ARGUED DECEMBER 4, 2006; DECIDED JULY 24, 2007
ORDER STAYING MANDATE ISSUED SEPTEMBER 28, 2007

No. 06-1078
(Consolidated with No. 06-1035)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, CITIZENS FOR RELIABLE AND SAFE HIGHWAYS, PARENTS AGAINST TIRED TRUCKERS, ADVOCATES FOR HIGHWAY AND AUTO SAFETY, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE UNITED STATES,

Respondents.

PETITIONERS' REPLY IN SUPPORT OF MOTION TO ENFORCE THE COURT'S ORDERS, OR, IN THE ALTERNATIVE, PETITION FOR A WRIT OF MANDAMUS

Henry M. Jasny
General Counsel
Advocates for Highway and Auto Safety
750 First Street, N.E., Suite 901
Washington, D.C. 20002
(202) 408-1711

Bonnie I. Robin-Vergeer
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Petitioners

January 10, 2008

Petitioners' argument in support of this motion to enforce the Court's orders (and now, the Court's mandate, issued on January 3, 2008) is straightforward, but has gone essentially unaddressed by the Federal Motor Carrier Safety Administration ("FMCSA") and the American Trucking Associations ("ATA"): The Court ordered the two driving-hour increases vacated because FMCSA did not afford notice and an opportunity for comment on its operator-fatigue model before adopting the 2005 hours-of-service ("HOS") rule. FMCSA cannot now reinstate those two features in an interim final rule ("IFR") by pursuing the same flawed procedure a second time.

To skirt this fundamental problem, FMCSA and ATA raise strawman arguments petitioners never advanced, cite "concessions" petitioners never made, and continue to insist that the rule is just as safe—if not safer—than the pre-2003 rules. None of these arguments saves FMCSA's action.

1. The July 24, 2007 decision. FMCSA contends (at 6) that the Court's July 2007 ruling vacated the 11-hour consecutive driving limit and 34-hour restart without restricting the agency's discretion to reinstate those provisions. In its decision, the Court vacated the two driving-hour increases in part because FMCSA failed to provide notice of its new model "in time for comment" before it adopted the 2005 rule. *Owner-Operator Indep. Drivers' Ass'n v. FMCSA*, 494 F.3d 188, 202 (D.C. Cir. 2007) ["*OOIDA*"]. Because FMCSA is "without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of

the opinion of [the] court deciding the case," *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977); *see* Pet. Motion at 2, it must correct the deficiencies identified by the Court before it re-adopts the vacated provisions. Accordingly, the IFR is unlawful to the extent that it reinstates those provisions without first affording advance notice and an opportunity for comment.

Both FMCSA and the ATA protest that neither the Court's July 2007 decision nor its September 2007 order granting a 90-day stay of the mandate explicitly directed FMCSA *not* to adopt an IFR reinstating the 11-hour driving limit and 34-hour restart before the agency rectifies the errors found by the Court. FMCSA Response at 3, 4, 7; ATA Response at 9-10, 18. The mandate in this case vacated the 11-hour limit and 34-hour restart "in accordance with the opinion of the court filed herein this date." It speaks for itself; nothing more was necessary.

Despite ATA's best efforts to distinguish them, ATA Response at 11 n.1, the cases cited by petitioners confirm the IFR's unlawfulness. In *Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795 (D.C. Cir. 1983), this Court had previously vacated a portion of a rule because it violated one requirement of the Administrative Procedure Act ("APA"), and the agency responded by promulgating a "new," nearly identical rule that violated another, the notice-and-comment requirements. The Court granted emergency relief because the agency could not "remedy a deficiency in one regulation by promulgating a new rule, equally defective

for the same or other reasons." *Id.* at 798-99. Similarly, in *National Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345 (D.C. Cir. 1978), the Court granted relief when the ICC issued an order inviting interim use of a study discredited in an earlier court decision. Although the ICC purported to be assessing the study's validity during the interim period, *id.* at 348, the Court found its action a "plain contradiction[]" of the Court's earlier order, *id.* at 349, much as FMCSA's reinstatement of the vacated provisions without *first* affording notice and comment plainly contradicts this Court's July 2007 decision. FMCSA cites no case law to support its position.

