NO ORAL ARGUMENT SET

No. 12-1483

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

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,

***Petitioner*,**

v.

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*.**

OOIDA's REPLY TO FMCSA'S OPPOSITION TO OOIDA'S CROSS MOTION FOR SUMMARY REVERSAL

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FMCSA's October 23, 2012 letter constituted a rule or regulation subject to Hobbs Act review under 28 U.S.C. § 2342(3). That rule or regulation should be vacated because FMCSA failed to comply with the requirement for notice and comment rulemaking pursuant to 49 U.S.C. § 31136(c).

1. **Rule or Regulation** – FMCSA's opposition makes no attempt to deal with the fact that on May 2, 2000, the agency specifically rejected the option of authorizing performance based regulation of fatigue on the ground that such regulation was technically beyond the capabilities of enforcement officers and operationally impractical. 65 Fed. Reg. 25540, 25552. FMCSA does not point to any formal administrative action by it, prior to October 23, 2012, reversing the clear and unambiguous determination made during the 2000 rulemaking proceeding. FMCSA points to the fact that some states have been issuing performance-based out-of-service orders for fatigue for years. State action under state law does not demonstrate formal authorization by FMCSA under federal regulations. At best, this circumstance demonstrates neglect on the part of FMCSA to deal with this issue while at the same time providing federal funds under MCSAP for enforcement activities that it had concluded were technically beyond the capabilities of officers in the field and operationally impractical.

FMCSA argues that this Court's 1999 opinion in *National Tank Truck Carriers, Inc. v. Federal Highway Administration*, 170 F.3d 203 (D.C. Cir. 1999)

(NTTC) somehow authorized such out-of-service orders (OOSO's). Resp. Reply at 7. NTTC addressed the legal status of CVSA's out-of-service criteria (OOSC). There, this Court held that "no federal statute or regulation either requires or authorizes federal or state agents to use the OOSC in deciding to place a vehicle out of service." 170 F.3d at 208. It further held that "CVSA's OOSC are not themselves federal rules subject to our review under Hobbs Act." *Id*. The Petition for Review here does not seek review of the many flaws in CVSA's OOSC for fatigue. It does, however, address FMCSA's October 23, 2012 determination to approve for the first time a federal rule authorizing federal performance-based regulation of fatigue. *NTTC* does not stand in the way of such review.

FMCSA argues that it has not adopted a new position inconsistent with an existing regulation because there is no existing regulation that has been changed. Resp. Reply at 10-11. Respondents' argument ignores the fact that Administrator Ferro's October 23, 2012 letter dealt specifically with 49 C.F.R. § 392.3, a provision which OOIDA's Brief in Opposition points out does not satisfy the statutory requirement that out-of-service orders be based upon an "imminent hazard to safety." Doc. 1422257 at 12-13, citing 49 U.S.C. § 521 (b)(5)(A),(B). Administrator Ferro's letter clearly amends the reach of Section 392.3 and does so in a manner that conflicts with the controlling statute. FMCSA's brief does not address this important question.

2. Waiver

The principal problem addressed by OOIDA's cross motion deals with FMCSA's failure to implement a major regulatory action through notice and comment rulemaking. Ironically, FMCSA seeks to impose procedural standards on OOIDA as if it was a party to a formal rulemaking proceeding – the very kind of proceeding that it specifically failed to convene[1]. Thus, FMCSA argues that OOIDA waived any objection it may have had regarding the authorization of performance-based fatigue regulation because it did not raise that issue in its June 12, 2012 letter. The purpose of OOIDA's June 12, 2012 letter was to demand that FMCSA terminate financial support for state enforcement activities under CVSA's 2012 amendment to its OOSC for fatigue because such state enforcement activity was not predicted on probable cause. FMCSA did not convene a formal notice and comment rulemaking proceeding where interested parties would have had the opportunity to comment on a specific agency proposal. Because OOIDA's June 12, 2012 letter was not part of any formal administrative proceeding, OOIDA was not required to identify every potential grievance that it might have against FMCSA under a risk of waiver. FMCSA went beyond the limited problem

[1] The cases relied upon by FMCSA each involved appeals from formal agency proceedings where interested parties had an opportunity to raise specific issues and create a record. *DOT v. Public Citizen*, 541 U.S. 752 (2004); *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012); and *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92 (D.C. Cir. 2000)

addressed in OOIDA's letter and addressed the authorization issue for the first time since the year 2000. There was simply no administrative proceeding during which OOIDA could have waived anything.

