Nos. 04-1233, 04-1236, 04-1418

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

ADVOCATES FOR HIGHWAY AND AUTO SAFETY, OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., and UNITED MOTORCOACH ASSOCIATION,

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE UNITED STATES,

Respondents.

On Petition for Review of a Final Rule Issued by
Respondent Federal Motor Carrier Safety Administration

PETITIONERS' BRIEF

Robert A. Hirsch
3323 Parkside Terrace
Fairfax, VA 22031
(703) 280-4517
Counsel for United Motorcoach Association

Paul D. Cullen, Sr.
Paul D. Cullen, Jr.
The Cullen Law Firm, PLLC
1101 30th Street, NW, Suite 300
Washington, DC 20007
(202) 944-8611
Counsel for Owner-Operator Independent Drivers Association, Inc.

Adina H. Rosenbaum
(admission to D.C. Circuit pending)
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000
Counsel for Advocates for Highway and Auto Safety

April 21, 2005

Additional counsel on signature page

PETITIONERS' CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for Petitioners certify as follows:

A. Parties

Petitioners are Advocates for Highway and Auto Safety, Owner-Operator Independent Drivers Association, Inc. (OOIDA), and United Motorcoach Association (UMA).

Petitioner Advocates for Highway and Auto Safety is a non-profit corporation that has no parent company and no subsidiaries or affiliates that have issued shares to the public.

Petitioner OOIDA is a trade association incorporated under the laws of the State of Missouri. No parent company or publicly-held company holds a 10% or greater ownership interest in OOIDA. Its membership consists primarily of individuals who operate commercial motor vehicles. The purpose of the Association is to promote the general commercial, professional, legislative, and other interests of its membership.

Petitioner UMA is the Nation's largest trade association of professional motorcoach owners and operators. UMA represents over 800 of the Nation's private commercial motor carriers of passengers, including school children.

UMA's members also include over 200 motorcoach and component manufacturers, and service suppliers. UMA operator members provide tour and charter, regular route, commuter, airport shuttle, and school transportation services in both interstate and intrastate commerce. In their capacity as motor carriers of passengers, UMA's motorcoach and school bus operators are subject to the federal motor carrier safety regulations, including the regulations that are being challenged in this litigation. UMA is a non-profit organization that has no parent company and does not issue stock.

Respondents are the Federal Motor Carrier Safety Administration (FMCSA) and the United States.

B. Rulings Under Review

Petitioners seek review of the final rule issued by respondents entitled "Minimum Training Requirements for Entry-level Commercial Motor Vehicle Operators," which was entered on the docket and published in the Federal Register on May 21, 2004, at 69 Fed. Reg. 29384.

C. Related Cases

The case on review has not previously been before this Court or any other court. However, prior to filing the petition for review involved in this case, No. 04-1418, Petitioner UMA filed a separate petition for review of FMCSA's final

rule on "Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators," which was docketed as No. 04-1240. At that time, UMA had a petition for reconsideration of the final rule pending before FMCSA. On September 27, 2004, the Court ordered UMA to show cause why No. 04-1240 should not be dismissed as premature in light of the pending petition for reconsideration. On October 13, 2004, UMA notified FMCSA that it was withdrawing its petition for reconsideration. On December 1, 2004, the Court dismissed No. 04-1240, noting that the withdrawal of the petition for reconsideration caused the appeal period to begin to run anew, but that it did not ripen the petition for review in No. 04-1240.

Petitioners are not aware of any related cases currently pending before this Court or any other court.

Respectfully submitted,

_____

Adina H. Rosenbaum
(Admission to D.C. Circuit Pending)
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Henry Jasny
Advocates for Highway and Auto Safety
750 First Street, NE
Washington, DC 20002
(202) 408-1711

Counsel for Petitioner Advocates for Highway and Auto Safety

Paul D. Cullen, Sr.
Paul D. Cullen, Jr.
Cullen Law Firm, PLLC
1101 30th Street, NW, Suite 300
Washington, DC 20007
(202) 944-8611

Counsel for Petitioner Owner-Operator Independent Drivers Association, Inc.

Robert A. Hirsch
3323 Parkside Terrace
Fairfax, VA 22031
(703) 280-4517
Counsel for Petitioner United Motorcoach Association

April 21, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

* Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

REGULATORY MATERIALS

MISCELLANEOUS

GLOSSARY

AAMVA	American Association of Motor Vehicle Administrators
ANPRM	Advance Notice of Proposed Rulemaking
CDL	Commercial Driver's License
CMV	Commercial Motor Vehicle
DOT	Department of Transportation
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
ISTEA	Intermodal Surface Transportation Efficiency Act of 1991
JA	Joint Appendix
NPRM	Notice of Proposed Rulemaking
OOIDA	Owner-Operator Independent Drivers Association, Inc.
PTDI	Professional Truck Driver Institute
PTDIA	Professional Truck Driver Institute of America
UMA	United Motorcoach Association

STATEMENT OF JURISDICTION

FMCSA published its final rule on May 21, 2004. *See* 69 Fed. Reg. 29384. Petitioner Advocates for Highway and Auto Safety filed a Petition for Review on July 13, 2004. Petitioner Owner-Operator Independent Drivers Association filed a Petition for Review on July 22, 2004. Petitioner United Motorcoach Association filed a petition for reconsideration with the agency on June 21, 2004. It withdrew the petition for reconsideration on October 14, 2004, and filed a petition for review on December 10, 2004. This Court has jurisdiction under the Hobbs Act, 28 U.S.C. § 2342. *See MST Express v. Dept. of Transp.*, 108 F.3d 401, 404 (D.C. Cir. 1997).

As demonstrated in the declarations attached to this brief, *see Sierra Club v. EPA,* 292 F.3d 895 (D.C. Cir. 2002), Petitioners participated in this rulemaking and bring this challenge on behalf of their members who were injured by the final rule under review.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum to this brief.

STATEMENT OF THE ISSUE

Whether FMCSA's mandatory entry-level truck driver training rule is arbitrary and capricious or contrary to law because it does not require that entry-level drivers receive any training in how to actually operate a commercial motor vehicle.

STATEMENT OF THE CASE

In 1991, Congress directed the Secretary of Transportation to "commence a rulemaking proceeding on the need to require training of all entry level drivers of commercial motor vehicles." Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, § 4007, 105 Stat. 1914, 2151 (1991). During the course of the rulemaking, the Federal Motor Carrier Safety Administration (FMCSA) found that the truck and motorcoach industries do not provide adequate training for their entry-level drivers. FMCSA also asserted that the Model Curriculum, a 320-hour curriculum for entry-level truck drivers developed by the Federal Highway Administration (FHWA), FMCSA's predecessor agency, "represents the basis for training adequacy." 68 Fed. Reg. 48863, 48865 (Aug. 15,

2003).[1] Despite these findings, the final rule does not require training remotely equivalent either in length or content to the training in the Model Curriculum. Instead of requiring entry-level drivers to receive training in how actually to operate a commercial motor vehicle (CMV), the final rule requires training only in the tangential areas of driver wellness, driver qualifications, hours of service, and whistleblower protection.

A. Congressional Concerns Regarding the Inadequacy of Driver Training

Congress has long been concerned about highway safety and the quality of CMV operators' driving skills.[2] In 1986, it passed the Commercial Motor Vehicle

---

[1]In 1999, Congress created FMCSA and transferred the regulatory responsibilities then being administered by FHWA over commercial motor vehicle operations and safety to the new agency. *See* Motor Carrier Safety Improvement Act of 1999, P.L. No. 106-159, § 101, 113 Stat. 1748, 1750 (1999); *see also* 65 Fed. Reg. 220-02 (Jan. 4, 2000) (delegating authorities relevant to motor carrier safety to FMCSA). In creating FMCSA, Congress specified that the agency's highest priority is supposed to be safety. *See* 49 U.S.C. § 113.

[2]The term "commercial motor vehicle" includes trucks and motorcoaches. For purposes of requiring commercial drivers' licenses, "'commercial motor vehicle' means a motor vehicle used in commerce to transport passengers or property that . . . has a gross vehicle weight rating or gross vehicle weight of at least 26,001 pounds, whichever is greater, or a lesser gross vehicle weight rating or gross vehicle weight the Secretary of Transportation prescribes by regulation, but not less than a gross vehicle weight rating of 10,001 pounds; [or] is designed to transport at least 16 passengers including the driver." 49 U.S.C. § 31301(4).

(continued...)

Safety Act of 1986, which required drivers of commercial motor vehicles to possess commercial driver's licenses (CDLs). *See* Commercial Motor Vehicle Act of 1986, Pub. L. No. 99-570, Title XII, 100 Stat. 3207 (1986). To receive a CDL, a driver must pass a knowledge and skills test. However, there are no prerequisite training requirements for obtaining a CDL. As FMCSA explained as recently as last year, "[t]he CDL standards do not require the comprehensive driver training proposed in the Model Curriculum because the CDL is a licensing standard as opposed to a training standard." 69 Fed. Reg. 29384, 29385 (May 21, 2004).

The establishment of the CDL program did not relieve all of Congress's concerns about the safety, knowledge, and skill level of CMV drivers. In 1991, "concerned about the number of heavy truck crashes caused by inadequate driver training, and believ[ing] that better training would reduce these types of crashes," 68 Fed. Reg. at 48867, Congress passed ISTEA.

Section 4007(a)(1) of ISTEA required the Secretary of Transportation to submit a report on the "effectiveness of the efforts of the private sector to ensure adequate training of entry level drivers of commercial motor vehicles." Section 4007(a)(2) directed the Secretary to begin a rulemaking "on the need to require

---

(...continued)
The definition also includes certain vehicles transporting hazardous materials. *Id*.

training of all entry level CMV drivers" and to complete the rulemaking within 24 months. Congress further directed that if the Secretary of Transportation determined that it was not "in the public interest to issue a rule that requires training for all entry level drivers" the Secretary had to submit to Congress "a report on the reasons for such decision, together with the results of a cost benefit analysis." ISTEA § 4007(a)(2).

On June 21, 1993, FHWA issued an advance notice of proposed rulemaking (ANPRM), requesting comments on the need to require training of all entry-level CMV drivers. *See* 58 Fed. Reg. 33874.

