure reform. On that day, the Federal Motor Carrier Safety Administration ("FMCSA") issued its proposed Hours of Service ("HOS") Rulemaking,² which included for the first time in the safety rules a requirement for some commercial motor carriers to install "Electric On Board Recorders" ("EOBR's") in their vehicles.³

This paper leaves to techies those issues surrounding the growing list of possible uses of technology in trucking,⁴ and instead focuses on the more prosaic—and at least to lawyers more immediate—issues of law and public policy surrounding the use of technology in the collection of operating data through EOBR's, and beyond.

The legal concepts are not novel, but their application to the new technology may be. The carrier industry and its lawyers will be important—but not the only—players in determining how technology and law meld in tomorrow's transportation industry.

HOW DID WE GET WHERE WE ARE?

Despite the end for all practical purposes of any economic regulation of trucking in recent years,⁵ safety regulation is alive and well and possibly even flourishing in the United States. The Motor Carrier Safety Improvement Act of 1999 ("MCSIA")⁶ was both a pragmatic and symbolic statement of safety's importance. One of its stated purposes was "to improve the administration of the Federal motor carrier safety program."⁷ The new FMCSA created by MCSIA is to have "safety as [its] highest priority."⁸

2. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540 (May 2, 2000). All references to "proposed" regulations (i.e., "Proposed 49 C.F.R. pt. 350, et al.") are to proposed regulations set out in this notice.

3. This paper uses the "EOBR" acronym favored by FMCSA. In the proposed new HOS regulations, FMCSA refers to use of an "automated time record system," which is defined in proposed 49 C.F.R. § 394.107 as "an electric, electronic, electromechanical, or mechanical system, including a device capable of recording driver's duty status information accurately and automatically" as the proposed rules require.

4. As a recent example of the far reaches of technology's use in trucking, a special section of the WALL STREET JOURNAL devoted to the growth of e-commerce included a full page of long-haul trucking's use of technology. Daniel Machalaba, *Rig and Roll; The Internet is Transforming the Business of Long-haul Trucking*, WALL ST. J., Oct. 23, 2000, at R51.

5. Almost all vestiges of traditional economic regulation were finally eliminated by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

6. Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (1999).

7. Motor Carrier Safety Improvement Act § 4(1) (note following 49 U.S.C. § 113 (1994)).

8. "In carrying out its duties, the [FMCSA] shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of

However one may view the efficacy of much that has actually been done by FMCSA, there is no denying that DOT's Secretary Slater was prolific in issuing hundreds of press releases, including a variation on the statement "Safety is President Clinton's and Vice President Gore's highest transportation priority." Self-proclaimed "public interest" highway safety groups have been successful in raising the public consciousness about commercial vehicle highway safety. Technology's perceived role in enhancing safety must be viewed in this context.

Technology's possible role in enhancing safety, at least in theory, has long been recognized. For quite some time, the safety community, and particularly the National Transportation Safety Board ("NTSB") and its Chairman Jim Hall have been championing the idea that all modes of transportation should be equipped with a device equivalent to the airplane's cockpit data and voice recorders, under the theory that having such devices, and being able to analyze the data they record, will identify causes of accidents and will result in fewer future accidents and the accompanying costs imposed on society (including the carriers themselves) by such accidents.⁹

In May 1999, NTSB hosted its "International Symposium on Transportation Recorders," to discuss then available technology and how it could achieve safety goals by expanding the use of technology. Almost a year earlier, NTSB had issued a "Safety Recommendation Letter" to various trucking industry groups, urging the groups to have their members "equip their commercial vehicle fleets with automated and tamper proof on-board recording devices, such as tachographs or computerized recorders, to identify information concerning both driver and vehicle operating characteristics."¹⁰ According to NTSB, of the three recipients, only ATA responded, and its response was to strongly decline to act on the recommendation.¹¹ The other two have not responded at all.

A year later, in April 2000, NTSB held a second symposium entitled "Transportation Safety and the Law," which dealt with a likely explanation of a major reason for industry inaction. In his opening remarks, Chairman Hall laid out the promises and problems of new technology

Congress to the furtherance of the highest degree of safety in motor carrier transportation." Motor Carrier Safety Improvement Act § 101 (enacting new 49 U.S.C. § 113(b) (1994)).

9. As this paper is being completed, Chairman Hall has announced his resignation. With his personal investment in this issue one of its driving forces, one can speculate if NTSB might be less of a champion of this cause under a new chairman.

10. NTSB Safety Recommendation H-98-23, issued August 5, 1998 was addressed to American Trucking Associations, International Brotherhood of Teamsters, and Motor Freight Carrier Association. Available at http://www.nts.gov/Recs/recording_device.htm.

11. "Most Wanted Transportation Safety Improvements," p.4, distributed at April, 2000 NTSB Symposium. Available at http://www.nts.gov/Recs/total_list.htm.

from the regulatory and private perspective.¹² He began with background:

About a year ago, the Safety Board held a [International Symposium on Transportation Recorders], . . . to explore the varied uses of recorded data to increase both safety and economic efficiency. The participants generally agreed that the intelligent use of recorded data can improve equipment reliability and help a company's bottom line, and that more importantly, it can greatly enhance operational safety. But there was also a profound sense of anxiety about who -outside a company - might use that company's recorded data and for what purposes.

