

ORAL ARGUMENT SCHEDULED FOR APRIL 25, 2022

Case No. 20-1370

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

ADVOCATES FOR HIGHWAY AND AUTO SAFETY, et al.,

Petitioners,

vs.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, et al.,

Respondents.

On Petition for Review of a Final Rule Issued by
the Federal Motor Carrier Safety Administration

FINAL REVISED INTERVENOR'S BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Fed R. App. P. 26.1 and D.C. Circuit Rules 26.1(a) and 28(a)(1), Intervenor certifies:

A. Parties and Amici

Petitioners are: Advocates for Highway and Auto Safety; International Brotherhood of Teamsters; Citizens for Reliable and Safe Highways; and Parents Against Tired Truckers (sometimes hereafter, “Advocates”).

Respondents are: United States Department of Transportation; Federal Motor Carrier Safety Administration; and the United States.

Intervenor in support of Respondents is Owner-Operator Independent Drivers Association, Inc. (sometimes hereafter, “OOIDA”). Intervenor OOIDA has no parent companies, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public.

B. Rulings Under Review

Petitioners have challenged Federal Motor Carrier Safety Administration’s final rule Hours of Service of Drivers, 85 Fed. Reg. 33,396 (June 1, 2020) (Docket No. FMCSA-2018-0248) (“Final Rule”), JA 218-74.

C. Related Cases

Intervenor has no knowledge of other related cases.

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GLOSSARY

ANPRM	Advance Notice of Proposed Rulemaking
FMCSA	Federal Motor Carrier Safety Administration
JA	Joint Appendix
NPRM	Notice of Proposed Rulemaking
OOIDA	Intervenor, Owner-Operator Independent Drivers Association, Inc.

STATUTES AND REGULATIONS

All applicable statutes and regulations are set forth in the Initial Brief for Petitioners and the Respondents' Brief.

SUMMARY OF ARGUMENT

The federal hours-of-service rules govern the operation of commercial trucks moving property and persons on our nation's roads. These rules must strike a balance between advancing FMCSA's safety directive and ensuring truckers can operate efficiently and move America's economy. FMCSA's changes to the 30-minute break requirement in 49 C.F.R. § 395.3(a)(3)(ii) and to the scope of the short-haul exemption found in 49 C.F.R. § 395.1(e) represent common sense updates to the hours-of-service rules that significantly increase flexibility for commercial truck drivers while maintaining safety at least equivalent to previous versions of these rules. In adopting the Final Rule, the Agency relied on ample evidence from the administrative record demonstrating that more hours-of-service flexibility means more efficient trips and less stress for drivers, improving safety on the road.

Agency action is not arbitrary or capricious if the agency "examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice

made.” *E.g., Mingo Logan Coal Co. v. Env’tl. Protec. Agency*, 829 F.3d 710, 718 (D.C. Cir. 2016) (quoting *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)) (cleaned up). OOIDA joins in Respondents’ arguments demonstrating that adopting the Final Rule was supported by the administrative record and was not arbitrary or capricious. Rather than repeat those arguments, OOIDA writes separately as a representative of parties affected by the Final Rule to share its members’ perspective and highlight additional specific record information that supports increasing the flexibility of the 30-minute break and short-haul rules and to demonstrate how the Advocates’ arguments lack record support.

ARGUMENT

I. Interest of Owner-Operator Independent Drivers Association, Inc.

A. OOIDA represents independent small-business operators, distinct from the employee drivers represented by the Teamsters.

OOIDA, founded in 1973, is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional truck drivers. It has more than 150,000

members located in all 50 states and Canada, who collectively own and operate more than 200,000 individual heavy-duty trucks. OOIDA is also the leading advocate of single truck motor carriers, which represent nearly half of the total active motor carriers in the United States, and owner-operators, drivers who own their own trucks and choose to work as independent contractors for a single motor carrier. Unlike the Teamsters, OOIDA principally represents independent owner-operators who have purchased their own trucks and work as independent contractors for motor carriers.

B. OOIDA and its members have participated extensively in the FMCSA's hours-of-service rulemakings.

OOIDA has worked tirelessly for years to improve the efficiency and effectiveness of the hours-of-service rules. In addition to its previous regulatory and litigation efforts¹, in early 2018, OOIDA petitioned FMCSA

¹ OOIDA has participated in several court challenges to the hours-of-service rules. *See, e.g., Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580 (7th Cir. 2011) (challenging rule mandating use of electronic logging devices to record hours-of-service); *see also Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety*

regarding the hours-of-service issues addressed here prior to the agency's ANPRM. *See* FMCSA-2018-0248-1210 (petitioning FMCSA to remove the 30-minute rest break requirement and amend the hours-of-service rules to allow drivers to use an off-duty break to stop the 14-hour clock), JA 45-46. Although FMCSA did not grant OOIDA's petition, OOIDA supported FMCSA's publishing its ANPRM, requesting extensive public comment through written submissions and listening sessions, and initiating the rulemaking at issue here that gives drivers increased hours-of-service flexibility.

