

No. 07-1355

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

OWNER-OPERATOR INDEPENDENT)
DRIVERS ASSOCIATION, INC.)
(a.k.a "OOIDA"),)
)
Petitioner,)
)
vs.)
)
)
MARY E. PETERS, Secretary of the U.S)
Department of Transportation; JOHN H. HILL,)
Administrator of the Federal Motor Carrier Safety)
Administration; and THE UNITED STATES,)
)
Respondents.)
)
)
)

**PETITIONER'S EMERGENCY MOTION FOR STAY PENDING
APPEAL AND REQUEST FOR EXPEDITIOUS CONSIDERATION
PURSUANT TO FRAP 25 AND CIRCUIT RULES 18 AND 27(g)**

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I. Statement of the Case

A. Jurisdictional Statement

On September 6, 2007, FMCSA took final agency action under 49 U.S.C. § 31315(c) implementing a pilot program allowing certain Mexican-domiciled motor carriers to operate in the United States beyond the current 25 mile commercial zone adjacent to the U.S.-Mexico border. This Court has jurisdiction under the Hobbs Act, 28 U.S.C. § 2342.

B. Nature of the Proceeding

Currently, Mexico-domiciled trucks are permitted in the United States only in limited areas adjacent to the United States-Mexico border. Respondents have initiated a program to open the border for the first time to permit Mexico-domiciled trucks to operate throughout the United States. Petitioner contends that Respondents have failed to comply with Congress's explicit statutory prerequisites for such a program.

C. Statutory and Regulatory Setting

Section 6901(a) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Pub. L. 110-28), 49 U.S.C. § 30112 (the "2007 Act") provides that funds appropriated may be obligated or expended to grant expanded operating authority to Mexican-domiciled motor carriers "only to the extent that – (1) granting

such authority is first tested as part of a pilot program.” A pilot program is one that provides *temporary regulatory relief* to a participant by way of an *exemption* from one or more sections or parts of the regulations (49 C.F.R § 381.400(a) and (b)). 49 U.S.C. § 31315(c) provides that “as a condition of approval of [a pilot] project, that the safety measures in the project are designed to achieve a level of safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved through compliance with the regulations prescribed under this chapter or section 31136.”

The 2007 Act also provides that, prior to initiating a pilot program, the Secretary shall publish in the Federal Register and provide sufficient opportunity for public notice and comment:

(v) a list of Federal motor carrier safety laws and regulations, *including the commercial drivers license requirements*, for which the Secretary of Transportation will accept compliance with a corresponding Mexican law or regulation as the equivalent to compliance with the United States law or regulation, including for each law or regulation an analysis as to how the corresponding United States and Mexican laws and regulations differ.

Section 6901(b)(2)(B)(v). On June 8, 2007, the Secretary of Transportation announced that she will accept three areas of Mexican regulations as being equivalent to United States regulations: (1) Commercial Driver’s License; (2) Physical examinations of drivers; and (3) Controlled substances testing.

Recognition of compliance with Mexican regulations in lieu of compliance with FMCSA's regulations constitutes exemptions under 31315(b).

49 U.S.C. § 31315(b)(4)(A) provides that a request for an exemption must be published in the Federal Register giving the public an opportunity to inspect and analyze the safety analysis submitted by the applicant together with any other information known to the Secretary and to comment upon the request. The Secretary must find that the "exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption" (*Id.*).

D. Regulatory History

On May 1, 2007, FMCSA published a notice and request for public comment announcing the initiation of a "project to demonstrate the ability of Mexican-based motor carriers to operate safely in the United States beyond the commercial zones along the U.S.-Mexican border" (72 Fed. Reg. 23883). This notice made no mention of, nor did it propose, a pilot program. No regulations were identified for which an *exemption* would be necessary to obtain *temporary regulatory relief* as contemplated by 49 C.F.R. § 381.400(a) and (b). In fact, the May notice stated that "[t]he demonstration project gives participants no exemptions from U.S. safety requirements" (72 Fed. Reg. at 23884).

