[ARGUED DECEMBER 4, 2006. DECIDED JULY 24, 2007.]

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

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

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

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION and THE UNITED STATES,

Respondents,

AMERICAN TRUCKING ASSOCIATIONS, INC., NASSTRAC, INC., HEALTH & PERSONAL CARE LOGISTICS CONFERENCE, INC., UNITED PARCEL SERVICE, INC., and THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,

Intervenors.

REPLY IN SUPPORT OF MOTION OF INTERVENOR AMERICAN TRUCKING ASSOCIATIONS, INC. FOR A STAY OF THE MANDATE

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September 28, 2007

Intervenor American Trucking Associations, Inc. ("ATA") hereby submits this reply in support of its motion for a stay of the mandate.

Petitioners' opposition ("Pet. Opp.") to ATA's motion fails to address a number of important issues and arguments, including

- the full scope of the steps needed for a transition to new hours-of-service ("HOS") rules (*see* ATA Mot. 2, 12-13, 14, 16-17);
- Dr. Marais' analysis demonstrating that statistical methods need to be applied to the TIFA data, and a sophisticated statistical analysis supports the overall conclusions that FMCSA reached concerning that data (*see id.* at 7-8; Marais Decl.);
- Dr. Rosekind's conclusions that cumulative fatigue is not a relevant factor in assessing HOS rules (*see* ATA Mot. 9-10);
- the evidence that, in practice, weekly driving has not significantly increased as a result of the 34-hour restart (*see id.* at 15); and
- the positive effects that the HOS rule has had on drivers – increasing their income, allowing them scheduling flexibility, and giving them enhanced opportunities to obtain their rest at home (*see id.* at 14, 15-16).

As we now show, the arguments that petitioners *have* made are unavailing.

I. <u>THE STAY SOUGHT BY ATA IS APPROPRIATE</u>

Petitioners concede that a transition period may be needed to address a change in HOS rules, but quibble with whether that transition should be managed by this Court through a stay of the mandate or, rather, by FMCSA. Pet. Opp. 2; *see also id.* at 18-19 (asserting that ATA's argument "is directed to the wrong forum" and that FMCSA could accord the relief sought here). FMCSA, however, has stated its view that the better course is to proceed through a stay of mandate. *See*

Response of FMCSA in Support of Motion to Stay the Mandate ("FMCSA Resp.") 2-3. If, however, the Court concludes that interim agency action is preferable to a stay of the mandate, ATA joins FMCSA in requesting that the Court delay issuance of the mandate for 21 days to permit FMCSA to fashion an appropriate interim rule. *See id.* at 9.

Petitioners also argue that ATA's requested relief is inappropriate because unsupported agency action typically requires vacatur. Pet. Opp. 2-3. This is a non-sequitur. The issue here is the *timing* of a vacatur – that is, whether the mandate should be held to permit a reasonable transition in order to prevent severe disruption in the trucking industry. Contrary to their clams (*id.* at 1, 2), a grant of our motion would not alter the remedy imposed by the court, just its timing.[1]

II. THE LIKELIHOOD OF SUCCESS ON THE MERITS

1. Petitioners both misconstrue our argument on the likelihood of success on the merits and overstate the burden on a movant for a stay of the mandate in these circumstances. *See* Pet. Opp. 4, 5. It is not ATA's burden to establish that the rule emerging from a remand will survive judicial review. ATA does not control the writing of a rule or the agency's justification of it. Rather, ATA's burden is to explain why there is a reasonable likelihood that the 11-hour daily driving and 34-

[1] As we noted in our motion (at 4 n.3), the Court could choose not to vacate the rule, but rather to grant rehearing on its own motion to amend the decision to provide for a remand without vacatur.

hour restart provisions will be re-promulgated in the remand proceedings. In its motion, ATA carried this burden by demonstrating that, contrary to petitioners' argument (*id.* at 4-6), the Court did not foreclose the re-promulgation of these provisions, but rather focused on procedural defects relating to notice and FMCSA's justifications for the rule, and that there do not appear to be serious – if any – safety problems caused by the rule. Moreover, a sophisticated statistical analysis suggests that the relative risks of driving in the 11th hour are actually lower than the agency concluded on the basis of its own statistical analysis, and the rule has significant productivity benefits.[2]

2. Citing *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001), and *Natural Resources Defense Council v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007) ("*NRDC*"), petitioners argue that "the fact that the Court did not address petitioners' other [that is, substantive] arguments for invalidating the two provisions is reason to *deny* the motion for a stay." Pet. Opp. 5-6. The question addressed by the Court in those cases, however, was whether to remand without vacatur. *See Cement Kiln*, 255 F.3d at 872; *NRDC*, 489 F.3d at 1261-1262. In both cases, the Court invited motions to stay the mandate. *See Cement Kiln*, 255 F.3d at

[2] In discussing productivity benefits resulting from the HOS rule, petitioners seem to believe that these benefits result solely from increased driving hours. This ignores the benefits accruing from increased flexibility and enhanced efficiency in equipment usage. *See* ATA Mot. 10, 13-14.

