

No. 14-1183

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

In Re: Advocates for Highway and Auto Safety; the International
Brotherhood of Teamsters; and Citizens for Reliable and Safe Highways,

Petitioners.

On Petition for a Writ of Mandamus

**MOTION TO TAKE PETITION OUT OF ABEYANCE AND TO REQUIRE
RESPONDENTS TO ISSUE A FINAL RULE**

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GLOSSARY

DOT	Department of Transportation
FMCSA	Federal Motor Carrier Safety Administration
NPRM	Notice of Proposed Rulemaking

INTRODUCTION

This motion is filed in response to the Court's March 9, 2016, order directing the parties to file motions to govern future proceedings by October 17, 2016. Petitioners respectfully request that this Court issue an order directing Respondents Department of Transportation (DOT), et al., to issue a final rule establishing minimum entry-level training requirements for commercial motor vehicle drivers within 45 days of the Court's order.

In 2012, Congress directed DOT to issue final regulations establishing minimum entry-level training requirements for commercial motor vehicle drivers by October 1, 2013. Almost a year after that deadline, when the agency had not yet even issued a notice of proposed rulemaking (NPRM), Advocates for Highway and Auto Safety, the International Brotherhood of Teamsters, and Citizens for Reliable and Safe Highways petitioned this Court for a writ of mandamus directing the agency to issue the required rule. In its response to the petition, DOT stated that it expected to issue a final rule by September 2016. On March 10, 2015, the Court ordered the petition to be "held in abeyance ... to permit the Department of Transportation to issue, by September 30, 2016, final regulations."

In December 2015, after DOT repeatedly pushed back the projected NPRM publication date, Petitioners filed a motion asking the Court to take the petition out of abeyance and require DOT to issue a final rule by September 2016. DOT

responded that an order was “unnecessary in light of the agency’s continuing efforts and commitment to issue a final rule by that time.” On March 9, 2016, “based on the agency’s representation that it [was] continuing its efforts to publish a final rule by September 2016,” the Court ordered that the petition remain held in abeyance. The Court directed the parties to file motions to govern future proceedings by October 17, 2016.

DOT eventually issued an NPRM, but, despite DOT’s assertion that a court order was unnecessary because of the agency’s commitment to publishing a rule by September 2016, DOT has now informed the Court in its August 1, 2016, status report that it will *not* be issuing a final rule by September 30, 2016—a date that is already three years past the statutory deadline. DOT’s report does not suggest that it is running only a month or two behind its schedule and will publish the rule soon after September. Indeed, DOT has not provided the Court with *any* estimate of when it will issue the regulations.

DOT has demonstrated that, when it comes to issuing driver-training regulations, it feels bound neither to statutory deadlines nor to the schedule it told the Court it was committed to following. DOT’s monthly report on its significant rulemakings indicates that the agency does not believe it has any legal deadline for acting. And DOT’s most recent regulatory agenda, which was published in the Federal Register on June 9, 2016, listed the entry-level driver-training rule as a

“long-term action”—that is, an action on which no regulatory action is expected within the following year.

“At some point, [the Court] must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.” *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987). That time has come. The only way to ensure that the agency does not endlessly delay issuing the entry-level driver-training regulations is for this Court to require it to publish the regulations by a date certain. There is no reason for the Court to wait until after October 17, 2016, to issue such an order. The Court should take the case out of abeyance and order Respondents to issue a final rule establishing minimum entry-level driver-training requirements within 45 days of the Court’s order.

BACKGROUND

This case follows decades of agency inaction and delay in promulgating entry-level driver-training requirements. In 1991, Congress required the Secretary of Transportation to complete a rulemaking proceeding on the need to require training of entry-level commercial motor vehicle drivers by December 18, 1993.¹ The agency submitted a report to Congress in 1996 indicating that driver training

¹ Intermodal Surface Transportation Efficiency Act, Pub. L. No. 102-240, § 4007(a), 105 Stat. 1914 (1991).

was inadequate.² Nonetheless, it did not issue a rule establishing entry-level driver-training requirements.