2. The September 28, 2007 order. FMCSA and ATA speculate about why the Court denied the 8-month or 1-year stays they requested, but one point is indisputable: The Court rejected their position that a stay of its order vacating the two driving-hour increases was necessary during the pendency of the new rulemaking. No party contended that a new rulemaking could be accomplished in 90 days. ATA's contention (at 11 n.1) that this case differs from *ILGWU v. Donovan*, 733 F.2d 920 (D.C. Cir. 1984), because there, the Court vacated a rescission of a restriction that was to remain in effect "unless properly modified pursuant to 'reasoned decisionmaking' consistent with the opinion of this court," *see id.* at 921, falls flat. The Court's condition in *ILGWU* simply restated a basic principle of administrative law: Agencies may modify their regulations only through reasoned

decisionmaking. *ILGWU* found that in suspending the Court's decision for 120 days, while publishing a notice of proposed rulemaking again to rescind the restriction, the Secretary of Labor in effect implemented the stay that the Court had denied, *id.* at 923—much as FMCSA has granted itself the year-long stay that this Court denied.[1]

Ultimately, if FMCSA possessed all along the unfettered discretion to issue an IFR (which is, after all, an interim *final* rule that has the force of law, not merely a proposed rule) reinstating the provisions vacated by the Court without *first* correcting the errors that led to the vacatur, then there would have been no need for a stay of the mandate in the first place. FMCSA's action here renders meaningless the Court's ruling on the motion for a stay.

3. Petitioners have demanded no specific re-write of the rule and have never conceded the necessity of an IFR. In an attempt to divert attention from the fact that *this Court* set aside the 11-hour driving limit and 34-hour restart, FMCSA and ATA contend that petitioners have demanded a specific re-write of the HOS rule that retains the provisions they prefer while jettisoning the features they oppose. FMCSA Response at 1, 5-6, 11; ATA Response at 13 n.3, 15, 17. Petitioners have argued nothing of the sort. Nowhere did petitioners express a view regarding how

[1] Contrary to ATA's characterization (at 10, 18), FMCSA left the impression in responding to the stay motion that the interim rule it planned to adopt within 21 days in the event that the Court denied the requested stay, would eliminate, not retain, the two vacated rule features. See FMCSA Response to Stay Motion at 8-9.

FMCSA should address, for the purpose of a transition period, the *other* features of the rule not vacated by the Court. Their motion is clear in asking the Court to direct FMCSA, consistent with the Court's orders, to issue a revised IFR or other authoritative guidance that prohibits use of the two vacated driving increases. *See* Pet. Motion at 1, 16, 20. Petitioners sought nothing more.

Relatedly, FMCSA and ATA press another mischaracterization of petitioners' views—that petitioners concede that an IFR of *some* kind is necessary and are simply protesting *this* IFR because of their substantive disagreement with FMCSA over its choice of rule. FMCSA Response at 11; ATA Response at 16, 18-19. Again, petitioners conceded no such thing. Indeed, they *challenged* FMCSA's claimed need for an IFR as both "contrived" and based on an "overblown" concern that the Court's decision left ambiguity as to the governing limits. Pet. Motion at 16 n.6. Petitioners said only that an IFR that simply clarified, in accordance with this Court's decision and until the agency issued a final rule, that drivers would be subject to a 10-hour driving limit and weekly limits with no restart, would not have been "objectionable." *Id.* Petitioners have consistently maintained that FMCSA has no discretion to promulgate the rule features invalidated by the Court without first correcting all the errors that led to the vacatur.

4. FMCSA's justifications for the IFR fail. FMCSA and ATA misunderstand the reason for petitioners' argument that FMCSA has not shown good

cause under the APA for adopting a rule retaining the vacated provisions while affording only an after-the-fact opportunity for notice and comment. Petitioners are not mounting an independent challenge to the IFR on this ground and hence need not file a separate petition for review. The agency attempted to justify in the IFR its decision to reinstate the vacated provisions without complying with normal APA procedures, despite the Court's ruling, by invoking the "good cause" exemption. 72 Fed. Reg. 71247, 71266-68 (2007). FMCSA is not entitled to de novo review of whether it has shown "good cause" to forgo advance notice and comment as if the Court's ruling did not exist. But given the overlap in arguments regarding the agency's alleged "good cause" and whether its IFR complies with the Court's orders, petitioners would be remiss if they failed to address FMCSA's justifications head-on.

