[ARGUED DECEMBER 6, 2012. DECIDED APRIL 19, 2013]

No. 11-1251

In the
United States Court of Appeals
For The District of Columbia

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,
***Petitioner*,**

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; RAYMOND H. LAHOOD, Secretary of the U.S. Department of Transportation; ANNE S. FERRO, Administrator of the Federal Motor Carrier Safety Administration; and THE UNITED STATES OF AMERICA,
***Respondents*.**

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Paul D. Cullen, Sr.
(*pdc@cullenlaw.com*)
David A. Cohen
Paul D. Cullen, Jr.
The Cullen Law Firm, PLLC
1101 30th Street, N.W., Suite 300
Washington, D.C., 20007
202-944-8600

June 3, 2013 ***Counsel for the Petitioner***

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. PARTIES

The parties appearing thus far in this proceeding are:

Petitioner: Owner-Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029

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

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

Federal Motor Carrier Safety Administration
United States Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

United States of America
c/o U.S. Department of Justice
Michael P. Abate, Esq.
950 Pennsylvania Avenue, NW
Room 7318
Washington, D.C. 20530-0001

B. RULINGS UNDER REVIEW

Petitioner seeks Panel Rehearing and Rehearing En Banc of the opinion of

the Court in the above captioned case filed on April 19, 2013.

C. STATEMENT OF RELATED CASES

A separate appeal from the final agency action challenged here was filed in the U.S. Court of Appeals for the Ninth Circuit on September 2, 2011. *International Brotherhood of Teamsters, et al. v. United States Department of Transportation*, 9th Cir., No. 11-72606. The *Teamsters'* unopposed motion to transfer its appeal was granted and the case was docketed in this Circuit on November 15, 2011 under No.11-1444.

D. CORPORATE DISCLOSURE STATEMENT

The Owner-Operator Independent Drivers Association, Inc ("OOIDA"), is a trade association incorporated in the State of Missouri. No parent company or publicly-held company holds a 10 percent or greater ownership interest in OOIDA. Its 150,000 members consist primarily of individuals who operate commercial motor vehicles within the United States and Canada. The purpose of the Association is to promote the general commercial, professional, legislative, regulatory, safety and other interests of its membership.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Public Laws

***** *Authorities upon which we chiefly rely are marked with asterisks.*

RULE 35 STATEMENT

Petitioner challenges the authority of the Federal Motor Carrier Safety Administration (FMCSA) to conduct a "pilot program" allowing Mexico-domiciled trucking companies and their drivers to operate trucks throughout the United States. In this Petition, OOIDA addresses the Panel's holding approving FMCSA's decision to permit individuals to operate in this country under Mexican commercial drivers licenses (CDLs). 49 U.S.C. § 31302 provides that "[n]o individual shall operate a commercial motor vehicle without a valid commercial drivers license issued in accordance with section 31308." The Panel held that Congress, in two appropriations bills, authorized FMCSA to accept Mexican-issued CDLs for the pilot program and that such licenses are equivalent to CDLs issued by the states. Essentially, the Panel held that two appropriations bills repealed by implication Section 31302's absolute bar on operating without a CDL issued under federal standards.

The Panel's decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Circuit. Consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

1. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (holding that the doctrine disfavoring repeals by implication is especially suspect when the subsequent legislation is an appropriations measure).

2. *Rodriguez v. United States*, 480 U.S. 522 (1987) (holding that repeals by implication will not be found unless an intent to repeal is clear and manifest).

3. *Agri Processor Co., Inc., v. N.L.R.B.*, 514 F.3d 1 (D.C. Cir. 2008) (holding that repeals by implication are not favored and will not be found unless an intent to repeal is "clear and manifest.").

4. *Calloway v. District of Columbia*, 216 F.3d 1 (D.C. Cir. 2000) (holding that there is a "very strong presumption" that appropriations acts do not amend substantive law).

Furthermore, the Panel decision raises issues of substantial importance to the broader regulation of Mexico-domiciled motor carriers. The Panel decision leaves open the possibility that the exemption created to the federal statute mandating full compliance with U.S. commercial driver's license standards may be extended beyond the pilot program.

SUMMARY OF THE ARGUMENT

When Congress enacts statutory safety standards, those whose actions are regulated by the standards as well as those whose activities are protected by the standards have justified expectations that the law will be implemented according to its terms. Here, Congress unambiguously provided that no individual should operate a commercial motor vehicle on the nation's highways without holding a valid commercial driver's license issued under federal standards. 49 U.S.C. §

31302. The Panel decision effectively repeals this statutory provision without so much as paying lip service to the standards of statutory construction approved in an unbroken line of cases by the U.S. Supreme Court and by this Circuit. It is not the prerogative of this Court to pick and choose which Acts of Congress that come before it will be enforced.