In November 2002, almost nine years after the date that the rulemaking was supposed to be completed, organizations concerned about vehicle safety filed a petition for a writ of mandamus in this Court, seeking an order directing DOT to promulgate overdue regulations relating to motor-vehicle safety, including the regulation on entry-level driver training.³ As part of a settlement agreement, DOT agreed to issue a final rule on entry-level driver training by May 31, 2004.⁴

In May 2004, DOT published a final rule (through the Federal Motor Carrier Safety Administration (FMCSA)) that required training only on driver qualification requirements, hours of service, driver wellness, and whistleblower protection.⁵ Organizations concerned about vehicle safety petitioned this Court for review of the final rule, arguing that the rule was arbitrary and capricious because it did not require drivers to receive training in how to operate a commercial motor vehicle. In

² Federal Highway Administration, *Assessing the Adequacy of Commercial Motor Vehicle Driver Training: Final Report* (1995).

³ Petition for a Writ of Mandamus and for Relief from Unlawfully Withheld Agency Action, *In re Citizens for Reliable and Safe Highways*, No. 02-1363 (D.C. Cir. Nov. 26, 2002).

⁴ Settlement Agreement, *In re Citizens for Reliable and Safe Highways*, No. 02-1363 (D.C. Cir. Feb. 24, 2003).

⁵ FMCSA, *Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators*, 69 Fed. Reg. 29384, 29385 (May 21, 2004).

a decision dated December 2, 2005, this Court agreed, declared the rule arbitrary and capricious, and remanded the rule to the agency for further rulemaking.⁶

Two years later, FMCSA issued a NPRM on entry-level driver training.⁷

When the agency had yet to issue a final rule four-and-a-half years later, Congress legislated on the issue again, directing the Secretary of Transportation to issue, by October 1, 2013, “final regulations establishing minimum entry-level training requirements for an individual operating a commercial motor vehicle.” Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 32304, 126 Stat. 405, 791 (July 6, 2012), *codified at* 49 U.S.C. § 31305(c).

DOT did not issue a final rule by the statutory deadline. Instead, two weeks before the deadline, FMCSA announced that it was withdrawing the 2007 proposed rule and beginning a new rulemaking.⁸ Eleven months later, FMCSA published a notice indicating that, although the statutory deadline for issuing a final rule had come and gone, the agency had not yet even decided what type of rulemaking process to undertake. Specifically, the agency announced that it was

⁶ *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136, 1139-40 (D.C. Cir. 2005).

⁷ FMCSA, *Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators*, 72 Fed. Reg. 73226 (Dec. 26, 2007).

⁸ FMCSA, *Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators*, 78 Fed. Reg. 57585 (Sept. 19, 2013).

“exploring the feasibility of conducting a negotiated rulemaking,” but had not yet decided whether to do so.⁹

On September 18, 2014, Petitioners filed the petition for a writ of mandamus in this case, asking the Court to direct the agency to publish entry-level driver-training regulations by a date certain. On November 26, 2014, FMCSA announced that it had decided to proceed through a negotiated rulemaking.¹⁰ FMCSA’s notice stated that the agency intended to finish the negotiated rulemaking within the first half of 2015, publish a proposed rule by the end of the year, and publish a final rule in 2016.¹¹ In its response to the petition for mandamus, the agency specified that it intended to issue the final rule by September 2016. Response at 2, 11 n.4.

On March 10, 2015, this Court ordered that the petition for writ of mandamus be held in abeyance pending further order to permit DOT to issue final regulations by September 30, 2016. The Court also directed the agency to advise the Court within 90 days of its progress in issuing the regulations and directed the parties to file motions to govern future proceedings by December 31, 2015.

⁹ FMCSA, *Minimum Training Requirements for Entry-Level Commercial Drivers’ License Applicants; Consideration of Negotiated Rulemaking Process*, 79 Fed. Reg. 49044, 49044 (Aug. 19, 2014).

¹⁰ FMCSA, *Minimum Training Requirements for Entry-Level Driver Commercial Motor Vehicle Operators; Establishment of a Negotiated Rulemaking Committee*, 79 Fed. Reg. 73273 (Dec. 10, 2014).

¹¹ *Id.* at 73274.