During this rulemaking, OOIDA submitted comments on three occasions. On September 26, 2018, OOIDA commented in support of the

Admin., 494 F.3d 188 (D.C. Cir. 2007) (challenging previous change to hours-of-service rules).

OOIDA also consistently participates in FMCSA's hours-of-service rulemakings. *See generally, e.g.*, Hours of Service of Drivers, 70 Fed. Reg. 49,978 (Aug. 25, 2005) (considering OOIDA's rulemaking comments); Electronic Logging Devices & Hours of Service Supporting Documents, 80 Fed. Reg. 78,292 (Dec. 16, 2015) (same); Electronic On-Board Recorders for Hours-of-Service Compliance, 75 Fed. Reg. 17,208 (Apr. 5, 2010) (same); Hours of Service of Drivers; Driver Rest & Sleep for Safe Operations, 68 Fed. Reg. 22,456 (Apr. 28, 2003) (same).

ANPRM and included a survey of its members on the relevant topics. *See* FMCSA-2018-0248-3347, JA 53-67. In October 2019, OOIDA commented on the NPRM, providing another survey and detailed responses to the Notice's questions. *See* FMCSA-2018-0248-7317, JA 136-50; FMCSA-2018-0248-7948, JA 151-61. Finally, on August 3, 2020, OOIDA submitted comments supporting the Final Rule. *See* FMCSA-2018-0248-8264, JA 286-90. Moreover, OOIDA, through its officers and board members, participated in FMCSA's listening sessions on numerous occasions. *See* Motion for Leave to Intervene in Support of Respondents at 5-6.

II. FMCSA justified its changes to the 30-minute rest break requirement with reasonable interpretations of data in the administrative record.

FMCSA relied on ample record evidence and interpretations thereof to support its position that breaks from driving, whether on- or off-duty, provide fatigue relief and substantial safety and health benefits.

A. Information in the administrative record demonstrated that any break from driving provides safety and health benefits.

As FMCSA noted, it relied on information in the administrative record to support its determination that any break from driving provides

safety and health benefits. Respondents' Brief at 49-51. Petitioners' contrary policy positions, even if arguably supported by evidence, do not support reversing the Agency's reasoned decision.

The Advocates' principal objection to the changes to the 30-minute break requirement is premised on the idea that working, whether driving or otherwise, causes fatigue, and FMCSA failed to adequately respond to this point. But FMCSA specifically pointed to evidence suggesting that *any* break from "time on task" (*i.e.*, continuous driving time) provides significant safety benefits. *See* Respondents' Brief at 53 (quoting Final Rule's discussion of Blanco 2011 study providing that stopping driving in any way provides fatigue benefits).

In addition to the statistical evidence, commenters provided similar information. For instance, OOIDA informed the Agency that the previous version of the 30-minute rule frequently adds to driver stress and forces drivers into unsafe driving conditions. *E.g.*, FMCSA-2018-0248-7317 at 6, JA 141. OOIDA reported that forcing drivers to stop, for a 30-minute off-duty break, within the first 8 hours of coming on duty, often forces drivers to

stop before they are tired and to stop at times or locations when there is no safe place to park their truck, like the highway shoulder. *Id.* The updated rule lets drivers take advantage of natural, preexisting, breaks from driving:

During the course of their daily schedules, drivers have opportunities to take breaks at their own discretion or when routine maintenance requires them to do so. These stops include purchasing food and fuel, using the restroom, and/or performing necessary inspections such as checking load securement and vehicle equipment. Typically, drivers also spend excessive time waiting at loading/unloading facilities.

Id. OOIDA backed up these comments with a survey of its members. *Id.* at 6-7 (citing OOIDA member survey).² The upshot of OOIDA's comments in the administrative record is that the new version of the 30-minute break better takes into account the realities of drivers' daily lives, making use of the breaks built-in to their days. Importantly, the rule still requires drivers to stop driving for 30 minutes if they drive continuously for eight hours.