He addressed that "profound sense of anxiety" further, observing:

Many companies appeared poised to develop aggressive programs to assess their own [safety] performance, but were concerned about what would happen to the data they developed in doing so. Would regulators use material derived from voluntary self-assessments as a basis for enforcement? Would the information be made available to the public or for use in litigation?

[I]t appears that legal issues are at the heart of the regulators' and transport companies' reluctance to proceed [with a new, non-punitive reporting program].

The same uncertainty often surrounds critical self-evaluation of any kind. No one doubts the importance of self-appraisal - safety audits are important tools and most of us would encourage their use. But, many wonder what becomes of those reports and audits when an incident occurs and the accident investigator wants to look at them, or the regulator has a change of heart, or the media presses for their release.

Chairman Hall was not alone in voicing such concerns. Pat Quinn, President of U.S. Xpress, a major truckload carrier, voiced similar concerns about the way electronic data is used—and misused—in civil litigation. He suggested that some carriers are warned by their attorneys not to gather certain data from advanced technology recorders for fear of how such data might be used in litigation, a fear which outweighs the perceived safety benefits of the data and any company analysis of it.¹³

Beyond traditional liability concerns about such data, Chairman Hall also voiced concerns about information gathering when there is a threat - real or perceived - of criminal prosecutions.¹⁴ He observed that NTSB

12. Chairman Hall's remarks, and other material from the Symposium, appear on the Board's website, *available at* http://www.nts.gov/events/2000/symp_legal/symp_legal_sessions.htm.

13. Mr. Quinn's remarks are included in the "Summary" of the April, *000 NTSB Symposium, distributed with Symposium papers and on the NTSB website. *Available at* http://www.nts.gov/events/2000/symp_legal/LAWSUMM.htm.

14. This fear is not just theoretical, nor is it limited to laws previously on the books. A lethargic Congress quickly became a frenzy of activity to confer on NHTSA criminal penalties to use in accident reporting (or non-reporting) as a result of the Firestone tire fiasco. *See* Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No.

had “for decades, . . . relied on individuals to tell [NTSB] what happened in the accident,” which information helped NTSB formulate policies to avoid future accidents. Now, if an accident spawns an immediate criminal investigation, everyone involved will often refuse to talk. To address this growing concern, Chairman Hall offered some further questions for consideration:

What crimes are accidents, and when do accidents become criminal? What is the relationship between pre-incident regulatory compliance and the likelihood of criminal inquiry? How should companies respond to the possibility of parallel criminal and accident investigations? What rules of process and evidence apply when parallel accident and criminal inquiries go forward?

These questions help to frame the issues to be resolved. They are given urgency by FMCSA’s HOS mandate of the use by long distance truckers of EOBR’s.

While it is true that Congress has prohibited FMCSA from issuing a final rule for the time being,¹⁵ it is reasonable to expect that the confluence of NTSB’s longstanding support of such EOBR’s, FMCSA’s buying into the concept that such EOBR’s are worthwhile in the promotion of commercial vehicle safety, and the increasingly strident and heard positions of the public interest highway safety groups supporting new technology, will result in some sort of government requirement for such EOBR’s in the foreseeable future. Further, when defined broadly, EOBR’s appeal to many forward thinking, well financed carriers, for the feedback they provide about operations, with perceived benefits in more efficient operations. The current widespread use of satellite tracking systems is but one example. Thus, it is reasonable to assume that their use will become increasingly widespread, even without a government mandate, and even in the face of strong opposition from some segments within the trucking industry.¹⁶

106-414, 114 Stat. 1800 (2000) (providing for criminal penalties for failure to report, was signed into law by the President on November 1, 2000, scant months after the problem first made the headlines).

15. Department of Transportation and Related Agencies—Appropriations, Pub. L. No. 106-346, § 335, 114 Stat. 1356, 1356A-71 (2000) (prohibits FMCSA from adopting any proposed rule for a year, but explicitly permits FMCSA to “issuing and proceeding, through all stage of rulemaking other than adoption of a final rule” on a supplement to the original rulemaking, which would “take into appropriate account” the information received in comments on the original rule).

16. John D. Schulz, *OOIDA Preparing to Sue Government if On-Board Recorders are Mandated*, *TRAFFIC WORLD*, Dec. 11, 2000, at 33.

FMCSA'S HOURS OF SERVICE PROPOSAL

The catalyst bringing this issue to the forefront is FMCSA's HOS rulemaking. The proposal mandates onboard recorders for Type 1 (long haul) and Type 2 (regional) operations, because use of these recorders "should ensure credible verification of drivers' adherence to, and improve motor carriers' ability to manage driver compliance with" the new HOS rules.¹⁷ An added benefit is that such recorders will "enable safety investigators and enforcement officials to better verify the drivers' compliance" with the rules.¹⁸

The nature of EOBR's now on the market and likely to appear on the market is beyond this paper's scope, but the information FMCSA expects EOBR's to capture is not. The proposed HOS rules define acceptable EOBR's (called here "automated time record systems," (*see* note 3, *supra*) as those which will satisfy certain "design and performance standards" as follows:

