

HOURS-OF-SERVICE: MISSED OPPORTUNITIES, ILLEGAL SHORTCUTS

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For the second time in three years, a unanimous panel of the U.S. Court of Appeals for the D.C. Circuit struck down on July 24 features of a rule governing the hours-of-service of commercial truck drivers that permitted them to drive significantly longer hours than under rules that had been in place for decades.

Why six different judges of the D.C. Circuit found both the 2003 and 2005 hours-of-service rules wanting is a tale of missed opportunities and illegal shortcuts taken by the Federal Motor Carrier Safety Administration (FMCSA), which has proved more interested in enhancing trucking industry productivity than in fulfilling its core mission – to make safety its highest priority.¹

We have reached another cross-roads in an hours-of-service odyssey with no end in sight. This is an appropriate juncture for the FMCSA to change course and relent on the longer driving hours it has twice tried to justify. At a minimum, the agency should restore the old limit of 10 consecutive driving hours, eliminate the 34-hour restart provision, and help address rampant violations of hours-of-service rules and falsification of handwritten driver logs by requiring that commercial trucks use electronic onboard recorders (EOBRs) to record driving hours.

SHORT HISTORY OF HOURS-OF-SERVICE RULEMAKINGS

All stakeholders in today's dispute likely would agree that revision of the hours-of-service rules is long overdue. Although the rules remained substantially unchanged for 60 years, America's transportation system did not. The advent of the Interstate Highway System led to much higher traffic speeds and volumes, generating many, and more severe, large-truck crashes.² In 1995, the year that Congress required the FMCSA's

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¹ 49 U.S.C. § 113(b).

² 68 *Fed. Reg.* 22456, 22472 (2003); 65 *Fed. Reg.* 25540, 25541 (2000).

predecessor, the Federal Highway Administration (FHWA), to revise the hours-of-service rules, 377,472 large trucks were involved in crashes – 4,194 of which involved fatalities.³

Large truck crashes that year killed 4,918 people and injured 117,000.⁴ Although representing only 3 percent of all registered vehicles, large trucks account for 8 percent of all vehicles involved in fatal crashes and 12 percent of all traffic fatalities.⁵ Most victims are not truck drivers. Some 78 percent of truck-crash fatalities in 1995 were in other vehicles; 9 percent were nonoccupants (*e.g.* pedestrians, cyclists); and 13 percent were truck occupants.⁶

The Department of Transportation (DOT) has long acknowledged the major role that fatigue plays in truck crashes.⁷ At a 1988 symposium, FHWA officials emphasized the contribution of driver fatigue to truck crashes and suggested the problem was partly attributable to violations of then-existing limits.⁸ Driver fatigue was voted the No. 1 safety concern at the FHWA 1995 Truck and Bus Safety Summit, involving more than 200 drivers, motor carrier representatives, government officials, and safety advocates.⁹

Precise assessments of fatigue's role in truck crashes have proved elusive. As DOT's agencies admit, their fatality and crash databases, which are based on police accident reports – unreliable on-the-scene assessments of fatigue – significantly understate the problem.¹⁰ Several studies have attempted to quantify the incidence of

³ FMCSA, *Large Truck Crash Facts 2005*, at 4, 10 (Tables 1, 4, 5) (“*Large Truck Crash Facts*”), available at <http://ai.fmcsa.dot.gov/CarrierResearchResults/CarrierResearchContent.asp?p=4>.

⁴ *Id.* at 4, 10 (Tables 1 & 4).

⁵ National Highway Traffic Safety Administration, *Traffic Safety Facts 1995: Large Trucks*, at 1, available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF95/Truck95.pdf>.

⁶ *Id.* at 2.

⁷ See, *e.g.*, DOT, Office of Inspector General, *Motor Carrier Safety Program: Federal Highway Administration 10* (1999), available at www.oig.dot.gov/StreamFile?file=/data/pdfdocs/tr1999091.pdf.

⁸ Comments, Advocates for Highway and Auto Safety 31-33 (June 1997), FMCSA-1997-2350-499 (describing FHWA statements at the symposium). Note that the docket number for the first hours-of-service rulemaking is FMCSA-1997-2350-[item no.], FMCSA-2004-19608-[item no.] for the second, and FMCSA-2004-18940-[item no.] for the EOBR rulemaking. Where reports, studies, and comments are part of the administrative record, their docket numbers are provided.

⁹ 65 *Fed. Reg.* at 25541.

¹⁰ *Id.* at 25545; FHWA, *HOS Study: Report to Congress 5* (1990), FMCSA-1997-2350-244 (“1990 FHWA”).

fatigue in truck crashes. The National Transportation Safety Board (NTSB) suggested that fatigue “may be a contributing factor in as many as 30 to 40 percent of all heavy truck accidents.”¹¹ The FMCSA’s own estimates of fatigue’s role have varied, ranging from 15 percent¹² to a reduced estimate of 8.15 percent just three years later, when the agency was attempting to justify the rule’s substantial increase in permissible driving hours.¹³

As the agency has often acknowledged, widespread hours-of-service violations have compounded the driver fatigue produced by arduous work schedules. Since 1938, truck drivers have been required to keep handwritten time logs,¹⁴ which are the primary regulatory tool to determine a driver’s compliance with hours-of-service limits.

The FMCSA acknowledged that logbook falsification is widespread.¹⁵ Indeed, logbooks are so routinely falsified that they are popularly known as “comic books,”¹⁶ with drivers often keeping two or three different sets – abuse that led the NTSB 17 years ago to urge DOT to require use of automated, tamper-proof recording devices.¹⁷

Exempt from the *Fair Labor Standards Act*’s overtime provisions,¹⁸ the trucking industry has powerful incentives to encourage drivers to drive long hours. Likewise, truckers have strong inducements to falsify their logs and drive illegal hours. For example, 93 percent of long-haul drivers are paid by the mile or load,¹⁹ not by hours worked, creating economic pressure to drive many hours, as fast as possible, and to violate the rules. A widely cited University of Michigan survey reported that the

¹¹ NTSB, *Factors That Affect Fatigue in Heavy Truck Accidents* v (1995), FMCSA-1997-2350-239 (“1995 NTSB”); see also *id.* at v, 13 (finding 58 percent of 107 single-vehicle truck crashes fatigue-related).

¹² 65 *Fed. Reg.* at 25546, 25568; Preliminary Regulatory Evaluation ES-1, 30 (2000), FMCSA-1997-2350-954 (“2000 PRE”).

¹³ Regulatory Impact Analysis, 8-14 to 8-15 (2002), FMCSA-1997-2350-23302.

¹⁴ 49 C.F.R. § 395.8.

¹⁵ 65 *Fed. Reg.* at 25558.

¹⁶ Petition to Require Electronic Onboard Recording Devices for Motor Carriers 4 (1995), FMCSA-1997-2350-810.

¹⁷ NTSB, *Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-to-the-Driver Heavy Truck Crashes (Volume 1)* 77-79, 90, 93 (1990), FMCSA-1997-2350-260 (“1990 NTSB”).

¹⁸ 29 U.S.C. § 213(b).

¹⁹ Beilock, *1988 Motor Carrier Safety Study* 32 (1988), FMCSA-1997-2350-859.