B. The Department of Transportation's Model Curriculum and the PTDI Standards

Although the government did not require entry-level CMV drivers to receive a specific minimum level of training at the time Congress passed ISTEA, FHWA had previously provided guidance on the minimum training that should be included in a curriculum for training entry-level truck drivers. In 1985, after finding that "few driver training institutions offered a structured curriculum or a standardized training program for any type of CMV," 68 Fed. Reg. at 48863, FHWA issued a "Model Curriculum for Training Tractor-Trailer Drivers." As

FMCSA has since described, the Model Curriculum

> instruct[s] drivers on the basic operational skills, such as vehicle inspection, vehicle backing, hazard perception, proper communications procedures, and speed and space management, which are necessary to operate CMVs on the public road . . . . [and contains] instruction in vehicle inspection procedures, off-road skill test maneuvers, and operating CMVs in vehicular traffic.

68 Fed. Reg. at 48868. According to the agency's regulatory evaluation of the final rule, the Model Curriculum "addresses all of the critical aspects of training for entry-level drivers. It is designed in such a manner that students who successfully complete the work are able to perform the actual skills that allow a tractor-trailer to be operated safely." FMCSA, *Final Rule Regulatory Evaluation* 8 (2003) (No. 220).[3]

The Model Curriculum requires at least 320 hours of instruction, of which 92.25 hours should take place on a protected off-street driving range and 116 hours should take place on the street. *See* Bureau of Motor Carrier Safety, FHWA,

---

[3]Documents from the administrative record are cited by document number in Docket No. FMCSA-1997-2199.

FMCSA did not place the Model Curriculum and its instruction manual in the docket of the rulemaking. However, the Curriculum is referenced in numerous items in the docket, including in both the ANPRM, 58 Fed. Reg. 33874 (No. 1), and the final rule. 69 Fed. Reg. 29384 (No. 218). In addition, FHWA's proposed minimum standards upon which it based the Model Curriculum are included in the docket. *See* Bureau of Motor Carrier Safety, FHWA, *Proposed Minimum Standards for Training Tractor-Trailer Drivers* 21 (1985) (No. 166).

Model Curriculum for Training Tractor-Trailer Drivers: Instructor's Manual 3 (1985). It includes, for example, over 22 hours of instruction on safely backing tractor-trailors, including instruction on straight-line backing, jackknife backing, alley dock backing, and parallel parking. *Id*. at unit 1-5. It also includes over 7 hours on driving under hazardous conditions such as adverse weather, hot weather, and mountain driving. During the unit on hazardous conditions, students learn, for example, how to install tire chains, how to control skids, and how to operate auxiliary brakes and speed retarders. *Id*. Part II at unit 2-6. In the introduction to its instructor's manual, the Curriculum emphasizes that the standards upon which it was based are minimum standards, and therefore, absent additional driving time and instruction tailored for the specific student, "[g]raduates of this curriculum cannot be considered fully trained, 'ready to solo' drivers." *Id*. Part I at 1.

The Professional Truck Driver Institute (PTDI), an industry-supported non-profit organization established specifically to develop standards for training truck drivers and to certify driver training courses that meet or exceed those standards, used the Model Curriculum as the basis for its entry-level curriculum and course certification criteria. Under PTDI's training standards, as described in the record, drivers must receive at least 147.5 hours of instruction, including at least forty-

four hours of behind-the-wheel training. *See Comments of the Professional Truck Driver Institute of America* (1993) (No. 9).[4]

In 1994, FHWA published a "Model Curriculum for Training Motorcoach Drivers" based on the Model Curriculum for truck drivers. The curriculum includes lessons on a variety of driving topics such as following intervals, passing on two-lane and multi-lane roads, and mechanical problems and malfunction symptoms. Although the curriculum emphasizes that the needs of the students will determine how long each lesson will last, it provides a suggested duration for each lesson. Combined, the suggested durations total 162.25 hours, including 100 hours of on-the-road driving demonstration and practice. *See* FHWA*, Model Curriculum for Training Motorcoach Drivers: Instructors Guide* 0-2 (1994) (No. 167). Because there is no organization comparable to PTDI for the motorcoach industry and the industry does not have the network of driver training schools that exists for the trucking industry, the Model Curriculum for motorcoach drivers has

---

[4]The minimum standard guidelines for entry-level tractor-trailer driver courses currently posted on PTDI's web site requires a minimum of 148 hours of instruction. *See* PTDI, *Curriculum Standard Guidelines for Entry-Level Tractor-Trailer Driver Courses* (1999), http://www.ptdi.org/standards/entry_level/curriculumstandardsentrylevel.pdf. At the time this rulemaking was initiated, PTDI's name was the Professional Truck Drivers Institute of America (PTDIA). The reference to "America" in PTDI's name has since been dropped because the organization also certifies programs in Canada. This brief will refer to the organization as PTDI, except when quoting documents that refer to it as PTDIA.

not been widely adopted. However, FMCSA has asserted that the Model Curriculum for Training Motorcoach Drivers, like its trucking counterpart, is an adequate curriculum for training entry-level drivers. 68 Fed. Reg. at 48865.

C. Agency Studies Finding Training Inadequacy

In 1995, in response to the directive in ISTEA, FHWA released the findings of a study entitled "Assessing the Adequacy of Commercial Motor Vehicle Driver Training: Final Report." The three-volume report described "the outcomes of surveys and other data collection activities conducted in the heavy truck, motorcoach and school bus industries." FHWA, *Assessing the Adequacy of Commercial Motor Vehicle Driver Training: Final Report* [hereinafter Adequacy Report], *Vol. I: Executive Summary*, at Foreward (1995) (No. 148). The report also "summarize[d] and analyze[d] the responses to the [ANPRM]." *Id*.

Finding a "general agreement in the industry that [the Model Curriculum] represents an adequate content and approach for training truck drivers," the study used the Model Curriculum as "the starting point in defining 'adequate training' for heavy truck drivers." *Adequacy Report*, *Vol. II: Technical Overview* 4 (No. 213). Because a model curriculum for motorcoach drivers had not yet been issued and because the study found many elements of the truck curriculum applicable to

the motorcoach industry, the study used "the truck curriculum . . . as a starting point for motorcoaches, as well." *Id*. The report defined entry-level training for both truck and motorcoach drivers as all training received during the first three years of a driver's experience. *Id*.

The study found that the heavy truck, motorcoach, and school bus sectors were not providing adequate driver training. With regard to the heavy truck industry, it found that fewer than 22% of the motor carriers that hired entry-level drivers provided formal training for those drivers, and only 37.5% of those formal programs provided adequate training. Thus, the report estimated that only 8.1% of the motor carriers in the heavy truck sector that hired entry-level drivers provided those drivers with adequate training. Similarly, although the study found that a significantly higher percentage of motorcoach operators were providing formal training to their entry-level drivers (62.5%), only 29.6% of those programs were adequate. Therefore, only 18.5% of motorcoach operators that hired entry-level drivers provided those drivers with adequate training. *Adequacy Report, Vol I,* at 3-5 (No. 148).

Shifting the focus to the drivers themselves, the study found that only 31.1% of heavy truck drivers and 18.2% of motorcoach drivers with five or fewer years of driving experience had received adequate training. *Id*. In other words,

68.9% of heavy truck drivers and 81.8% of motorcoach drivers with five or fewer years of experience were not adequately trained.

The Adequacy Report further noted that few motor carriers expressed plans to increase the level of formal entry-level training they provided. *Id*. at 7. It concluded, therefore, "that the present level of training adequacy is not likely to improve due to the actions of the private sectors themselves." *Id*.

By recognizing that the private sector did not provide adequate training and was unlikely to do so in the future, the Adequacy Report identified a need to require adequate training of entry-level drivers.

That same year, also in response to ISTEA, FHWA produced a cost-benefit analysis of entry-level driver training. *See* FHWA, *Final Regulatory Evaluation: Entry-Level Driver Training* [hereinafter Final Regulatory Evaluation] (1995) (No. 158). In determining the cost of training entry-level drivers, the Final Regulatory Evaluation "used the [course length of] 147.5 hours in the curriculum developed by PTDIA." *Id*. at 10. The agency determined that the cost of an entry-level driver training program of the length of PTDI's would be either $4.19 or $4.51 billion, in 1995 dollars, over a ten-year period. It then analyzed the benefits of the program while altering a series of variables — the demand for entry-level drivers, the percentage reduction of accidents, and how long the effects of training a driver

would last — and determined that the benefits of a national entry-level training program would be between $5.83 billion and $15.27 billion over ten years, in 1995 dollars. *Id*. at 32-34. In other words, the agency determined that the benefits of an entry-level driver training program such as PTDI's outweighed the costs of such a program under every scenario examined. On February 5, 1996, the Secretary of Transportation submitted the Adequacy Report and the Final Regulatory Evaluation to Congress. 68 Fed. Reg. at 48865. On April 26, 1996, FHWA published a notice in the Federal Register requesting comments from the public on the two studies. 61 Fed. Reg. 18355 (April 25, 1996). On November 13, 1996, the agency sponsored a public hearing on training entry-level drivers.

D. The Proposed and Final Rule

After the public hearing, the agency did not take any steps towards issuing a rule on entry-level driver training for seven years. In November 2002, organizations concerned about motor vehicle safety filed a petition for a writ of mandamus in this Court, seeking an order directing the Secretary of Transportation to fulfill his statutory duty to promulgate various overdue regulations relating to motor vehicle safety. The petition pointed out that the agency was supposed to have issued a final rule addressing training of entry-level drivers by December 18,

1993. *See* 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.). As part of a settlement agreement between the organizations and DOT, DOT agreed to issue a final rule on minimum training standards for entry-level CMV drivers by May 31, 2004. *See* Settlement Agreement, *In re Citizens for Reliable and Safe Highways*, No. 02-1363 (D.C. Cir.).[5]

On August 15, 2003, almost twelve years after ISTEA was enacted, FMCSA published a notice of proposed rulemaking (NPRM) on minimum training requirements for entry-level CMV operators. In the NPRM, the agency expressly acknowledged that training for entry-level drivers was inadequate and stated its belief "that the Model Curriculum represents the basis for training adequacy." 68 Fed. Reg. at 48865. Nevertheless, and although both the Adequacy Report and the Final Regulatory Evaluation submitted to Congress had analyzed the costs and benefits of entry-level training by assuming the training would be similar to the Model Curriculum or PTDI curriculum, the proposed rule did not require any of the skills and knowledge training that form the central focus of the Model

---

[5]The petition in *In re Citizens for Reliable and Safe Highways*, No. 02-1363, is available at http://www.citizen.org/documents/Petition%20Final.pdf. The settlement agreement is available at http://www.citizen.org/documents/TruckSafety %20RulesAgreement0224.pdf.

