

UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT  
DEC 21 2012  
RECEIVED

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

OWNER-OPERATOR INDEPENDENT )  
DRIVERS ASSOCIATION, INC., )

Petitioner, )

vs. )

**PETITION FOR REVIEW**  
**12-1483**

Case No. \_\_\_\_\_

ANNE S. FERRO, )  
In her official capacity as Administrator )  
Of Federal Motor Carrier Administration; )  
FEDERAL MOTOR CARRIER SAFETY )  
ADMINISTRATION; )  
UNITED STATES DEPARTMENT OF )  
TRANSPORTATION; and RAYMOND )  
H. LaHOOD, in his official capacity as )  
Secretary of the Department of )  
Transportation, )

Respondents. )

---

Pursuant to Federal Rule of Appellate Procedure 15(a), 49 U.S.C. § 351(a), 5 U.S.C. § 702, and 28 U.S.C. § 2342, the Owner-Operator Independent Drivers Association, Inc., (“OOIDA”), hereby petitions this Court for review of the final rule issued by the Federal Motor Carrier Safety Administration (“FMCSA”) and the U.S. Department of Transportation (“DOT”) through the letter of Anne S. Ferro, Administrator of FMCSA to James Johnston, President of OOIDA dated October 23, 2012. Copies of

Mr. Johnston's letter to Administrator Ferro dated June 12, 2012, a follow-up letter from Mr. Johnston dated September 12, 2012 and Administrator Ferro's letter in reply dated October 23, 2012 are attached. The new rule determines that 49 C.F.R. § 392.3 establishes a performance based standard that authorizes enforcement officials to place drivers out of service for being too ill or fatigued to operate a commercial motor vehicle safely, and that such an out-of-service orders may be based upon the official's reasonable articulable suspicion. Under the Administrative Procedures Act Administrator Ferro's action constitutes a new rule or new interpretation of an existing rule that materially changes what had historically been the agency's policy. This new rule was established without notice and comment rulemaking.

Since 1936 the FMCSA or its predecessor agencies, including the Interstate Commerce Commission and the Federal Highway Administration, have addressed the problem of driver fatigue by restricting the number of hours that an individual driver may be on duty and/or may operate a commercial motor vehicle. Hours of Service (HOS) regulations are currently codified at 49 C.F.R. Part 395. Two separate challenges to proposed amendments to these HOS regulations are presently pending before this Court in Case Nos. 12-1092 and 12-1113.

The FMCSA and its predecessor agencies have repeatedly stated in various rulemaking proceedings that there is no adequate scientific or medical basis that would allow enforcement officers in the field to determine whether an individual driver is too fatigued to operate a vehicle safely. Proposals to establish a performance based criteria for fatigue detection and regulation have always been rejected in favor of further study. Continued reliance on HOS regulations is currently the only basis for addressing driver fatigue. FMCSA's May 2, 2000, Notice of Proposed Rulemaking for amendments to HOS regulations rejected proposals for performance based alternatives to the proposed regulations noting that "more study is needed before such alternatives should be incorporated in the regulation of commercial highway operations." 65 Fed. Reg. 25540, 25552.

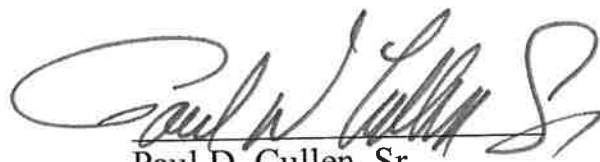
Administrator Ferro's October 23, 2012 letter promulgates a new rule authorizing the issuance of out-of-service orders based upon violations of 49 C.F.R. § 392.3. That regulation has been in existence since 1940. The purpose of the regulation has been to protect drivers from forced dispatch by motor carriers when the driver considers himself too ill or fatigued to operate a commercial motor vehicle safely. Prior to October 23, 2012, FMCSA never approved use of Section 392.3 as the basis for an out of service order. Administrator Ferro's October 23, 2012 letter constitutes a *de*

*facto* amendment to its regulations without notice and comment rulemaking. The final rule adopted by FMCSA further sanctions the issuance of out-of-service orders for fatigue on the basis of reasonable articulable suspicion of a violation of the law rather than the Constitutional minimum of probable cause.