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average driver under the pre-2003 rules worked 64.3 hours in seven days, with long-haul drivers at the 75th percentile working 80 hours per week and driving 12 hours and working 15.5 hour daily. At the 90th percentile, truckers drove 15 hours and worked 19 hours daily, accumulating 96 hours per week.²⁰ As the FMCSA recognized, these findings corroborated previous surveys evidencing pervasive hours-of-service violations.²¹

The ever-increasing truck crashes, unmitigated driver fatigue, and rampant hours-of-service violations led Congress to issue several statutory mandates of central importance to this rulemaking.

In 1995, Congress ordered FMCSA's predecessor agency, the FHWA, to revise the hours-of-service rules.²² The mandate came on the heels of the NTSB's 1995 report urging a rule revision and reiterating its 1990 recommendation that the agency require onboard recorders to record driving hours.²³ Congress required the agency to consider an array of hours-of-service issues to "reduc[e] fatigue-related incidents and increas[e] driver alertness."²⁴ The 2003 and 2005 rules represent the FMCSA's completely inadequate response to that mandate.

In 1999, Congress established the FMCSA, a new agency within DOT, to promote motor carrier safety.²⁵ *The Motor Carrier Safety Improvement Act* of 1999 (MCSIA) arose from Congress's alarm over mounting truck-crash fatalities, FHWA's delay on hours-of-service and other rulemakings, and lax enforcement of safety regulations.

Enacted "to reduce the number and severity of large-truck involved crashes,"²⁶ the MCSIA codified the FMCSA's preeminent safety mission, requiring the agency to

²⁰ Campbell & Belzer, *Hours of Service Regulatory Evaluation Analytical Support* 104, 106-07 (2000), FMCSA-1997-2350-1136.

²¹ 65 *Fed. Reg.* at 25558; 2000 PRE, *supra*, at 4-5.

²² *ICC Termination Act* of 1995, Pub. L. No. 104-88, § 408, 109 Stat. 803, 958-59 (49 U.S.C. § 31136 note).

²³ 1995 NTSB, *supra*, at 53-54.

²⁴ 49 U.S.C. § 31136 note.

²⁵ *Motor Carrier Safety Improvement Act* of 1999, Pub. L. No. 106-159, § 101(a), 113 Stat. 1748, 1750-58 (1999).

²⁶ *Id.* § 4(2) (49 U.S.C. § 113 note).

“consider the assignment and maintenance of safety as the highest priority” and to further “the highest degree of safety in motor carrier transportation.”²⁷

Finally, the FMCSA inherited a longstanding mandate applicable to DOT commercial motor vehicle (CMV) regulations, which requires that, in regulating truck safety, the FMCSA must protect driver health. The *Motor Carrier Safety Act* of 1984 (MCSA) provides that, “[a]t a minimum, the regulations shall ensure that . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.”²⁸ Indeed, because “enhanced protection of the health of [CMV] operators is in the public interest,”²⁹ the agency must “minimize dangers to the health of operators of [CMVs].”³⁰

The hours-of-service rules were first adopted in the *Motor Carrier Act* of 1935.³¹ Since 1962,³² the rules permitted truck drivers to drive for up to 10 hours after taking eight consecutive hours off-duty. After being on-duty for 15 hours (a period that could be extended indefinitely by breaks), a trucker could not drive without taking another eight hours off-duty.³³ If a carrier did not operate CMVs every day, its drivers could not drive after 60 hours on-duty in seven consecutive days; if the carrier operated daily (the norm for long-haul, or over-the-road, drivers), its drivers were barred from driving after 70 on-duty hours in 8 consecutive days.³⁴

These rules allowed work/rest cycles as short as 18 hours if drivers drove the maximum 10 hours, followed by the minimum eight hours off-duty, followed again by 10 driving hours, etc., until weekly limits were reached.³⁵

²⁷ 49 U.S.C. § 113(b).

²⁸ *Id.* § 31136(a)(4).

²⁹ *Id.* § 31131(b)(3).

³⁰ *Id.* § 31131(a)(2). FMCSA must also “ensure” that drivers’ responsibilities “do not impair their ability to operate the vehicles safely” and that their “physical condition” is “adequate to enable them to operate the vehicles safely.” *Id.* § 31136(a)(2) & (3).

³¹ Pub. L. No. 74-255, 49 Stat. 543 (1935).

³² In 1962, the ICC permitted drivers, for the first time, to operate on a non-circadian 18-hour cycle, rather than on a 24-hour schedule. 27 *Fed. Reg.* 3553 (1962). For general historical background, see 65 *Fed. Reg.* at 25547-49.

³³ 49 C.F.R. § 395.3(a) (2002).

³⁴ *Id.* § 395.3(b) (2002).

³⁵ 68 *Fed. Reg.* at 22491; 65 *Fed. Reg.* at 25548, 25558.

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The rules did not require that drivers using sleeper berths take their eight off-duty hours in a single block, but permitted them to split their required rest into two periods, so long as each period in the sleeper was at least two hours long.³⁶

In May 2000, acting against the backdrop of the above statutory mandates and the urgent need to reduce truck-driver fatigue, the new FMCSA issued a Notice of Proposed Rulemaking (NPRM).³⁷ With the notable exception that the proposed rule would have permitted truckers to drive for 12 consecutive hours, the NPRM would have substantially improved truck safety.

First, concluding that truckers need at least “eight consecutive hours of uninterrupted sleep every day” and that eight hours off-duty was not long enough to allow eight hours’ *sleep*,³⁸ the FMCSA proposed to require a minimum of 10 hours off-duty between shifts for long-haul drivers.³⁹

Recognizing that people are more alert and perform better on regular 24-hour schedules and heeding its expert panel’s recommendation, the FMCSA also proposed to increase the 18-hour on-duty/off-duty cycle to a normal 24-hour work cycle.⁴⁰ It proposed to permit long-haul drivers to work or drive up to 12 hours within a 14-hour work period each 24-hour cycle, with 10 consecutive hours off-duty and two additional off-duty hours to be taken during the day.⁴¹

The FMCSA also determined – again, consistent with its expert panel’s recommendation – that drivers need a weekly off-duty period to recover from cumulative fatigue from multiple long driving days, to compensate for “sleep debts” accrued each week, and to alleviate fatigue from nighttime driving.⁴²

³⁶ 49 C.F.R. § 395.1(g) (2002).

³⁷ 65 *Fed. Reg.* 25540 (2000).

³⁸ *Id.* at 25554.

³⁹ *Id.* at 25581, 25603. FMCSA also proposed to abolish for single drivers the “sleeper-berth exception,” which permitted bifurcation of off-duty periods when drivers spent them in their sleepers. *Id.* at 25586-87, 25603.

⁴⁰ *Id.* at 25553-54, 25558, 25561; *see* Belenky et al., Report of the Expert Panel, *Potential Hours-of-Service Regulations for Commercial Drivers* 5, 15 (1998), FMCSA-1997-2350-618 (“Expert Panel Report”).

⁴¹ 65 *Fed. Reg.* at 25568, 25581, 25603.

⁴² *Id.* at 25555-56, 25558, 25561-62; *see* Expert Panel Report, *supra*, at 12-14, 18, 30-31, 33-34, 40.