Curriculum and PTDI criteria.

The proposed rule required no training on how to safely and efficiently operate a CMV. Instead, it required training in just four areas: 1) driver qualifications (including medical examination procedures and qualifications such as vision, hearing, and hypertension standards); 2) hours of service (including causes of fatigue and how to keep a daily log); 3) driver wellness (including diet, cholesterol, and blood pressure); and 4) whistleblower protection. The agency did not propose a minimum time requirement for the training, but it estimated that training in the four proposed areas would take 10.5 hours. 68 Fed. Reg. at 48868. Although the Model Curriculum and PTDI criteria cover personal health and hours of service requirements, these topics constitute, at most, only 2.8% of the Model Curriculum and 7.3% of the PTDI curriculum, measured in hours. In addition, while the Adequacy Report defined new drivers as those with five or fewer years of experience, and "entry-level" as the first three years of a drivers' experience, *see Adequacy Report, Vol. I,* at 5, *Vol II,* at 4, the proposed rule defined entry-level drivers as drivers with fewer than two years of experience driving a CMV with a CDL and grandfathered in drivers who had one year of experience and good driving records, despite their lack of adequate training. 68 Fed. Reg. at 48866, 48869.

FMCSA attempted to justify the paucity of topics covered in the proposed rule by asserting that "the CDL tests examine CMV drivers on the knowledge and skill the drivers learn in [the Model Curriculum]" and stating that it was "not requiring entry-level drivers to receive training in areas that are covered in the CDL test," because "[s]uch training would be redundant." *Id.* at 48868. At the same time, however, it noted that it did not think "that the knowledge to pass the CDL test [was] sufficient to determine training adequacy." *Id.* at 48865.

Over one-quarter of the comments received in response to the NPRM contended that the rule did not mandate a sufficient level of training. For example, the Sage Corporation, which owns and operates 27 professional commercial truck driving schools in 15 states, commented that "FMCSA has proposed a disappointing and minimal training program that falls short of the mark and will have little impact on whether entry-level drivers are receiving adequate training." It continued: "Characterizing training as 'redundant' because it addresses the topics included on a test is absurd. If testing without training were considered an effective means of ensuring that professionals are competent, schools themselves would be considered 'redundant' and unnecessary." *Comments of the Sage Corporation* (2003) (No. 207). Similarly, Consolidated Safety Services commented that "mere acquisition of a CDL does not properly prepare a potential

driver for safe operation of CMVs on the nation's highways" and recommended that all drivers applying for CDLs be required to prove they had graduated from a class that complied with the Model Curriculum. *Comments of Consolidated Safety Services, Inc.* (2003) (No. 193).[6] Petitioner Advocates for Highway and Auto Safety noted that the administrative record contained no support for the conclusion that the CDL gives drivers the necessary knowledge and skills to operate a CMV. *See Comments of Advocates for Highway and Auto Safety* 2 (2003) (No. 191). Most of these commenters did not oppose requiring instruction in the four proposed areas, but viewed the proposed rule as insufficient, without knowledge and skills training, to ensure highway safety. Of the other comments submitted in response to the NPRM, the vast majority argued either that the rule would cause too much additional paperwork, that it would be best simply to require the CDL test to cover the four topics in which training was proposed, or that training was not necessary in all four of the proposed areas. Only a handful of commenters

---

[6]Consolidated Safety Services, Inc. (CSS) is a highly-respected transportation safety consulting company. *See* http://www.users.interport.net/c/s/cssi/. Among other things, since 1990, CSS has been under contract to the Department of Defense (DOD) to conduct regulatory compliance monitoring and evaluation of all freight and passenger motor carriers transporting DOD freight and passengers. Furthermore, FMCSA, recently selected CSS as its third-party auditor for FMCSA's new carrier entrant program.

supported government-mandated training on the four topics covered in the proposed rule alone.

On May 21, 2004, FMCSA published its final rule on minimum training requirements for entry-level CMV operators. Although the rule purports to respond to Congress's directive to conduct a rulemaking on requiring training for entry-level CMV drivers, the final rule asserts that it is not the best place to address issues of training on "the actual operation of CMVs." 69 Fed. Reg. at 29388. Like the proposed rule, the final rule requires training only in the four areas of driver qualification requirements, hours of service, driver wellness, and whistleblower protection. *Id.* at 29385. The final rule differs from the proposed rule, however, in that it defines entry-level drivers as drivers with less than one year of experience, rather than as drivers with less than two years of experience. In addition, the final rule preamble estimated that the required training would take 10 hours, whereas the NPRM had estimated that the proposed training would take 10.5 hours. *Id.* at 29398.

SUMMARY OF ARGUMENT

When Congress ordered the Secretary of Transportation to undertake a rulemaking on training for entry-level CMV drivers, it legislated against a

backdrop of existing model curricula on minimum training standards for entry-level truck and bus drivers: FHWA's Model Curriculum and PTDI's course certification criteria. The Department of Transportation (DOT) considered these curricula integral to the rulemaking and began the "background" section of the ANPRM with a history of the curricula. Commenters to the ANPRM most frequently cited to one or both of the curricula in defining "adequate training." The reports submitted by the Secretary to Congress assumed that, when Congress said "training" in the context of entry-level CMV drivers, it meant training similar in content and scope to the model curricula. FMCSA itself stated in the NPRM that the Model Curriculum "represents the basis for training adequacy." 68 Fed. Reg. at 48865.

In promulgating a final rule that requires no training in the basic skills and knowledge essential to the safe operation of a commercial motor vehicle, FMCSA abandoned the definition of adequate training embodied in the Model and PTDI curricula, and the common-sense notion that a rule on driver training should include lessons in how to actually drive the kind of vehicle or vehicles for which the driver is being trained. And, after the agency definitively identified the failure of the private sector to provide adequate training and, therefore, the need to require such training, it abandoned the congressional mandate that its rulemaking

address that need.

FMCSA's decision not to require skills and knowledge training on how to actually drive a CMV was arbitrary and capricious. Its explanation for not mandating knowledge and skills training — that providing training in areas addressed on the CDL test would be redundant — runs counter to the evidence in the record demonstrating that most drivers who pass the CDL test have not received training adequate to ensure that they can safely operate CMVs under real-world highway conditions. Furthermore, the record contains no evidence that training in the four topics covered by the final rule will have any positive effect on highway safety.

STANDARD OF REVIEW

The Court reviews the final rule to determine whether it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). A rule is arbitrary and capricious if it is not the result of reasoned decisionmaking. *See New York Cross Harbor R.R. v. Surface Transp. Bd.,* 374 F.3d 1177, 1181 (D.C. Cir. 2004). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the

problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin*., 374 F.3d 1251, 1260 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Public Citizen v. FMCSA*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).

ARGUMENT

I. The Final Rule is Arbitrary and Capricious Because it is Contrary to the Evidence Before the Agency.

FMCSA claims that its goal, in promulgating the final rule, was "to reduce the number of crashes caused by entry-level CMV drivers." 69 Fed. Reg. at 29401. Despite this purported goal, and despite the agency's own findings that driver training is inadequate and that requiring adequate entry-level training would be cost-beneficial, the final rule does not mandate that CMV drivers receive adequate entry-level training in the actual operation of a CMV. It requires only *de minimis* training in four areas unrelated to the skills and knowledge necessary to safely operate a CMV and successfully reduce crashes.

FMCSA recognizes that entry-level truck drivers do not receive adequate

training. The summary of the final rule asserts that the rule was issued in response to the report on the effectiveness of private sector efforts to ensure adequate entry-level driver training, *id.* at 29384, which concluded that fewer than one-third of truck drivers and one-fifth of motor coach drivers received adequate training. *Adequacy Report, Vol I,* at 5. Both the NPRM and FMCSA's regulatory evaluation of the final rule assumed that 70% of heavy truck drivers are not currently being trained through a PTDI or similarly accredited training program. 68 Fed. Reg. at 48870; FMCSA, *Final Rule Regulatory Evaluation,* at 9. The agency's very act of promulgating a regulation on mandatory training for entry-level CMV drivers made clear it believes that current training is inadequate to ensure safety on our nation's highways. Indeed, had the agency instead determined that it was not in the public's interest to mandate training, it would have been required to submit to Congress a report explaining that decision. *See* ISTEA § 4007(a)(3).

The report that the Secretary of Transportation submitted to Congress, the Final Regulatory Evaluation, concluded that requiring entry-level CMV drivers to receive adequate training would be cost-beneficial. Even under the most conservative of its estimates, the analysis concluded that the benefits of a mandatory driver training program similar in length to the PTDI curriculum would

exceed the costs by $1.22 billion in 1995 dollars. Under one set of assumptions, the benefits exceeded the costs by $10.76 billion in 1995 dollars. *See* FHWA, *Final Regulatory Evaluation,* at 33-36.

Given that entry-level CMV drivers do not receive adequate training and that it would be in the public interest to require them to receive adequate training, it was unreasonable for FMCSA to promulgate a rule on mandatory entry-level training that did not require the drivers to receive at least minimally adequate training in the skills and knowledge necessary to drive a CMV. Yet this is precisely what FMCSA did. Throughout the thirteen-year history of this rulemaking, FMCSA has recognized that the model curricula for truck and, subsequently, motorcoach drivers, represent the baseline for determining whether an entry-level driver has been adequately trained. In the NPRM, FMCSA expressly asserted "that the Model Curriculum represents the basis for training adequacy." 68 Fed. Reg. 48865. As the agency explained in the Adequacy Report, "[w]ith regard to heavy trucks, there is general agreement in the industry that the model tractor-trailer curriculum developed by the FHWA in the mid-1980s represents an adequate content and approach for training truck drivers." *Adequacy Report, Vol. III: Findings, Conclusions, and Recommendations* 1-6 (No. 216).