Repeal by implication is not favored. This is especially so when the Act of Congress that purportedly repeals a prior statute is an appropriations bill. There is not a word in either appropriations bill cited by the Panel that cannot be easily harmonized with Section 31302, the pre-existing statute mandating CDLs issued under federal standards. Rather than harmonize these provisions, the Panel has converted appropriations riders intended to limit the circumstances under which FMCSA could conduct temporary pilot programs into a potentially permanent exemption for Mexican drivers from licensing requirements applicable to U.S.-domiciled drivers. Rehearing or rehearing en banc is fully warranted under these circumstances.

ARGUMENT

A. The Panel Decision

49 U.S.C. § 31302 is clear and unambiguous: "No individual shall operate a commercial motor vehicle without a valid commercial drivers license issued in accordance with [49 U.S.C.] section 31308." Slip Op. at 7. Notably, the Panel

recognized that "Section 31302 and 31308 alone might prohibit Mexican truckers form using their Mexican commercial driver's licenses. . ." *Id*. However, the Panel concluded that "two subsequent statutes made clear that Mexican commercial driver's licenses are permissible." *Id.*

The first statute the Panel relied upon was the Department of Transportation and Related Agencies Appropriations Act. Pub. L. No. 107-87, 115 Stat. 833 (2001). According to the Panel, section 350(1)(B)(viii) of this 2001 Appropriations Act "requires the [FMCSA] to verify that each Mexican truck driver has the proper qualifications, 'including a confirmation of the validity of the Licencia de Federal de Conductor [the Mexican-issued commercial driver's license] of each driver.'"[1]

The second statute relied upon by the Panel was also an appropriations statute. U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, was enacted in 2007. Pub. L. No. 110-28, 121 Stat. 112 (2007). A provision of this statute, section 6901(b)(2)(B)(v), required the Secretary of Transportation to publish "a list of Federal motor carrier safety laws

[1] Slip Op. at 7. The Panel noted that sections 31302 and 31308 were initially enacted in the 1990's. It is, however, also important to note that these sections were amended once again in 2005 together with companion provisions of Title 49 addressing the creation and administration of a national federal/state commercial driver's license regulatory regime. Safe, Accountable, Flexible, Efficient transportation Equity Act: A Legacy for Users or "SAFETEA-LU", PL 109-59, August 10, 2005, 119 Stat 1144. There is no mention in this 2005 statute of any amendment to Section 31302 by a 2001 appropriations statute.

and regulations, including commercial driver's license requirements, for which the Secretary of Transportation will accept compliance with a corresponding law or regulation as the equivalent with the United States law or regulation…." *Id.* The Panel concluded that these two statutes, "enacted in two separate public laws directly addressing the issue of Mexican trucks – reflect Congress's decision to allow Mexican truckers with Mexican commercial drivers' licenses to drive on U.S. roads." Slip Op. at 8.

By holding that two subsequent appropriations statutes allowed for the use of Mexican commercial driver's licenses, the Panel implicitly found that the later statutes repealed the unambiguous prohibitions set forth in Section 31302 . The effect of the Panel's decision was to rewrite Section 31302 to read: " No individual [except a Mexican-domiciled driver holding a valid Mexican commercial driver's license] shall operate a commercial motor vehicle without a valid commercial driver's license issued in accordance with section 31308."

B. The Panel Ignored Governing Cannons of Statutory Construction

Under the canon of construction disfavoring repeals by implication, courts are reluctant to read one congressional enactment as implicitly repealing or suspending an earlier one. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978); *Morton v. Mancari*, 417 U.S. 535, 549 (1974). It is well-settled that "repeals by implication are not favored and will not be found unless an intent to

repeal is 'clear and manifest.'" *Agri Processor Co., Inc. v. National Labor Relations Board*, 514 F.3d 1, 4 (D.C. Cir. 2008), quoting *Rodriguez v. United States*, 480 U.S. 522, 524 (1987).

However, "courts should not infer that one statute has partly repealed another 'unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary.'" *Agri Processor Co.*, 514 F.3d at 4, quoting *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). "[I]t is the duty of the courts, absent clearly, expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984) (citations and internal quotation marks omitted).

The Supreme Court, in *Tennessee Valley Authority v. Hill*, held that "[t]he doctrine disfavoring repeals by implication applied with full vigor when the subsequent legislation is an appropriations measure." *Tennessee Valley Authority v. Hill*, 437 U.S. at 190 (emphasis in original). Indeed, the Court held that "[t]his is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an Appropriations Act." *Id.* (emphasis in original). Furthermore, as this Court has stated, "we are guided by the well-settled principle that while appropriation acts are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not." *Calloway v. District of Columbia*, 216 F.3d

1, 9 (D.C. Cir. 2000). In fact, "the established rule is that, when appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly." *Id.*, quoting *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984).