Accordingly, the agency proposed drivers be required to take a “weekend” off each week, encompassing two consecutive nights and the intervening day.⁴³ The FMCSA acknowledged widespread flouting of the hours-of-service rules and agreed its proposal’s safety objectives would be “attainable” only “if the rules are followed.”⁴⁴ Thus, the NPRM proposed long-haul drivers be required to use EOBRs instead of logbooks to “ensure credible verification of drivers’ adherence to, and improve motor carriers’ ability to manage driver compliance with, these proposed rules.”⁴⁵

The 2000 NPRM was greeted with an outcry from the trucking industry. Congress prohibited the agency from adopting a final rule that year.⁴⁶ The FMCSA buckled under political and industry pressure and adopted a rule in 2003 that discarded virtually every precept for regulatory action outlined in its 2000 proposal.⁴⁷

First, the 2003 rule increased from 10 to 11 hours the maximum number of hours truckers could drive consecutively without taking a break, but within a shorter and stricter 14-hour driving window.⁴⁸

Second, the agency increased the required off-duty period between shifts from eight to 10 hours, producing a 21-hour cycle for drivers who maximized driving time (alternating 11 hours’ driving and 10 hours’ off-duty) and a 24-hour cycle only if drivers worked 14-hour shifts, followed by 10 hours off-duty.⁴⁹

Third, the FMCSA nominally retained the 60- and 70-hour weekly limits from the pre-2003 rules, but added a “34-hour restart” provision, which permitted drivers to “restart” their weekly tally of hours to zero at any time during the work week if they took 34 hours off-duty.⁵⁰

⁴³ 65 *Fed. Reg.* at 25555, 25558, 25587, 25603.

⁴⁴ *Id.* at 25585; *see also id.* at 25558, 25570.

⁴⁵ *Id.* at 25563; *see also id.* at 25570, 25590, 25604.

⁴⁶ FY 2001 *DOT Appropriations Act*, Pub. L. No. 106-346.

⁴⁷ 68 *Fed. Reg.* 22456 (2003).

⁴⁸ *Id.* at 22473, 22475, 22492; 49 C.F.R. § 395.3(a) (2004).

⁴⁹ 68 *Fed. Reg.* at 22468; *see* 49 C.F.R. § 395.3(a) (2004). The rule continued to permit drivers using sleeper berths to split their required off-duty time into two periods, however, so long as each period exceeded two hours. 68 *Fed. Reg.* at 22465-66, 22504, 22515, *as amended by* 68 *Fed. Reg.* 56208, 56211-12 (2003); *see* 49 C.F.R. § 395.1(g) (2004).

⁵⁰ 68 *Fed. Reg.* at 22477, 22479; *see* 49 C.F.R. § 395.3(b) & (c) (2004).

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Drivers with heavy schedules who previously had to take a three-day layover each week could now take only 34 hours off before driving again.⁵¹ As a result, the restart significantly expanded permissible weekly driving time at the expense of off-duty time. Drivers maximizing driving time could drive 77 hours instead of 60 in seven days – 28 percent more than under the pre-2003 rules – while a driver on a 70-hours-in-eight-days schedule could drive 88 hours in 8 days – a 26 percent increase.⁵² These striking totals don't include the increase in nondriving on-duty hours enabled by the restart.

Finally, the FMCSA refused to resolve whether to require drivers to use EOBRs to record their driving hours, forestalling a decision “at this time” while it purported to continue research on EOBRs and other technologies.⁵³

On July 16, 2004, after a challenge by Public Citizen, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers, the U.S. Court of Appeals for the D.C. Circuit unanimously struck down the 2003 rule in its entirety, finding the rule arbitrary and capricious because FMCSA neglected to consider a statutorily mandated factor—the health of truck drivers.⁵⁴

The court did not stop there, but continued to discuss “the troubling nature of . . . other facets of the rulemaking,”⁵⁵ criticizing the agency’s decisionmaking on feature after feature of the 2003 rule challenged by the safety groups.⁵⁶

Following a one-year congressionally mandated period for a second notice-and-comment rulemaking,⁵⁷ the FMCSA re-issued the same rule for long-haul truckers that it had promulgated in 2003, except for a change to the sleeper-berth exception.⁵⁸

⁵¹ 68 *Fed. Reg.* at 22502, 22505.

⁵² 70 *Fed. Reg.* at 50021-22; 70 *Fed. Reg.* 3339, 3348 (2005).

⁵³ 68 *Fed. Reg.* at 22488.

⁵⁴ *Public Citizen v. FMCSA*, 374 F.3d 1209, 1216-17 (D.C. Cir. 2004).

⁵⁵ *Id.* at 1217.

⁵⁶ *See id.* at 1217-23.

⁵⁷ Pub. L. No. 108-310, § 7(f), 118 Stat. 1144, 1154 (2004).

⁵⁸ 70 *Fed. Reg.* 49978 (2005). The agency modified the sleeper-berth exception by allowing drivers to continue to split their required 10-hour off-duty period so long as they remain in the sleeper for eight consecutive hours during one of the two periods, leaving the 2 other required off-duty hours available for other off-duty activities. *Id.* at 50031, 50071; *see* 49 C.F.R. § 395.1(g) (2006).

Separately, in September 2004, FMCSA issued an Advance Notice of Proposed Rulemaking on EOBRs,⁵⁹ followed by a Notice of Proposed Rulemaking in January 2007,⁶⁰ divorcing that issue from the rest of the hours-of-service rulemaking.

On July 24, 2007, in response to a second lawsuit brought by the same three safety groups, this time joined by Advocates for Highway and Auto Safety and the International Brotherhood of Teamsters, the D.C. Circuit unanimously vacated the two driving-hour increases re-adopted in the 2005 rule: the increase in consecutive driving time from 10 to 11 hours and the 34-hour restart.⁶¹

The court found that the FMCSA committed a “serious procedural error” in failing to provide notice and comment regarding the new operator-fatigue model the agency included in its cost-benefit analysis in response to the court’s first decision.⁶² Equally important, the court found that the FMCSA’s explanations (or lack thereof) for relying on this model to justify the 11-hour driving limit, and for failing to account for the effects of cumulative fatigue from the 34-hour restart, were “arbitrary and capricious.”⁶³

On Sept. 28, 2007, the court stayed its mandate for 90 days, until Dec. 27, 2007⁶⁴ – a far shorter delay than had been requested by the FMCSA and the American Trucking Associations (ATA), an intervenor in the case.

WHAT’S WRONG WITH PERMITTING MORE HOURS

Much of the battle over the hours-of-service rulemaking has centered on whether FMCSA can justify permitting an increase in daily and weekly driving maximums. FMCSA has touted the increased productivity promoted by the 2003 and 2005 rules.

The 34-hour restart, coupled with the daily driving increase, enabled so many more driving hours that the agency predicted in 2003 that the rule would enable the industry to hire 58,500 *fewer* long-haul drivers, saving nearly \$1.1 billion annually compared to

⁵⁹ 69 *Fed. Reg.* 53386 (2004).

⁶⁰ 72 *Fed. Reg.* 2340 (2007).

⁶¹ *Owner-Operator Independent Drivers Ass’n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007) (“*OOIDA*”).

⁶² *Id.* at 199.

⁶³ *Id.* at 204, 206. The court denied *OOIDA*’s petition, however, challenging the 14-hour daily on-duty limit and the modification of the sleeper-berth exception. *Id.* at 206-11.