Despite FMCSA's recognition that the Model Curriculum is the baseline for

determining whether training is adequate, the final rule does not mandate any training that is remotely equivalent to the Model Curriculum's in content or length. Of the forty-nine topics included in the "research baseline curriculum" developed by the Adequacy Report to specify the minimum requirements for pre-service entry-level training for heavy truck and motorcoach drivers, *id*. at B6-B13, the final rule covers only four. Although the baseline curriculum requires 85 hours of training on a driving range and 116 hours of training on the street, and although the study specifically noted that a program had to include on-street hours to be considered adequate, *id.* at B-5, the final rule requires zero driving range or street hours for either truck or motorcoach drivers. And while the baseline curriculum focuses on developing basic and advanced driving skills and safe operating practices, including lessons on the basic control and maneuvering of the vehicle, collision avoidance, and equipment-related emergencies, the final rule requires no training in vehicle-related skills or knowledge.

The training mandated by the final rule will not fill the gap between the inadequate training currently received by most truck and motorcoach drivers and the curriculum that FMCSA considers "the basis for training adequacy." 68 Fed. Reg. at 48865. The Final Regulatory Evaluation submitted by the agency to Congress estimated that for the industry to comply with a rule requiring a training

program of the length of PTDI's, drivers would have to receive, on average, 65.8 more hours of training than they were already receiving. FHWA, *Final Regulatory Evaluation*, at 11. In contrast, it will take only 10 hours to complete the training mandated in the final rule and, as explained, none of the training concerns actual vehicle operation. 69 Fed. Reg. at 29398.

The only explanation FMCSA gives for its failure to mandate skills and knowledge training like that included in either the Model Curriculum or the PTDI curriculum is that such training would "duplicate training that the public and private sectors provide a driver to operate a CMV before taking a CDL." *Id.* at 29387. This explanation is contradicted by the agency's own statements and "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

FMCSA itself has recognized that the CDL testing regime is insufficient to ensure adequate training. The agency stated in the NPRM that "it disagrees with commenters indicating that the knowledge to pass a CDL test is sufficient to determine training adequacy." 68 Fed. Reg. at 48865. Moreover, in a publication produced while this rulemaking was underway, the agency made clear that drivers can receive CDLs without being adequately trained. It wrote:

> Recent contacts with truck and bus operators indicate that some, particularly smaller operators, are mistakenly assuming that if a driver possesses a Commercial Driver's License (CDL), he or she is a

> trained and experienced commercial vehicle driver. This is not true and can be a very dangerous mistake. All prospective employers of commercial drivers should be aware of the following fact:
>
> 1. A CDL does **not** indicate that the holder is a trained or experienced truck or bus driver.
> 2. A CDL merely indicates that the holder has passed minimal skills and knowledge tests concerning the type of vehicle he or she proposes to drive.
>
> . . .
>
> Title 49 CFR 39.11(b)(3) (Qualification of Drivers) requires that a driver must be able, by reason of experience, training, or both, to safely operate the commercial motor vehicle he or she drives. This requirement is **not** met by simply ascertaining that a prospective driver holds a CDL.

FHWA, DOT, *On Guard* 25:1 (January 1997) (prepared by Office of Motor Carriers) (Publication No. FHWA-MC-97-004) (emphasis in original).

The evidence before the agency, particularly the Adequacy Report that the agency submitted to Congress, similarly demonstrated that, despite the existence of the CDL knowledge and skills test, the private sector does not provide drivers with adequate training on how to drive a CMV. Although the CDL testing regime was in place at the time the Adequacy Report was conducted, the report found that fewer than one-third of heavy-truck drivers and one-fifth of motorcoach drivers received adequate training. *Adequacy Report, Vol I,* at 5. Only 8.1% of motor carriers hiring entry-level heavy-truck drivers and 18.5% of motor carriers hiring entry-level motorcoach drivers provided those drivers with adequate training. *Id*.

at 3. Furthermore, the study found it unlikely that the overall adequacy of training received by entry-level drivers would improve based on private sector actions.

The Adequacy Report explicitly rejected the idea that the CDL testing requirement was sufficient to ensure adequate training of entry-level drivers. When the authors of the study asked drivers who had begun driving after the CDL requirement went into effect how well their training prepared them for the CDL test, the most frequent response was that their training gave them more knowledge than they needed to pass the test. The report concluded that the existing training received by CMV drivers, which it had found overall to be inadequate, was sufficient preparation for the CDL. *Id., Vol II,* at 54-55. It determined that "the CDL, in its present form as a licensing standard, does not (and cannot be expected to) ensure adequately trained entry-level drivers." *Id*. at 56.

The Adequacy Report did *not*, therefore, conclude that better training was not needed in the areas covered by the CDL. To the contrary, the report expressed concern that the continued existence of the CDL requirement would lead to a decrease in the number of adequately trained drivers. It reasoned:

> We know from our industry experts that many proprietary and publicly funded schools have reduced the scope (and thus the cost) of their programs by providing only the knowledge and skills necessary to obtain the CDL. . . . Apparently, this CDL-focused formal training meets the needs for licensing. . . . Unfortunately, *these courses do not*

> *satisfy the minimum criteria for adequate entry-level training*. . . . So, while we may be seeing more formally trained drivers, we may also be seeing fewer adequately trained drivers.

Id. at 55-56 (emphasis added).

The Final Regulatory Evaluation submitted to Congress also demonstrated that the existence of the CDL requirement does not ensure drivers receive adequate training. The analysis estimated that the benefits that would accrue from requiring training such as the PTDI's curriculum for entry-level heavy-truck drivers would be between $5.83 billion and $15.27 billion (in 1995 dollars) over a ten-year span. These benefits included decreases in fatalities, property damage, injury, and suffering, as well as decreases in the costs associated with delays due to crashes on highways and in the costs of emergency response to those accidents. *See* FHWA, *Final Regulatory Evaluation*, at 15. Were drivers already receiving adequate training because of the CDL, there would be few, if any, benefits derived from mandating that level of training. The final rule's preamble does not mention the Final Regulatory Evaluation, nor did the agency conduct any comparative analysis of the costs and benefits of the comprehensive training regime evaluated in the Final Regulatory Evaluation versus the costs and benefits of the limited training included in the final rule.

Various comments to the ANPRM help explain why the existence of the

CDL requirement does not ensure that drivers receive training in all areas in which they need to be trained to safely and competently drive on the highway. As some commenters pointed out, CDL tests cannot cover all areas of knowledge and skill necessary for safe operation of a CMV. *See, e.g., Comments of PTDIA* 4 (1993) (No. 9) ("[T]ime, money, and logistical considerations dictate the tests only sample knowledge and skill."); *Comments of Owner-Operator Independent Drivers Association, Inc. (OOIDA)* 28 (1993) (No. 68) ("The CDL examination, which consists of a limited number of questions and topics, simply does not test the range of knowledge necessary to safely operate a commercial motor vehicle. Similarly, the driving portion of the examination, in which the applicant must demonstrate only minimal driving skills, is far too brief to allow an assessment of whether the driver will operate the vehicle safely under the wide variety of circumstances that he or she will encounter in normal working conditions.")

Other commenters to the ANPRM expressed concern that a driver's ability to pass a test in a controlled atmosphere does not mean the driver is prepared to handle driving under normal working conditions. *See*, *e.g.*, *Comments of Becker Driver Training Facility* 2 (1993) (No. 4) ("After a few hours of instruction, most students can pass the driving test, with an unloaded trailer, hooked to the semi tractor, in a CONTROLLED circumstance, such as that of a road test. That same

individual in a job situation, near the end of an exhaustive trip in perhaps a crowded Washington D.C. traffic setting, driving on ice/snow covered roadway is another."). Some also noted the rise of cram courses designed just to teach students how to pass their CDL tests. *See, e.g.*, *Comments of OOIDA* 29 ("Perhaps the most effective means of showing the inadequacy of the CDL as a measurement of proper training is the large number of CDL 'cram courses' that have sprung up since the beginning of the CDL licensing process."). These test-centered courses do not cover, or only partially cover, many of the topics included in a basic core curriculum such as PTDI's. For example, CDL preparation classes tend to only partially cover forward and backward acceleration, night driving, driving under extreme conditions, backing hazards, and development of upshifting and downshifting skills, all of which are covered more extensively in the PTDI curriculum. The CDL preparation classes also tend to include less practice of safe and basic operation of CMVs on urban and rural roads, expressways, and in light to heavy city traffic. *See Comments of PTDIA* (comparing CDL preparation courses and its certification standards). As Petitioner Advocates for Highway and Auto Safety noted in its comments to the ANPRM, "thousands of CMV drivers have been put behind the wheels of enormous, dangerous vehicles without the necessary skills even though they have successfully passed their state's CDL

examination." *Comments of Advocates for Highway and Auto Safety* 5 (1993) (No. 75).

Although some comments in response to the ANPRM did demonstrate a belief that the CDL is sufficient to ensure adequate training, these comments hardly support a rule that provides no training for any drivers in the actual skills necessary to drive a CMV. As the agency acknowledged in the Adequacy Report, the ANPRM commenters "cannot be considered representative of the industry as a whole because it was a self-selected group, not a random sample." *Adequacy Report, Vol. II,* at 52. More importantly, the majority of those who thought additional mandated training was not needed were either administrators of CDL tests or trucking companies – parties with vested interests – and "surely it is not enough that the regulated industry has eschewed a given safety device." *State Farm*, 463 U.S. at 49.

Evidence from the events organized by DOT to explore mandatory training for entry-level CMV drivers overwhelmingly demonstrated that the CDL is not sufficient to ensure that drivers receive adequate training. At the 1995 Truck and Bus Safety Summit, which was cited in the final rule's preamble as one of the "projects that contributed to an enhanced understanding of driver training," 69 Fed. Reg. at 29385, the Highway Safety Community leadership group,

"recognized that the CDL process still allows unsafe and undesirable drives [sic] to drive on our nation's highways" and that "[c]urrent CDL testing does not ensure a qualified driver." FHWA, *1995 Truck and Bus Safety Summit, Report of Proceedings* B-13 (1995) (No. 215). It found that "training to CDL minimums reduces training." *Id.* at B-14. In interviews before the summit, senior management at FHWA's Office of Motor Carriers – which regulated motor carrier safety prior to the creation of FMCSA – identified "the inability of present driver qualifications and training programs to produce safe and capable drivers" as one of the most important issues for the highway safety community group to discuss. *Id*. at 14. The summit as a whole concluded that it was necessary to ensure adequate and continuing education for all drivers. *Id*. at 21.

