Court of Appeals Rules on HOURS OF SERVICE APPEALS

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"The third time's a charm," said the United States Court of Appeals for the District of Columbia. On August 2, 2013, the court struck down the 30-minute off-duty break for short-haul drivers and upheld:

- the 30-minute off-duty break for long-haul drivers, which prohibits truckers from driving over eight hours unless they have had an off-duty break for no fewer than 30 minutes;
- the once-per-week restriction, that allows drivers to invoke the 34-hour restart provision only once every 168 hours (or seven days); and
- the two-night requirement, which mandates that the 34-hour restart include two time periods between 1:00 a.m. to 5:00 a.m.

American Trucking Ass'n's v. Federal Motor Carrier Safety Administration and United States of America, ___ F.3d ___, No. 12-1092 at 21-22 (D.C. Cir. Aug. 2, 2013).

Background

The court provided a detailed history of the "protracted rulemaking" of the agency, tracing the beginnings to 1999 – the year Congress passed the Motor Carrier Safety Improvement Act and created the Federal Motor Carrier Safety Administration ("FMCSA"). *Id.* at 3. In 2003, FMCSA adopted a final rule that "increased the daily driving limit from 10 hours to 11 hours; reduced the daily on-duty limit from 15 to 14 hours; increased the daily off-duty requirement from 8 to 10 hours; and created a new exception to the weekly on-duty limit known as the 34-hour restart." *Id.*, citing *Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations*, 68 Fed. Reg. 22,456; 22,457 (Apr. 2003) ("2003 Final Rule").

The trucking industry and a number of public interest groups challenged the rule for opposing reasons. "Public Citizen," a variety of individuals and organizations, challenged the 2003 Final Rule as "arbitrary and capricious" – the standard for vacating any rule promulgated by a federal agency. *Id.* at 4. The D.C. Circuit agreed, noting FMCSA "failed to comply with the specific statutory requirement to ensure that . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of operators." *Id.* at 4, quoting *Public Citizen v. FMCSA*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).

After a second challenge by the trucking industry and public interest groups in 2005, the D.C. Circuit struck down a new set of rules that were almost identical to the 2003 rules. *Id.*, citing *Owner-Operator Indep. Drivers Ass'n Inc. v. FMCSA*, 494 F.3d 188, 206 (D.C. Cir. 2007). Instead of vacating the 2005 rules, the court "rested [its] holdings on two technical shortcomings: the agency's failure to (1) timely disclose its methodology for determining its time-on-task multipliers, and (2) provide a reasoned explanation for a number of the methodology's critical elements." *Id.* at 5.

When the same groups threatened to challenge the 2008 Final Rule, FMCSA agreed to "undertake a more responsive rulemaking." *Id.* This effort began with the 2010 notice of proposed rulemaking ("NPRM") and ended in 2011 when the agency enacted the final rule now before the court. *Id.*, citing *Hours of Service of Drivers*, 75 Fed. Reg. 82,170 (Dec. 29, 2010) ("2010 NPRM"); *Hours of Service of Drivers*, 76 Fed. Reg. 81,134 (Dec. 27, 2011) ("2011 Final Rule").

The 2011 Final Rule resembled earlier versions of the rules except for (1) the 30-minute off-duty break, (2) the once-per-week (168 hours) restriction on restarts, and (3) the two-night (1:00 a.m. to 5:00 a.m.) requirement on restarts. *Id.*, citing 2011 Final Rule at 81,135-36. Interested parties immediately challenged the 2011 Final Rule.[1]

Standard of Review

When a party challenges a federal agency's rules as arbitrary and capricious, the court must apply the principles set forth in *Motor Vehicle Mfrs. Assn. v. State Farm*, citing 463 U.S. 29 (1983). Id. at 11. "Deferring as appropriate to the agency's expertise and looking only for a 'rational connection between the facts found and the choice made,' [the court stated it] remains ever mindful that in performing 'a searching and careful inquiry into the facts, [the court does not] look at the agency's decision as would a scientist, but as a reviewing court exercising [its] narrowly defined duty of holding agencies to certain minimum

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standards of rationality," citing *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803, 810 (D.C. Cir. 2012). Id., at 11.

The 34-Hour Restart Is Here To Stay

The court again noted that Public Citizen had no standing to challenge FMCSA's decision to include a 34-hour restart, and it was "left only to deal with [the] ATA's far more circumscribed objections to the two limits on the restart's use." *Id.*, ___ F.3d ___, at 11. The ATA challenged only the once-per-week (168-hour) restriction and the two-night (1:00 a.m. to 5:00 a.m.) requirement. *Id.* at 12.