⁶⁴ Order (D.C. Cir. Sept. 28, 2007) (Nos. 06-1035, 06-1078).

the old rules.⁶⁵ In the 2005 rule, the FMCSA said eliminating the 11th hour of driving would cost the trucking industry \$586 million per year,⁶⁶ eliminating the 34-hour restart would cost more than \$1.5 billion annually,⁶⁷ and its analysis reflected the 2003 and 2005 rules had substantially enhanced industry profitability over the pre-2003 rules.⁶⁸

The FMCSA is not writing on a blank slate, however, and is not free to promote industry productivity over safety and driver health. The agency's design of an hours-of-service rule must be governed by the extensive scientific research establishing that driving longer hours than were permitted under the pre-2003 rules is not safe and not healthy. Its choice of rule is constrained by congressional mandates that place safety first and that require improved driver alertness, reduced fatigue-related incidents, and safeguards for truck-driver health – not by a requirement that the agency maximize industry productivity.

Even apart from statutory mandates, the *Administrative Procedure Act* (APA) itself incorporates a presumption “*against* changes in current policy that are not justified by the rulemaking record.”⁶⁹

It should be obvious that a rule that raises the permissible consecutive driving-hour limit by 10 percent in each shift, when even the *old* limit of 10 hours promoted fatigue and was of dubious safety, and increases permissible weekly driving hours by a staggering 25 percent or more, flouts decades of research findings and Congress's directives. Because the evidence against these driving-hour increases is so lopsided, the FMCSA has been forced to cut corners in an effort to force these rule changes through.

Twice now, the U.S. Court of Appeals for the D.C. Circuit has unanimously repudiated these illegal shortcuts. The inescapable truth is that the improvements to the rules – reducing the on-duty window from 15 to 14 hours without extensions and raising required off-duty time from eight to 10 hours – cannot justify or compensate for the dramatic driving-hour and working-hour increases.

Over the past 17 years, the agency frequently noted “[t]he risk of accidents appears to increase with the number of hours driven.”⁷⁰ Citing a case-control study by the Insurance Institute of for Highway Safety (IIHS), which found that crash risk nearly

⁶⁵ 68 *Fed. Reg.* at 22495 (Tables 5 & 6).

⁶⁶ 70 *Fed. Reg.* at 50012; Regulatory Impact Analysis 74 (2005), FMCSA-2004-19608-2094 (“2005 RIA”).

⁶⁷ 70 *Fed. Reg.* at 50022.

⁶⁸ *Id.* at 50058, 50064.

⁶⁹ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

⁷⁰ 1990 FHWA, *supra*, at 5.

doubles after eight hours' driving, the FHWA said that "driving in excess of eight hours may be associated with a significantly increased risk of crash involvement."⁷¹

In its 2000 NPRM, the FMCSA cited other research evidencing a "dramatic and consistent increase in crash risk after 8 hours," leading it to conclude that "[n]ot surprisingly, risk increases with time driven."⁷² Indeed, an extensive body of research establishes that crash risk climbs sharply after driving eight-10 hours – even after controlling for time-of-day effects.⁷³

Multiple studies confirmed, moreover, that exceeding the pre-2003 limits exacerbated driver fatigue. A 1995 NTSB study found that 82 percent of single-vehicle truck crashes involving drivers exceeding hours-of-service limits were fatigue-related.⁷⁴

The IIHS study found a three-fold increase in crash risk for drivers with logbook violations.⁷⁵ These results comport with two seminal DOT-sponsored studies demonstrating that performance of long-haul drivers degraded *well before* the 10-hour driving limit,⁷⁶ which cast doubt decades ago on whether even the longstanding 10-hour limit was scientifically sound.

⁷¹ *Id.* at 6; see Jones & Stein, *Effect of Driver Hours of Service on Tractor-Trailer Crash Involvement* 11-12, 15-17 (1987), FMCSA-1997-2350-759. In both court cases, IIHS submitted amicus briefs supporting the petitioners' challenges—in each case citing data and research demonstrating that the driving-hour increases degraded safety.

⁷² 65 *Fed. Reg.* at 25546 (citing Jovanis et al., *Exploratory Analysis of Motor Carrier Accident Risk and Daily Driving Patterns* (1991), FMCSA-1997-2350-872; and Lin et al., *Modeling the Safety of Truck Driver Service Hours Using Time-Dependent Logistic Regression* (1993), FMCSA-1997-2350-815)).

⁷³ See, e.g., Lin et al., *Time of Day Models of Motor Carrier Accident Risk* 7 (1994), FMCSA-1997-2350-759; Lin (1993), *supra*, at 8-10; Jones & Stein, *supra*, at 11-12, 15-17; Saccomanno et al., *Effect of Driver Fatigue on Commercial Vehicle Accidents* 157, 167-72 (1996), FMCSA-1997-2350-759; Frith, *A Case Control Study of Heavy Vehicle Drivers' Working Time and Safety* 24-28 (1994), FMCSA-1997-2350-759.

⁷⁴ 1995 NTSB, *supra*, at 26, 52.

⁷⁵ Jones & Stein, *supra*, at 13, 17; see also Summala & Mikkola, *Fatal Accidents Among Car and Truck Drivers: Effects of Fatigue, Age, and Alcohol Consumption* 319 (1994), FMCSA-1997-2350-521 (truckers at fault in fatal crashes 2 ½ times more likely than faultless truckers to have driven at least 10 hours).

⁷⁶ See, Mackie & Miller, *Effects of Hours of Service Regularity of Schedules, and Cargo Loading on Truck and Bus Driver Fatigue* vi-ix, xiii-xv, 2-3 (1978), FMCSA-1997-2350-278; Harris & Mackie, *A Study of the Relationships Among Fatigue, Hours of Service, and Safety of Operations of Truck and Bus Drivers* viii-xi (1972), FMCSA-1997-2350-272.

Because even under the old rules, truckers “work[ed] some of the longest hours known in this country,”⁷⁷ falling asleep at the wheel became commonplace.⁷⁸ In a FHWA-sponsored survey, 28 percent of truckers reported falling asleep while driving during the past month, and 32.2 percent did so three to six times.⁷⁹ Not surprisingly, in 1995 truck drivers suffered more work-related fatalities (749) than any other workers.⁸⁰

The FMCSA’s contention the increase in off-duty hours justifies additional driving was likewise “dubious,” in the court’s view, because it depended on the agency’s cost-benefit analysis, which the court found “circular” because, in one of the FMCSA’s many shortcuts, its analysis excluded “time on task” effects from longer driving hours, assuming away “the exact effect” FMCSA used the cost-benefit to justify.”⁸¹

In the 2005 rulemaking, the FMCSA re-adopted the 11-hour driving limit. The agency advanced three main arguments in its defense: (1) that the reduced 14-hour driving window and increased off-duty time between shifts compensated for more driving time, reiterating its prior dubious claim⁸²; (2) that scientific research was conflicting and inconclusive, but preliminary crash data suggested that the 2003 rule was superior to the pre-2003 rules or at least doing no harm⁸³; and (3) that the agency’s new cost-benefit analysis, purportedly taking into account “time on task,” demonstrated that retaining the 11-hour limit was more cost-effective than abandoning it.⁸⁴

Each of these contentions was flawed.

⁷⁷ 65 *Fed. Reg.* at 25548.

⁷⁸ Transportation Research Board, National Academies of Science, *Literature Review on Health and Fatigue Issues Associated with Commercial Motor Vehicle Driver Hours of Work* 92 (2005), FMCSA-2004-19608-2084.

⁷⁹ Abrams et al., *Commercial Motor Vehicle Driver Fatigue, Alertness, and Countermeasures Survey* 14 (1997), FMCSA-1997-2350-797. According to a recent IIHS driver survey, sleepy driving remained prevalent under the 2003 rule. Comments, IIHS 5 & Appendix A, at 3, 11 (2005), FMCSA-2004-19608-1800.