On May 25, 2007, the President signed into law the 2007 Act.

Thereafter, on June 8, 2007, in response to the requirements of Section 6901 of the 2007 Act, FMCSA published a notice in the Federal Register (72 Fed. Reg. 31877) soliciting supplemental comments from the public on its demonstration project. In its June notice, FMCSA set forth the view that its planned demonstration project satisfied the statutory requirements for a pilot program (72 Fed. Reg. at 31878 (Col. 3)) but also noted that “participating Mexico-domiciled motor carriers would not be provided with relief from any of the rules implementing section 350, or any of the safety regulations” (*Id.*).

On August 17, 2007, FMCSA published a notice entitled, “Action Notice; response to public comments.” There it “announc[ed] its *intent to proceed* with a project to demonstrate the ability of Mexico-domiciled motor carriers to operate safely in the United States, beyond the commercial zones along the U.S.-Mexican border” (42 Fed. Reg. 46263). FMCSA’s “intent to proceed” was specifically made contingent upon: (1) completion of a report on the proposed pilot program by its Inspector General, and (2) completion by the Agency of “any follow-up actions needed to address any issues that may be raised in the [Inspector General’s] report (72 Fed. Reg. at 46264-46265). Because of these contingencies, the agency was unable to say what final form its pilot program might take following the Inspector General’s

comments and when that pilot program might be implemented. Respondents implemented the pilot program by granting authority to a Mexican motor carrier on September 6, 2007. *See* “Declaration of Paul Cullen, Sr.”

E. Standard for an Injunction Pending Review

This Circuit employs a long-standing test for injunctive relief that includes: (1) a likelihood of success on the merits; (2) irreparable injury; (3) the impact on the interests of third parties; and (4) the public interest.

Washington Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1971). *CSX Transportation, Inc. v. Williams*, 406 F. 3d 667, 670 (D.C. Cir. 2005).

II. An Injunction Pending Review Should Issue

A. Petitioner has a Substantial Likelihood of Success on the Merits

1. The Court Has Subject Matter Jurisdiction

The Hobbs Act imposes responsibility for providing notice of final orders by service or publication. “Any party aggrieved by the final order” may file a petition for review within 60 after its entry (28 U.S.C. §§ 2342-2344). FMCSA’s practice with respect to pilot programs has been to publish a “Notice of Final Determination” following the public comment period. See, for example, “Hours of Service of Drivers; Pilot Program for Drivers Delivering Home Heating Oil [FMCSA Docket No. FMCSA-99-3585] 66

Fed. Reg. 36823 (July 13, 2001). Now, however, the agency is proceeding to implement its pilot program without any formal order or published determination. The issue thus presented is whether an administrative agency whose formal orders are subject to the review provisions of 28 U.S.C. § 2342 can deprive aggrieved parties of their right to judicial review by undertaking agency action without convening a formal proceeding or issuing a formal order.

In Natural Resources Defense Council v. Nuclear Regulatory Commission, 666 F.2d 595 (D.C. Cir. 1981), the petitioner was adversely affected by the amendments to a regulation promulgated by the Nuclear Regulatory Commission (“NRC”) without prior notice and the opportunity to comment. Petitioner did not challenge the offending amendments within the 60-day period prescribed by 28 U.S.C. § 2344. Instead, some 17 months after the original rule was adopted, the petitioner requested the NRC to initiate a rulemaking proceeding and rescind the offending amendments. The NRC denied the petitioner’s request and a petition for review was filed with this Court. In attempting to explain why it had not filed a petition for review when the rule was first amended, petitioner argued that since the NRC did not convene a rulemaking proceeding when the amendments were originally adopted, there was no proceeding to which it could become an

aggrieved party. It therefore lacked the status of a “party aggrieved” as required by U.S.C. § 2344. This Court rejected the petitioner’s position for “exalt[ing] literalism over common sense,” concluding that to accept petitioner’s position “would create a dangerous precedent, for it would grant agencies the power to remove their regulations from direct review by simply promulgating them without notice and comment.” 666 F.2d at 601-602, n. 42.

