

BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

REPLY COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

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BEFORE THE
DEPARTMENT OF TRANSPORTATION
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INTRODUCTION

In the initial comments submitted by the Owner-Operator Independent Drivers Association, Inc. (“OOIDA” or “Association”) in response to the Federal Motor Carrier Safety Administration’s (“FMCSA” or “Agency”) notice of proposed rulemaking at 75 Fed. Reg. 80014 (Dec. 21, 2010) (“Notice”), OOIDA presented a strong case against the FMCSA’s proposed restrictions on the use of hand-held mobile phones by commercial motor vehicle (“CMV”) drivers. Although many of the other commenters supported FMCSA’s proposal, none considered whether comparable safety improvements could be achieved through a less burdensome educational outreach program combined with more active enforcement of laws already on the books that prohibit inattentive or negligent driving practices, an alternative promoted by OOIDA. Moreover, most commenters seem to embrace a ban on hand-held cell phone use in spite of FMCSA’s total lack of any plan for enforcing the ban. As noted by OOIDA in its initial comments, this raises troubling practical and constitutional Fourth Amendment concerns.¹ Finally, none of the other commenters provide compelling reasons, if restrictions on the use of hand-held cell phones are nevertheless imposed, why motor carriers as well as drivers should not be held liable for rule violations. Making drivers the only regulatory target would allow carriers, the party in the best position to educate drivers about the proper use of any and

¹ Lack of any enforcement-related guidance also raises concerns about the FMCSA’s potential consideration of convictions for violation of state cell phone bans that happened before the proposed regulations take effect in determining whether a driver may be disqualified under the federal regulations. Such action might well violate the Constitutional prohibition (at Article I, sec. 9) on the passage of *ex post facto* laws, which has been applied to most administrative regulations.

all electronic equipment in their trucks, to turn a blind eye to cell phone use without any fear of repercussions.

A number of other commenters also suggest that the FMCSA proposal be expanded to include all cell phones, both hands-free and hand-held, as well as Citizens Band or two-way radios (“CB”). As discussed below, the evidence strongly favors unrestricted use of both hands-free equipment and CBs. CBs have been safely used by CMV drivers for decades, in many cases to enhance highway safety. So far as OOIDA is aware, there have not been any studies conducted specifically to CB usage that would suggest otherwise. Further, there is nothing to show that hands-free cell phones, when used by CMV drivers, create a level of distraction that warrants any regulation. Indeed, in both the hands-free and CB situations the minimal level of distraction created is far outweighed by the benefits gained from allowing essential communications between drivers and other parties.

DISCUSSION

I. The evidence does not support restrictions on the use of hands-free equipment.

In its Notice , the FMCSA proposed restrictions only on the use of hand-held cell phones, and made it clear that “It is not the FMCSA’s intention to limit current or future innovative technologies that could allow safe and effective, completely hands-free voice communication.” 75 Fed. Reg. at 80025. Indeed, FMCSA correctly recognized that hands-free cell phones, which do not require the driver to reach for, dial, and hold them, do not create a sufficient safety hazard to require regulation. *Id.* Consequently, OOIDA did not address the possibility of broader restrictions except in passing. Several other organizations, however, have seen it differently and have asked that the proposed FMCSA ban be extended to all cell phones. That misguided suggestion requires some

response.

First, while many commenters in general terms support a broader ban, the only party that made a serious attempt to present concrete evidence to justify such action was Advocates for Highway and Auto Safety (“Advocates”). However, the studies relied upon by Advocates simply do not support the extension, particularly when their results are compared with the results of the naturalistic study of cell phone use by truck drivers conducted for DOT by the Virginia Tech Transportation Institute (“VTTI”). That study showed that hands-free cell phones do not create a legitimate safety issue.

Advocates discusses three studies – Harbluk, Just, and Drews² –which it claims demonstrate that the cognitive distraction from hands-free cell phones is sufficient to necessitate a ban on **all** cell phones. However, significant flaws in each of those studies raise serious doubts about their reliability. First, two of the three studies (Harbluk and Just) simulated driving in a lab. FMCSA itself has recognized that such simulator studies “may have unrealistic driving and cell phone use conditions because they are not conducted on public roadways and therefore lack many of the risks associated with real world driving.” 75 Fed. Reg. at 80020. Drivers on the road face potential adverse monetary and physical consequences far greater than anything that could be generated in a lab setting, and the different magnitude of risk provides a strong incentive for constant alertness that is totally lacking while using a simulator in a lab. Accordingly VTTI, which has conducted naturalistic driving studies for FMCSA, has emphasized the need to be wary of drawing conclusions