⁸⁰ Bureau of Labor Statistics, *National Census of Fatal Occupational Injuries, 1995*, at 2, 5, 7 (1996).

⁸¹ *Id.* at 1219.

⁸² 70 *Fed. Reg.* at 49982-83, 49991, 49992-94, 50003, 50012-14, 50038.

⁸³ *Id.* at 49992-94, 49997-50000, 50009-12.

⁸⁴ *Id.* at 49981, 50000, 50012; 2005 RIA, *supra*, at 74-79.

First, the FMCSA continued to rely on the shorter 14-hour driving window in concluding that truckers could now safely drive 11 hours, even though its own expert panel had found that even the shorter “14-hour work day is excessive,” a view shared by the National Institute for Occupational Safety and Health (NIOSH).⁸⁵

But the D.C. Circuit rejected the FMCSA’s position in the first case because the agency “cited absolutely no studies in support of its notion that the decrease in daily driving-eligible tour of duty from fifteen to fourteen hours will compensate for the[] conceded and documented ill effects from the increase.” Even if the reduced driving window had benefits, the court continued, “the effects from the increased weekly driving hours may offset any decrease in fatigue flowing from the fact that drivers have shorter over-all tours of duty.”⁸⁶ Nothing changed in 2005.

The FMCSA also relied on preliminary study findings that drivers operating under the 2003 rule were averaging 6.28 hours of sleep per day, which the FMCSA claimed was over one hour more than under the pre-2003 rules.⁸⁷ Whether or not 6.28 hours’ sleep is more than truckers got pre-2003 – a debatable point – the FMCSA has repeatedly recognized that each driver needs “8 consecutive hours of uninterrupted sleep every day,”⁸⁸ and admits that six hours’ sleep leads to impaired performance and alertness.⁸⁹ Even if drivers were sleeping for eight hours daily, the FMCSA lacks any evidence that the increased sleep would enable drivers to drive safely for 11 hours.

Second, the FMCSA did not repudiate its finding, emphasized by this court, that “performance begins to degrade after the 8th hour on duty and [that risk] increases geometrically during the 10th and 11th hours.”⁹⁰ Instead, citing preliminary 2005 research findings, the FMCSA attempted to manufacture uncertainty and conflict regarding the risk difference between the 10th and 11th driving hours,⁹¹ when, as discussed above, overwhelming evidence reveals no such uncertainty and that driving in *either* hour is unsafe. After the court’s first decision, the FMCSA sought new research findings justifying the 11-hour driving limit. It failed.

⁸⁵ Expert Panel Report, *supra*, at 21; Comments, NIOSH 3 (2000), FMCSA-1997-2350-22637.

⁸⁶ *Public Citizen*, 374 F.3d at 1218.

⁸⁷ 70 *Fed. Reg.* at 49983, 49991, 49993, 50003.

⁸⁸ 70 *Fed. Reg.* at 3346; 68 *Fed. Reg.* at 22469; 65 *Fed. Reg.* at 25554; *see Public Citizen*, 374 F.3d at 1219.

⁸⁹ 70 *Fed. Reg.* at 50015-16.

⁹⁰ *Public Citizen*, 374 F.3d at 1218 (quoting 68 *Fed. Reg.* at 22471).

⁹¹ *See*, 70 *Fed. Reg.* at 49993, 49999, 50000, 50011.

Two of three new studies the agency cited demonstrate driving 11 hours is unsafe;⁹² the third suggests crash risk may be high for drivers in *both* the 10th and 11th hours.⁹³ Lacking supporting research, the FMCSA invoked early partial crash statistics post-2003 rule and self-selected reports from motor carriers purportedly showing fewer crashes since the 2003 rule was adopted.⁹⁴

As the FMCSA acknowledged, however, such information “is mostly preliminary, self-reported without statistical controls, and also reflects small sample sizes”⁹⁵ and “reveals nothing about the 11-hour driving limit or the 34-hour restart provisions, nor can the improvements be clearly linked to the 2003 rule.”⁹⁶

Finally, the agency’s cost-benefit analysis, including its new fatigue model, was riddled with flaws. In response to the court’s first decision, the FMCSA modified its operator-fatigue model to include what it called “time-on-task” multipliers – a factor, based on hours of driving, by which the FMCSA multiplied the outputs of its fatigue

⁹² A 2005 analysis of the Trucks Involved in Fatal Accidents (TIFA) database reflected that the relative risk of a fatigue-related crash in the 11th hour of driving or later was “substantially higher than in the 10th hour,” *id.* at 50010; *accord id.* at 49997, 50000, with the risk of fatigue-related fatal crashes more than doubling from the 10th to the 11th hours, and the risk in *both* hours 10 and 11 greatly elevated compared to early driving hours. 2005 RIA, *supra*, at 45; *see, also* Campbell, *Estimates of the Prevalence and Risk of Fatigue in Fatal Crashes Involving Medium/Heavy Trucks from the 1991-2002 TIFA Files* 12 (2005), FMCSA-2004-19608-2116. A 2005 case-control study “found a pattern of increased crash risk associated with hours driving, particularly in the 9th, 10th, and 11th hours,” 70 *Fed. Reg.* at 49997-98, 50010, with risk escalating non-linearly after the 6th hour and the 11th-hour risk three times higher than the 1st hour. *See* Jovanis et al., *Crash Risk and Hours Driving: Interim Report II*, at 2, 7, 9, 17 (2005), FMCSA-2004-19608-2091.

⁹³ *See*, Hanowski et al., *Assessment of the Revised Hours-of-Service Regulations: Comparison of the 10th and 11th Hour of Driving Using Critical Incident Data and Measuring Sleep Quantity Using Actigraphy Data* (2005), FMCSA-2004-19608-2089. That study preliminarily found no significant difference between the 10th and 11th driving hours regarding driver alertness or involvement in critical events, 70 *Fed. Reg.* at 49997, 50010; Hanowski at 9, but Hanowski relied on a small sample of only 82 drivers and provided no information about how the seemingly high numbers of “critical incidents” in both hours 10 and 11 compared with levels after fewer hours. Hanowski at 1, 4. Thus, the study provided no yardstick for evaluating relative risk and at best, may support only the proposition that crash risk is high for drivers in *both* hours.

⁹⁴ 70 *Fed. Reg.* at 49998-99, 50010. The full-year data for 2004, however, which FMCSA had in hand when it issued the 2005 rule, actually reflected an *increase* in total fatal truck crashes from 2003 to 2004. *See* FMCSA Memorandum (February 2006), FMCSA-2004-19608-2458. Indeed, fatal truck crashes and fatalities rose from 2003 to 2005, the last year for which final data is available. *See Large Truck Crash Facts, supra*, at 4 (Table 1).

⁹⁵ 70 *Fed. Reg.* at 49981.