a. FMCSA maintains (at 9) that issuance of an IFR retaining the two vacated features "was necessary to avoid widespread confusion and to ensure continued enforcement of HOS requirements." "An immediate change to the HOS rules," it claims, "would result in a patchwork of regulations enforced by thousands of State law enforcement officers who lack training in the changed standards, thus rendering effective enforcement problematic." *Id.* Yet the same transition FMCSA declares will spawn confusion and harm enforcement occurred after adoption of the revised 2005 rule, which became effective only slightly more than 30 days after its announcement. 70 Fed. Reg. 49978 (2005). By contrast, FMCSA has now had nearly

six months to facilitate a transition to a rule without the two driving-hour increases.

FMCSA's claim conveniently obscures the fact that *whenever* it issues a new commercial motor vehicle safety regulation, standard, or order, the states must follow suit. Because of the time lag before all states adopt conforming safety regulations, however, some inconsistency among the states is inevitable—and, indeed, is standard procedure. The fact is, although states are required "[a]s soon as practical after the effective date of any newly enacted regulation or amendment to the FMCSRs . . . , but no later than three years after that date," to amend their laws to make them compatible with federal regulations, 49 C.F.R. § 350.331(d), many do not do so promptly.

For example, as of September 2004—well over a year after the 2003 rule's effective date—at least 4 states (including California and New York, two states with a high number of miles traveled by commercial motor vehicles) had not yet amended their laws to adopt the 2003 rule. *See* Petitioners' Opp. to Stay Motion at 13 (No. 03-1165) (D.C. Cir., filed Sept. 13, 2004). In fact, California did not amend its regulations until October 2007. *See* Cal. Code Regs. tit. 13, § 1212.5 & History. FMCSA's claim (at 8), citing Mr. Hartman's declaration, that state HOS regulations could remain inconsistent for "up to three full years," is thus an understatement, as California was more than four years behind. But no chaos in California or elsewhere ensued after the 2003 or 2005 rules were adopted because the new rules were well publicized; FMCSA allowed a transition period for enforcement; and motor carriers

and drivers were independently required to obey federal rules for interstate trucking—regardless of the status of state regulations. 49 C.F.R. § 395.1(a).

FMCSA advised this Court that the states would need at least 3 months to implement and enforce an HOS rule restoring the old driving limits. Hartman Decl. ¶ 9. The agency did not take advantage of the 90-day stay the Court granted to effect such a transition. It is beside the point that FMCSA could not have developed its detailed analysis and justifications before the end of that time frame. ATA Response at 14 & n.4, 18. Neither FMCSA nor ATA denies that the agency could have issued guidance (whether in an IFR or not) within 21 days clarifying that drivers were now subject to a transitional set of HOS rules, and then taken its time to issue a notice of proposed rulemaking with the analysis set out in the current IFR. Where the need to issue a rule without advance notice and comment arises because of the agency's own delays, the APA's "good cause" exception is not satisfied. Pet. Motion at 17-18.[2]

b. Finally, citing 2006 statistics reflecting reductions in fatal large-truck crashes and other crash measures, FMCSA contends (at 10) that the disruption of a

[2] FMCSA adds (at 9-10) that changing the rule to eliminate the daily driving limit increase and the restart would impose significant transition costs on the industry. As petitioners discussed in opposing ATA's stay motion, most of the costs claimed by the industry were projected productivity losses (or costs to make up for lost productivity) for relinquishing the driving-hour increases instituted at the expense of public safety and truck-driver health. Pet. Opp. to Stay Motion at 13-16. The costs of actually effecting the transition are small in relation to the potential harm to the public and drivers of retaining the higher driving maximums. *Id.* at 16-18.

rule change is unnecessary, "especially in light of the statistics indicating that continuing the status quo will not diminish safety." The rulemaking record contains considerable research evidence demonstrating that crash risk climbs sharply after driving 8 hours, leading FMCSA to "freely concede[]" in 2003 that risk "increases geometrically during the 10th and 11th hours." *OOIDA*, 494 F.3d at 196 (quoting *Public Citizen*, 374 F.3d 1209, 1218 (2004)). After the Court's first decision, FMCSA sought new research findings that would justify retaining the 11-hour driving limit. It failed. *See* Pet. Br. 18-20 & n.6, 37-39; Pet. Reply Br. 2-7. FMCSA's selective citation of generic crash statistics without supporting research establishing the safety of longer driving hours should not reassure the Court that the IFR promotes safety or protects driver health. *See also* Pet. Opp. to Stay Motion at 6-10.