Petitioner asks that the Court hold that the rule approved in Administrator Ferro's October 23, 2012 letter to be arbitrary, capricious, and otherwise not in accordance with law under the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) Petitioner seeks a declaration that the rule is null, void, and without force and effect; vacatur of the rule; issuance of a permanent injunction prohibiting the FMCSA from implementing and enforcing the rule; issuance of a permanent injunction requiring FMCSA to purge its database of all performance based out-of-service orders based on fatigue; and such other relief as the Court deems appropriate.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul D. Cullen, Sr.", written over a horizontal line.

Paul D. Cullen, Sr.

*Counsel of Record*

Dated: December 21, 2012

THE CULLEN LAW FIRM PLLC  
1101 30th Street NW, Suite 300  
Washington, DC 20007  
Tel: (202) 944-8600  
Fax: (202) 944-8611

Counsel for Petitioner

# **ATTACHMENTS**



**Owner-Operator Independent Drivers Association, Inc.**

National Headquarters: OOIDA Building, I-70 at Grain Valley Exit  
1 NW OOIDA Drive, P.O. Box 1000, Grain Valley, MO 64029  
Tel: (816) 229-5791 Fax: (816) 427-4468  
Email: [ooida@ooida.com](mailto:ooida@ooida.com) web site: [www.ooida.com](http://www.ooida.com)

June 12, 2012

Via First Class Mail

The Honorable Anne S. Ferro  
Administrator  
Federal Motor Carrier Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
Washington, DC 20590

**Re: Owner Operator Independent Drivers Association, Inc. v. Dunaski,  
USDC D. Minn. Civ. File No. 09-cv-1116 (DWF/RLE)**

Dear Administrator Ferro:

I am writing today to call your attention to a significant problem arising out of recently approved amendments to an out-of-service criteria ("OOSC") adopted by the Commercial Vehicle Safety Alliance ("CVSA"). Because of its longstanding ties with CVSA and its active participation on CVSA's Executive Committee, FMCSA is in a position to assist in correcting a serious injustice currently being inflicted upon drivers by state enforcement officers who follow CVSA's OOSC.

Enclosed for your information and review is a copy of a Motion for an Order to Show Cause filed this week against the Minnesota State Patrol by OOIDA in federal court in St. Paul, Minnesota in connection with the MSP's fatigued driver enforcement efforts. Note that the enclosed motion also seeks relief against CVSA under Rule 65(d)(2) of the Federal Rules of Civil Procedure. That rule subjects non-parties to contempt proceedings when they act in concert or participation with a party.

Since FMCSA has representation on CVSA's Executive Committee, it is undoubtedly aware that, effective April 1, 2012, CVSA amended its out-of-service criteria ("OOSC") for fatigue to authorize the issuance of an out-of-service order on the basis of "*reasonable articulable suspicion*." The recently amended version of CVSA's OOSC for fatigue provides:

**FATIGUE**

When so fatigued that the driver of a commercial vehicle should not continue the trip *based on reasonable articulable suspicion* (392.3). Declare the driver out-of-service until no longer fatigued.

This amended standard is unconstitutional on its face.

Under well-understood principles of constitutional law, an arrest without a warrant must be based upon probable cause, not “*reasonable articulable suspicion*.” In its Final Order and Judgment dated September 21, 2011, the U.S. District Court for the District of Minnesota ruled that during a NAST inspection, MSP Troopers and Commercial Vehicle Inspectors are to observe drivers for signs of impairment due to illness, fatigue, or other causes, but they **cannot expand** the driver portion of the inspection to determine impairment unless they have a **reasonable articulable suspicion** that the driver may be impaired. If there is “*reasonable articulable suspicion*”, the inspecting officer may then inquire further to determine whether enforcement action is appropriate. A driver **will not be ordered out of service** for fatigue or illness unless there is **probable cause** to believe that the driver, due to fatigue or illness, is unsafe to drive because there is an **imminent risk to public safety**. *OOIDA v. Dunaski*, 812 F.Supp. 2d 994, 997 (D. Minn. 2011). The proposition that enforcement action may not be taken without probable cause has deep constitutional roots that are examined in OOIDA’s moving papers with the court.