⁹⁶ *Id.* at 50012.

model in an effort to account for the elevated risk of longer consecutive driving hours.⁹⁷

The court recognized in the second case, however, that the data from the Trucks Involved in Fatal Accidents (TIFA) database upon which FMCSA's multipliers were based indicated that "the risk of fatal-crash involvement *more than doubled* from the 10th hour to the 11th,"⁹⁸ yet the FMCSA's model produced a risk factor for the eleventh hour that was "*only 30% higher* than the . . . multiplier for the 10th hour."⁹⁹

The court found that the FMCSA's "complete lack of explanation" for important steps in its analysis that may have had "the effect of improperly minimizing the crash risk associated with the 11th hour of driving," rendered the analysis "arbitrary and capricious."¹⁰⁰ (As discussed below, the court likewise found arbitrary and capricious the FMCSA's failure to justify its fatigue model's exclusion of cumulative fatigue effects from the expanded driving hours allowed by the 34-hour restart.¹⁰¹)

Second, the cost-benefit analysis was procedurally deficient because the FMCSA did not disclose its new approach in its 2005 NPRM, but waited for the final rule. As the court recognized, this "failure to provide an opportunity for comment on the model's methodology . . . constitutes a violation of the APA's notice-and-comment requirements."¹⁰² The court emphasized the petitioners would have mounted a "credible challenge" to the agency's methodology were they afforded an opportunity to do so.¹⁰³

The bottom line is that no evidence in the record countermanded the decades of research findings establishing that driving 11 consecutive hours – long enough to drive from Washington, D.C., to Jacksonville, Fla., or to Nashville, Tenn. – is unsafe.

In the 2003 rule, the FMCSA failed even to acknowledge that the 34-hour restart could be used to increase dramatically the total weekly hours that drivers could drive or work.

⁹⁷ 2005 RIA, *supra*, at 61.

⁹⁸ *OODA*, 494 F.3d at 203 (citing Petitioners' Br. at 48-49 (citing 2005 RIA at 45)); *see also supra* note [95].

⁹⁹ *Id.* (citing Petitioners' Br. at 49 (citing 2005 RIA at 61)).

¹⁰⁰ *Id.* at 203-04.

¹⁰¹ *Id.* at 206.

¹⁰² *Id.* at 201.

¹⁰³ *Id.* at 202-03.

In the 2005 rule, the FMCSA finally admitted the staggering increase in weekly driving and work hours enabled by the 34-hour restart,¹⁰⁴ but the agency continued to evade its obvious consequences and to minimize the rule's health and safety effects by discounting the possibility that the "average" driver was actually working and driving the longer hours permitted by the rule.¹⁰⁵

Yet the agency's cost-benefit analysis admitted that "many drivers work and drive longer hours than the averages."¹⁰⁶ In the second case, the court made the same point: "But whatever the 'average driver' will do on a 'regular basis,' it is clear that the FMCSA contemplates many drivers *will* work those longer hours – as those hours are the basis for the agency's conclusion that the 34-hour restart provision will have economic benefits."¹⁰⁷

Indeed, the court recognized that "FMCSA concedes as much," emphasizing the agency's own point that "more than half of for-hire operations, and somewhat less than half of private fleet operations, are intensive enough to press the HOS limits, and should therefore be affected by [changes in] those limits."¹⁰⁸

The agency's decision to re-adopt the 34-hour restart is indefensible. The factors likely responsible for increased fatigue on long-haul trips "are longer hours driving, driving at night (circadian component), and longer cumulative work weeks."¹⁰⁹ In 1990, the FMCSA conceded in its report to Congress that "research has noted a cumulative fatigue effect after several successive days of driving operations."¹¹⁰ In the 2000 NPRM, the agency cited research evidencing increased crash risk with long driving times over two or more days per week.¹¹¹ Moreover, Jovanis's 2005 study found "a pattern of increased crash risk associated with hours driving, particularly in . . . *multi-day*

¹⁰⁴ See, 70 *Fed. Reg.* at 50021-22; see also Comments, Public Citizen 11, FMCSA-2004-19608-1861 (restart allowed 600+ more driving hours annually).

¹⁰⁵ See, 70 *Fed. Reg.* at 49981, 49984, 50005, 50010, 50022, 50036, 50039-40.

¹⁰⁶ 2005 RIA, *supra*, at 18.

¹⁰⁷ *OIDA*, 494 F.3d at 206 (citing 70 *Fed. Reg.* at 50049; 2005 RIA at ES-3 to -4, 68-69).

¹⁰⁸ *Id.* (quoting 2005 RIA at 67).

¹⁰⁹ Campbell, *supra*, at 6; see also *id.* at 1.

¹¹⁰ 1990 FHWA, *supra*, at 6; see, e.g., Harris & Mackie, *supra*, at ix (finding "cumulative effect" on drivers' alertness "due to several successive days on duty").

¹¹¹ 65 *Fed. Reg.* at 25556; see, e.g., Jovanis (1991), *supra*, at 34, 41.

*driving.*¹¹² Yet, the FMCSA disregarded this latest research finding, as well as warnings from its own expert panel and NIOSH, that an 84-hour work week was excessive.¹¹³ Without explanation, the FMCSA excluded the effects of cumulative fatigue from its revised operator-fatigue model in its cost-benefit analysis, leading the D.C. Circuit to find the 34-hour restart provision “arbitrary and capricious.”¹¹⁴

The 34-hour restart legalizes practices the FMCSA has previously condemned. As the court recognized in the second case, the 2000 NPRM expressed concern about evidence that 2 percent% of drivers reported working at least 75 hours in the last seven days.¹¹⁵ That schedule fits easily within the 2003/2005 rule. No evidence supports the safety of such monumental working hours for drivers operating heavy machinery carrying 40 tons of freight at highway speeds, while sharing the road with others. And the FMCSA has never confronted head-on whether the new weekly driving/working maximums instituted by the 34-hour restart actually *are* safe.¹¹⁶ Instead, it has attempted to deflect criticism of the 34-hour restart by making illogical or misleading arguments.

First, the FMCSA insists that the 34-hour restart serves as a “safety net” or as a “benefit” affording most truckers two nights’ recovery sleep each week.¹¹⁷ That claim is nonsense. The 34-hour restart is only *optional*, providing no recovery benefit to drivers who do not use up their hours fairly early in the driving week.¹¹⁸ It gives truckers nothing they did not already have under the pre-2003 rule and *shortens* the weekly off-duty period for those drivers who are driving or working the longest hours. The restart

¹¹² 70 *Fed. Reg.* at 49997-98, 50010 (emphasis added); see Jovanis (2005), *supra*, at 2, 8.

¹¹³ Expert Panel Report, *supra*, at 22; Comments, NIOSH, *supra*, at 2; Comments, NIOSH 2 (2005), FMCSA-2004-19608-1856 (re-adopting 2000 comments).

¹¹⁴ *OIDA*, 494 F.3d at 206.

¹¹⁵ *Id.* at 205 (citing 65 *Fed. Reg.* at 25558).

¹¹⁶ The FMCSA cited a literature review regarding weekly recovery periods without disclosing the authors’ conclusion that, “although the available research is sparse, it is sufficient to raise concerns about a 36-hour reset that would allow drivers to accumulate up to 92 hours on-duty within a seven-day period, particularly for night driving.” 70 *Fed. Reg.* at 50024; see Smiley & Heslegrave, *A 36-Hour Recovery Period for Truck Drivers* vii, 14 (1997), FMCSA-1997-2350-593. The FMCSA also dismissed findings from other studies finding 36 and even 48 hours off-duty inadequate. 70 *Fed. Reg.* at 50024; see Wylie *et al.*, *Commercial Motor Vehicle Driver Rest Periods and Recovery of Performance* vii, 25-26 (1997), FMCSA-1997-2350-592; Park *et al.*, *Safety Implications of Multi-Day Driving Schedules for Truck Drivers: Comparison of Field Experiments and Crash Data Analysis* 14 (2005), FMCSA-2004-19608-1998.