² Harbluk, J.L., et al., *The Impact of Cognitive Distraction on Driver Visual Behavior and Vehicle Control*, Report No. TP 134889E, Transport Canada (2002)(“Harbluk”); Just, M.A., et al., *A Decrease in Brain Activation Associated With Driving When Listening to Someone Speak*, Brain Research (2008)(“Just”); Drews, F.A., et al., *Passenger and Cell Phone Conversations in Simulated Driving*, Journal of Experimental Psychology: Applied 14(4)(2008) (“Drews”).

about actual driving from simulator research, particularly where, as here, the results from naturalistic driving studies are at odds with simulator study results. VTTI Press Release (July 27, 2009), www.vtti.vt.edu/PDF/7-22-09-VTTI-Press_Release_Cell_phones_and_Driver_Distraction.pdf. The ability to generalize from the simulated setting to the real world is especially suspect where, as in the Just study, subjects were essentially playing a video game that used a mouse or a handball to steer and were required at the same time to press a button with the other hand to signal true or false responses to distracting questions.

Second, none of the three cited studies, including the one naturalistic study (Drews), used any truck drivers as subjects. Moreover, subjects tended to be on the younger side. In the Drews study, the average age was 20. We don't know the average age in the others, but we do know that the subjects in the Just study ranged from 18 to 25, and the subjects in the Harbluk study were 21 through 34. Clearly, these subjects represent a different population than the one FMCSA is now proposing to regulate – professional truck drivers with years of extensive driving experience.

Third, the involved tasks were not always comparable to telephone conversations. For example, the Harbluk study required subjects to do addition problems while driving. The Just study, as discussed above, required subjects to answer true/false questions by pressing appropriate buttons. Thus, those subjects were really engaged in three simultaneous tasks – simulated driving, responding to questions, and pressing buttons. In both of those studies, it is difficult to equate the distracting tasks with participating in a typical hands-free telephone conversation with two hands on a steering wheel.

In contrast to the studies discussed above, the naturalistic study focusing on driver distraction in CMV operations conducted for FMCSA by VTTI observed actual truck drivers engaged in real

cell phone conversations. As pointed out by OOIDA in its initial comments, in that real-world setting, VTTI found that talking or listening on a hand-held cell phone in real-world driving conditions does not create **any** increased risk of such safety-critical events for CMV drivers. Olson et al, *Driver Distraction in Commercial Vehicle Operations*, Doc. No. FMCSA-RRR-09-042 (“2009 VTTI Distraction Study”); see Fed. Reg. at 80020-80021 & Table 1. In a hands-free setting, the slightly higher risks associated with reaching for and dialing a cell phone, which led FMCSA to propose regulation of hand-held cell phones, is totally absent. *Id.* Thus, the VTTI study strongly indicates that any regulation of hands-free cell phones is unwarranted.

Advocates’ critique of the 2009 VTTI Distraction Study is simply not persuasive. The primary criticisms leveled are two-fold: (1) that the combination of two different populations of CMV drivers (drivers from companies with and without cell phone policies) could skew the results, and (2) that all drivers were from fleets that are “safety forward”. While these observations may be accurate, there is no logical reason why either the existence of a cell phone policy or the “safety forward” focus of a company should lessen the level of distraction caused by any particular cell phone conversations. Either factor will affect the manner in which a particular carrier deals with cell phone use and might reduce unnecessary calls. However, when a driver does engage in a cell phone conversation, we fail to see why distractability would be any less just because the absent carrier is “safety forward” or has a general policy against cellphone use while driving. Additionally, while Advocates also suggests that the subjects here may not represent the entire real-world CMV fleet, these groupings of professional truck drivers are certainly far more representative than the subjects used in the distraction studies discussed above which Advocates chooses to rely upon.

In sum, when the various studies are fairly appraised, they do not provide concrete support

for a ban on the use of hands-free cell phones. The limited time spent by a driver interacting with such equipment, with eyes and hands off the wheel, plus the minimal level of distraction from conversing, strongly indicate that FMCSA and law enforcement officers could better spend their time policing tasks that create real safety-related hazards.