² For these reasons, OOIDA proposed eliminating the 30-minute rest break requirement altogether. FMCSA-2018-0248-7317 at 5-6, JA 140-41. Short of elimination, the current iteration of the 30-minute break requirement represents a significant improvement to driver health, safety, and efficiency over the previous version.

The Advocates also contend that allowing drivers to spend their 30-minute breaks on-duty will extend drivers' workdays. That is, the previous version of the workday was a maximum of 13.5 on-duty time—the 14-hour duty limit less the 30-minute off-duty break. By allowing drivers to take that break on-duty, the Advocates claim, drivers will now spend all 14 hours of the workday on-duty. *E.g.*, Petitioners' Brief at 47-49. But this version of the workday does not exist for many drivers. FMCSA's Regulatory Impact Analysis estimated, based on survey data, that only 5.6% of drivers work even 13.3 hours per day. *See* FMCSA-2018-0248-8308 at 2-7, JA 31. Moreover, the Advocates do not cite to any record evidence identifying how many drivers, if any, routinely work 14 or more hours per day, a necessary yet unsupported factual foundation of their arguments.

Moreover, neither the previous 30-minute break rule nor the Final Rule limit the amount of time a driver can *work* each day. Rather, a driver is prohibited only from *driving* more than 11 hours or driving after the 14-hour period starting with the beginning of the driver's workday. The

driver may, under the previous and current rules, continue to perform non-driving work beyond the 14-hour driving window without limit.³

In fact, for many drivers, the previous version of the 30-minute break requirement actually *extended* their workdays. For a driver whose workday is already 13.5 hours or less (according to FMCSA, roughly 95% of drivers), requiring 30 minutes off-duty time may extend their workday by at least⁴ those 30 minutes. That is, in a day where a driver has 12.5 hours of work which includes 30 minutes' worth of paperwork, for example, requiring 30 minutes of off-duty time forces the driver to spend 13 hours (or more) to complete 12.5 hours of work. *See* OOIDA Comments in Response to Petitions for Reconsideration, FMCSA-2018-0248-8264 at 3-4 ("Many drivers have also expressed that more flexibility would allow them to complete their day more quickly and get home sooner), JA 288-89. The

³ To note, regardless of how many hours a driver works in a day, the driver must take at least 10 hours off-duty before driving again. *See* 49 C.F.R. § 395.3(a)(1).

⁴ The bare minimum extension is 30 minutes. But many drivers required additional time to arrange the 30 minutes off-duty, including leaving the highway or flow of traffic and finding a safe place to park.

same driver can finish 12.5 hours of work in 12.5 hours if the non-driving paperwork time can also serve as the break required by § 395.3(a)(3)(ii).

Moreover, drivers are ultimately still bound by the 11-hour and 14-hour limits on driving; providing more flexibility within those limits promotes driver efficiency, allowing drivers to take breaks when they are tired and it is safe to do so, and allowing them to better complete their trips. *E.g.*, OOIDA Comments in Response to NPRM, FMCSA-2018-0248-7317 at 7, JA 142. Thus, without increasing daily driving time, the new rule promotes driving more efficient and safe vehicle miles for the same amount of work. *See id.*

FMCSA's changes to the rule, while short of the changes OOIDA requested in its original rulemaking petition, constitute an improvement over the previous version. Basing the break requirement on driving time rather than on-duty time helps drivers better plan their trips. Allowing the break to be served on-duty gives them the flexibility to interrupt their driving during their natural stops for maintenance and other on-duty tasks.

This increased flexibility will permit drivers to drive more safely and efficiently without increasing driving time.

B. FMCSA's change to the 30-minute rest rule complied with Administrative Procedure Act requirements.

The Advocates take issue with FMCSA's reexamination of the Blanco 2011 study on driver fatigue and assert that the Agency should have ignored this data and the comments highlighting the benefits of a 30-minute break of any kind. *See* Petitioners' Brief at 48-49. Because FMCSA previously relied on the study's conclusions regarding the benefits of off-duty breaks, the Agency could not later rely on the study's evidence about the benefits of any breaks in time on task. But FMCSA is justified in reevaluating those data and applying them to a different perspective on drivers' work. *See* Respondents' Brief at 51 (noting that Blanco 2011 study shows that any break from time on task benefits drivers).

Moreover, this conclusion comports with the comments submitted by OOIDA and others. For instance, OOIDA reported to FMCSA that requiring drivers to find a time and place to take 30 minutes off-duty often adds to driver fatigue and stress and extends their workday. *See, e.g.,*

FMCSA-2018-0248-7137 at 6, JA 141. Allowing drivers to use the breaks inherent in their day allows them to achieve the benefits of time away from task without adding stress or extra time to their days. Moreover, avoiding this increased pressure and stress, *see id.* at 8, JA 143, contributes to driver health. *See* Respondents' Brief at 54.