On June 5, 2015, the agency submitted a status report stating that the negotiated rulemaking committee had met six times and that FMCSA was on schedule to issue a final rule by September 2016. On June 15, 2015, the negotiated rulemaking committee issued consensus recommendations for the entry-level driver-training rule.¹²

On December 30, 2015, in response to the Court's order directing the parties to file motions to govern future proceedings by December 31, 2015, Petitioners filed a motion to take the petition out of abeyance and to require Respondents to issue a final rule by September 2016. In the motion, Petitioners explained that, despite the negotiated rulemaking committee's work, FMCSA had fallen behind on its schedule and had repeatedly pushed back the date on which it expected to publish the NPRM. Later that day, Respondents filed a motion asking that the case remain in abeyance and stating that the order Petitioners requested was "unnecessary in light of the agency's continuing efforts and commitment to issue a final rule by" September 2016. Resp.'s Mot. to Govern Further Proceedings, at 1.

On March 9, 2016, the Court ordered "that the petition for writ of mandamus remain held in abeyance, based on the agency's representation that it is continuing

¹² Written Statement of the Entry-Level Driver Training Advisory Committee: Consensus Recommendation on Rule for Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators (June 15, 2015), *available at* <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/ELDTAC%20Written%20Statement.pdf>.

its efforts to publish a final rule by September 2016.” The Court directed the agency to file status reports by April 29, 2016, and August 1, 2016, and directed all parties to file motions to govern future proceedings in the case by October 17, 2016.

On March 7, 2016, FMCSA published its NPRM.¹³ The comment period closed 30 days later.¹⁴ On April 28, 2016, the agency filed a status report stating that “FMCSA remains committed to continuing its efforts to complete the final rule and publish it by September 2016, as we had previously proposed in our submissions to the Court.”

In a status report filed August 1, 2016, however, the agency indicated that it would *not* be issuing a final rule by September 2016. The agency stated that it would pursue the rulemaking’s “completion at the earliest possible time,” but did not give any indication of when a final rule could be expected. Instead, the agency stated that it intends to update the Court on October 17, 2016—the date by which the Court had ordered the parties to file motions to govern future proceedings.

DOT’s most recent semiannual regulatory agenda, the preamble of which is dated March 23, 2016, but which was published in the Federal Register on June 9, 2016, states that the agency’s next action on the entry-level driver-training rule is

¹³ FMCSA, *Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators*, 81 Fed. Reg. 11944 (Mar. 7, 2016).

¹⁴ *See id.* at 11944.

“undetermined” and lists the entry-level driver-training rule as a “long-term action.”¹⁵ A long-term action is an “item[] under development but for which the agency does not expect to have a regulatory action within the 12 months after publication” of the agenda.¹⁶ Thus, six weeks after informing the Court on April 28, 2016, that it was committed to continuing its efforts to publish the final rule by September 2016, the agency indicated in the Federal Register (in a document apparently prepared a month before the agency filed its status report) that it did not expect to take any action on the issue within the following 12 months.

Meanwhile, DOT’s monthly reports on its significant rulemakings, published on the agency’s website, indicate that, although Congress mandated that DOT promulgate a rule by October 1, 2013, DOT does not believe it is under any legal deadlines for acting. The reports list the legal deadline for the rulemaking as “None.”¹⁷

¹⁵ Office of the Secretary, DOT, *Department Regulatory Agenda, Semiannual Summary*, 81 Fed. Reg. 37342, 37360 (June 9, 2016); *see also* Reginfo.gov, RIN Data, RIN: 2126-AB66, www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=2126-AB66 (Spring 2016).

¹⁶ Regulatory Information Service Center, *Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions*, 81 Fed. Reg. 37244, 37246 (June 9, 2016). In contrast, DOT’s regulatory agenda listed final rules whose earliest expected dates of publication were October 2016 as being in the “final rule stage.” 81 Fed. Reg. at 37355-56, 37362.

¹⁷ *See, e.g.*, DOT, *Report on Significant DOT Rulemakings* 46 (Aug. 2016), available at <https://cms.dot.gov/regulations/significant-rulemaking-report-archive>;

ARGUMENT

The Court should take this case out of abeyance and order DOT to issue final regulations on entry-level driver training within 45 days of the Court's order.

This Court issues writs of mandamus “to correct transparent violations of a clear duty to act.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (internal quotation marks and citations omitted). Such a violation unquestionably exists here. DOT was required by law to promulgate entry-level driver-training regulations by October 1, 2013. It transparently violated that clear duty when it did not issue regulations by that date.