- (a) must generate records which can be read directly or remotely at the driver's home terminal
- (b) must record the date, whether the engine is on or off, vehicle speed, distance driven per day, and a continuous time scale
- (c) must be capable of maintenance and calibration
- (d) must be "to the maximum extent practicable" tamper proof and must prohibit drivers from editing data
- (e) must warn the driver visibly and audibly that the system has ceased to function
- (f) must identify sensor failures and data edited by anyone when produced in written form
- (g) must allow duty status to be updated only when the vehicle is stopped, except for registering time crossing a state line.
- (h) must meet specified information collection standards, which prescribe in detail information which must be collected and how it must be available upon request to law enforcement personnel, at a roadside inspection or at a carrier's place of business.¹⁹

While this describes FMCSA's requirements for EOBR's, it is by no means clear just what requirements FMCSA will ultimately adopt. It is even less clear just how far carriers will go on their own in the use of new technology, which, while not necessarily satisfying FMCSA, satisfies the carrier's own need for additional data.

Perhaps the easiest example is the current widespread use of satellite

17. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,604 (proposed May 2, 2000) (to be codified at 9 C.F.R. § 394.201(a)).

18. Hours of Service of Drivers; Driver Rest and Sleep for Safety Operations, 65 Fed. Reg. 25,540, 25,563 (May 2, 2000).

19. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,606 (proposed May 2, 2000) (to be codified at 49 C.F.R. § 394.301).

tracking technology, almost all of which is not now geared to provide all the information FMCSA might want, but which does now provide information in sufficient detail to satisfy a carrier's managerial and safety needs, and, as technology advances, may be modified to record even more data.²⁰ Indeed, an October 27, 2000, press release by Qualcomm, one of the leading satellite tracking vendors, described an agreement with XATA, a supplier of onboard computer systems for transportation companies, which will make available a new product to extend the capability of satellite tracking to include FMCSA mandated data.²¹

ISSUES RAISED BY TECHNOLOGY

The mandated use of EOBR's raises a number of legal issues, some of which (but by no means all) are discussed in the following sections. As an opening thought, one might consider how each of the issues is affected if (1) EOBR's are mandatory by reason of government rule, (2) EOBR's are a part of an entirely voluntary, government sanctioned and regulated safety program, or (3) EOBR use is altogether voluntary, without any government standards or involvement. Applying each of these three scenarios to each issue serves to show the broad scope of questions that are now raised and can be raised. Definitive answers seem far off.

Carrier Civil Liability Arising From EOBR Data.

When NTSB Chairman Hall spoke of carriers' "profound sense of anxiety" from the increased use of EOBR's, he was talking directly to the lawyers' and trucking industry's concern that data collected could be used, and likely misused in personal injury lawsuits, especially since any accident involving a commercial motor vehicle is, by definition in the public's eye, an accident involving a "killer truck" or a "killer bus." Further, electronic records are generally perceived as the most accurate records, not susceptible to after-the-fact modification. The slightest safety violation, judged strictly by the numbers (such as the instance in which a driver exceeded the posted speed limit by a few miles per hour or exceeded permissible HOS rules by a few minutes, for whatever

20. How much information is "enough" may all be in the eyes of the beholder. See *GPS Data Clears Trucker of Murder*, TRANSPORT TOPICS, Sept. 25, 2000, at 6 (describes how a truck driver murder suspect was cleared of murder charges when global positioning system records showed he was nowhere near the scene of the crime. The article also mentions another instance in which a trucker confessed to a murder, "after police confronted him with GPS records that proved his truck stopped 600 yards from where [the] body was found.").

21. *QUALCOMM Wireless Business Solutions' Satellite Communication Modem to be Offered by XATA Corporation* (October 27, 2000), available at <http://www.qualcomm.com/cda/pr/view/0,1800,421,00.htm>. According to Qualcomm, the new system "will offer customers the ability to lower administrative costs while adhering to current and anticipated federal safety and operational mandates, including reporting driver hours of service"

reason), would be recorded electronically and made available for any plaintiff to see.²²

In the overall scheme of things, use of such data in civil litigation arising out of accidents is only one element of this anxiety. Nearly three years ago, the U.S. General Accounting Office undertook a study of the Federal Aviation Administration's voluntary "Flight Operational Quality Assurance Programs."²³ In such a program, participating airlines would use flight data to detect technical flaws, unsafe practices, or conditions outside of desired operating procedures early enough to allow timely intervention to avert future accidents or incidents.²⁴ GAO was generally laudatory of such programs, but at the same time, it identified as the "primary factor impeding" the use of such programs the "resolution of data protection issues." GAO identified these concerns as including not only the disclosure of such data in civil litigation (actually this was the *third* concern), but more importantly, the use of such data for enforcement/disciplinary purposes against carrier employees and disclosure to the media and the public under the Freedom of Information Act.²⁵

However great the concern for the records associated with the driver of the vehicle involved in an accident, the concern may be even greater for any composite data and carrier internal analyses of that data and the possibly inaccurate picture such data could paint of a carrier's safety program and compliance. Imagine, for example, a carrier that used EOBR's to analyze HOS compliance; it would have available in black and white a statement of all its violations over any specified time period.