CVSA’s adoption of a facially unconstitutional standard for fatigue based out-of-service orders is troubling. More disturbing, however, is FMCSA’s public approval of CVSA’s current Roadcheck program, focused specifically on driver fatigue. Your statement quoted in CVSA’s press release dated June 7, 2012 (attached) implicates FMCSA in CVSA’s ongoing and ill-conceived enforcement efforts:

“For 25 years, the Federal Motor Carrier Safety Administration (FMCSA) has joined forces with CVSA to support the world’s largest targeted inspection and enforcement effort aimed at commercial vehicles and their drivers,” said FMCSA Administrator Anne Ferro. “We want to prevent fatigue-related crashes and save lives by enforcing the hours-of-service requirements.”

Further, FMCSA’s support of state law enforcement activities through the Motor Carrier Safety Assistance Program (MCSAP) currently puts it in a position where it is funding implementation of CVSA’s unconstitutional out-of-service criteria for fatigue with federal dollars.

FCMSA should take immediate steps to correct the present situation. OOIDA requests that you take the following actions:

1. Repudiate CVSA’s current out-of-service criteria for fatigue and request that CVSA immediately rescind its recent amendment.
2. Notify state enforcement agencies currently receiving MCSAP grants that no out-of-service orders for fatigue should be issued on the basis of “*reasonable articulable suspicion*.”
3. Purge all data from the agency’s PSP database that report out-of-service orders based on fatigue issued on or after April 1, 2012.



These steps will allow FMCSA to place itself on the right side of this issue and will demonstrate that its enforcement activities are properly aligned with sound constitutional principles.

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized capital letter 'J' followed by a horizontal line and a short vertical stroke.

James Johnston  
President



**Owner-Operator Independent Drivers Association, Inc.**

National Headquarters: OOIDA Building, I-70 at Grain Valley Exit  
1 NW OOIDA Drive, P.O. Box 1000, Grain Valley, MO 64029

Tel: (816) 229-5791 Fax: (816) 427-4468

Email: [ooida@ooida.com](mailto:ooida@ooida.com) web site: [www.ooida.com](http://www.ooida.com)

September 12, 2012

Via First Class Mail

The Honorable Anne S. Ferro  
Administrator  
Federal Motor Carrier Safety Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
Washington, DC 20590

**Re: Owner Operator Independent Drivers Association, Inc. v. Dunaski,  
USDC D. Minn. Civ. File No. 09-cv-1116 (DWF/RLE)**

Dear Administrator Ferro:

On June 12, 2012, I sent you copies of OOIDA's Motion For an Order to Show Cause filed in the above-captioned matter. Enclosed for your information is a copy of OOIDA's papers submitted to the Court in response to opposition papers filed on behalf of the Defendants (Minnesota State Patrol) and CVSA. You should note that while these organizations take the position that the Court should not hold them in contempt, neither organization disputes OOIDA's principal contention that CVSA's revised (2012) out-of-service criteria for fatigue is facially unconstitutional.

This litigation has important implications for FMCSA and its very public support for the CVSA out-of-service criteria. OOIDA continues to urge FMCSA to take steps to properly align its enforcement activities with sound constitutional principles.

Very truly yours,

James Johnston  
President

Enclosure



U.S. Department  
of Transportation

**Federal Motor Carrier  
Safety Administration**

**Administrator**

October 23, 2012

1200 New Jersey Avenue, SE  
Washington, DC 20590

Refer to: MC-CC

Mr. James Johnston  
President  
Owner-Operator Independent Drivers Association  
P.O. Box 1000  
Grain Valley, MO 64209

Dear Mr. Johnston:

Thank you for your letter concerning the Commercial Vehicle Safety Alliance's (CVSA) recent amendment to the North American Standard Out-of-Service Criteria (OOSC) for fatigue violations under 49 C.F.R. § 392.3. You have requested that the Federal Motor Carrier Safety Administration (FMCSA): "(1) repudiate CVSA's out-of-service criteria for fatigue and seek immediate rescission of the recent amendment; (2) notify state enforcement agencies currently receiving MCSAP grants that no out-of-service orders for fatigue should be issued on the basis of 'reasonable articulable suspicion'; [and] (3) purge all data from the Agency's PSP database that reports out-of-service orders based on fatigue issued on or after April 1, 2012."