As Respondents and commenters both noted, drivers remain bound by the 11- and 14-hour limits, a key component of protecting driver health. *Id.*; *see also* OODIA Comments in Response to Petitions for Reconsideration, FMCSA-2018-0248-8264 at 3-4 ("The majority of our members expect to use the additional flexibility provided by the rule to more efficiently utilize their on-duty time. While their total miles might increase on a given day, the final rule does not increase their daily driving time as they are still restricted to the 11-hour rule. Many drivers have also expressed that more flexibility would allow them to complete their day more quickly and get home sooner."), JA 288-89.

III. Several of the Advocates' short-haul arguments rely upon assumptions that the administrative record does not support.

A. The increased likelihood of more short-haul drivers exceeding the maximum driving time is unsupported by the record.

The Advocates' argument that the longer 14-hour workday will increase the "likelihood" that short-haul drivers will exceed the driving limits (Petitioners' Brief at 42) is premised upon the implied suggestion that, as a general matter, drivers generally push to drive the maximum hours allowed under the rules or longer. It may be possible as a mathematical exercise that the longer workday would provide the opportunity to increase driving time, but nothing in the record supports the Advocates' assertion that the new rule increases the "likelihood" that such increased driving time will cause drivers to exceed the 11-hour limit. The Advocates cite to no evidence in the record as to how frequently short-haul drivers routinely come close to driving 11 hours a day and, therefore, the scope, if any, of the "likelihood" of drivers exceeding 11 hours under the new rule or what the safety implications would be.

As a general matter, Intervenor OOIDA takes umbrage at the implication that truck drivers generally attempt to reach or exceed the

maximum driving time on a routine basis. It is incorrect, disingenuous, and unsupported in the record to assert or imply that the hours-of-service limits have the practical effect of cutting short the daily schedules of the truck-driver population as a matter of course.

The record is replete with references to the numerous stops to load and unload that short-haul drivers, as opposed to their long-haul counterparts, are required to make each workday. For example, the Iowa Motor Truck Association commented that short-haul drivers make 20-25 deliveries and pick-ups each day, Iowa Motor Carrier Ass'n Comments, FMCSA-2018-0248-4075 at 1, JA 68, and these frequent stops provide a natural impediment to short-hauls drivers exceeding 11 hours of daily driving time. FMCSA, therefore, reasonably inferred that these drivers routinely spend fewer hours driving than long-haul drivers. Thus, FMCSA's judgment that a two-hour longer workday will not cause an increase in drivers exceeding the 11-hour maximum driving time was reasonable.

B. The Advocates assume, without support, that without electronic logging devices, short-haul drivers will violate the hours-of-service rules more often.

The Advocates complain that the agency “does not explain how motor carriers will ensure that their drivers comply with the limits when the drivers will not be required to keep a log detailing their driving time.” Petitioners’ Brief at 45. Again, there is no evidence of the extent to which short-haul drivers currently exceed their allowable driving time and to what extent, if at all, that is an ongoing concern under the current rule. Furthermore, if this is an issue, its origins lie in the prior rule. Without contrary evidence in the record from drivers’ and carriers’ actual experiences under the previous rule, the Agency appropriately relied upon its assumptions and findings considered during the previous amendments to the rule.

The Advocates argue that the expanded scope of the short-haul exemption will increase the incidence of hours-of-service violations because more drivers will not be required to use electronic logging devices. The assumption here is that electronic logging devices cause fewer hours-

of-service violations. Petitioners cite to no evidence for the assertion and assumption that “electronic logging devices reduce noncompliance with hours-of-service rules.” Petitioners’ Brief at 43. Electronic logging devices have been mandated since December 2017, and there is no support in the record (or anywhere, to OOIDA’s knowledge) as to how electronic logging devices have improved actual hours-of-service compliance or safety. While the potential efficacy of electronic logging devices to improve hours-of-service compliance may have been considered a reasonable assumption to support the proposed electronic logging device rule prior to its 2017 effective date, more than four years of industry-wide electronic logging device use has yield no evidence of their actual effectiveness.