Here, FMCSA’s implementation of its pilot program with exemptions without a Notice of Final Determination constitutes *de facto* final agency action that cannot elude review by this Court simply because the agency declines to enter a formal order. Final agency action took place on September 9, 2007 when FMCSA granted operating authority to the first Mexican participant in the program.

2. Petitioner Has Standing

OOIDA is a not-for-profit corporation having more than 155,000 members -- professional drivers and small business truckers located in all 50 states and Canada who collectively own and operate more than 240,000 individual heavy-duty trucks and small truck fleets. OOIDA files this petition in a representative capacity on behalf of its members. OOIDA filed comments with FMCSA during every phase of this proceeding.

Petitioner has standing to pursue this appeal. Unless the respondents are enjoined, Petitioner, and its members, will suffer actual or imminent injury that is concrete and particularized and is fairly traceable to the actions of the Respondents. It is likely that a favorable decision in this proceeding will redress that injury. *International Brotherhood of Teamsters v. Peña*, 17 F.3d 1478, 1483-1484 (D.C. Cir. 1994).

3. The Secretary’s Decision to Accept Physical Examinations Conducted by Mexican Doctors Violates Statutory Requirements

FMCSA’s June notice states that “the Secretary of Transportation will also consider that physical examinations conducted by Mexican doctors and drug testing specimens collected by Mexican collection facilities are equivalent to examinations and test specimens conducted or collected in the United States” The Secretary’s action is specifically barred by statute.

Title 49 of the U.S. Code imposes detailed requirements on the Secretary with respect to overseeing the physical qualifications of drivers of commercial motor vehicles. 49 U.S.C. § 31136(a)(3) provides that the Secretary adopt regulations that “at a minimum ensure”:

(3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely and the periodic physical examination required of such operators are performed by medical examiners who have received training in physical and medical examination standards and, after the national registry maintained by the Department of

Transportation under section 31149(d) is established, are listed on such registry

The Secretary is required to establish a Medical Review Board, appoint a chief medical examiner, establish medical standards for operators of commercial motor vehicles, establish and maintain a national registry of medical examiners, require periodic physical examinations of drivers to be performed by medical examiners listed on a national registry and require drivers to maintain a current valid certificate (49 U.S.C. § 31149). The Secretary is also mandated to conduct periodic reviews of select medical examiners on the national registry to ensure that proper examinations are being conducted (49 U.S.C. § 31149(c)(1)(C)), as well as to monitor and investigate patterns of improper certification by medical examiners and remove those responsible for improper certification from the national registry. Most importantly, the Secretary shall accept as valid only medical certificates issued by persons on the national registry (49 U.S.C. §31149(d)(3)). Title 49 also makes it clear that the “Secretary of Transportation may not prescribe a safety regulation . . . that differs from a motor vehicle safety standard prescribed under this chapter” (49 U.S.C. §30103(a)). The decision to accept medical certificates issued in Mexico that do not satisfy these statutory standards is simply “not in accordance with law.”

4. The Secretary Violated Section 31315(b) by Accepting Compliance with Mexican Government Regulations In Lieu of FMCSA's Regulations Without Following the Mandatory Procedures for Exemptions

In its June 8, 2007 notice the Secretary announced that it will be accepting the Mexican CDL's (commercial drivers' licenses), Mexican driver medical qualification standards, and Mexican drug testing procedures in place of compliance with U.S. rules (72 Fed. Reg. at 31884 (Col. 2-3)). This announcement was confirmed in FMCSA's August announcement (72 Fed. Reg. at 46276). These announcements acknowledge that Mexican drivers are being exempted from compliance with specific FMCSA regulations.