In support of the 34-hour restart, FMCSA argued "hours-maximizing drivers" could use the restarts to increase their driving or on-duty time. *Id.* The ATA disagreed, noting FMCSA had previously held the opposite belief; *i.e.*, FMCSA "had dismissed as unlikely and unrealistic" that drivers would "drive and work the longer weekly hours, on a regular basis . . . ." *Id.*, citing 2005 Final Rule at 50,222. The ATA contended FMCSA's new position was evidence the rule was arbitrary and capricious, and thus should be vacated. *Id.* at 13.

The court disagreed, noting "[a]gencies are free to change their views provided they offer reasonable explanations and justifications for their departure." *Id.*, citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "New evidence caused a change in the agency's view." *Id.*, citing 2010 NPRM at 82,182 ("drivers and carriers disabused the agency of its previously held views when they 'stated at the [most recent] listening sessions and in their comments that, especially on the road, drivers do indeed take the minimum restart allowed,' with some carriers acknowledging 'that they have used the restart to add one work shift a week.'"). Thus, the court upheld the once-per-week (168 hour) restriction.

The ATA argued that the two-night (1:00 a.m. to 5:00 a.m.) component of the 34-hour restart was inconsistent with FMCSA's "long-championed" argument in favor of stability or circadian synchronization – the "maintenance of a consistent, 24-hour daily schedule instead of a constantly shifting or rotating schedule." *Id. at* 13. The court noted, "[b]ecause a 34-hour restart must now include two 1:00 a.m. to 5:00 a.m. periods, the rule strongly encourages night-time drivers who generally sleep during the day to switch to night-time sleep during a restart," which actually results in circadian "desynchronization." *Id.* FMCSA conceded the apparent inconsistency; however, it argued it "never championed the maintenance of circadian rhythms above all else." The court determined FMCSA's record supported such a contention, citing a 2010 study concluding "the 2-night provision works better than 1-night to mitigate driver fatigue in nighttime drivers." *Id.*at 14. The court said it "must unquestionably defer to an agency's expertise in weighing and evaluating the merits of scientific studies. *Id.* at 14, citing *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000). Thus, the two-night (1:00 a.m. to 5:00 a.m.) requirement was upheld because it is reasonably tailored to promote driver health and safety, and the 34-hour restart survived in its entirety.

The 11-Hour Driving Allowance Is Upheld

The court upheld the 11-hour driving rule, which allows drivers to drive eleven hours following ten hours off-duty. *Id.* at 14. In announcing FMCSA's final decision, the 2011 Final Rule explained how the agency had been "unable to *definitively demonstrate* that a 10-hour-limit [–which the agency considered in 2010–] . . . would have higher net benefits than an 11-hour limit." *Id.* (emphasis in original), citing 2011 Final Rule at 81,134. Public Citizen argued that the agency was "demanding proof of cost effectiveness before adopting a rule that would improve safety" and that this was contrary to Congress's intent. *Id.* at 15-16.

The court criticized FMCSA for its "largely perfunctory statements" in the rule but ultimately held its approach was not inconsistent with congressional intent. *Id.* "FMCSA's point is far more mundane than its imprecise language would suggest: the agency ran the cost/benefit analysis with an eye toward adopting a 10-hour limit, but recognized that doing so would have been unreasonable and unfounded on the record before it." Thus there was not "adequate and reasonable grounds...for adopting a new regulation" because there was "an absence of compelling scientific evidence demonstrating the safety benefits of a 10-hour driving limit, as opposed to an 11-hour limit." *Id.*, citing 2011 Final Rule at 81,135. As such, the court upheld the 11-hour driving allowance, even as the court criticized the agency for using "improvidently absoluted and unqualified language" in drafting the rule.

The 30-Minute Break Requirement Is Upheld For Long-Haul Drivers But Not For Short-Haul Truckers

The hours of service regulations cover both long-haul and short-haul drivers; however, FMCSA has "historically distinguished" between their operations. *Id.* at 16, citing 49 C.F.R. §§ 395.1(e)(2); 395.1(e)(2)(iv); 395.3(a)(a). The court noted that, in general, "short-haul trucking work has far more in common with other occupations than it does with regional or long-haul trucking." *Id.*, citing 2011 Final Rule at 81,141. Moreover, the court noted "short-haul drivers rarely drive anything close to 11 hours, and available statistics show that they are greatly under-represented in

fatigue-related accidents." *Id.*, citing 2005 Final Rule at 49,980.