At the FHWA-sponsored public meeting on training entry-level commercial drivers, held on November 13, 1996, not one person who spoke about truck or motorcoach driver training, except the lone presenter who focused on drivers who transport hazardous materials, expressed the belief that the CDL in its current form ensured adequate training. Even those presenters who opposed mandating training and wanted a performance-based standard recognized that the CDL test does not always weed out unsafe drivers. For example, Joel Dandrea, then Assistant Director of Safety for the American Trucking Associations, reported that "We

know of certainly many instances where a driver has received a CDL and come into an operation, and proved that they couldn't safely back a vehicle to 100 percent of what the carrier expected." *Training of Entry-Level Drivers Public Hearing* 43 (1996) (No. 152). Don Orr, then Chairman of the Interstate Truckload Carriers Conference, which had a negative reaction to the idea of mandated training, went into greater detail about the shortcomings of the CDL, stating:

> [T]he program was never designed to really meet any specific industry-based skill standard, only to limit multiple licenses. . . .
>
> As the result, the CDL program is not a measurement of a driver's ability. Anyone can pass the test; it's like cramming for an exam and then the questions are easy, and deductive reasoning and common sense will get most people by. The skills portion of the test is not really a skills test. An instructor takes you around the block, and if you don't hit anything, you pass. For example, there's no interstate driving required. The test is very easy, and any intelligent person can get their CDL if they want to put the effort forth.
>
> When the new CDL holders come to my company looking for a job, I would be guilty of negligent entrustment if I put them behind the wheel of a truck.

Id. at 67.[7]

Other presenters gave details that help explain why the CDL is an

---

[7]The position of chairman of the Interstate Truckload Carriers Conference (ITTC) was filled by a carrier member of the association. ITTC has since changed its name to Truckload Carriers Association (TCA). Since the 1930s, TCA has been the national association for truckload carriers. TCA has also been managing the Professional Truck Driver Institute (PTDI) program since 1996, when Mr. Orr testified. *See* http://www.truckload.org/about/history.htm.

insufficient substitute for a training standard. Harvey Kowalchyk, President of the National Tractor Trailer School, which has been training entry-level truck drivers since 1971, noted that in New York the skills part of the CDL test took only 35 minutes. *Id*. at 238. Lana Batts, then President of PTDI, mentioned that the written test consisted of only thirty questions. *Id*. at 88. She also discussed how people in the Bay Area of California were being issued CDLs without showing they could drive on the freeway. *Id*. Rick Craig, then Treasurer of OOIDA, noted that because "the knowledge portion of the CDL examination is a standardized test that is selected from a number of established questions, some current entry-level driver training programs focus only on teaching their students the answer to these questions, and can do so in a period as short as one day." *Id.* at 113.

Finally, Mike Calvin, Senior Director of Driver Services at the American Association of Motor Vehicle Administrators (AAMVA), which represents the officials who administer the CDL tests, explained why merely improving the tests would be insufficient to ensure sufficient training. He stated:

> I don't think the CDL tests and manual were ever designed to fulfill that purpose. Is it possible to do that? Yes. The problem is we can't have two and three-hour road tests.
>
> There are administrative and political considerations within the Department of Motor Vehicles that really would prohibit, I feel, taking the test to the point that it would fulfill that requirement.
>
> I think there is, as I mentioned, room for us to make some

> changes, to become more responsive and make the CDL test a little more demanding. But I think that needs to be coupled with some form of required training.
>
> I don't think changing the test itself will work.

Id. at 186-87.

Ignoring this evidence, and despite its own admissions that the CDL requirement is not sufficient to ensure that drivers receive adequate training, FMCSA attempts to justify its "basic approach in this rulemaking," by asserting that it "has had twelve years of experience with testing and licensing CMV drivers" and that it "now knows the CDL program improved the quality of CMV drivers." 69 Fed. Reg. at 29384. However, in the final rule's preamble, where it makes these assertions, the agency does not provide any support for these claims, nor does it detail what it has learned during those 12 years that justifies the narrow scope of the final rule. Instead, FMCSA emphasizes that the final rule is just "one prong of the overall effort" to improve driver safety and that the effort includes "improvements to the CDL tests." *Id.* at 29387.

The agency does assert that it "*plans* to coordinate with the Driver License and Control Committee of the American Association of Motor Vehicle Administrators to determine if the required skill tests can be given in a more efficient and less costly method." *Id.* at 29385 (emphasis added). However,

nothing in the rulemaking record, other than the agency's unsupported assertions, demonstrates that FMCSA is, indeed, working to improve the CDL testing regime to ensure that all drivers who receive CDLs possess the skills and knowledge to safely operate a CMV. Even if the agency is examining the current CDL tests to determine whether they need modification, its anticipated follow-up with AAMVA is, by its own admission, in the planning stage. Given the long history of this rulemaking, including agency delay of nearly a decade in promulgating a congressionally mandated training rule, it is clear that any potential changes in the CDL will come, if at all, well into the next decade. Moreover, the agency's stated focus on efficiency and cost may suggest that it is contemplating methods to reduce, not enhance, the CDL licensing regime.

Finally, in enacting ISTEA, Congress was not concerned with the stringency of the existing CDL program, but with the need to improve the training of entry-level drivers. Although actual improvements to the CDL test may be beneficial, modifying the CDL would not fulfill the statutory mandate, in which Congress "directed the Secretary of Transportation to promulgate regulations requiring training for entry-level heavy truck, school bus, and motorcoach drivers." 68 Fed. Reg. at 48871.

The final rule also ignores Congress's statutory mandate by not addressing

the need for adequate training that was found in the Adequacy Report. In ISTEA, Congress ordered the Secretary to commence a rulemaking on the "need" to require training of entry-level drivers. ISTEA § 4007(a)(2). The Adequacy Report, which was also mandated by Congress in ISTEA, identified a serious need for adequate training, defined in the report as the "research baseline curriculum" developed for the Report based on the Model Curriculum. The Adequacy Report was made part of the rulemaking docket, but the "need" identified in the study for training entry-level drivers was ignored in the final driver training rule. Moreover, FMCSA's final rule does not establish, discuss, or identify the basis for any other "need" purported to be addressed by the final rule. Because the final rule does not purport to address *any* need identified during the rulemaking proceeding, the final rule is arbitrary and capricious for ignoring the statutory mandate "to commence a rulemaking on the need to require training of all entry level drivers." *See Public Citizen v. FMCSA*, 374 F.3d at 1216 (finding that failure to comply with a specific statutory requirement "is sufficient to establish an arbitrary-and-capricious decision requiring vacatur of the rule").

* * *

"The purpose of this rulemaking is to enhance the safety of CMV operations on our nation's highways." 69 Fed. Reg. at 29384. Under all the scenarios

considered by the Final Regulatory Evaluation, the benefits of mandating a comprehensive training program that includes skills and knowledge training in the actual operations of a CMV far outweigh the costs. FMCSA's decision not to mandate such training, given the evidence before the agency, is unreasonable. It runs counter to common sense, which tells us that a rule on driver training should, at a minimum, require drivers to obtain sufficient training to enable them to safely operate the vehicle in question under the highway conditions they will likely confront. It requires the agency to ignore clear evidence that the CDL test fails to ensure sufficient training even in those areas it covers. *See Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) ("[A]n agency rule is arbitrary and capricious if the agency . . . ignores important arguments or evidence . . . . "); *Gen. Chem. Corp. v. Interstate Commerce Comm'n*, 817 F.2d 844, 851-55 (D.C. Cir. 1987) (finding agency determination that ignored evidence in the record was arbitrary and capricious). And it violates the congressional mandate to conduct a rulemaking on the identified need for training. The agency has failed to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). The final rule is therefore arbitrary and capricious. *See Am. Tel. & Tel. Co. v. FCC*,

974 F.2d 1351, 1354 (D.C. Cir. 1992) (requiring "a reasoned explanation that is supported by the record").

II. The Final Rule is Arbitrary and Capricious Because the Agency Has Presented No Evidence That It Will Enhance the Safety of CMV Operations.

According to FMCSA, the purpose of the rule on minimum training requirements for entry-level CMV drivers is "to enhance the safety of CMV operations on our nation's highway." 69 Fed. Reg. at 29384. More specifically, FMCSA has stated that "the objective of [the rule] is to reduce the number of crashes caused by entry-level CMV drivers," because "Congress was specifically concerned about the number of crashes caused by inadequate driver training, and believes that better training will reduce these types of crashes." *Id.* at 29401. However, FMCSA has presented no evidence that the rule will reduce the number of crashes or have other beneficial effects on safety. *See Chem. Mfrs. Ass'n v. EPA*, 217 F.3d 861, 865 (D.C. Cir. 2000) (finding "a classic case of arbitrary and capricious rulemaking" where the agency conceded its program may produce no benefits at all).

In a general discussion of the potential benefits of the overall rule, the final rule's preamble cites studies demonstrating that driver training programs reduced

crashes by between two and 40 percent. 69 Fed. Reg. at 29400. These studies, however, did not analyze entry-level driver training programs that focused solely on the four areas of instruction in the final rule: driver qualifications, hours of service requirements, driver health and wellness, and whistleblower protection. For example, the study that found that training produced a 40 percent reduction in crashes analyzed the effects of a program providing "training on hazard-driving conditions." 68 Fed. Reg. at 48865. It is irrational to assume that because a training program on driving under hazard conditions led to a reduction in crashes, training on the four areas covered by the final rule, which do not include driving, let alone driving under hazardous conditions, will also reduce crashes. That logical leap is not founded on evidence in the record and is not a sign of reasoned decisionmaking.

The regulatory evaluation of the final rule likewise assumes, without foundation, that if training overall has a positive effect on safety, training in the four areas covered by the final rule will also have a positive effect. It "presume[s] [the impact of truck driver training on safety] to be positive, based on the stakeholder comments provided to the docket of the ANPRM." FMCSA, *Final Rule Regulatory Evaluation*, at 17. However, commenters to the ANPRM did not know what sort of training would be mandated by the final rule, and none of them

discussed the potential effects of training solely in the areas of driver qualifications, hours of service rules, driver health and wellness, and whistleblower protection. The ANPRM's "background" section began with an introduction to the Model Curriculum and PTDI criteria, and many of the commenters pointed to those curricula as standards for training adequacy. The commenters in all probability assumed that the training would be similar in content and length to the Model and PTDI curricula. After all, commenters on the effects of a potential driver training rule could not have been expected to anticipate that the rule would not, in fact, train people to drive. Their comments therefore shed no light on whether the commenters believed that training in the four areas included in the final rule, alone, would be helpful.