¹¹⁷ 70 *Fed. Reg.* at 50023, 50038-39, 50041.

¹¹⁸ See 49 C.F.R. § 395.3(c)(1) & (2) (2006) (Any period of seven or eight consecutive days “*may end with the beginning of any off-duty period of 34 or more consecutive hours*”) (emphasis added).

is intended to allow drivers who have run out of weekly hours to resume driving sooner than permitted under the pre-2003 rule.

Second, in the 2005 rule preamble, the FMCSA reaffirmed its pronouncement in the 2000 NPRM that studies show that drivers need two consecutive nights off-duty each week to recover from cumulative fatigue and sleep debt¹¹⁹ – a recovery period that its expert panel pronounced “absolutely minimal.”¹²⁰ But only a driver who ends his driving shift and begins his 34 hours off-duty at *night* would obtain two consecutive nights off-duty. The record suggests that nearly 80 percent of long-haul drivers engage in at least some night driving;¹²¹ thus, many truckers may not end their shifts at night.

Even if one accepted the premise, pressed hard by the industry, that the substantial extra hours truckers can drive after taking 34 hours off-duty are irrelevant, so long as the off-duty period is long enough to “zero out” fatigue, the agency’s adoption of a 34-hour restart would *still* be unjustified because, based on the agency’s own findings and those of its expert panel, 34 hours off is insufficient because it fails to guarantee two consecutive nights off-duty each week.

Similarly, the agency’s claim that the 34-hour restart avoids forcing night drivers to drive during the day, with adverse safety consequences, is also illogical.¹²² There is no reason to believe that drivers would always begin their restarts at the same time of day; longer layovers (such as a 58-hour off-duty period) would not affect day versus night driving; and certainly reverting to the pre-2003 60/70 hour limits with no restart would have no night-driving impact. Any implication that the load of a night driver who takes two nights off must be driven during daytime is unfounded. The pre-2003 rules *already* required drivers to take three nights off if they reached weekly driving/working limits in five days.

The FMCSA touts the 34-hour restart for other reasons. It claims that the restart gives drivers more time at home,¹²³ even though the 34-hour restart *curtails* required weekly off-duty time for the hardest-working drivers. Remarkably, the agency relied on a survey by the Owner-Operator Independent Drivers Association (OOIDA), in which drivers were asked “Do you get more time at home under the new HOS regs regime?”

¹¹⁹ 70 *Fed. Reg.* at 49995, 50016-17, 50021, 50023.

¹²⁰ Expert Panel Report at 40; *see also supra* note [42].

¹²¹ *See*, McCartt et al., *Study of Fatigue-Related Driving Among Long-Distance Truck Drivers in New York State, Volume 1: Survey of Long-Distance Truck Drivers* xii, 21, 23 (1997), FMCSA-1997-2350-882.

¹²² 70 *Fed. Reg.* at 50022-23, 50039.

¹²³ *Id.* at 50001-02, 50022.

While 20 percent said, “yes,” 77 percent said, “no.”¹²⁴ More telling, the survey neglected to ask whether the 77 percent who said “no” were getting *less* time at home under the new rule.¹²⁵ The agency and the industry tout the operational flexibility fostered by the restart, which potentially allows drivers and carriers to make more efficient use of downtime, but such efficiency gains could have been preserved by the FMCSA without allowing drivers significantly to increase their weekly driving.

Long driving hours risk more than highway safety. In the late 1990s, the FHWA undertook a wellness study, which recognized the “generally poor state of health of commercial drivers,”¹²⁶ and catalogued myriad driver health problems, including obesity, diabetes, hypertension and high stress causing cardiovascular, hypertensive, gastrointestinal, and immune-system impairments.¹²⁷ A wealth of research, furthermore, establishes that long, irregular driving hours significantly impair driver health, both directly and by increasing truckers’ exposure to other hazards, such as cancer-causing diesel emissions, excessive noise levels (causing hearing loss), and vibration (causing back pain and injuries). In 1995, truck drivers experienced more nonfatal injuries and illnesses involving days away from work than any other occupation.¹²⁸

In the first case, the D.C. Circuit vacated the 2003 rule in its entirety because the FMCSA failed to consider the impact of its rule on driver health.¹²⁹ For the 2005 rule, the FMCSA commissioned the Transportation Research Board of the National Academy of Sciences (TRB) to conduct a literature review on driver health issues. The TRB’s findings underscored the grave health risks of longer driving and on-duty hours, including heightened risks of lung and bladder cancer (from diesel-exhaust exposure), cardiovascular disease, noise-induced hearing loss, and back disorders.¹³⁰

¹²⁴ *Id.* at 50001-02, 50025.

¹²⁵ *Id.* at 50025; see OOIDA Survey Question 13, FMCSA-2004-19608-2092.

¹²⁶ Roberts, *Design, Development and Evaluation of Driver Wellness Programs, Technical Memorandum Number One: Wellness Literature and Programs Review I-36* (1997), FMCSA-2004-19608-1999.

¹²⁷ *Id.* at I-2 to I-9.

¹²⁸ Bureau of Labor Statistics, *Lost-Worktime Injuries: Characteristics and Resulting Time Away from Work, 1995* (Tables 3 & 8).

¹²⁹ *Public Citizen*, 374 F.3d at 1216-17.

¹³⁰ TRB, *supra*, at 8, 49.

Although the FMCSA discussed issues in the 2005 rule preamble affecting truck-driver health,¹³¹ and praised the “nationally known health and fatigue experts” who performed the literature review,¹³² the FMCSA never mentioned the TRB’s findings, gave short shrift to each of the health concerns implicated by longer driving/working hours for truck drivers, and excluded health effects *entirely* from its cost-benefit analysis.

The MCSA requires that the FMCSA regulations “[a]t a minimum . . . shall ensure that . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.”¹³³ The agency must also “consider, to the extent practicable and consistent with the purposes of this chapter – costs and benefits.”¹³⁴

In adopting a rule that substantially increases maximum allowable daily and weekly driving and on-duty hours – without even *estimating* the health costs associated with those increases – the FMCSA failed to satisfy either statutory directive, rendering the 2003/2005 rule contrary to law and arbitrary and capricious.¹³⁵ Although the D.C. Circuit did not address driver health issues in its second decision, health concerns are certain to remain a prominent issue in any future litigation.

In the 2000 NPRM, the FMCSA acknowledged widespread violation of the hours-of-service rules and accordingly proposed that long-haul drivers be required to use EOBRs instead of logbooks, which “should ensure credible verification of drivers’ adherence to, and improve motor carriers’ ability to manage driver compliance with, these proposed rules.”¹³⁶

The 2003 rule, however, abandoned the proposal and forestalled a decision “at this time” to continue research on EOBRs and other technologies¹³⁷ – inaction challenged by the petitioners in the first case. The agency claimed it lacked the economic and safety

¹³¹ 70 *Fed. Reg.* at 49982-92.

¹³² *Id.* at 50036.

¹³³ 49 U.S.C. § 31136(a)(4).

¹³⁴ *Id.* § 31136(c)(2); *see also id.* § 31502(d).

¹³⁵ *See, Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 149 (D.C. Cir. 2001); *Motor Vehicle Mfrs. Ass’n v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983).

¹³⁶ 70 *Fed. Reg.* at 25563; *see also id.* at 25558, 25570, 25590, 25604.