Under 49 C.F.R. §395.1(e)(2) for example, short-haul drivers who operate trucks that do not require a commercial driver's license ("CDL"), drive "within a 100-air-mile radius of the location where the driver reports to and is released from work," and "return to the normal work reporting location at the end of each duty tour," have much more flexibility in scheduling. *Id.* See 49 C.F.R. §395(e)(2)(iv) (two days per week, short-haul drivers may drive between the 14th and 16th hour after coming on duty). C.F.R. 49 C.F.R. §395.3(a)(2) (long-haul drivers may not drive beyond the 14th hour after coming on duty).

The court discussed FMSCA's 2010 NPRM which proposed allowing the 16-hour extension to also apply to long-haul drivers. *Id.* at 17. FMCSA also considered eliminating the exemption altogether. *Id.* "When all was said and done, however, the 2011 Final Rule opted *not* to disturb the status quo." *Id.* (emphasis in original), citing 2011 Final Rule at 81,136. The 16-hour exemption survived, "but short-haul drivers did not emerge from the rulemaking unscathed" because FMCSA imposed the 30-minute off-duty break on short-haul drivers as well as long-haul drivers. *Id.*

The ATA presented three arguments against application of the 2011 Final Rule to short-haul drivers. First, the ATA challenged the procedural validity of the rule; however, the court quickly dismissed this argument, noting, "[w]e fail to see how any reasonable commentator would have read the NPRM to suggest the agency would not do what it was otherwise free to do: apply the 30-minute break requirement to short and long-haul truckers alike." *Id.* at 17.

Next, the ATA protested FMCSA's decision to force an "off-duty" break on short-haul drivers, challenging the rule as arbitrary and capricious. *Id.* at 19. The court dismissed this argument: "FMSCA has more than adequately supported its choice by referencing an intervening 2011 study concluding that 'off-duty' breaks provided the 'greatest benefit.'" *Id.* at 20, citing 2011 Final Rule at 81,154. Given the court's required deference to the agency in such matters, the court had "no reason to doubt that FMCSA made a reasoned decision based on reasonable extrapolations from some reliable evidence." *Id.*, citing *NDRC v. EPA*, 902 F.2d 962, 968 (D.C. Cir. 1990).

Finally, the ATA argued FMCSA "acted arbitrarily and irrationally" when it failed to explain its decision to apply the 30-minute break rule to short-haul truckers. *Id.* at 19. The court agreed with the ATA, observing that "the 2011 Final Rule contains not one word justifying the agency's decision to apply the new requirement to the unique context of short-haul operations." *Id.* FMCSA argued in its brief why the rule should apply to short-haul drivers as well. However, the court vacated the rule as it applies to short-haul drivers because FMCSA's "post-hoc rationalization [fell] far short of what is required under *State Farm*." *Id.*, citing 463 U.S. at 29.

FMCSA's Cost/Benefit Model Upheld

Near the end of its opinion, the court briefly addressed Public Citizen's and the ATA's "predictabl[e]" challenges" to FMCSA's cost/benefit model. *Id.* at 20. The court noted that FMCSA "toggled" several variables – including "baseline sleep assumptions (low, medium, or high), baseline percentage of crashes caused by fatigue (7%, 13%, and 18%), and discount rates (3% or 7%) – to calculate the net benefits for . . . 18 different scenarios." *Id.* FMCSA used the cost/benefit analysis "for the constellation of regulations under consideration." *Id.*

The court explained that prior precedent required it to "review an agency's cost/benefit analysis deferentially." *Id.*, citing *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 563 (D.C. Cir. 2002). "The burden to show error is high," and the court can vacate a cost/benefit analysis can only when the reasoning applied is arbitrary and capricious or otherwise "seriously flawed." *Id.* Thus, the court upheld the agency's cost-benefit model.

Conclusion

In having all but one issue affirmed, the court quipped that FMCSA "won the day not on the strengths of its rulemaking prowess but through an artless war of attrition." Is this the final chapter in a 14-year saga? Unless further appeals are brought and accepted by the Supreme Court of the United States, it would appear that the seemingly endless legal challenges to FMCSA's revisions to its Hours of Service regulations are finally at an end.

Endnotes

1 The court discussed in detail the standing of the parties. The court reasoned both Public Citizen and the ATA had prudential standing and were in the "zone of interest protected by the statute"). However, the court questioned whether Public Citizen satisfied the Article III standing requirements –"a concrete and particularized injury... capable of judicial redress." Id. at 6, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The court was satisfied with Public Citizen's standing to challenge the decision to use an 11-hour driving time over their preferred 10-hour time. But the court held Public Citizen failed to demonstrate standing regarding the "broad challenge" to the 34-hour restart. Id. at 9.