The primary mission of FMCSA is to reduce crashes, injuries, and fatalities involving large trucks and buses. Investigations of commercial motor vehicle (CMV) accidents reveal that driver fatigue is often a causation factor with devastating impact on both driver and public safety. Fatigue has been cited as a factor in accidents even when the CMV driver was technically in compliance with hours of service requirements. Thus, the Agency's mandate to reduce CMV crashes and enhance the safety of the travelling public is advanced by ensuring that commercial motor vehicle drivers do not operate a CMV when fatigued (49 C.F.R. § 392.3). A driver operating a CMV while so fatigued as to be unsafe is in violation of the Federal Motor Carrier Safety Regulations (FMCSR).

The North American Standard Out-of-Service Criteria are all necessarily predicated on a finding of an FMCSR violation. These OOSC identify the violations that have the greatest potential to impact safety as to require that the vehicle or driver be placed out-of-service (OOS) until such time that the violation has been resolved. Once an enforcement official makes a finding that a regulatory violation has occurred, an out-of-service order is appropriate to remedy the violation before transportation may resume. State law, not the OOSC, establishes the standard of proof necessary to issue a roadside citation for a violation of an FMCSR.

All States participating in the Motor Carrier Safety Assistance Program (MCSAP) have agreed that their inspectors are to use the OOSC enforcement guidelines. Specifically, State law enforcement officials use the guidelines in carrying out their responsibilities under the FMCSRs, including determining when a driver or commercial motor vehicle should be placed OOS.<sup>1</sup> The Federal Motor Carrier Safety Regulations do not carry criminal penalties or sanctions, as they are

---

<sup>1</sup> National Tank Truck Carriers v. Federal Highway Administration, 170 F.3d 203, 205 (D.D.C. 1999).

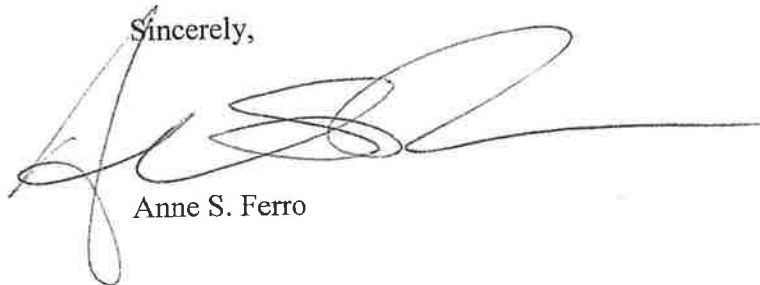
administrative regulations. As in the Federal process, a State law enforcement official's finding of a violation of 49 C.F.R. §392.3, as adopted by the State, is implicit in the issuance of an OOS order for driver fatigue.

Notwithstanding the administrative processes for finding a regulatory violation, some States issue criminal citations for the parallel violations, as adopted or incorporated in State law. Accordingly the CVSA criteria specifically state that motor carrier safety enforcement personnel are not required to comply with the out-of-service standards where State, provincial, territorial, or Federal law preclude such enforcement. In States such as Minnesota, where the State Police have implemented a program that requires officers to establish probable cause and issue a criminal citation for a violation of 49 C.F.R. §392.3 as a condition for issuing a fatigue OOS order, the State law standard would apply.

We understand that the April 2012 change to the long-standing CVSA out-of-service criteria for fatigue actually occurred following a request from OOIDA to CVSA that questioned the basis for the requirement that a fatigued driver be placed OOS for 10 hours and the lack of a standard or criteria for determining when a driver should be placed OOS for fatigue. We also understand that in response to OOIDA's request, CVSA eliminated the 10-hour requirement and inserted the "reasonable, articulable suspicion" standard for placing a driver OOS "until no longer fatigued." Our position regarding the propriety of the fatigued driver criteria is a matter that we will discuss with CVSA. We will not communicate our position on this particular criterion to private litigants prior to that coordination. The Agency also declines to notify our MCSAP State Partners to no longer issue OOS orders for fatigue and declines to purge from the Agency's PSP database out-of-service orders based on fatigue issued on or after April 1, 2012, because such orders are predicated on a finding of the underlying regulatory violation.