Here, although invited to do so by OOIDA, the Panel did not engage in an analysis regarding whether the later statutes repealed the earlier statutes by implication.[2] Instead, the Panel "[r]ead all the relevant statutes together," and failed to consider, or mention, the issue of repeal by implication. Slip. Op. at 8.

C. Neither Appropriations Statute Demonstrates an Intent to Repeal

The two appropriations statutes cited by the Panel do not demonstrate a "clear and manifest" intent to repeal. Not only is there no clear indication that Congress intended the appropriations statutes to repeal the licensing requirements in the earlier statutes, the evidence suggests the opposite. The Panel decision does not point to a single word in either appropriations bill that would support repeal of the unambiguous language of section 31302 forbidding operation of a commercial motor vehicle by an individual who does not hold a valid commercial driver's license issued in accordance with section 31308.

In this case, the appropriations bill Section 350 requirement that the

[2] Petitioner advanced both the "repeal by implication" and the limited reach of appropriations bills arguments in its opening and reply briefs. *See* Petitioner's Brief at 21-22; Petitioner's Reply Brief at 11.

Secretary ensure that drivers from Mexico have a current valid Mexican license can easily be read within the restrictive purposes of Section 350 to impose a requirement upon Mexican drivers that is in addition to all existing requirements under U.S. law, including the requirement to have a U.S. CDL under 49 U.S.C. §31302 . This interpretation gives effect to both statutes. There is no clear unambiguous language in Section 350 directing or authorizing the Secretary to accept Mexican CDL's in conflict with the existing U.S. statutory requirement to have a U.S. CDL. If there was such language in this 2001 appropriations bill, there would have been no need for Congress to repeal Section 31302 again in 2007.

Section 6901(b)(2)(B)(v) of Pub. L. 110-28 became law on May 25, 2007, less than four weeks after the FMCSA published a notice announcing a previous Demonstration Project on Mexican trucks. 72 Fed. Reg. 23883 (May 1, 2007). Lawmakers concerned over a possible Mexican truck program passed Section 6901 to restrict the conditions under which the Secretary could commence such a program. Congress did not grant the Secretary the extraordinary authorization to waive his statutory and regulatory motor carrier safety responsibilities as the Panel suggests. Nothing in Section 6901 suggests that Congress intended to permit FMCSA to deviate from requiring full compliance with existing motor carrier safety statutes and regulations.

The provision of Section 6901 requiring the Secretary to disclose which

provisions of U.S. statutes and rules for which it will accept compliance with Mexican laws is merely a disclosure requirement, not a repeal of the existing CDL statute. Because the Secretary has existing authority to accept alternate forms of compliance with U.S. motor carrier safety *rules* under 49 U.S.C. § 31315, Section 6901 can be read to refer to that existing authority and need not, and should not, be interpreted to create new authority to accept non-compliance with existing *statutes*. And 49 U.S.C. § 31315 does not give the Secretary authority to accept alternate compliance with Section 31302.

Nothing in Section 6901 or previous appropriations section 350 suggests that Congress intended to permit the Secretary to deviate from requiring full compliance with existing motor carrier safety statutes and regulations. Nothing in the *additional* requirements imposed under Section 6901 overcomes the "very strong presumption that appropriations acts do not amend substantive law…" *Calloway v. District of Columbia*, 216 F. 3d at 9 (internal citation omitted).

> As the Court has said, we "are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). We should read federal statutes "to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981); see also *United States v. Fausto*, 484 U.S. 439, 453, 108 S.Ct. 668, 676-677, 98 L.Ed.2d 830 (1988).

Pittsburgh & Lake Erie R. Co. v. Ry. Labor Executives' Ass'n, 491 U.S. 490, 510

(1989).

CONCLUSION

For the foregoing reasons, the Panel should grant rehearing regarding its ruling that the subsequent appropriations statutes provided FMCSA with the authority to accept Mexican CDLs *for the pilot program*. The Panel should also address whether these subsequent appropriations statutes *permanently* repealed or amended Section 31302. Alternatively, the Court should grant *en banc* rehearing of the Panel's Decision.

Respectfully submitted,

/s/ Paul D. Cullen, Sr.

PAUL D. CULLEN, SR.
DAVID A. COHEN
PAUL D. CULLEN, JR.
The Cullen Law Firm, PLLC
1101 30th Street NW, Suite 300
Washington, DC 20007
Tel: (202) 944-8600
Fax: (202) 944-8611

Dated: June 3, 2013

Counsel for Petitioners