872; *NRDC*, 489 F.3d at 1262. In *Cement Kiln*, such a motion subsequently was filed, and a stay was granted and later extended. *See* Docket, Case Nos. 99-1457 and consolidated cases, entries dated 10/19/01, 11/01/01, and 3/4/02. Thus, these cases do not support petitioners' argument.

3. Citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-420 (1971), petitioners argue that the Court should not consider the extra-record evidence submitted by ATA. Pet. Opp. 6. *Overton Park*, however, addresses review under the APA, not whether a court may consider extra-record material in deciding whether to stay a mandate under F.R.A.P. 41(b).

4. Disputing ATA's statistics, petitioners point to increases in fatal truck crashes and fatalities from 2003 to 2005. Pet. Opp. 6-7. In 2006, however, there were steep declines in large truck fatalities (down 4.7% from 2005) and injuries (down over 7%). FMCSA Motor Carrier Safety Progress Report (attached herein to Sloane Decl.). Moreover, the increases in the 2004 and 2005 *rates* of fatal crashes, vehicles involved in fatal crashes, and fatalities were extremely small, while the rates of injury crashes, vehicles involved in injury crashes, and persons injured *declined* significantly. FMCSA Large Truck Crash Facts 4, 10 (attached to Sloane Decl.). Finally, as FMCSA states, the data shows that fatigue is a causal factor in only a tiny percentage of accidents and has gone down in two of the three years under the new rules in comparison to 2003. FMCSA Resp. 5.

5. Perhaps recognizing their vulnerability in this respect, petitioners assert that there is no basis for attributing recent positive safety experience to the HOS rule, because "generic statistics are useless" for this purpose. Pet. Opp. 7. This assertion, however, supports the conclusion that accident data, like the TIFA data that petitioners trumpet, is subject to confounding factors that render it less reliable than observational studies like the Virginia Tech studies (*see, e.g.,* JA1575), which have shown no statistically significant difference in driving performance in the 10th and 11th hours. In addition, ATA's affiants did not make sweeping claims for their accident data. To the contrary, they noted the difficulty of determining why safety experience has improved, and they generally stated merely that the safety experience under the rules appears to be positive, or at least not negative. *See*, *e.g.*, Bennett Decl. ¶¶ 14-15; Hedgpeth Aff. ¶¶ 9, 13; Stoddard Decl. ¶ 6; Uriah Decl. ¶ 17;Woodruff Aff. ¶ 9. Thus, whatever the data's limitations, the safety experience under the rules certainly gives no basis for foreclosing the re-adoption of the 11-hour daily driving and 34-hour restart provisions.

6. Petitioners also argue (Pet. Opp. 7-9) that there is no basis for concluding that driving in the 11th hour does not pose increased risks. We did not argue that driving in the 11th hour poses no additional risks. Indeed, Dr. Marais' analysis, which petitioners ignore, shows a modest increase in risk in the 11th hour of driving. The issue here, however, is the *extent* of the increase in risk, and whether

FMCSA is likely to conclude that the costs of that increase are outweighed by the benefits of the provisions. As Dr. Marais shows, the increase in risk is not nearly as substantial as petitioners' flawed analysis suggests and is less than the increase found by FMCSA using less sophisticated analytical methods.

7. Petitioners point out that this Court twice has faulted FMCSA for failing to consider cumulative fatigue in the operator-fatigue model. Pet. Opp. 9-10. This Court, however, did not conclude that cumulative fatigue *is* an independent risk factor, but rather pointed to FMCSA's failure to explain the omission of that factor from its operator-fatigue model (slip op. 28). The Court did not preclude FMCSA from concluding on remand that cumulative fatigue is irrelevant.

8. Petitioners seek to sidestep the productivity benefits of the provisions by asserting that "Congress did not direct FMCSA to increase industry *profits*." Pet. Opp. 10. This is a red herring. Congress directed FMCSA to consider "costs and benefits" in prescribing regulations for commercial vehicle safety (49 U.S.C. § 31136(c)(2)(A)), and productivity improvements certainly may be considered as a benefit of the provisions at issue here. The considerable productivity benefits of the provisions – which include not just increases in driving hours, but also efficiencies in equipment usage and routing structures, as well as enhanced flexibility – provide ample grounds for concluding that it is reasonably likely that, on remand, the benefits of the provisions will be found to outweigh their potential costs.

III. IRREPARABLE HARM

1. Petitioners argue that the harms cited by ATA are not irreparable, but are recoverable, because "[p]resumably those carriers could pass along some or all of any increased costs to their customers." Pet. Opp. 12. This is mere ipse dixit. Petitioners have provided no grounds for their presumption, which ignores, among other things, the fact that many customers may be able to alter their supply chain and routing choices to avoid paying increased transportation costs. Petitioners' uninformed speculation about the economics of the trucking industry is entitled to no weight. *Cf. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 47 (1990) ("We repeatedly have recognized that determining whether a particular business cost has in fact been passed on to customers or suppliers entails a highly sophisticated theoretical and factual inquiry . . . .").