An ancillary issue is FMCSA's use of this data for its own enforcement purposes. This is an especially difficult issue, because so many conflicting concerns are at stake. The expressed *raison d'être* for EOBR's is improved compliance with the HOS rules. On the carrier side, this is to be reflected in "ensur[ing] credible verification of drivers' adherence to" HOS requirements, and improvement "of carriers' ability to manage driver compliance with" HOS rules. On FMCSA's side, EOBR's are to

22. See Donald C. Maddey, *Proposed On-Board Recorders for Motor Carriers: Fostering Safer Highways or Unfairly Tilting the Litigation Playing Field?*, 24 S. ILL. U. L.J. 453 (2000). There appears to be little legal literature on the subject, but this is a thorough, excellent treatment of this entire subject. Mr. Massey argues that in a personal injury litigation context, it is inherently unfair that commercial carriers might be required to use (and be subject to liability by reason of the data appearing on) EOBR's while private vehicles are not burdened with a similar requirement. He concedes that such data as is collected is almost certainly discoverable during litigation, and, as an antidote, urges creation of an evidentiary privilege, to protect against disclosure of such data during the course of litigation.

23. *Aviation Safety: Efforts to Implement Flight Operational Quality Assurance Programs*, GAO/RCED-98-10 (Dec. 1997).

24. *Id.* at 1.

25. *Id.* at 2.

“enable safety investigators and enforcement officials to better verify drivers’ compliance.”²⁶

One unresolved question is how enforcement personnel may use the carrier management generated data in the enforcement process. It is one thing for a driver, stopped at a roadside inspection, to be subject to enforcement for HOS violations by reason of the data on his EOBR. It is altogether something else for a motor carrier, which uses this data for its own management compliance purposes, to have its internal analysis of the data used by enforcement personnel as the basis of enforcement action, with the carrier’s internal analysis providing the “proof” of the violation. In the past, FMCSA has seldom appreciated such subtleties. There is little reason to expect this agency to better understand in the future.

To the extent an open and candid discussion of the safety implications of actual EOBR data within a carrier’s own organization may enhance safety, there is a growing recognition of the chilling effect of the uncertainty surrounding the disclosure issue. The appropriate response may perhaps best be described as a work in progress. As an outgrowth of the concern with the Flight Quality program issues described by GAO, *supra*, Congress enacted 49 U.S.C. § 40123, which gave the FAA statutory power to withhold certain data from the public.²⁷ As a result, the FAA has undertaken rulemaking to establish guidelines to implement the law,²⁸ but the rulemaking, first announced in July 1999, is still dragging along. Further, by its very focus on legislation regarding only information submitted voluntarily, this new rule could provide rationale for the argument that Congress intended to exclude from such protection information the government *requires* to be developed.²⁹

26. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,563 (May 2, 2000).

27. 49 U.S.C. § 40123 (1994) (provides, in part, “[n]otwithstanding any other provision of law, neither the . . . [FAA] nor any agency receiving information from the [FAA] shall disclose voluntarily-provided safety or security related information, if the Administrator finds that (1) the disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator’s safety and security responsibilities; and (2) withholding such information from disclosure would be consistent with the Administrator’s safety and security responsibilities.”)

28. Protection of Voluntarily Submitted Information, 64 Fed. Reg. 40,472 (July 26, 1999) (to be codified at 14 C.F.R. pt. 193).

29. Another nuance to this issue is the disclosure process itself. For example, a recent safety-related news story began with a lead which reflected the tension: “After intensive lobbying by the airline industry, the Federal Aviation Administration released an audit that finds wide variations in how carriers document their maintenance and safety procedures, *but stops short of faulting companies by name for specific problems.*” Stephen Power and Melanie Trottman, *Airline Audit Shows Varying Safety Management*, WALL ST. J., December 11, 2000, at A6 (emphasis added).

A second pending FAA rulemaking seeks to codify rules for the Flight Operational Quality Assurance Program, along with a proposed provision to keep the data developed from being disclosed.³⁰ However, even in making its proposal, FAA, while acknowledging the carriers' "significant concerns about increased tort liability as a potential result" of accumulating and reporting data, points out that such concerns are "not within the purview of the FAA to resolve."³¹

Looking at the issue in a different way, FMCSA expects motor carriers to use EOBR data to improve their management of HOS compliance, or, in other words, do more self-policing. Yet, the agency provides little guidance.

Another agency, the Environmental Protection Agency, looking at the desirability of regulated entities undertaking their own self-policing, has developed its own, sophisticated policy which governs the agency's treatment of companies voluntarily identifying their own violations.³² EPA's stated incentives, for companies which qualify for its self-audit procedures, include "elimination or substantial reduction of the gravity component of civil penalties and a determination not to recommend . . . prosecution."³³ At the same time, EPA makes clear it will ordinarily place copies of any settlements and compliance agreements in its public docket, where they would presumably be available for anyone's review and use.³⁴ Further, EPA made explicitly clear its opposition to any immunity or privilege which would keep such audits confidential, reasoning that such a privilege would be contrary to the idea of openness in government.³⁵ Thus, short of a formal, EPA-like program and the harsh penalties frequently imposed by that agency (at least harsh (measured by dollars) as opposed to the penalties ordinarily imposed by FMCSA), there appears to be no FMCSA policy against using in its enforcement actions such potentially self-incriminating data from EOBR's or any other source.