Despite being in direct violation of Congress's orders, DOT has shown itself to be in no hurry to promulgate the required regulations. It did not decide to engage in a negotiated rulemaking until over a year after it was supposed to have *completed* the rulemaking process. Then, although engaging in a negotiated rulemaking process was expected to facilitate issuance of a NPRM, and although the negotiated rulemaking successfully resulted in consensus recommendations, DOT did not issue its NPRM until almost nine months after the negotiated rulemaking committee issued those recommendations.

see also RIN Data, RIN: 2126-AB66, www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=2126-AB66.

Now, after repeatedly assuring the Court that it was committed to continuing its efforts to issue the rule by September 2016, and after successfully urging the Court to rely on its representations by placing and keeping the case in abeyance, the agency has informed the Court—less than two months before the end of September 2016—that it “appears that [the September 2016] completion date will not be met.” Aug. 1, 2016, Status Report at 3. The agency has provided no update about when it now expects to publish the final rule; it does not even intend to provide the Court with such an update until October 2016. *Id.* at 4. In its regulatory agenda published in the Federal Register in June 2016, however, it indicated that it did not plan to take any regulatory action on the issue within the next 12 months. *See* 81 Fed. Reg. at 37360.

This Court has explained that the “the time agencies take to make decisions must be governed by a ‘rule of reason.’” *Telecomms. Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (citations omitted). “[W]here Congress has provided a timetable ..., that statutory scheme may supply content for this rule of reason.” *Id.* Here, DOT’s continued delay in promulgating the required rule three years after the statutory deadline cannot be squared with a rule of reason. DOT did not abide by the timetable supplied by the statutory scheme. It set its own schedule, which it told the Court it was committed to follow, that gave it almost four times longer than Congress provided it to issue the rule. And it has now made clear that it

will not be complying even with that extended schedule or promulgating the required regulations any other time soon. The agency has offered no valid justification for delaying beyond the self-designated September 2016 deadline that it repeatedly represented to the Court as feasible.

DOT's prolonged delay in issuing the rule is particularly troubling because the rule concerns human health and welfare. *See* 81 Fed. Reg. at 11945 (“[FMCSA] believes this rulemaking would enhance the safety of commercial motor vehicle (CMV) operations on our Nation’s highways.”); *see also Telecomms. Research & Action Center*, 750 F.2d at 80 (explaining that the courts should “take into account the nature and extent of the interests prejudiced by delay” and that delays “are less tolerable when human health and welfare are at stake”). Every year, people are injured and die in commercial motor vehicle crashes.¹⁸ The longer the agency delays in issuing the required regulations, the longer entry-level commercial motor vehicle drivers without adequate training will drive on our nation’s highways, endangering both their own lives and those of the people with whom they share the road.

¹⁸ In 2014, 3,903 people were killed and an estimated 111,000 people injured in large truck crashes. *See* National Highway Traffic Safety Administration, Traffic Safety Facts 2014 Data, Large Trucks, DOT HS 812 279 (May 2016), *available at* <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812279>.

By requiring the agency to promulgate entry-level driver-training regulations within one year, Congress demonstrated that it intended the agency to make such regulations a priority. In light of the congressional mandate, the decades-long history of this issue, the agency's repeated delays, the successful completion of the negotiated rulemaking, the public-health nature of the issue, and the agency's earlier commitments, the agency's continued delay almost three years after the statutory deadline passed should not be excused.

This Court has held this case in abeyance for over 17 months based on DOT's representations that it was committed to its efforts to promulgate final regulations by September 2016, yet DOT still is not poised to promulgate the regulations any time soon. Neither Congress's mandate nor this Court's reliance on the agency's claims that it was committed to its efforts to issue a final rule by September 2016 has succeeded in getting the agency to issue the required regulations. The only way to ensure that the agency does not continue to delay indefinitely is for this Court to order it to issue the regulations by a date certain. This Court should take this case out of abeyance and order DOT to issue final driver-training regulations within 45 days of the Court's order.

CONCLUSION

The Court should reinstate the petition and order DOT to issue a final rule establishing entry-level training requirements for commercial motor vehicle operators within 45 days of the Court's order.

Respectfully submitted,

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August 19, 2016

CERTIFICATE OF SERVICE

I certify that on August 19, 2016, I caused the foregoing motion to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on counsel for all parties.

/s/ Adina H. Rosenbaum
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Counsel for Petitioners