I hope you find this information helpful. Should you or members of your staff need additional information or assistance, please contact Fred (Herb) Ford, Assistant Chief Counsel for Enforcement and Litigation, at (202) 366-7542 or by email at [fred.ford@dot.gov](mailto:fred.ford@dot.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Anne S. Ferro", with a long horizontal line extending to the right.

Anne S. Ferro

UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT

DEC 21 2012

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

~~RECEIVED~~ OWNER OPERATOR INDEPENDENT )  
DRIVERS ASSOCIATION, INC., )

Petitioner, )

vs. )

ANNE S. FERRO, )  
In her official capacity as Administrator )  
Of Federal Motor Carrier Administration; )  
FEDERAL MOTOR CARRIER SAFETY )  
ADMINISTRATION; )  
UNITED STATES DEPARTMENT OF )  
TRANSPORTATION; and RAYMOND )  
H. LaHOOD, in his official capacity as )  
Secretary of the Department of )  
Transportation, )

Respondents. )

) PETITION FOR REVIEW

) Case No. 12-1483

---

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner  
Owner Operator Independent Drivers Association, Inc. states that it has no  
parent companies, subsidiaries (including wholly-owned subsidiaries), or  
affiliates that have issued shares to the public.

Respectfully submitted,

A handwritten signature in cursive script, reading "Paul D. Cullen Sr.", written over a horizontal line.

Dated: December 21, 2012

Paul D. Cullen, Sr.

*Counsel of Record*

THE CULLEN LAW FIRM PLLC

1101 30th Street NW, Suite 300

Washington, DC 20007

Tel: (202) 944-8600

Fax: (202) 944-8611

Counsel for Petitioner

UNITED STATES COURT OF APPEALS  
FOR DISTRICT OF COLUMBIA CIRCUIT  
**DEC 21 2012**  
**RECEIVED**

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

OWNER-OPERATOR INDEPENDENT )  
DRIVERS ASSOCIATION, INC., )

Petitioner, )

vs. )

**PETITION FOR REVIEW**

Case No. 12-1483

ANNE S. FERRO, )  
In her official capacity as Administrator )  
Of Federal Motor Carrier Administration; )  
FEDERAL MOTOR CARRIER SAFETY )  
ADMINISTRATION; )  
UNITED STATES DEPARTMENT OF )  
TRANSPORTATION; and RAYMOND )  
H. LaHOOD, in his official capacity as )  
Secretary of the Department of )  
Transportation, )

Respondents. )

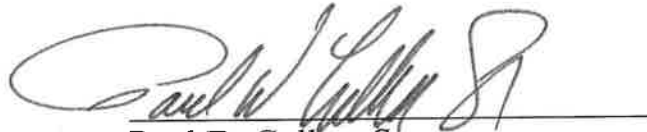
**CERTIFICATE OF SERVICE**

Petitioner recognizes that under 28 U.S.C. §§2342 - 2344 and F.R.A.P. 15(c) and Circuit Rule 15(a) the Clerk will serve copies of the Petition for Review to Respondents. As a courtesy, Petitioner has placed with the U.S. Postal Service a copy of the Petition on this day, December 21, 2012, to each of the following:

Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530

Raymond LaHood, Secretary  
U.S. Department of Transportation  
1200 New Jersey Avenue S.E.,  
Washington, DC 20590

Annes S. Ferro, Administrator  
Federal Motor Carrier Administration  
1200 New Jersey Avenue S.E.,  
Suite W60-300  
Washington, DC 20590



Dated: December 21, 2012

Paul D. Cullen, Sr.

*Counsel of Record*

THE CULLEN LAW FIRM PLLC  
1101 30th Street NW, Suite 300  
Washington, DC 20007  
Tel: (202) 944-8600  
Fax: (202) 944-8611

Counsel for Petitioner