The regulatory evaluation went on to note a "widespread belief in the motor carrier industry that those carriers with the best training programs have the lowest accident rates" and to comment that "Congress also clearly believes that such a relationship exists, a belief embodied in [ISTEA's] training mandate." FMCSA, *Final Rule Regulatory Evaluation*, at 17. The agency here again confuses the general consensus that real driver training in operational skills and knowledge improves safety with support for its whittled-down, no-hands-on-training approach. Just because both the industry and Congress believe that training as a

general matter can lead to a reduction in collision rates does not mean that training limited to the four areas covered by the final rule will reduce crashes. Common sense and logic, as well as the agency's published research, lead to the conclusion that providing a new commercial driver with behind-the-wheel training on how to drive a CMV will create a safer driver; it is more difficult to see how teaching that driver about whistleblower protections will reduce crashes.

The Final Regulatory Evaluation submitted to Congress did not assume that additional training automatically leads to a reduction in crashes, regardless of the subject matter of the training. Rather, it noted that "[c]ase studies tend to support the assertion that *quality* training leads to a reduction in accidents." FHWA, *Final Regulatory Evaluation*, at 15 (emphasis added). It asserted that large-scale data sets that did not look just at quality programs showed training contributing to an increase in crash involvement. *Id*. The Adequacy Report notes that some researchers attribute the tendency for trained drivers to have more crashes to poor training that gives drivers a false sense of confidence in their abilities. *Adequacy Report, Vol. 1,* at 10. Under this theory, a training program such as that mandated by the final rule — one that does not actually teach drivers how to drive more safely — could actually increase crashes because drivers completing it will have a bloated sense of confidence even though they have not been trained in the skills

necessary to actually drive a CMV.

It is also questionable whether the final rule will provide drivers with quality training even in the four topics actually covered in the rule, given the limited number of hours FMCSA estimates the training mandated by the final rule will require. For example, FMCSA estimates that training in driver qualifications and hours of service, combined, will consume 5.5 hours. *See* 69 Fed. Reg. at 29398. During these hours, drivers will be expected to learn about myriad medical topics, ranging from vision and hearing standards to standards for drivers with diabetes requiring insulin to "standards for rheumatic, orthopedic, muscular, neuromuscular, or vascular disease." *Id.* at 29391. They will be expected to learn about general driver qualifications, driver responsibilities, and "disqualifications based on various offenses, orders, and loss of driving privileges." *Id.* And they will be expected to learn about causes of fatigue, fatigue prevention strategies, "limitations on driving hours," "the requirement to be off-duty for certain periods of time," "record of duty status preparations" (i.e. how to keep a log book), and exceptions to the various rules. *Id.* at 29404. Many of these topics are quite complicated and would require detailed training in order to be taught well.

Moreover, even if we assume, without basis in the record, that the limited training mandated in the rule would reduce crashes, the purported safety benefits

of the rule have been drastically curtailed by FMCSA's choice to exclude many drivers from the scope of the rule. FMCSA's repeated and unsupported reduction of the number of drivers considered to be "entry-level" is arbitrary and capricious. In the Adequacy Report, the agency defined "new" drivers as those with five or fewer years of experience and "entry-level training" as training received during a driver's first three years of experience. *Adequacy Report, Vol I,* at 5, *Vol II,* at 4. In the NPRM, FMCSA reduced the number of drivers considered "entry-level," asserting that "the three-year experience requirement cited in the adequacy study is too long, because operating experience helps CMV drivers reduce accidents caused by driver error." 68 Fed. Reg. at 48866. It defined an "entry-level driver" as a driver with less than two years experience and grandfathered in drivers with good records and a year or more of experience. *Id.*at 48866, 48869. In the final rule, FMCSA further limited the definition, defining entry-level drivers as drivers with less than one year of experience operating CMVs. The only reasons it provided to justify this change were economic and efficiency-related: that it would be a simpler rule for employers to follow and would reduce the burden on employers to train currently employed drivers. FMCSA provided no information on the effect the change would have on safety, simply stating conclusorily that it "believes safety will continue to be served by allowing only one year of

experience rather than two years of experience" and that it "has no reason to believe based on comments and other available data that defining an entry-level driver as one year or less will have a negative impact on safety." 69 Fed. Reg. at 29390. The final rule, moreover, does not even encompass all CMV drivers with less than one year of experience, because it applies only to drivers who drive in interstate commerce. In the final rule's preamble, FMCSA assumed that only 75% of entry-level drivers, as defined by the agency, will be trained to operate in interstate commerce. *Id.* at 29398. That means that 25% of entry-level drivers, over 15,000 drivers, will not receive the training. In addition, FMCSA exempted 5,400 drivers – one-sixth of the drivers with less than one year of experience driving a CMV at the time the rule was published – from the requirements of the final rule. As explained by the agency in the regulatory evaluation of the final rule, "since there is a 60-day window between this rule's publication date in the Federal Register and its effective date, drivers with 11 to 12 months of driving experience at the time of the rule's publication will become exempt from the rule's training requirements upon its effective date." FMCSA, *Final Rule Regulatory Evaluation*, at 15.

By promulgating a rule that mandated some training, albeit very limited training in four areas tangential to the actual operation of a CMV, FMCSA was

able to avoid ISTEA's requirement that it submit to Congress a report explaining why mandating training would not be in the public interest, a requirement that it would have found difficult to fulfill given that the report it prepared for Congress demonstrated that mandating training of the length of PTDI's was soundly in the public interest. It is conceivable that the final rule promulgated by FMCSA could also prove to be in the public interest. Petitioners will not presume otherwise when there is no evidence in the record about the rule's potential effects. However, similarly, FMCSA should not be permitted to presume that the rule will benefit public safety when the record is completely devoid of evidence supporting this presumption. In short, it was FMCSA's burden to demonstrate that the rule will have a positive effect on safety, and FMCSA failed to do so. *See, e.g., Mossville Envtl. Action Now v. EPA*, 370 F.3d 1232, 1243 (D.C. Cir. 2004) (declaring agency determination for which the agency did not present record support arbitrary and capricious); *Michigan v. EPA*, 213 F.3d 663, 681 (D.C. Cir. 2000) (finding that agency had not shown a reasonable connection between the facts on the record and the decision made where the only evidence in support of the agency's decision was the narrative statements in the rule's preamble).

As this Court has previously noted in discussing an agency's incomplete and conclusory analysis, "[s]uch intuitional forms of decisionmaking, completely

opaque to judicial review, fall somewhere on the distant side of arbitrary." *Gen. Chem.*, 817 F.2d at 855 (quoting *Cent. Fl. Enters. v. FCC*, 598 F.2d 37, 50 (D.C. Cir. 1978)). The final rule should be vacated and the matter should be remanded to FMCSA to promulgate a rule that addresses the need identified in the Adequacy Report for skills and knowledge training for entry-level drivers and that bears a rational connection with Congress's goal of increasing safety on our nation's highways.

III. The Final Rule Is Arbitrary and Capricious In Addressing the Training Needs, Concerns, and Realities of the Motorcoach Industry.[8]

A. FMCSA failed to consider significant safety and training differences between the motorcoach and trucking industries. "The FMCSA acknowledges that the characteristics of the private motorcoach industry are essentially different from for-hire private trucking industry." FMCSA said this in the Proposed Rule Regulatory Evaluation it prepared for the NPRM published in August 2003. FMCSA, *Proposed Rule Regulatory Evaluation* 10 (July 2003) (No. 161). Yet, in spite of substantive differences and concerns that FMCSA documented during the twelve years leading up to the NPRM, which petitioner United Motorcoach

[8]This section of the argument, which discusses concerns specific to the motorcoach industry, is submitted solely by the United Motorcoach Association.

Association (UMA) supplemented in its comments in response to the proposed rule, the agency failed to take these differences and concerns into account when it adopted the final rule. For the reasons discussed below, petitioner UMA submits that FMCSA's failure to address these differences and concerns in the final rule, or in response to UMA's petition for reconsideration of the final rule, was arbitrary and capricious.[9]

One major difference that was documented throughout FMCSA's Adequacy Report is the *low accident experience of motorcoach operators compared to truck drivers*. As noted in Volume II of the Adequacy Report: "It is clear that the

---

[9] The final rule attempts to suggest that UMA is somehow alone within the motorcoach industry in its opposition to the training requirements FMCSA adopted, by noting in the preamble the so-called "general support" of the American Bus Association (ABA) and ten other commenters to the NPRM. 69 Fed. Reg. at 29386. However, were the Court to review ABA's comments, it would quickly see that ABA had a number of substantive reservations and concerns about the proposed rule, including that the final rule "emphasize specific training content, including basic defensive driving topics including space management, proper lane changes/merging, vehicle dynamics, adverse weather driving, etc., and require that the carrier be able to provide documentation that all elements of the training have been met." *Comments of ABA* 2 (2003) (No. 210). ABA also recommended more restrictive training for driver physical qualifications than adopted; questioned the need for separate fatigue management training; and challenged the safety benefits of providing whistleblower training. *Id.* at 3. Like UMA, ABA also recommended that the training requirements be incorporated into "the commercial driver's license process." *Id.* The motorcoach industry is far more united in its questions and concerns about the final rule's merits than the preamble wants the public to believe.

magnitude of the accident problem for motorcoaches is small, relative to large trucks." *Adequacy Report, Vol II,* at 11; *see also id., Vol I,* at 10. Based on this fact, the Report concluded that "any efforts to improve the safety of truck drivers (such as requiring adequate safety training) will likely have a greater return, in terms of accidents avoided, than the same efforts aimed at motorcoach and school bus drivers." *Id., Vol. II,* at 12. As a result, the Adequacy Report recommended to FMCSA that "[i]f it is desirable to target fewer than all three domains, *the heavy truck domain should be given first priority*, followed by motorcoaches." *Id., Vol. I,* at 12 (emphasis added). FMCSA never broached these facts in the NPRM, not even when UMA reminded FMCSA of the motorcoach industry's exemplary accident record in its comments.[10] FMCSA's failure to take these facts, or the recommendation of its own study, into account in the rulemaking was arbitrary and capricious, especially in light of the practical issues presented by the second major difference.