¹³⁷ 68 *Fed. Reg.* at 22488.

data to justify an EOBR requirement,¹³⁸ notwithstanding pervasive hours-of-service violations, widespread use of electronic onboard recording systems and global positioning systems (GPS) throughout the industry in the U.S. and worldwide, the existence of inexpensive devices meeting the NPRM's requirements, and 15 years of voluntary use of EOBRs to record hours of service under the regulations.¹³⁹

The D.C. Circuit's opinion in 2004 could not have been more withering in chastising the FMCSA for retreating from its 2000 proposal to require EOBRs. The court chided the agency for failing "to exercise its expertise to make tough choices" and could not "fathom . . . why the agency ha[d] not even taken the seemingly obvious step of testing existing EOBRs on the road."¹⁴⁰

In the court's view, the FMCSA's "one-sided and passive regulatory approach in all likelihood does not comport with" congressional mandates.¹⁴¹ Running through the agency's excuses for not requiring EOBRs, the court found that the FMCSA's "explanation [was] probably flawed."¹⁴²

Congress's 1995 directive that the agency "deal[] with" the issue of "automated and tamper-proof recording devices," the court reasoned, "required the agency, at a minimum, to collect and analyze data on the costs and benefits of requiring EOBRs" and "to evaluate seriously whether EOBRs should be required."¹⁴³ Observing that "[d]river noncompliance with federal regulation in this and related areas might be described as the stuff of legend," the court believed "[i]t stands to reason that requiring EOBRs will have substantial benefits by inducing compliance with HOS regulations, and the agency concedes that compliance with HOS regulations has benefits."¹⁴⁴

Moreover, the FMCSA's failure to require EOBRs in the 2003 rule makes little sense in light of the fact that all European Union (EU) countries, along with Morocco, Argentina, Brazil, Peru, Uruguay, Venezuela, Israel, Turkey, Japan, South Korea and

¹³⁸ *Id.* at 22489.

¹³⁹ 49 C.F.R. § 395.15 (2002).

¹⁴⁰ *Public Citizen*, 374 F.3d at 1221-22.

¹⁴¹ *Id.* at 1222.

¹⁴² *Id.* at 1220.

¹⁴³ *Id.* at 1221.

¹⁴⁴ *Id.* at 1222 & n.1.

Singapore require tamper-proof electronic tachographs to monitor drivers' hours-of-service compliance.¹⁴⁵

The FMCSA's treatment of EOBRs in nothing short of a cynical ploy. The same agency that in the 2000 NPRM proposed a universal EOBR requirement for long-haul drivers reversed direction just three years later, finding that, even though use of EOBRs and GPS is prevalent throughout the U.S. trucking industry and similar technology is used around the world, the FMCSA lacked sufficient information about EOBRs.

The agency's actions since the court's 2004 decision have completed the turnabout. In response to the court's ruling, the FMCSA separated EOBRs from the rest of the hours-of-service rulemaking and issued an Advance Notice of Proposed Rulemaking in September 2004,¹⁴⁶ followed by a Notice of Proposed Rulemaking in January 2007.¹⁴⁷

The FMCSA's proposal, which would require use of EOBRs by less than one-tenth of one percent (0.1 percent) of registered motor carriers,¹⁴⁸ demonstrates that the agency has no intention of putting an end to the widespread, systematic violations of hours-of-service limits and routine falsification of paper logbooks. Disregarding previous research, driver surveys, enforcement data and its own findings on the prevalence of hours-of-service regulations, the FMCSA proposes that EOBRs be required only for the worst offenders, those drivers and carriers "with serious and repeated HOS noncompliance."¹⁴⁹

Instead of promoting the adoption of EOBRs as a positive motor carrier safety tool, the agency proposes to impose EOBRs only as a punishment – and one applicable only to a trivial few. Given the FMCSA's agreement in the NPRM that EOBRs could be expected to "significantly reduce, and in some cases virtually eliminate, several types

¹⁴⁵ Lehmann, Dr. Gerhard, International Symposium on Transportation Recorders, *Highway Recording Systems: A Report on European and US Experiences* (May 1999). For a list of the 27 EU countries that have been required to use digital tachographs since May 1, 2006, see, [/www.eu-digitaltachograph.org/DisplayPage.asp?PageId=22&Table=2](http://www.eu-digitaltachograph.org/DisplayPage.asp?PageId=22&Table=2).

¹⁴⁶ 69 *Fed. Reg.* 53386 (2004).

¹⁴⁷ 72 *Fed. Reg.* 2340 (2007).

¹⁴⁸ The FMCSA estimates that an average of only 465 motor carriers each year would be required to install EOBRs, *id.* at 2364, 2380 – a minuscule fraction of the 723,072 motor carriers registered in the U.S. See, <http://ai.fmcsa.dot.gov/International/border.asp?redirect=HistoricalOverview.asp> (Summary Statistics for U.S. DOT Active Motor Carriers).

¹⁴⁹ 72 *Fed. Reg.* at 2364.

of HOS violations,”¹⁵⁰ and given EOBRS’ conceded efficiency benefits and accompanying cost savings from reduced paperwork,¹⁵¹ the FMCSA will be unable to defend its proposal if the agency adopts it as the final rule. Its poor record on EOBRS highlights just how far FMCSA has strayed from its mission to make safety its highest priority.

SO, WHAT NOW?

The D.C. Circuit gave the FMCSA an opportunity to change course when, for the second time in three years, it threw out the increase in driving time from 10 to 11 hours and the 34-hour restart.

In the short term, FMCSA must drop both rule changes until it can address the concerns with its cost-benefit analysis discussed by the court. The agency is expected to issue guidance regarding the hours-of-service rule before the end of the 90-day stay of the issuance of the court’s mandate on Dec. 27, 2007.

But looking beyond the short term to a potential third rulemaking, the FMCSA should, once and for all, make safety its highest priority and abandon permanently both driving-hour increases.

Continued pursuit of the 11th driving hour and the 34-hour restart will lead only to continued uncertainty for the industry, with little likelihood of ultimate success in court. Indeed, the D.C. Circuit did not even reach the bulk of the petitioners’ health and safety challenges to these two provisions of the 2005 rule because the flaws in the cost-benefit analysis afforded a sufficient basis for the court to vacate those features.

The factual history and administrative record of the hours-of-service rulemaking is replete with safety studies, health studies, other research, and the FMCSA’s findings of fact that it cannot now disown. In an effort to maneuver around the inconvenient facts, the agency has resorted to unlawful shortcuts, misdirection, and statistical legerdemain to support increasing driving and working hours at the expense of public safety and drivers’ health.

Although the two unanimous court panels decided each case on grounds that did not directly implicate the safety merits of longer driving and work hours, the implications of the two opinions could not be more clear.

¹⁵⁰ *Id.* at 2358.

¹⁵¹ *Id.* at 2359.

HOURS-OF-SERVICE: MISSED OPPORTUNITIES, ILLEGAL SHORTCUTS

The court has twice signaled the agency that increases in driving hours will not pass muster.

The FMCSA should accept that judgment and focus on issuing a revised rule without the 11-hour driving day and 34-hour restart provisions.

It should also adopt an industry-wide EOBR mandate that will put an end to “comic books” and help ensure meaningful compliance and enforcement of the driving limits.

These actions would help reduce truck-driver fatigue and improve highway safety and, at the same time, would demonstrate that FMCSA’s current leadership is intent on making safety the agency’s highest priority.