FMCSA further argues that the position OOIDA took in its August 2011 comments on the agency's draft strategic plan was a closed matter at the time of OOIDA's June 12, 2012 letter to Administrator Ferro. Not so. In 2011 FMCSA sought comments on the priorities established in its draft strategic plan. 76 Fed. Reg. 38267 (Jan. 29, 2011). OOIDA's comments informed FMCSA of its position that no regulations authorizing OOSO's for fatigue had been adopted. OOIDA encouraged FMCSA to include within the priorities to be established in its strategic plan a decision to withhold MCSAP funding of state enforcement activity in this area until an authorization for performance based OOSOs for fatigue was given. Johnston Declaration at ¶¶10-12 and Exhibit 1 at 7. OOIDA never requested that FMCSA promulgate a regulation authoring performance based out-of-service orders for fatigue. FMCSA's approval of a final strategic plan that did not address direct fatigue regulation had no binding legal consequences on anyone. The resulting plan was not a rule, regulation or final order reviewable under the Hobbs Act. No rights, remedies or obligations were created by the Strategic Plan.

In its October 23, 2012, letter FMCSA unilaterally announced a new policy shifting away from exclusive reliance on hours-of-service and log book regulations

when dealing with driver fatigue. That announcement was not made as part of a formal administrative proceeding. FMCSA has no basis to hold OOIDA to standards applicable to one who participates in a formal rulemaking proceeding – the very type of proceeding which it failed to conduct.

FMCSA insists that "fatigue related out-of-service orders have always been permissible." Resp. Reply at 11. It is difficult to see how the agency can make this statement. In 2000, FMCSA admitted on the record that "more study is needed before such alternatives should be incorporated in this regulation of commercial highway operations." 65 Fed. Reg. 25540, 25552. FMCSA has not been able to identify for the Court whether any such further study has been undertaken and, if so, what the results of such further study may have shown. FMCSA can point to no formal agency action approving performance based out-of-service orders for fatigue. By contrast see the rules specifically authorizing enforcement by the use of an out-of-service orders: 49 C.F.R. §§392.5, 392.9a, 395.13, 396.9 and 398.8. The fact that FMCSA may be funding enforcement activities by individual states under MCSAP suggests lax and potentially irresponsible management of federal funds by FMCSA. After all, FMCSA is on the record finding that the activities being funded are technically beyond the capabilities of enforcement officers and operationally impractical. 65 Fed. Reg.

25540, 25552. Be that as it may, the fact that some states may be issuing fatigue based OOSOs is not evidence of proper federal authorization for such activities.

3. The October 23, 2012 Letter Sets Forth a Rule or Regulation Reviewable Under the Hobbs Act

Respondents argue that Administrator Ferro's October 23, 2012 communication to OOIDA "is just a letter and does not in any way constitute a rule, regulation or final order." Resp. Reply at 11 (Doc. 1426670 at 11). FMCSA does not support its conclusory denial with any analysis of the case law and legal argument set forth in OOIDA's opening brief. *See* Doc. 1422257 at 23 to 30. FMCSA points out that 49 U.S.C. § 31136 (c) requires notice and comment only for rules and regulations "not in the issuance of final orders." Resp. Reply at 11-12. The brief provides no analysis or supporting authority showing why the October 13, 2012 letter constitutes a final order, but not a rule or regulation. The following language from the October 23, 2012 letter describes a rule or regulation clearly applicable to commercial motor vehicles drivers generally and to their current and future activities while operating their vehicles:

> Once an enforcement official makes a finding that a regulatory violation [under § 392.3] has occurred, an out-of-service order is appropriate to remedy the violation before transportation may resume.

Add. at 4. This is a rule or regulation by any reasonable standard. These words constitute a statement of general applicability and future effect designed to

prescribe the policy and practice requirements for an OOSO for fatigue that is well within the definition of a "rule" under 5 U.S.C. § 551. The statement in the October 23, 2012 letter "effects 'a substantive regulatory change' to [FMCSA's] statutory or regulatory regime" requiring notice and comment procedures. *Electronic Privacy Information Center v. U.S. Dept. of Homeland Security*, 653 F.3d 1, 6-7 (D.C. Cir. 2011), citing *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34-40 (D.C. Cir. 2005). This rule should be vacated because Respondents failed to comply with the requirements established under 49 U.S.C. § 31136(c).

CONCLUSION

Administrator Ferro's October 23, 2012 letter overturned a formal agency determination published on May 2, 2000 rejecting the regulatory option of direct, performance based regulation of driver fatigue. For the first time, Administrator Ferro's letter sanctioned the issuance of out-of-service orders for violations of 49 C.F.R. § 392.3. That action constituted a rule or regulation subject to Hobbs Act review by this Court. Because that rule or regulation was promulgated without following the procedures mandated by 49 U.S.C. § 31136(c), summary reversal is appropriate. There are, to be sure, additional flaws in FMCSA's action, but it is not necessary to address those flaws at this point in time. Respondents' Motion to

Dismiss should be denied. Petitioner's Cross Motion for Summary Reversal should be granted.

Respectfully submitted,

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