The second major difference is that *the motorcoach industry does not have any motorcoach driver training schools*, unlike the extensive network of schools

---

[10]UMA stated: "Recently, FMCSA Administrator Sandberg used the motorcoach industry's safety record to justify allowing operators to continue to operate under the existing hours-of-service rules." *Comments of UMA* 12 (2003) (No. 201).

enjoyed by the trucking industry. Although this fact has long been known to FMCSA, *see, e.g., Adequacy Report, Vol. III*, at 4-1-4-2, and should at the very least have been substantively addressed in the NPRM, and preferably should have influenced what FMCSA proposed and how it approached any training that would be required for motorcoach drivers, the NPRM made only passing reference to this fact. ("A representative of Robert Forman Associates stated at the public meeting that there were no motorcoach training schools in the country.") 68 Fed. Reg. at 48867. Nonetheless, the lack of schools and the potential consequences were raised in UMA's comments on the NPRM. *Comments of UMA*, at 12. Although FMCSA acknowledged UMA's comment in the final rule's economic analysis, 69 Fed. Reg. at 29395, UMA's fundamental concern and its impact on the adequacy of training, as well as the practicalities of delivering motorcoach training, were never substantively addressed in the final rule.

Because of these significant and substantive differences between the motorcoach and trucking industries, UMA requested an exemption for the motorcoach industry in its response to the NPRM. However, without addressing the matter in any substantive way, FMCSA merely replied:

> Non-transit motorcoach operations are included in today's final rule because Congress specifically wanted the agency to study the effectiveness of "private sector

> efforts" to ensure adequate training of CMV drivers. The agency studied the motorcoach industry's private sector training efforts and found them to be inadequate.

69 Fed. Reg. at 29389. FMCSA's response and its reasoning are seriously flawed and do not advance "a reasonable explanation for its conclusion that the regulations serve the" objectives. *Chem. Mfrs.*, 217 F.3d at 861.

FMCSA's approach to training in the final rule is akin to building a two-story house by constructing the second floor before the foundation is laid and the first floor is built. However, as Petitioners have collectively and consistently maintained throughout this brief, FMCSA's finding of inadequacy in the training of entry-level drivers, both motorcoach and truck, was, with respect to training, directed at the fundamental skills and knowledge of driver training relating to the vehicles they operate. UMA was a participant in and contributor to that study.[11] FMCSA's study gave no consideration to the need for, or adequacy of, any training on the four specific topics required by the final rule. FMCSA certainly never noted or discussed any such consideration in the study in either the NPRM or final rule. By not requiring that entry-level drivers *obtain* a minimum level of operational driving training, FMCSA's final rule was clearly arbitrary and

---

[11] *Adequacy Report, Vol. 1,* at Preface and Acknowledgments. At the time of the study, UMA was known as "United Bus Owners of America."

capricious and should be rejected by the Court.[12]

Further, UMA's request for an exemption was solely with respect to the four specific topics for which FMCSA was proposing to require training. UMA did not request or ever mention an exemption relating to entry-level motorcoach driver training in general, as the final rule may want to suggest, and any suggestion that UMA was seeking a broader exemption from training would be without merit. UMA's objective in requesting the exemption was to achieve the objective Congress intended when it first directed FMCSA to study the effectiveness of entry-level driver training in 1991. This fact is demonstrated by UMA's explicit offer in its petition for reconsideration:

> During the exemption period, representatives from our industry would work with FMCSA in the development of a far more comprehensive entry-level driver training than was established by the Final Rule; one that would appropriately recognize and address the issues and training deficiencies identified in the FHWA's 1995 study, "Assessing The Adequacy of Commercial Motor Vehicle Driver Training." A copy of the final report from that study was made a part of the

[12] In using the word "obtain," UMA means that drivers and motorcoach operators should have options available to them insofar as how the requisite training could be achieved or provided. For example, a driver could obtain the training on his/her own through a self-study course, at a public or private driver training school, or from a carrier with a program that provides such entry-level training. In all such cases, however, the training would have to meet the minimum established standard.

> record in this proceeding and FMCSA has acknowledged it is aware of that report, *see* 69 Fed. Reg. at 29385.

UMA, *Petition for Reconsideration* 8-9 (2004) (No. 222). However UMA's offer to work with FMCSA to comprehensively address entry-level training was never acted upon by FMCSA, and the petition for reconsideration had to be withdrawn when no substantive action by FMCSA "appear[ed] to be imminent." UMA, *Notice of Withdrawal of Petition for Reconsideration* (2004) (No. 225).

FMCSA was arbitrary and capricious not only in denying *de facto* UMA's offer regarding development of a comprehensive entry-level driver training program, but also in failing to heed the advice of its Adequacy Study which recommended:

> If the intervention is to include motorcoaches and/or school buses, FHWA should develop three-element model curriculum specifications for operators of these CMVs. These curricula should be developed in close cooperation with motorcoach and school bus industries.

Adequacy Report, Vol. I, at 14. Further, the American Association of Motor Vehicle Administrators (AAMVA) long-ago also saw the inherent problems with the fragmented, go-it-alone approach that FMCSA took in the final rule. In 1996, AAMVA counseled:

> It is no longer possible for any of us to operate in a vacuum. The education and training communities along with industry, law enforcement, government and the motor vehicle agencies must work together.
>
> Mandated entry-level driver training requirements will be ineffective if they are not tied to the licensing process. To that end, we propose the following recommendation:
>
> 1. Require all entry-level commercial motor vehicle drivers to successfully complete an approved training course prior to obtaining a license. Completion of the course should be one of the pre-requisites to obtain a license. FHWA should:
>
> - work with industry and AAMVA to establish, coordinate and monitor national training effort [sic];

Comments of AAMVA 2 (1996) (No. 112).

B. FMCSA's decision not to incorporate the four areas of training adopted into the CDL was arbitrary. Recognizing the merits of AAMVA's foregoing recommendations, UMA and eight other commentators to the NPRM urged "that the goal of improving driver safety would be better realized if the training topics contained in the proposed rule were made a part of the CDL curriculum." 69 Fed. Reg. at 29388. Here again, without discussing or making any reference to the extensive record that had been developed prior to the NPRM, in particular AAMVA's 1996 recommendations, the final rule's sole response to the nine

comments was merely:

> FMCSA believes that requiring the State to administer, and enforce at roadside inspections, the entry-level driver training requirements would add an unnecessary complication to the CDL program.

Id. FMCSA's response and its reason for not incorporating the training into the CDL clearly failed to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Chem. Mfrs.*, 217 F.3d at 865-66 (quoting *State Farm*, 463 U.S. at 43). Moreover, contrary to the final rule's assertion, not one of these nine comments suggested or recommended the use of roadside inspections to enforce the training requirements imposed under the final rule.[13]

C. FMCSA's assessment of the final rule's costs on motorcoach operators was grossly and capriciously understated. The motorcoach industry's low accident rate is also relevant to UMA's objection to FMCSA's inclusion of transit crash data

---

[13] *See Comments of National Ready Mixed Concrete Association* (2003) (No. 173); *Comments of Petroleum Marketers Association of America* (2003) (No. 183); *Comments of Colorado Ready Mixed Concrete Association/Colorado Rock Products Association* (2003) (No. 184); *Comments of National School Transportation Association* (2003) (No. 189); *Comments of National Private Truck Council, Inc.* (2003) (No. 192); *Comments of C.R. England, Inc.* (2003) (No. 194); *Comments of American Moving and Storage Association* (2003) (No. 196); *Comments of UMA* (2003) (No. 201); *Comments of American Bus Association* (2003) (No. 210).

with motorcoach data when FMCSA conducted its economic analysis of the cost and benefits of the proposed rule. 69 Fed. Reg. at 29396. In rejecting UMA's concerns, the final rule responded as follows:

> FMCSA generally uses national-level crash cost estimates to evaluate the impacts of its rules on society. The crash cost estimates used in this evaluation are aggregated averages, and are not useable if FMCSA tries to exclude one particular subset of the larger industry. As such, the agency reports the average crash costs for crashes involving large trucks. Additionally, contrary to UMA's belief that the crash cost data were used to justify the motorcoach industry's inclusion in the rule, the crash cost data were simply used to estimate the level at which the rule would become cost beneficial if implemented (based on the average cost of a large truck crash).

Id. Once more, the final rule was unresponsive and failed to provide a satisfactory explanation for the agency's actions.

While FMCSA may "generally use[] national-level crash cost estimates," FMCSA's response nonetheless concedes, albeit without explanation, that it *does not always do so*. Regardless, the aggregation of transit crashes – operations expressly excluded from the final rule – with motorcoach crash data in order to "estimate the level at which the rule would become cost beneficial," *id.*, for the instant rulemaking was clearly arbitrary and capricious. FMCSA's inclusion of transit crash data with non-transit motorcoach crash data resulted in an imprecise

and distorted cost benefit analysis, by artificially imputing a higher number of crashes to motorcoach operations. That, in turn, spread out the projected costs for the proposed training across a larger population of crashes, thereby arbitrarily lowering the agency's estimated level at which the rule would become cost beneficial if implemented. No amount of obfuscation in the final rule changes that result. This is especially important given the Adequacy Report's undisputed findings of a low incidence of motorcoach crashes, *Adequacy Report, Vol. I,* at 10, and the Report's conclusion that any training efforts:

> to improve the safety of truck drivers (such as requiring adequate safety training) will likely have a greater return, in terms of accidents avoided, than the same efforts aimed at motorcoach and school bus drivers.

id., giving further justification for the exemption UMA requested.

The final rule's cost analysis is also faulty for an additional reason. As UMA warned FMCSA:

> for FMCSA to expect that carriers could limit training solely to entry-level drivers is impractical, if not unreasonable, and would also not serve the public's interest. Carriers that would do so would create two classes of drivers – those who will have received the requisite training and those who do not. Why would that be reasonable if the purpose of the training is supposed to be safety and the predicate for the training has been that drivers who do not receive this training

> will, *per force*, be considered to have been inadequately trained?

