A Primer on American Trucking Associations v. FMCSA (12-1092)

On Friday, March 15, at the U.S. Court of Appeals for District of Columbia Circuit Judges Janice Rogers Brown, Thomas B. Griffith and A. Raymond Randolph will hear oral arguments in consolidated challenges to the Federal Motor Carrier Safety Administration's 2011 hours-of-service rules. One challenge is being brought by ATA (joined by a number of intervenors and amici) and the other by the troika of Public Citizen, Advocates for Highway and Auto Safety and the Truck Safety Coalition.

The heart of ATA's challenge – which was supported by National Industrial Transportation League, OOIDA, TCA, NASSTRAC; as well as another 15 organizations representing shippers or the business community in general – rests in the agency's limitations on the restart (limiting it to once per week and requiring that it span two consecutive 1am-5am periods); in the requirement that the mandatory 30-minute break within 8 hours of starting a duty period be *completely* off-duty (rather than just a break from driving); and the unannounced application of the break requirement to local delivery drivers. The advocacy groups challenged the existence of the restart at all and the retention of the 11th hour of driving.

ATA argues that the challenged rules are "arbitrary and capricious," which is the relevant legal standard.

In particular, ATA offered a detailed rebuttal of FMCSA's justification for the rule changes:

- While FMCSA is entitled to deference in its rulemaking, that deference is not unbounded. It must still articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. An agency action is not reasonable if its explanation runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Where an agency changes its mind on prior positions, it must indicate that it is aware it is changing positions and provide an adequate explanation for its departure.

- FMCSA justified the rule changes largely on the basis of an analysis from which it concluded that the benefits of the rule changes would outweigh their costs. That analysis was deeply flawed in a number of ways:

- The analysis vastly overstates the number of truck-involved fatalities that were caused by fatigue, because FMCSA misrepresented the evidence in the Large Truck Crash Causation Study (conducted by FMCSA and the National Highway Traffic Safety Administration). NHTSA experts coded every crash in the LTCCS study for "critical events" (the event that made the crash inevitable), "critical reasons" (the reason the crash occurred), and "associated factors" (conditions or circumstances present at the time of the crash, including things like weather, road condition, time of day, and driver fatigue). FMCSA ignored the distinction between critical and associated factors, and counted as "fatigue-caused" any crash in which fatigue was listed as an associated factor, even if the critical event/critical reason was entirely outside the driver's control.

- The analysis relies on the unsupported assumption that measurable health benefits will accrue to drivers from increases in nightly sleep on the order of less than a minute. The agency began with a study finding that, when compared with an average of seven hours of sleep per night, sleeping either less than five or more than nine hours correlates with mortality risk. From this, FMCSA unjustifiably assumed a continuous and *causal* relationship between sleep and mortality; imposed the assumption that any deviation from exactly seven hours per night increases mortality risk; and assumed that this is true even of changes in sleep measured in minutes or second.

- The analysis assumes, contrary to the evidence, that a small group of drivers consistently works long weeks at the limits of what the rules permit. FMCSA relied on its 2007 Field Survey for data about driver hours. That survey included data points representing weekly work periods, and showed that approximately 5% of weekly work periods were as high as 75 hours. But rather than conclude—as other evidence demonstrates—that those long workweeks are more or less uniformly distributed over the driver population, FMCSA simply made the loaded and implausible assumption that the same small group of *drivers* work those long hours week in and week out.

- FMCSA's justification for the requirement that the 30-minute break be completely off-duty is counter to the evidence the agency relied on: the study FMCSA used did not show any statistically significant difference in the safety benefit of an off-duty break compared to an on-duty break from driving, nor did the agency attempt to explain why one particular type of non-driving break would be more effective than another at reducing the "time on task" effect which it was designed to remedy.

- FMCSA also refused to acknowledge a number of long-held positions, or reversed those positions without justification. For example:
  - FMCSA has long maintained that a 34-hour off-duty period is sufficient to remedy any accumulated fatigue.
  - It has previously concluded that consistent sleep schedules are more important than forcing nighttime drivers to "flip" their schedules to nighttime sleep during a restart and disrupt their circadian stability.
  - It has rejected on multiple occasions the suggestion that drivers use the current rules to maximize hours, describing that scenario as "unrealistic".

- If the agency's analysis had not made these errors, it would have been clear that the costs of the rule outweigh its benefits. FMCSA's reliance on the analysis as the primary support for the rule was thus improper. Indeed, the flaws in FMCSA's analysis make it clear that it had an outcome in mind during this rulemaking and then worked backwards to fabricate a justification.

For fuller details, you can read ATA's Statement of Issues in the case and our opening brief.

Oral arguments are scheduled as one of three cases to be heard beginning at 9:30am in Courtroom 11. If you have questions before or after the hearing, please feel free to contact me at 703-838-1995 or smcnally@trucking.org.