2. Petitioners also blithely dismiss the costs "that would accompany the transition to an HOS rule without the" 11-hour driving and 34-hour restart provisions as "simply a cost of doing business in a highly regulated industry. . . ." Pet. Opp. 13. The issue here, however, is not whether the trucking industry should have to incur the costs of a transition. Rather, it is whether the industry should be required to incur the costs of an *instantaneous* transition and, possibly, to incur transition costs *twice* in a short period – once when the HOS rule is vacated and again if FMCSA issues a new final rule.

3. Moreover, the economic costs of a sudden transition to new rules are not the only harms that the industry would face. The severe confusion and dislocation that would result from uncertainties about the new rule, and the impossibility of effecting an instantaneous re-writing of software, rerouting of traffic, hiring of new drivers, purchasing of new equipment, and reprogramming of EOBRs also are irreparable harms. Although petitioners deride ATA's arguments about such transitional requirements, they have presented no basis for doubting ATA's detailed evidence on these transitional requirements.

4. Petitioners' discussion of the productivity losses associated with an immediate termination of the current rule (Pet. Opp. 13-15) also is misleading. ATA focused on productivity losses primarily to show that, in light of the clear productivity benefits of the existing rule and the minimal (if any) safety problems associated with it, FMCSA is reasonably likely to re-promulgate the provisions at issue on remand. This is an argument that goes to the likelihood of success on the merits. ATA's principal arguments on *irreparable harm* are not about productivity losses, but rather the short-term transitional costs and severe dislocation resulting from an instantaneous rule change.

5. Petitioners seem to believe (Pet. Opp. 16-17) that it will not be difficult for the industry to return to the pre-2003 rule, and that it would not cost as much to do so as it did to transition from the pre-2003 rule to the current HOS rule. This

ignores both that many drivers have never operated under the pre-2003 rules and the detailed showing made by ATA's declarants about what a transition entails.[3]

6. Petitioners also argue that the transition costs are relatively modest. Pet. Opp. 16-17. This argument is based largely on petitioners' exaggerated emphasis on retraining costs, and corresponding neglect of other transitional issues. As ATA showed, however, retraining is only one of the aspects of a transition. ATA's affiants detailed many other transitional requirements, including significant operational changes. These changes cannot be effected instantly and would be quite costly. *See* ATA Mot. 14, 16, 17.

7. Petitioners also argue (Pet. Opp. 17-18) that the transition costs are dwarfed by the costs of accidents. They have not shown, however, that the retention of the current rule for a limited period will result in such accidents. Moreover, if highly costly accidents were as likely a result of the 11-hour daily driving and 34-hour restart options as petitioners seem to assume, few trucking companies would avail themselves of these options.

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[3] Petitioners' argument also simply assumes that this Court's July 24, 2007 decision automatically revives the pre-2003 rule. As FMCSA has shown, that is not at all clear. FMCSA Resp. 8-9.

Petitioners' quotation of FMCSA's Administrator Hill's statement that a change to a rule with a 10-hour daily driving limit and no 34-hour restart would not be a "huge adjustment" (Pet. Opp. 2) is misleading. The article petitioners cite does not say that Administrator Hill was discussing an instantaneous transition to new HOS rules. Moreover, FMCSA's response to ATA's motion acknowledges the costs and difficulties of a sudden transition to new rules. *See* FMCSA Resp. 2-4.

8. Petitioners also argue that the industry already has had two months for the transition. Pet. Opp. 18. This argument, however, ignores the fact that it still is not clear what the industry is expected to transition to. *See* note 3, *supra.*

IV. <u>HARM TO OTHERS AND THE PUBLIC INTEREST</u>

Citing this Court's prior decisions, petitioners argue (Pet. Opp. 19) that any harm to the industry is outweighed by the harm to the public from retaining the rule. This Court, however, has never found that the rule affirmatively puts the safety of the public at risk.[4]

V. <u>THE LENGTH OF A STAY</u>

Finally, citing D.C. Cir. R. 41(a)(2), petitioners argue that no stay should exceed 90 days. Pet. Opp. 20. This argument ignores the cases that ATA cited in which this Court has granted much longer stays (ATA Mot. 3-4), and it ignores the impracticality of transitioning to a new HOS regime in such a short period.

CONCLUSION

For the foregoing reasons, ATA's motion should be granted.

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[4] Petitioners also argue that the extent of 11th hour driving cuts against a stay. Pet. Opp. 19-20. But this assumes sharply increased risks in the 11th hour. There is no basis for this assumption. Raw data about accidents in the 11th hour are of limited value – not only because such data may not be adjusted for exposure but also because it is subject to important confounding variables, such as time of day, congestion, and road conditions. Nevertheless, none of the data of which we are aware provides any reason to conclude that the 11th hour of driving poses significant safety concerns, and sophisticated analyses – including Dr. Marais' analysis of the TIFA data – suggests that it does not. Hence, petitioners' argument about the implications of the actual use of the 11th hour of driving is meritless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 28th day September, 2007, I served copies of the foregoing Reply in Support of Motion for a Stay of the Mandate by e-mail and overnight delivery on Petitioners, Respondents, and *amici* herein at the following addresses:

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