UMA, *Petition for Reconsideration*, at 7. To further demonstrate the necessity for motorcoach carriers to train all of their drivers and the resulting additional costs that FMCSA had overlooked, UMA further advised FMCSA:

> To reinforce this point, UMA has had discussions with several of the largest insurers of motorcoach and school bus operators since the Final Rule was published to identify what they see will be the impact of the Final Rule on UMA's members. They have advised that they agree with UMA's concerns on this point and will insist that the carrier they insure give the training to all of their drivers, not just to their entry-level drivers. In the insurers' opinion, a two-class system of drivers would be indefensible and resulting in creating an unnecessary huge liability exposure for them.[ ]

Id. (footnote omitted).

D. FMCSA failed to articulate a definable training standard and as a result has arbitrarily exposed motorcoach operators to potential liability. The training requirements imposed by the final rule are also arbitrary and capricious because the final rule failed to provide any identifiable and/or measurable criteria for either the training content or outcome(s) of the required training. As such, the final rule is merely a requirement to train, *i.e.,* a direction to carriers that they must engage in the act of training and to drivers that they must obtain training. However, the

final rule is not a standard of training, as FMCSA has maintained. 69 Fed. Reg. at 29388 ("FMCSA is making the training *standards* mandatory.") (emphasis supplied). As UMA told FMCSA in its petition for reconsideration, "the term 'standard' connotes the idea of uniformity and consistency." UMA, *Petition for Reconsideration*, at 2. The Final Rule did not establish a standard.[14] Because of the rule's vagueness and ambiguity, particularly in the areas of fatigue management and driver wellness, all parties (carriers, drivers, and trainers) are left to their own devices as to content, priority, and focus of the training. As such, the final rule is also devoid of any metric(s) or measurements by which a carrier, driver, or trainer will be able to evaluate whether FMCSA's desired outcomes have, in fact, been achieved through the training.

Moreover, the final rule's ambiguity exposes carriers to potential liability that FMCSA never addressed because of its failure to give substantive consideration to UMA's petition for reconsideration. As UMA attempted to explain therein by way of example:

---

[14] According to the *Concise Oxford Dictionary* 1188 (8th ed. 1990), a "standard" is: "An object or quality or measure serving as a basis or example or principle to which others conform or should conform or by which the accuracy or quality of others is judged." *See also Black's Law Dictionary* 1576 (4th ed. 1951), which provides the following two comparable definitions: (1) "Stability, general recognition, and conformity to established practice." (2) "A weight or measure fixed and prescribed by law, to which all other weights and measures are required to correspond."

> By requiring carriers to provide wellness training without providing any functional guidance as to the minimum of that training, FMCSA has effectively made carriers directly and personally responsible – and therefore potentially liable – for all wellness matters relating to their drivers and thereby opened up a Pandora's Box of inestimable dimension. Because of its lack of precision and clarity, the Final Rule can effectively be read to impose a duty on carriers to warn drivers of potentially any and every any health hazard directly or indirectly relating to their job, thereby forcing them to provide training well beyond the ten-hour time frame FMCSA has suggested the entirety of the training should take. Thus a carrier's failure to address an issue, or to fully cover an issue, can easily expose it to liability.

Id. at 4-5.

Clearly, in all respects the final rule does not meet the standards required by 5 U.S.C. § 706(2)(A). As this Court has previously observed:

> The confusing and inconsistent analysis [the agency] offered was so incomplete and conclusory as to fall below the standard of reasoned decisionmaking. As Judge Wilkey has pointed out: "Such intuitional forms of decisionmaking, completely opaque to judicial review, fall somewhere on the distant side of arbitrary." *Central Florida Enterprises, Inc. v. FCC,* 598 F.2d 37, 50 (D.C. Cir. 1978).

Gen. Chem., 817 F.2d at 855.

CONCLUSION

For the foregoing reasons, this Court should declare FMCSA's final rule on minimum training requirements for entry-level CMV operators arbitrary and capricious, and remand to the agency with instructions that it promulgate a final rule requiring entry-level CMV operators to receive training in the skills and knowledge necessary to actually operate a CMV.

Respectfully submitted,

_____

Adina H. Rosenbaum
(Admission to D.C. Circuit pending)
Brian Wolfman
Public Citizen Litigation Group
1600 20th St., NW
Washington, DC 20009
(202) 588-7720

Henry Jasny
Advocates for Highway and Auto Safety
750 First Street, NE
Washington, DC 20002
(202) 408-1711

Counsel for Petitioner Advocates for Highway and Auto Safety

Paul D. Cullen, Sr.
Paul D. Cullen, Jr.
Cullen Law Firm, PLLC
1101 30th Street, NW, Suite 300

Washington, DC 20007
(202) 944-8611

Counsel for Petitioner Owner-Operator Independent Drivers Association, Inc.

Robert A. Hirsch
3323 Parkside Terrace
Fairfax, VA 22031
(703) 280-4517

Counsel for Petitioner United Motorcoach Association

April 21, 2005

Rule 32(a)(7)(C) Certificate

I hereby certify that the foregoing brief complies with the type-volume imitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (WordPerfect), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules) contains 13,636 words.

_____

Adina H. Rosenbaum

STATUTORY AND REGULATORY ADDENDUM

1. Section 4007 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240 (Dec. 18, 1991), provides in pertinent part:

§ 4007. Training of Drivers; Longer Combination Vehicle Regulations, Studies, and Testing.

(a) ENTRY LEVEL.--

> (1) STUDY OF PRIVATE SECTOR.--Not later than 12 months after the date of the enactment of this Act, the Secretary shall report to Congress on the effectiveness of the efforts of the private sector to ensure adequate training of entry level drivers of commercial motor vehicles. In preparing the report, the Secretary shall solicit the views of interested persons.
>
> (2) RULEMAKING PROCEEDING.--Not later than 12 months after the date of the enactment of this Act, the Secretary shall commence a rulemaking proceeding on the need to require training of all entry level drivers of commercial motor vehicles. Such rulemaking proceeding shall be completed not later than 24 months after the date of such enactment.
>
> (3) FOLLOWUP STUDY.--If the Secretary determines under the proceeding conducted under paragraph (2) that it is not in the public interest to issue a rule that requires training for all entry level drivers, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than 25 months after the date of the enactment of this Act a report on the reasons for such decision, together with the results of a cost benefit analysis which the Secretary shall conduct with respect to such proceeding.

2. The Administrative Procedure Act, 5 U.S.C. § 706, provides in pertinent part:

§ 706. Scope of Review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . .

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be --
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

3. The Final Rule, 49 CFR chapter III, subchapter B, part 380 provides in pertinent part:

Subpart E – Entry-Level Driver Training Requirements

§ 380.500 Compliance date for training requirements for entry-level drivers.

> (a) Employers must ensure that each entry-level driver has received the training required by this subpart no later than July 20, 2004, except as provided in paragraph (b) of this section.
>
> (b) Each employer must ensure that each entry-level driver who first began operating a CMV in interstate commerce requiring a CDL between July 20, 2003, and October 18, 2004, has had the required training no later than October 18, 2004.

§ 380.501 Applicability.

> All entry-level drivers who drive in interstate commerce and are subject to the CDL requirements of part 383 of this chapter must comply with the rules of this subpart, except drivers who are subject to the jurisdiction of the Federal Transit Administration or who are otherwise exempt under § 390.3(f) of this subchapter.

§ 380.502 Definitions.

> (a) The definitions in part 383 of this chapter apply to this part, except where otherwise specifically noted.
>
> (b) As used in this subpart:
>
> > Entry-level driver is a driver with less than one year of experience operating a CMV with a CDL in interstate commerce.
> >
> > Entry-level driver training is training the CDL driver receives in driver qualification requirements, hours of service of drivers, driver

wellness, and whistle blower protection as appropriate to the entry-level driver's current position in addition to passing the CDL test.

§ 380.503 Entry-level driver training requirements.

Entry-level driver training must include instruction addressing the following four areas:

(a) Driver qualification requirements. The Federal rules on medical certification, medical examination procedures, general qualifications, responsibilities, and disqualifications based on various offenses, orders, and loss of driving privileges (part 391, subparts B and E of this subchapter).

(b) Hours of service of drivers. The limitations on driving hours, the requirement to be off-duty for certain periods of time, record of duty status preparation, and exceptions (part 395 of this subchapter). Fatigue countermeasures as a means to avoid crashes.

(c) Driver wellness. Basic health maintenance including diet and exercise. The importance of avoiding excessive use of alcohol.

(d) Whistleblower protection. The right of an employee to question the safety practices of an employer without the employee's risk of losing a job or being subject to reprisals simply for stating a safety concern (29 CFR part 1978).

§ 380.505 Proof of training.

An employer who uses an entry-level driver must ensure the driver has received a training certificate containing all the information contained in § 380.513 from the training provider.

§ 380.507 Driver responsibilities.

Each entry-level driver must receive training required by § 380.503.

§ 380.509 Employer responsibilities.

(a) Each employer must ensure each entry-level driver who first began operating a CMV requiring a CDL in interstate commerce after July 20, 2003, receives training required by § 380.503.

(b) Each employer must place a copy of the driver's training certificate in the driver's personnel or qualification file.

(c) All records required by this subpart shall be maintained as required by § 390.31 of this subchapter and shall be made available for inspection at the employer's principal place of business within two business days after a request has been made by an authorized representative of the Federal Motor Carrier Safety Administration.

§ 380.511 Employer recordkeeping responsibilities.

The employer must keep the records specified in § 380.505 for as long as the employer employs the driver and for one year thereafter.

§ 380.513 Required information on the training certificate.

The training provider must provide a training certificate or diploma to the entry-level driver. If an employer is the training provider, the employer must provide a training certificate or diploma to the entry-level driver. The certificate or diploma must contain the following seven items of information:

(a) Date of certificate issuance.

(b) Name of training provider.

(c) Mailing address of training provider.

(d) Name of driver.

(e) A statement that the driver has completed training in driver qualification requirements, hours of service of drivers, driver wellness, and whistle blower protection requirements substantially in accordance with the following sentence:

I certify _____ has completed training requirements set forth in the Federal Motor Carrier Safety Regulations for entry-level driver training in accordance with 49 CFR 380.503.

(f) The printed name of the person attesting that the driver has received the required training.

(g) The signature of the person attesting that the driver has received the required training.

CERTIFICATE OF SERVICE

I hereby certify that on this date, April 21, 2005, I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on counsel for the parties as follows:

Matthew M. Collette
Edward Himmelfarb
Robert S. Greenspan
Appellate Staff, Civil Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Room 7212
Washington, D.C. 20530

_____
Adina H. Rosenbaum