Even if the agency believes that accepting compliance with those Mexican rules is equivalent to compliance with the U.S. rules, their acceptance as a substitute for compliance with the U.S. rules constitutes a grant of an exemption that may only be made in compliance with the law. The requirements for establishing exemptions to the rules are set out in 49 U.S.C. §31315(b) and 49 CFR §§ 381.300 through 381.315. These requirements include the publication of an explanation of how compliance with those Mexican requirements would ensure a level of safety that is equivalent to or greater than the level that would be obtained by complying with U.S. laws. *See* 49 CFR 381.310(5) and the "specific countermeasures

the person would undertake to ensure an equivalent or greater level of safety than would be achieved absent the requested exemption” (49 U.S.C. §31315(b)). Neither the May, June or August notices cite to these requirements, nor do they comply with them. Without such an explanation, the public has no fair opportunity to comment on DOT’s proposal and DOT has no proper record upon which to make a determination.

The June Notice asserts that the U.S. and Mexican version of these three regulatory areas are equivalent. But that conclusory assertion does not provide any analysis that adequately informs the public of how the agency made such a determination and denies the public the opportunity to provide meaningful comment on such an analysis as required by the law.

The substantive and procedural requirements for the establishment of a pilot program and exemptions are important to highway safety. They were established by Congress so that alternatives to compliance with U.S. safety rules could be tested, but only where the same level of public safety could be assured and maintained during the test.

5. The Demonstration Project Does Not Satisfy the Congressional Mandate to Proceed as a Pilot Program

The 2007 Act directs Respondents to test plans to confer operating authority on Mexican-domiciled motor carriers “as part of a pilot program” (Section 6901(a)). The requirements for a pilot program are provided for by

statute (49 U.S.C. § 31315(c)). FMCSA defines a pilot program as one in which *temporary* regulatory relief from one or more FMCSA regulation is sought and in which participants receive that regulatory relief by way of an *exemption* (49 C.F.R. § 381.400(a) and (b)). The statutory provision governing exemptions provides critical procedural rights to interested parties (49 U.S.C. § 31315(b)). A request for an exemption must be published in the Federal Register together with the applicant's safety analysis and commentary on that analysis by the Secretary. Of course, no applicant has filed a safety analysis with FMCSA in this matter. Members of the public have the right to file comments after reviewing the analysis of the Secretary and the applicant. Before granting the exemption, the Secretary must find that the "exemption" would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." *Id.* at (4)(A).

The Secretary's acceptance of compliance with certain Mexican regulations in lieu of compliance with FMCSA's regulations is clearly an exemption within the meaning of 49 U.S.C. § 31315 (b) and (c). Congress confirmed this conclusion in the 2007 Act when it directed the Secretary to proceed with a pilot program which, by necessary implication, involves the granting of exemptions to provide temporary regulatory relief. FMCSA is

steadfast in its position that its demonstration project does not include exemptions from U.S. regulations. Respondents' position allows them to sidestep the procedures required in the exemption process thereby denying interested parties important rights.

6. The Secretary Has Ignored the Statutory Requirement that She Compare Mexican and U.S. Regulatory Requirements and Present an Analysis as to How they Differ

The 2007 Act also provides that, prior to initiating a pilot program, the Secretary shall publish in the Federal Register and provide sufficient opportunity for public notice and comment its analysis of how specific Mexican and FMCSA regulations differ (Section 6901(b)(2)(B)(v)). The Secretary has announced that she will accept three areas of Mexican regulations as being equivalent to United States regulations including regulations dealing with commercial driver's licenses, physical examinations, and controlled substances testing in Mexico. But the Secretary did not follow the statutory prerequisites for conducting this pilot program because she did not publish a comparison of U.S. and Mexican regulations nor did she provide an analysis as to how such regulations differ.