In torts, there seems to be a slowly evolving limited privilege regarding the discovery of *some* company-generated safety enforcement data provided to the government. A leading case is *In re Air Crash Near Cali, Columbia, on December 20, 1995*, 959 F. Supp. 1529 (S.D. Fla. 1997). There, personal injury plaintiffs sought safety related material American

30. Flight Operational Quality Assurance Program, 65 Fed. Reg. 41,528 (July 5, 2000) (to be codified at 14 C.F.R. pt. 13).

31. Flight Operational Quality Assurance Program, 65 Fed. Reg. 41, 528, 41,530 (July 5, 2000).

32. Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, 65 Fed. Reg. 19,618 (April 11, 2000).

33. *Id.*

34. *Id.* at 19,624.

35. *Id.* at 19,623.

Airlines had prepared and reported to FAA under a voluntary "Safety Action Partnership" (similar to the Quality Assurance Program, *supra*). On the one hand, the Court rejected American's claim of a "self-critical analysis privilege" to protect some safety data from disclosure.³⁶ On the other, the Court followed the analysis in *Jaffee v. Redmond*, 518 U.S. 1 (1996), for assessing recognition of any new federal common law privilege. In the words of the Florida District Court,

At the outset, a court must consider the "private interests" involved; in other words, whether dissemination of the information will chill the "frank and complete disclosure of facts" shared in an "atmosphere of confidence and trust." Next, a court must consider the "public interests" furthered by the proposed privilege. A court should also consider the "likely evidentiary benefit that would result from denial of the privilege." Finally, a court may consider the extent to which the privilege has been recognized by state courts and legislatures. 959 F. Supp. at 1533 (citations omitted)

In its consideration of the "public interests" criterion, the Court described the issue in terms of American's participation in the voluntary safety program as promoting improved air safety, and "there is a . . . compelling public interest in improving the safety of commercial air travel."³⁷ The Court also agreed with American that even though the Court could find no other recognition of the precise privilege being claimed, it was appropriate to rely on federal policy, as reflected in statutes and regulations (including the FAA policies discussed above) to make the finding that other forums have recognized the need to maintain this safety data as confidential, even if not the claimed privilege itself.³⁸ Finally, the Court took pains to hold that "the privilege recognized here is qualified rather than absolute,"³⁹ and that the public interest of confidentiality "does not wholly erase the competing interests of the Plaintiffs, the Court and the public at large in accessing materials that may contain information highly relevant to the claim. . . ."⁴⁰

The shifting legal sands upon which these sorts of issues are debated are highlighted in *Chiron Corp. v. NTSB*, 198 F.3d 935 (D.C. Cir 1999). The case before the court arose from an NTSB investigation of a FedEx cargo plane crash. The Plaintiffs, who it appears tendered freight which may have been on the downed flight, voluntarily participated in the

36. *In re Air Crash Near Cali, Columbia*, on December 20, 1995, 959 F. Supp. 1529, 1531 (S.D. Fla. 1997). The Court's opinion includes a thorough description of the history of such privilege, its limitations, and its general disfavor in an "accident" circumstance.

37. *Id.* at 1534. In the motor carrier field, MCSIA spells out the same strong public interest in improving motor carrier safety. Whether a court would be similarly swayed by such a statement of public policy remains to be seen.

38. *Id.* at 1535.

39. *Id.*

40. *Id.* at 1536.

NTSB investigation. In the court's words, "[c]oncerned that they might be found responsible for the accident and eventually face claims of liability in a civil suit," they requested NTSB to release certain data.⁴¹ NTSB's refusal to release it resulted in the lawsuit. Underlying the case was Plaintiffs' concern that the NTSB report ultimately to be issued on the accident might be inaccurate, and, if used against them in a civil trial, could be harmful. The court went on at great length to describe the fire-wall Congress had imposed between NTSB investigations and litigation, saying, in part,

"The simple truth here is that NTSB investigatory procedures are not designed to facilitate litigation, and Congress has made it clear that the Board and its reports should not be used to the advantage or disadvantage of any party in a civil lawsuit. In our view, this congressional mandate could not be clearer."⁴²

At one level, the case is worth considering as a comprehensive review of NTSB's role in accidents, but even more so as an example of how concerns about tort liability can create all sorts of strange legal maneuvering. This case was resolved by a finding that the Plaintiffs had no standing, since they couldn't show they had been injured by NTSB's investigation, because the results of that investigation can't be used in court.

Concerns regarding the use of data from EOBR's as an element in proof of causation in personal injury actions is intuitive. Less intuitive, and perhaps a better indication of the uncharted seas upon which we sail, is the possible liability for an accident caused by driver distraction while using an EOBR. As but one example, the FMCSA's performance standards allow the driver, while driving, to register the time a vehicle crosses a state line—a potentially distracting activity.⁴³ While FMCSA is making its proposals and NTSB is holding symposia, National Highway Traffic Safety Administration ("NHTSA") held its own public meeting on July 18, 2000, and instituted an internet forum on the "Safety Implications of Driver Distraction When Using In-Vehicle Technologies."⁴⁴ NHTSA's Deputy Administrator Rosalyn Millman, in her opening remarks at the meeting, did not say, "Houston, we have a problem," but her remarks could well be interpreted that way.⁴⁵ The public perception of the

41. *Chiron Corp. v. NTSB*, 198 F.3d 935, 936 (D.C. Cir 1999).