Our preliminary review of the IFR suggests that, in an effort to minimize the truck-driver fatigue problem, FMCSA is relying on flawed data that the agency itself has previously stated is unreliable. But even on its own terms, the agency's analysis is flawed. Even assuming that the number of fatal crashes coded as fatigued is a useful safety measure, *but see* Pet. Reply Br. at 4, 10-11, according to the IFR the percentage of fatigue-coded fatal crashes rose from 1.5 percent in 2004, to 1.8 percent in 2005, 72 Fed. Reg. at 71259 (Table 1)—a 20 percent increase in a single year. Because 2004 was the first year in which the new, longer hours of driving and work were put into effect, the negative impact is obvious.

In addition, as National Highway Traffic Safety Administration ("NHTSA") recently reported, fatalities in large truck crashes declined in 2006 "after increasing three years in a row." NHTSA, Motor Vehicle Traffic Crash Fatality Counts & Estimates of People Injured for 2006, at 121 (Sept. 2007), *at* http://www.nhtsa.gov/portal/site/nhtsa/menuitem (under "What's New" heading); *see also id.* at 123; 72 Fed. Reg. at 71259. The recorded increases in 2004 and 2005, the first two years during which truck drivers operated under the 2003 rule's much higher driving and on-duty limits, directly contradict FMCSA's safety claims. That fatalities declined four years in a row from 1999 to 2002 (NHTSA at 123), *before* FMCSA issued the 2003 rule, suggests that if there is any trend, it is that large-truck crash fatalities were in decline until the 2003 rule went into effect.

In short, without studies demonstrating the safety of the driving-hour increases, FMCSA has no evidence that contradicts or undercuts its prior safety findings that longer driving hours are unsafe.

CONCLUSION

With FMCSA expressing only a "hope[]" that it will complete the new rulemaking by the end of 2008, FMCSA Response at 5, the public faces the prospect of an IFR leaving in place indefinitely the two driving-hour increases that the agency has never justified and that have been vacated twice by the Court. For the reasons expressed above and in petitioners' motion, the Court should set aside the IFR.

Dated: January 10, 2008

Respectfully submitted,

Bonnie I. Robin-Vergeer
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Henry M. Jasny
General Counsel
Advocates for Highway and Auto Safety
750 First Street, N.E., Suite 901
Washington, D.C. 20002
(202) 408-1711

Counsel for Petitioners

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 10th day of January, 2008, she caused one copy of the foregoing Petitioners' Reply in Support of Motion to Enforce the Court's Orders, Or, in the Alternative, Petition for a Writ of Mandamus to be served by first-class U.S. mail, postage prepaid, and electronic mail, on the following:

Matthew M. Collette
U.S. Department of Justice
Civil Division, Appellate Staff
Room 7212
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Erika Z. Jones
Adam C. Sloane
Mayer Brown, LLP
1909 K Street, N.W.
Washington, D.C. 20006

and one copy by first-class mail, postage prepaid on:

Michele McDowell Fields
Insurance Institute for Highway Safety
1005 N. Glebe Road, Suite 800
Arlington, VA 22201

Kenneth E. Siegel
Strasburger & Price, LLP
1800 K St., N.W., Suite 301
Washington, D.C. 20006

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway, PC
2175 K Street, N.W., Suite 600
Washington, D.C. 20007

James A. McCall
International Brotherhood of Teamsters
25 Louisiana Ave., N.W.
Washington, DC 20001

C. Fairley Spillman
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Paul D. Cullen, Sr.
Paul D. Cullen, Jr.
The Cullen Law Firm
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007

Nicholas J. DiMichael
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036

_____
Bonnie I. Robin-Vergeer