Further, as pointed out in OOIDA's initial comments, those who oppose even hands-free cell phone use fail to consider the need for occasional communications with the outside world if drivers are to stay alert, avoid highway hypnosis, and complete their deliveries in a safe and efficient manner. The reality is that long-haul drivers who are on-duty for up to 14 hours a day, day after day, often need to communicate with dispatchers to get changed instructions once they are on the road.³ Drivers also need to communicate with shippers and receivers, as well as dispatchers, to obtain directions after getting lost or encountering congestion or when special pickup or delivery instructions are needed. In short, phones often play a role in completing a job effectively. Further, long-haul drivers can spend weeks on the road – away from their families. Having the ability to keep in touch with family members helps to greatly reduce stress and depression that can result from long-term separation and that can diminish job performance. Distractability studies and commenters citing them consider only the potential negative impact of cell phone use on CMV drivers. They are biased insofar as they have not attempted to ascertain these and other positive benefits to highway safety that can flow from the use of these technologies by truck drivers.⁴

³This circumstance is recognized in the Washington State legislation (Senate Bill 6345) signed by the Governor that made holding a wireless communications device to one's ear a traffic infraction.

⁴ While only anecdotal, it is interesting to note that CMV fatality data shows a reduction from 3.09 fatalities per hundred million miles in 1990 to 1.69 in 2007. Although many factors have affected this dramatic decline, the period also coincides with the advent of reasonably

Finally, OOIDA would note that enforcement of restrictions on the use of hands-free equipment without constitutional ramifications is virtually impossible. With current technology, activating a cell phone in hands-free mode is arguably less distracting than tuning in a radio station. In many instances, law enforcement personnel cannot tell from personal observation whether a driver is violating a ban on hands-free phone use. This means that the only way to determine whether a hands-free cell phone has been improperly used while driving is by an after the fact inspection comparing a driver's telephone activity records and logbook records. As discussed in OOIDA's initial comments (at page 10), to avoid constitutional Fourth Amendment problems, such warrantless inspections are permissible only when necessary to further a legitimate regulatory scheme and where there is a published enforcement plan providing certainty and regularity of application and limiting the discretion of officers in the field. Where as here, the FMCSA has no enforcement plan, "reasonable articulable suspicion" of a regulatory violation is required to justify any search (OOIDA initial comments, pp.10-11). Without actual observation of apparently wrongful conduct, the requisite level of suspicion simply does not exist.

II. CB and two-way radios offer benefits that outweigh any perceived safety risk.

The FMCSA has in its Notice excluded CB radios from the proposed restrictions because this equipment does not fall within the definition of commercial mobile radio services as defined by the FCC. 75 Fed. Reg. at 80025. While this may not be a sufficient basis for avoiding regulation as Advocates suggests, there are a number of other persuasive reasons for continuing to allow the unfettered use of CBs.

priced and accessible instant communications by cell phones for drivers to use in maintaining contact with their families.

First, certain groups of truckers have an operational need to be in constant contact with other parties. For example, drivers hauling over-dimensional/over-width or high security/high value shipments that require escort services need to be in constant communications with their escorts who will advise the trucker of certain safety issues – such as lower than expected clearances (i.e., bridge height or electric lines crossing a highway). These ongoing communications are absolutely necessary to avoid incidents that could potentially result in significant property damage or injury to others.

Second, truck drivers frequently use CBs to advise other unsuspecting drivers behind them or heading in the opposite direction of accidents or serious traffic congestion due to other causes. This gives them time to divert to other highways or at least to safely navigate through the problem area. Drivers familiar with a particular area will also provide others with alternative routes. Such assistance prevents trucks from contributing to already deteriorated traffic conditions. It has also proven helpful in keeping existing accidents from spiraling into worse chain reaction accidents. Assistance from other drivers is particularly beneficial when an accident has occurred at night or in adverse weather conditions that prevent other drivers from independently discovering the situation until it is too late. In some cases, truck drivers using CB communications have even formed a cordon with their trucks to slow traffic down, with their warning flashers activated, to prevent further problems. These types of situations, with their associated benefit to highway safety, happen virtually every day on America's highways thanks to CB radios.

Third, law enforcement personnel regularly interact in positive ways with truck drivers through CB communications. They monitor CB channels to learn of accidents and other road hazards that need to be addressed, which allows them to get to the problem area sooner. They solicit assistance from truck drivers in locating particular vehicles or drivers. Indeed, it was a truck driver

who spotted the Washington D.C. snipers in a rest stop. Finally, they use CBs to advise the truck drivers of hazards ahead.