42. *Id.* at 940.

43. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,606 (proposed May 2, 2000) (to be codified at 49 C.F.R. § 394.301(g)).

44. Notice of Public Meeting and Internet Forum on Safety Implications of Driver Distraction When Using In-Vehicle Technologies, 65 Fed. Reg. 34,797 (May 31, 2000).

45. She did say, "[t]he driver's responsibility is to operate the vehicle safely. Distraction degrades driver performance. Multiple distractions and more complex distractions degrade driv-

NHTSA's proceeding is at least, in part, that the government has said distractions are unsafe.⁴⁶ The liability implications of performing the already dangerous task of driving while concurrently dealing with electronic equipment which the government has found to be even more dangerous are apparent.⁴⁷ One can easily imagine the arguments to be made on all sides after the first multimillion dollar judgment based on a finding that a trucker was liable for an accident caused by his performing a task on his EOBR, rather than paying attention to traffic.

Carrier and Employee Criminal Liability Arising From EOBR Data

It is the criminal liability issue which perhaps best highlights the conflicting concerns at play in the use of electronically assembled data. While FMCSA speaks of EOBR's as helping to promote safety by improving monitoring capabilities for HOS compliance, FMCSA's credibility is compromised by its assuming two roles: namely advocate for improving safety, and prosecutor, judge, and jury of those who violate the safety laws.⁴⁸ This is in contrast to the NTSB, whose only role is to investigate accidents (and other safety related situations) and make recommendations to improve future safety, but does not assign blame for liability purposes nor punish those who may have engaged in wrongdoing.

This becomes important in light of increasing criminalization of accidents, including, but not limited, to use by federal regulatory agencies of 18 U.S.C. § 1001⁴⁹, the "false statement statute" for purpose of criminal

ing performance even more. . . . [W]e have a serious problem on our roadways now and it is growing." Rosalyn G. Millman, Prepared Remarks for July 18, 2000, NHTSA Public Meeting on Driver Distraction, available at <http://www-nrd.nhtsa.dot.gov>.

46. Not only NHTSA has expressed this view. There is a more than nascent movement underfoot to outlaw cellular phones while driving, due to safety concerns. See Christine Haughney, *Taking Phones Out of Drivers' Hands; New York County Joins a Growing Effort to Restrict Cellular Use in Vehicles*, WASHINGTON POST, November 5, 2000, at A8.

47. According to a WALL STREET JOURNAL story after the NHTSA meeting, "[a] number of big employers are considering prohibiting their employees from using cell phones while driving because of safety and liability concerns." Jeffrey Ball, *Federal Agency to Advise Drivers to Hang Up Phones*, WALL ST. J., July 19, 2000, at B8.

48. It is more accurate to say that with respect to civil actions, FMCSA acts as prosecutor, judge, and jury. When FMCSA feels criminal prosecution may also be warranted, it calls in the local United States Attorney. For example, a recent press release describes sentencing of a trucking drug testing consortium official whose company did not perform DOT required drug tests, as advertised. According to the release, after FMCSA agents began to suspect a problem, FMCSA worked with the FBI and the local U.S. Attorney "to bring this case to a conclusion." *Trucking Consortium Official Sentenced in Drug-Fraud Case*, FMCSA 16-00, Sept. 20, 2000, available at <http://www.dot.gov/briefing.htm>.

49. 18 U.S.C. § 1001 (Supp. IV 1994). This statute provides, in pertinent part, "whoever, in any matter within the jurisdiction of the . . . Government of the United States knowingly and wilfully . . . (2) makes any materially false, fictitious, or fraudulent statement or representation, or (3) makes or uses any false writing or document knowing the same to contain any materially

prosecution of those who, when asked if they were in compliance with federally mandated safety rules, replied, "No," when such answer was not accurate.⁵⁰ A recent Supreme Court decision, *Brogan v. U.S.*, seems to have interpreted this statute in a very restrictive way, so even answering a simple but inaccurate "no" to a Federal investigator's question may be a violation of §1001.⁵¹ According to *Brogan*, the one being interviewed has only two choices. He can tell the truth, or he can invoke the self-incrimination protections of the Fifth Amendment. If he makes any other statement, which turns out to be untrue, he has violated §1001.

Keep in mind that however truthful the driver may think he is being, electronically generated data is as black and white as it gets, leaving no room for subjective interpretation or explanation, unless the prosecutor is willing to entertain it. If the EOBR says the driver exceeded permissible hours—for whatever reason and for however great the amount—that by itself may well be enough to prosecute a driver who says he was in compliance with the rules for having made a false statement.

It goes without saying that since, under federal safety rules, the carrier is responsible for compliance by its employees, the corporation (and its principals), not just drivers, may be called upon to answer criminally.⁵²

In his opening comments to the April, 2000 Symposium, NTSB Chairman Hall spoke specifically of his agency's concerns that NTSB's traditional access to those involved in an accident "to tell us what happened in the accident" would be thwarted by a criminal investigation leading to the immediate legal advice to all those involved to invoke their Fifth Amendment rights. Without access to those persons actually involved, who knew exactly what happened, Chairman Hall sees "serious safety issues and serious questions about prevention, remain[ing] unanswered."