(a) Commercial Driver's Licenses

FMCSA's position that U.S. and Mexican CDL requirements were found to be similar in 1991 certainly does not satisfy the provision of the

2007 Act requiring the Secretary to undertake a comparison today as part of his current safety analysis. There are very good reasons for Congress's decision to demand a current comparison. The revised U.S. CDL provisions relating to disqualification for violations committed while driving a non-commercial vehicle were adopted pursuant to the express direction of Congress in the Motor Carrier Safety and Improvement Act of 1999 (Pub. L. 106-159, 113 Stat. 1748, 49 U.S.C. § 31310). In enacting the specific disqualification standards, the FMCSA explained that

The Congress has chosen, in the interest of safety, not to distinguish between risk taking behavior in a passenger car or a CMV [commercial motor vehicle]. Section 201 (b) of the MCSIA specifically directed the Secretary of Transportation to issue regulations requiring the disqualification of CDL holders convicted of serious offense while operating a non-CMV.

67 Fed. Reg. 47742, 49744 (July 31, 2002).

The FMCSA readily acknowledges that the Mexican CDL qualifications are *not equivalent*. In response to a petition for reconsideration, the FMCSA stated that the final rule left “unresolved differences between the consequences for a U.S. driver convicted of a disqualifying offense in a non-CMV, and a foreign domiciled driver who commits similar offenses in his/her country of domicile” (68 FR 4394, 4395 (January 29, 2003)). The FMCSA then attempts to justify its deficiency, with remarkable circularity, stating that it could not resolve the issue

“through the rulemaking process because it involves offenses in *countries that have not adopted laws to disqualify commercial drivers for offenses committed in private vehicles.*” *Id.* (emphasis added).

Further, CDL disqualification in the U.S. is mandatory in specific circumstances. The license cancellation rules are *discretionary* in Mexico. The FMCSA has not demonstrate how Mexican license cancellation rules provide for at least the same level of safety as the U.S. *mandatory* CDL disqualification rules. The Secretary’s refusal to conduct the mandated comparison and analysis of Mexican and U.S. CDL requirements masks other important differences and makes it quite obvious that she is not proceeding in accordance with law as she implements the pilot program.

(b) Physical Examinations

FMCSA cites to *Reglamento del Servicio de Medicina Preventiva del Transporte* as the corresponding regulatory equivalent to U.S. medical qualification requirements found in Part 391 of title 49 of the Code of Federal Regulations. The Agency states that Mexico requires a comprehensive physical and psychological examination for a driver to be licensed. Again, FMCSA’s notices provide none of the information required by the 2007 Act with respect to how U.S. and Mexican regulations differ. How do Mexico’s rules compare to those found in 49 U.S.C. §§ 31136 and

31149 and 49 C.F.R. Part 391? Does Mexico issue waivers from their medical standards? Waivers are possible in the U.S. and Canada, however, by agreement, each nation's drivers operating under a waiver are not allowed into the other's jurisdiction. How will our enforcement officials know whether a Mexican driver is operating under a waiver? Neither the June nor August notices provide information on which the public can evaluate how the Mexican medical qualification rules provide for the same level of safety as the U.S. rules. Beyond the inability of the public to file useful comments, nothing in this record suggests that the FMCSA performed the kind of detailed analysis contemplated by the 2007 Act.

(c) Controlled Substances Testing

Drug and alcohol testing is an integral part of the U.S. driver qualification process and furthers FMCSA goals related to highway safety. Procedures specifically detailing requirements on both employers and drivers are detailed at 49 C.F.R. at Part 382. Pre-employment, post-accident, random, reasonable suspicion, return-to-duty and follow-up testing are meant to insure that CDL holders are held to a higher standard than other vehicle operators. Nowhere in FMCSA's notices does it give details as to whether or to what extent Mexican procedures or regulations mimic U.S. regulations and how they provide for the same level of safety. FMCSA has

only cited to corresponding Mexican regulation identifiers without detailing, in English, the content of those regulations and how they've been determined to be equivalent to U.S. regulations.