Fourth, even when used for non-driving related conversations, CBs help to maintain alertness and keep fatigue at bay during long monotonous hours on the road. Having a short conversation with another driver – as truckers have safely done for decades using CBs – has not to OOIDA’s knowledge been shown to increase crash risk. Indeed, having a conversation via a CB is a great way to counter boredom and fatigue. Moreover, in the 2009 VTTI Distractability Study, the only study we know of addressing distractability from CB use, researchers found that talking or listening on a CB had an odds ratio of causing a crash of only .6, less than that of the average driver not using any communications equipment. 75 Fed. Reg. at 80021, Table 1. This led VTTI to conclude that “drivers are able to use them while driving without increased risk of being involved in a safety-critical event.”⁵ VTTI 2009 Distractability Study, p.49. Indeed, the low odds ratio even suggests that CB usage might provide a safety benefit by causing drivers to stay alert and undermines the negative premise that is the starting point of most driver distraction studies – i.e., that the use of any communications equipment (including CBs) is inherently inimical somehow to highway safety. *Id.*

With the advent of cell phones, CB’s have lost much of their appeal. However, because CBs are unique in their ability to be shared by many users and to reach others without dialing a specific phone number, as discussed above they are useful for many safety-related purposes that cannot be achieved with any other type of communications equipment. Thus, far more will be lost than gained

⁵ While Advocates distinguishes the talk and listen task from reaching for the CB, VTTI has noted that drivers “typically kept these devices within close reach” alleviating much of the concern associated with reaching for such equipment. VTTI 2009 Distractability Study, p.49. Unlike cell phones, most CBs are on a cord, so have only limited range of movement and are easily found.

in terms of safety if their use were to be banned.

III. If cell phone restrictions are imposed, carriers as well as drivers should be liable for their violation.

FMCSA has proposed civil penalties up to \$2,500 for drivers and \$11,000 for employers for violations of cell phone restrictions. The fine for employers reflects the fact that motor carriers may not “allow or require” their drivers to use hand-held mobile phones while operating their trucks. Not surprisingly, carriers and the organizations representing them have asked in their initial comments to be relieved of potential liability for the actions of drivers. This is based primarily upon the contention that carriers do not have control over the driver’s actions while on the road.

As indicated in OOIDA’s initial comments, OOIDA believes that the proposed penalties are much too harsh for the alleged wrong. OOIDA also believes that a total ban is largely unenforceable for both practical and constitution reasons. However, if any restrictions on cell phone use are nevertheless imposed, it is imperative that motor carriers as well as drivers are equally held responsible for regulatory violations.

It is well-established standard agency practice to make carriers responsible for the conduct of their drivers while on the road. As codified at 49 C.F.R. § 390.11, whenever a driver is required to take particular action or refrain from action by the Federal Motor Carrier Safety Regulations, “it shall be the duty of the motor carrier to require observance of such duty or prohibition.” As FMCSA is well aware, anything less will dilute the effectiveness of the regulatory scheme.

Carrier liability is not only the legal norm but makes sense. While carriers may not have direct supervisory control over driver actions that take place out of their presence, they are in a far better position than any government agency or law enforcement personnel to influence driver

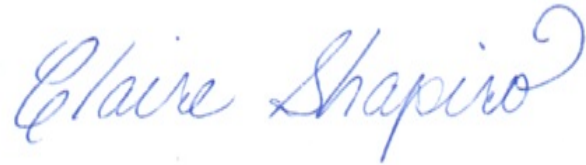
behavior through awareness training programs and safety policies, including but not limited to progressive discipline for non-compliance or monetary rewards for full regulatory compliance. As FMCSA explained, in response to similar arguments presented by carriers attempting to escape their regulatory duties in the recent texting ban rulemaking, “Carriers may institute internal policies and programs, including educational programs, to meet this duty.” 75 Fed. Reg. 59125, 59126 (Sept. 27, 2010). There is nothing particularly unique about the cell phone situation that would justify it being singled out for disparate treatment.

CONCLUSION

Although OOIDA supported the FMCSA’s proposed ban on texting, OOIDA opposes restrictions on the use by CMV drivers of less distracting communications equipment, including any kind of cell phones and CB radios, for the reasons set forth in OOIDA’s initial comments in this proceeding as supplemented by this reply. Available data shows that CMV drivers are able to carry on conversations using such equipment without any increased level of crash risk. Given this established fact, it should not be surprising that state cell phone bans seem not to have improved highway safety. To the contrary, insurers have not seen any reduction in collision claims in states with a hand-held cell phone ban. *See* www.iihs.org/research/topics/pdf/HLDI_Cellphone_Bulletin_Dec09.pdf. Accordingly, safety interests would be better served if regulators followed a different path consisting of a directed educational awareness and training campaign by federal, state and local governments as well as motor carriers, combined with more aggressive enforcement of laws already on the books that address inattentive and negligent driving practices. Such an alternative approach

would do more than new regulatory prohibitions that eliminate the use of cell phones or CB radios.

Respectfully submitted,



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