While every responsible carrier shares concerns, NTSB's concerns that we should be able to learn from any accident lessons which will help to avoid similar accidents in the future, those concerns are not such that carriers would urge their employees to subject themselves to criminal prosecution and possible imprisonment in the vague chance that their

false or fictitious or fraudulent statement or entry shall be fined . . . or imprisoned not more than 5 years, or both."

50. See Martin R. Riskin, *Criminal Enforcement in the Aviation Industry*, The National Transportation Safety Board Transportation Safety and the Law Symposium, April 25-26, 2000, available at http://www.nts.gov/events/2000/symp_legal/Raskin%20Paper.htm (a more thorough discussion of the entire criminalization issue in the airline setting).

51. See *Brogan v. U.S.*, 522 U.S. 398 (1998). The general denial, which until *Brogan* was permissible, was often described as the "exculpatory no."

52. *Trucking Firm President Handed 15 Months in Tanker-Explosion Death*, OIG-2-00, April 13, 2000, available at <http://www.dot.gov/affairs/oig0200.htm> (DOT Inspector General press release reflecting criminalization of violation of the safety rules, including a corporate officer.)

conviction may promote the public good. So long as there seems to be a readiness by government to use criminal prosecution as a high profile response to some accidents, carriers have little realistic option but to cooperate as little as possible in safety investigations. It would appear public safety is the loser.

Driver Privacy Issues From Use of EOBR Data

In both the United States and Canada, individual rights are often weighed against the public good when formulating government policy. An individual's right to privacy is a concern anytime there is electronic tracking of his activities.⁵³ The more "intrusive" the electronic device, the more the concern about invasion of privacy. The issue is not an easy one to resolve. On the one hand, an article describes the drivers' point of view as follows:

There may be more intrusive forms of government regulation on the nation's 3 million long-haul truck drivers. But except for the government's decade-old mandatory random drug testing program, no proposal affecting truck drivers is causing more venom than this idea.⁵⁴

On the other, in his statement at the April, 2000 Symposium, NTSB's Chairman Hall phrased the issue in a slightly different way:

The bottom line is the government's responsibility and the Board's primary mission is to ensure public safety. . . . [W]hile every individual's right to privacy must be respected and protected as much as possible - should that be the determining factor when we make decisions on public safety issues?

FMCSA expressed a far more myopic view. In its explanation of its HOS proposal, it said,

The FMCSA recognizes that drivers may consider this proposal an invasion of their privacy. This is not our intention. We view the EOBR requirement as a more effective form of the self-monitoring and -reporting drivers have been required to [do] for many decades in the form of paper records of duty status (logbooks). The EOBR requirement does not include, and should not be interpreted as authorizing, the use of audio or video recording of drivers' activities in, on, or near the vehicle.⁵⁵

While this may state FMCSA's view, NTSB, the other proponent of recorders, hastened to assuage privacy (and litigation) concerns by extending current statutory protection of the privacy of aircraft voice re-

53. An interesting issue, but one beyond the scope of this paper, is how this concern for individual privacy may differ in the United States and Canada, by reasons of the differences in the U.S. and Canadian views of the inalienable rights of the individual *vis-a-vis* the government.

54. Schulz, *supra* note 16.

55. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,563 (May 2, 2000).

orders to motor vehicles as well.⁵⁶ However, its legislative proposal is limited explicitly to voice or video recordings, both of which FMCSA says are not embraced in its HOS proposal and neither of which is in common use in trucking. While an airplane pilot is in constant voice communication with air traffic controllers and radio communications may be an important part of ship safety, a truck driver will have infrequent voice communications with his company.⁵⁷ This would render the NTSB legislation of little value to trucking interests.

Although voice data recorders are not (yet) embraced in the type of EOBR's contemplated by the FMCSA's HOS proposal, once voice data is recorded, another element of privacy comes into play, namely the release of the actual voice recording, as opposed to the transcript of what was said. A leading case is *New York Times v. NASA*, 920 F.2d 1002 (D.C. Cir., 1990), in which the D.C. Circuit, sitting *en banc*, held in a six to five decision that the last voice recordings of the astronauts of the Space Shuttle Challenger fell within the personal exemption to the Freedom of Information Act.⁵⁸

In the trucking field, *Veilleux v. NBC*, 206 F.3d 92 (1st Cir. 2000), a case arising from the unflattering NBC "Dateline" show on trucking, dealt with the privacy issue for truck drivers in the drug testing setting, and found that NBC's broadcast of a driver's drug testing experience was warranted and not an unlawful invasion of privacy, since "Individuals' drug use, particularly where related to public safety, may be a legitimate matter of public concern. So, too, may be the regulation of public health

56. National Transportation Safety Board Amendments Act of 2000, Pub. L. No. 106-424, 114 Stat. 1883 (2000). It would, *inter alia*, modify current law to provide:

(d) Surface Vehicle Recordings and Transcripts

- (1) Confidentiality of Recordings. The Board may not disclose publicly any part of a surface vehicle voice or video recorder recording or transcript of oral communications by or among drivers, train employees, or other operating employees responsible for the movement and direction of the vehicle or vessel, or between such operating employees and company communications centers, related to an accident investigated by the Board. However, the Board shall make public any part of a transcript or any written depiction of visual information that the Board decides is relevant to the accident (A) if the Board holds a public hearing on the accident, at the time of the hearing, or (B) if the Board does not hold a public hearing, at the time a majority of the other factual reports on the accident are placed in the public docket.