The June notice refers to an MOU in which Mexico agrees to adhere to U.S. drug testing regulations, states that their procedures and regulations are equivalent (a task which Congress has assigned to Respondents), and then states that Mexican laboratories are not certified due to lack of proper equipment and other procedural requirements (72 Fed. Reg. at 31885 (Table 1)). FMCSA also admits that “[c]urrently there are not any collection facilities certified in Mexico to collect controlled substance and alcohol specimens in accordance with 49 CFR Part 40.” *Id.* These facts appear to contradict the conclusion that Mexico’s drug testing standards are equivalent to those required of U.S. drivers and carriers. The Notice states that FMCSA has agreed to accept a drug test collected in Mexico using U.S. forms, but is silent as to the testing procedures that it believes are acceptable.

The public is owed an explanation and analysis by the Respondents as to how compliance with Mexico’s rules provide for the same level of safety as the U.S. rules. FMCSA should have published a side-by-side comparison of the Mexican and U.S. rules, to accompany its analysis as to how the Mexican rules will provide for at least the same level of safety as the U.S.

rules. The 2007 Act requires such an approach, yet FMCSA refused to comply.

B. Petitioner Will Suffer Irreparable Harm

The standard for injunctive relief in this Circuit involves a balancing test. The more likely it is that Petitioner will succeed on the merits the less stringent a showing of harm will be required. *CSX Transportation*, 406 F.3d at 670.

In *FTC v. Heinz, H.J., Co.*, the Court afforded great weight to the question of whether the challenged conduct will become a *fait accompli* in the absence of a preliminary injunction, such that subsequent administrative proceedings “will not matter.” 2000 WL 1741320 *2 (D.C. Cir., Nov. 8, 2000). In that same vein, courts have considered: “[t]he difficulty of stopping a bureaucratic steam roller, once started.” *Sierra Club v. Marsh*, 872 F. 2d 497, 504 (1st Cir. 1989).

Petitioner here faces precisely the kind of steamroller alluded to in *Sierra Club*. Here, FMCSA has determined to launch a pilot program which, if unchecked, will leave Petitioner and other interested parties powerless to prevent the Secretary from declaring this inherently flawed exercise a success and then moving on to a permanent arrangement with Mexico. These dangers must be added to the dangers that additional unsafe

drivers from Mexico pose which will impact professional drivers more than others. *International Brotherhood of Teamsters*, 17 F.3d at 1483.

C. The Balancing of Interests Tilts Strongly in Favor of a Stay Pending Review

The public interest is not well served by leaving unchecked Respondents' obvious disregard for their statutory responsibilities. Respondents were directed by Congress to implement their demonstration project as a pilot program implying the need for regulatory exemptions, yet they refuse to characterize their substitution of Mexican for FMSCA regulations as an exemption. They were directed to provide the public with comparisons between specific Mexican and FMCSA regulations and to provide their analysis of how the Mexican regulations would provide the same level of safety as the U.S. regulations. They declined to do so. They are prepared to accept medical examinations by Mexican doctors under circumstances that are in complete conflict with *statutory* requirements that they have no legal authority to waive or exempt. They provide nothing more than conclusory statements on safety issues that have no support in the agency record.

Respondents argue in their notices that there are important international trade implications to further delay. But that provides no excuse for violating legitimate safety laws and regulations. Even the NAFTA Panel

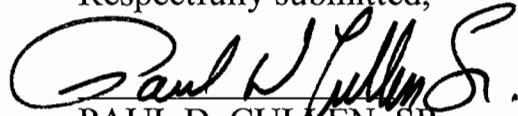
that examined U.S. compliance with that trade agreement agreed that the United States may enforce its own safety laws and regulations. *In the Matter of Cross-Border Trucking Services*, at 90, Sec. File No. USA-MEX-98-2008-01 (NAFTA Arbitration Panel Feb. 6, 2001).

The public interest would be well-served by a stay pending appeal.

III. Conclusion

Petitioner has demonstrated a substantial likelihood of success on the merits. The issues raised are both substantial and clear-cut. Respondents' actions are clearly not in accordance with law. Petitioner and its members will experience harm because of the admission of unsafe trucks and drivers to the highways. As important, denial of Petitioner's substantive and procedural rights will have long-term negative consequences unless this Court intervenes. A stay pending review should be granted.

Respectfully submitted,



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