C. Longer workdays for short-haul drivers will not result in more accidents or injuries.

The Advocates argue that “operating under the short-haul exemption has been shown to increase crash risk.” Petitioners’ Brief at 33. The Advocates cite to the Teamsters’ comments that short-haul drivers engage more in non-driving tasks and that those tasks cause the most injuries for short-haul drivers. *Id.* at 35. Thus, the Advocates argue, a longer workday

for short-haul drivers will cause drivers to engage in activities that cause them injury. *Id.* at 35-36. This is contradicted by their assertion elsewhere that the expanded driving hours “will enable drivers to stop less often.” *Id.* at 45.

The Advocates rely primarily on the number of “safety critical events” in the effect hours-of-service changes have on their incidence. Such argument fails in this challenge for at least two reasons. First, safety critical events are not crashes, nor are they appropriate proxies for crash risk. Although sometimes the vehicle movements categorized as safety critical events may result in crashes, many may reflect evasive movements that avoid crashes. *See* 85 Fed. Reg. 33,396, 33,417-18 (“[A]n SCE has been defined as a ‘crash, near-crash, crash-relevant conflict, or unintentional lane deviation” that often has a measurable kinematic signature, including longitudinal and lateral acceleration, yaw rate, and active safety system activations.”). OOIDA provided this analysis in its comments: “Such harmless surrogate events have no intrinsic significance; to be significant, they must be validated against actual harmful crashes or against a known

hazardous condition such as driver drowsiness.” FMCSA-2018-0248-7317 at 6 (quoting Knipling), JA 141.

Second, even accepting safety critical events as a reasonable measure of crash risk, FMCSA considered the impact its hours-of-service changes would have on safety critical events and determined that the changes were not statistically significant, and, indeed, the safety critical event data supported the changes. *See, e.g.*, 85 Fed. Reg. at 33,416-17 (finding that on-duty breaks of at least 30 minutes reduce safety critical events), JA 238-39.

More stops will not necessarily increase accidents or worker injury. The Advocates’ authorities for those assertions, Petitioners’ Brief at 35 (related to injuries) and *id.* at 33 (increased short-haul risk of accidents), are based primarily on facts inherent to short-haul work and are not tied exclusively to a time of day. Given a constant market demand for deliveries, the exposure to injury and accident to the driver population remains the same whether that amount of work is performed by more drivers and trucks operating shorter workdays or fewer drivers and trucks operating slightly longer days.

D. The Advocates have not shown that short-haul drivers had a better safety experience working a 12-hour day than long-haul drivers do working a 14-hour day.

The Advocates assert that fatigue occurs after time spent working, not just after time spent driving. Thus, by extending the short-haul drivers' driving window from 12 to 14 hours, FMCSA has increased the likelihood of fatigued driving.

OOIDA submitted comments explaining that expanding the short-haul exemption increases flexibility—*i.e.*, efficiency and safety. Extending the short-haul limits gives those drivers additional flexibility to complete trips and return home safely. Even putting aside the fact that the Advocates point to no evidence in the record demonstrating that short-haul drivers approached the daily drive time limits under the old rule with any regularity, maintaining the 11-hour drive limit under the amended 14-hour work limit ensures that those short-haul drivers who occasionally approach the daily driving limit do not exceed the daily driving time—11 hours—deemed safe in the previous rulemaking.

Lining up the time limits for short-haul and long-haul truckers will also simplify enforcement. OOIDA does not anticipate that short-haul drivers, as a rule, will drive more or longer under the expanded exemption.

Since the long-haul hours-of-service rules and the prior short-haul rules were in place, there has been time to observe and collect information about their actual application. OOIDA is not aware of any support in the record to demonstrate that drivers operating under the shorter short-haul day had better health or better safety records attributable to their shorter workday. On the other hand, there was adequate evidence in the record that the longer workday will not result in more unsafe driving. Because short-haul drivers make more stops during the day to load and unload their trucks, they operate their vehicles for far fewer hours than long-haul drivers, resulting in less driving fatigue. The most significant fatigue and health advantage that short-haul drivers enjoy—the ability to go home to sleep every night, and all of the attendant benefits on their diet, exercise, and family life—remains in place under the new rule. These factors, combined with FMCSA's previous decision that long-haul drivers could

safely operate in a 14-hour workday, render FMCSA's Final Rule changes to the short-haul exemption entirely reasonable.

CONCLUSION

For the reasons set forth above and in the Initial Brief for Respondents, the Court should deny the Advocates' challenge to the Final Rule.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 32(e)(2)(B) in that the brief contains 3,685 words excluding those parts exempted by Fed. R. App. P. 32(f).

Dated: March 08, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on March 08, 2022, an electronic copy of the foregoing *Final Revised Intervenor's Brief* was electronically filed and served on all parties of record via the Court's CM/ECF system.

Dated: March 08, 2022

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