57. See Don Phillips, *Pilot Fought to Control Jet to Moment of Crash*, WASHINGTON POST, December 14, 2000, at A6 (As part of its hearings into the Alaska Airlines crash of January, 2000, NTSB released the transcripts of the voice recording, which dealt not only with the safety aspects of the pilots' actions, but also interaction with the airlines' own dispatcher.).

58. 5 U.S.C. § 552(b)(6) (1994) (provides that the FOIA disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). The Court decision held the voice recordings were a "similar file" and remanded the case for determination as to whether the release of the tapes would be "a clearly unwarranted invasion of personal privacy."

or safety.”⁵⁹ This is one example of the public’s concern with safety outweighing an individual’s right to privacy, as Chairman Hall suggested.⁶⁰

As to driver privacy in general when weighed against safety requirements, the courts have generally held public safety concerns outweigh individual privacy concerns. The best example is mandatory drug testing, which is an intrusive, highly personal “search” of an individual, and which to many, constitutes an “unreasonable search and seizure” in violation of the Constitution’s Fourth Amendment. Nevertheless, privacy concerns arising from this intrusive practice are outweighed by public safety considerations.⁶¹ It would seem reasonable to predict that less “intrusive” monitoring of driver activities by EOBR’s in the name of safety would withstand privacy challenges.

The privacy issue differs from civil and criminal liability issues in that the former is generally an individual issue and the latter more directly affects the company. If the law requires the company to monitor the driver’s activities by means of an EOBR, then the company should be insulated from any driver claim of invasion of privacy. The issues surrounding disclosure of the driver’s EOBR recorded safety performance in the media have been raised above. Another privacy issue could arise in the disclosure by the company of a former driver’s EOBR recorded performance to a second company, contemplating hiring him. Presumably, any company liability in such circumstances would be limited by the TEA-21 provision limiting liability for those carriers which make safety records available to another carrier, so long as the first carrier meets all of the conditions of that law.⁶² One realistic fear is the widespread use of EOBR’s will make readily available—and therefore more frequently requested—far more detailed driver safety information than was ever available in the past. The more detailed the information, the greater the privacy concerns.

59. *Veilleux v. NBC*, 206 F.3d 92, 101 (1st Cir. 2000).

60. It should be kept in mind the individual’s right to privacy was not considered in a vacuum, but rather weighed against the chilling effect on the First Amendment Freedom of the Press rights of the media which could result from a finding that such safety information was private. If the defendant in an invasion of privacy action was not the media, bolstered by First Amendment concerns, it is at least arguable that the individual’s right to privacy may have been accorded greater weight.

61. See *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602 (1989); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (providing the analytical framework for analyzing the extent to which drug testing is Constitutionally permissible). See also *Int’l Bhd. of Teamsters v. DOT*, 932 F.2d 1292 (9th Cir. 1991) (applying this analysis in the trucking field).

62. 49 U.S.C. § 508 (1994) (enacted by Sec. 4014 of TEA-21, limits the liability for various claims, including specifically “invasion of privacy,” for one motor carrier which furnishes “safety performance records” to a second carrier, but the limitation is quite narrowly drawn, with a number of conditions precedent to the limitation’s effectiveness. Also, more than 30 months after enactment, there are still no regulations to implement the law.).

WHERE ARE WE GOING FROM HERE?

So much written about the future—especially the future of technology—must be based on sheer speculation. The future use of EOBR's is no different. Though one can hardly imagine exactly the form EOBR's will ultimately take, one can realistically imagine instances in which the liability and privacy issues described above will arise. The precise configuration of tomorrow's EOBR is speculation of one sort; the identity of the first trucking company to be hit with a multimillion dollar personal injury judgment solely by information discovered from one of its EOBR's is speculation of an entirely different kind. The first can be viewed with positive anticipation about what new benefit technology will provide; the second can be viewed with anxiety and trepidation.

Yet, without denying that liability concerns are foremost in the minds of carriers,⁶³ in the broader scheme of things it is most likely that technology will in this area - as in so many others - sweep away before it all prosaic concerns of the industry most affected to the end of increasing our knowledge and our ability to analyze that knowledge.

Trucking safety regulation has never been "cutting edge." FMCSA began its rulemaking with an admission that the current HOS rules have been in effect in their current form since 1962, and with the many significant changes in our transportation system, "It has become increasingly clear, . . . , that a complete reevaluation of the HOS rules is needed."⁶⁴ In a world of daily changing technology, a process that requires 40 years to change a government rule will simply be left along the roadside of the information superhighway.

While the issues described here will continue to be of concern to the motor carrier community, it is most likely that the increased sophistication of EOBR's and the valuable-to-management information they can generate and analyze will outweigh such "mundane" issues as liability and privacy. These mundane issues will be left for battle in the few cases in which they arise. Technology will likely consign these issues, like so many others, to the role of historical roadside markers on the highway to the future.

63. As Alfred E. Neuman said in a memorable *MAD MAGAZINE* issue, "Puppy love is real to the puppy."

64. Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,541 (May 2, 2000).