

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

PUBLIC CITIZEN, ET AL.,)	
)	
Petitioners,)	
)	
v.)	No. 03-1165
)	
FEDERAL MOTOR CARRIER)	
SAFETY ADMINISTRATION,)	
)	
Respondent.)	

**GOVERNMENT'S REPLY IN SUPPORT OF MOTION
TO STAY ISSUANCE OF THE MANDATE**

The Court in this case invalidated the Hours of Service (HOS) rule promulgated by the Federal Motor Carrier Safety Administration (FMCSA), on the ground that the agency failed to consider the statutorily mandated factor of driver health. In light of the severe disruption that would result from immediate issuance of the mandate, the agency, as well as the intervenors, have requested an order staying issuance of the mandate to allow the agency to develop an orderly process for the administration and enforcement of HOS requirements pending issuance of a new final rule addressing the concerns expressed by the Court.

Petitioners oppose the motions, urging an immediate return to the old HOS rule, which remains largely unchanged since the 1930s, on the grounds that such a stay would be unprecedented, inconsistent with the Court's rules, and unnecessary.

As we discuss below, however, petitioners are incorrect on all counts. A stay of the mandate is consistent with this Court's procedures and past practices. Moreover, such a stay is necessary to avoid substantial interference with enforcement of the HOS requirements, and petitioners' argument to the contrary reflects a fundamental misunderstanding of the nature of the harm and a persistent misconstruction of the statutes and regulations governing enforcement of those requirements. Petitioners' dire predictions of harm from continued implementation of the new rule overlooks the fact that there has been no finding in this case that the current rule is less safe than the old rule and fails to recognize that immediate return to the old rule is not in the interest of safety.

1. Petitioners' contention (Opp. 2) that the relief sought here is unprecedented and inconsistent with this Court's rules is incorrect. In fact, this Court has stayed its mandate in similar circumstances after invalidating agency action. *See, e.g., Maryland People's Counsel v. Federal Energy Regulatory Comm'n*, 768 F.2d 1354 (D.C. Cir. 1985); *Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 42, 57 (D.C. Cir. 1982); *see also Sprint Corp. v. FCC*, 2003 WL 1877308 (D.C. Cir. Apr. 1, 2003) (order granting stay of mandate until Sept. 30, 2003); *United States Telecom Assoc. v. FCC*, 2002 WL 31039663 (D.C. Cir. Sept. 4, 2002) (order denying rehearing and granting partial stay of mandate until Jan. 2, 2003).

Nor have such stays been limited to 90 days, as petitioners contend is required. In *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001), the Court invalidated an agency rule, but invited the agency to seek a stay of the mandate pending the issuance of an interim rule. The agency thereafter requested and received a four-month stay of the mandate. *See* 67 Fed. Reg. 44,452, 44,455 (2002). The same scenario (a four-month stay of the mandate after an invitation from this Court) occurred in *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998). *See* 65 Fed. Reg. 42,937, 42,939-40 (2000); *see also Maryland People's Counsel*, 768 F.2d at 1354 (issuing a stay of mandate from July 1 to October 31, 1985, or until the effective date of a new agency rule, whichever occurs first).

Indeed, in *Environmental Defense Fund*, the Court retained jurisdiction and continued the stay of its mandate for over three years. The Court's initially stayed the mandate in February 1981, retaining jurisdiction and adopting a plan for further action by the agency. *See* 672 F.3d at 57. Subsequent agency proceedings reveal that the Court granted two subsequent requests for further stay of the mandate and continued to monitor the agency's progress, before finally issuing its mandate on October 1, 1984 – more than three and one-half years after the initial stay order. *See* 49 Fed. Reg. 28,172, 28,173-74 (1984); 53 Fed. Reg. 24,206, 24,207 (1988).

As the proceedings in *Environmental Defense Fund* indicate, the stay requested here is not a back door attempt to obtain “remand without vacatur” (*see* Opp. 3). As it did in *Environmental Defense Fund*, this Court can monitor the agency's progress and adjust the parameters of the stay as circumstances change. Moreover, as the cases discussed above illustrate, while Fed. R. App. P. 41 and D.C. Circuit Rule 41(a) generally contemplate a stay of the mandate to allow a party to file a petition for certiorari, this Court's authority to issue a stay of the mandate is not limited to such a narrow circumstance.

2. The cases discussed above also illustrate that petitioners are incorrect when they assert (Opp. 7) that because this Court already has issued a decision on the merits, the stay must be denied without considering any additional factors. Petitioners' contention (Opp. 5-6) that a stay cannot be granted in the absence of an intention to seek further review on the merits cannot be squared with the fact that this Court has on numerous occasions invited agencies to request just such a stay, *Cement Kiln Recycling*, 255 F.3d at 872; *Columbia Falls*, 139 F.3d at 923, and has granted numerous such requests. *See, e.g., Maryland People's Counsel*, 768 F.2d at 1354; *Environmental Defense Fund*, 672 F.2d at 57. Where, as here, the Court's mandate would cause severe disruption in the enforcement of an important safety rule, this

Court may stay its issuance to allow the agency to develop a course of action that attempts to minimize the disruption pending the promulgation of a new rule.

3. In our motion, we demonstrate that immediate issuance of the mandate would cause widespread disruption within the motor carrier industry and would significantly hamper the agency's ability to conduct and coordinate effective enforcement of the HOS requirements. Issuance of the mandate will result in a patchwork of inconsistent HOS requirements in numerous states, significantly undermining the agency's reliance upon state authorities in HOS enforcement and creating confusion that will increase the risk of noncompliance.

Petitioners attempt to minimize the problem of inconsistent state laws, suggesting that it will not cause the harm that FMCSA believes. However, the notion that the regulatory scheme “anticipates and tolerates time lags” before states amend their laws (Opp. 14) does not establish that the patchwork of disparate state laws that would result from issuance of the mandate here would create no harm. The MCSAP program, and the requirement that states conform their laws to federal requirements, covers a variety of areas, from driver licensing qualifications to the installation of lights and reflectors. *See* 49 C.F.R. Pt. 355, App. A. Not every requirement has the widespread daily effect on the entire trucking industry – and hence the need for uniformity – as the HOS requirements.

Indeed, the fact that several states did not conform their laws before the compliance date of the current rule (Opp. 13) merely serves to illustrate the difficulty facing the FMCSA when new rules are promulgated. Moreover, unlike the initial transition period (which lasted 8 months, involved a substantial amount of effort on the part of FMCSA and the states, and resulted in only a few dilatory states), immediate issuance of the mandate here would instantly result in incompatible HOS requirements in 28 states.

Next, petitioners suggest (Opp. 14-15) that states can easily conform their laws – or be forced to do so by FMCSA – and therefore that the enforcement problem is easily resolved. This, too, is wrong.

Petitioners contend (Opp. 15), for instance, that states “have every incentive” to adopt the federal safety regulations as quickly as possible, pointing to the largely successful efforts to do so during the transition to the current rule. Yet, as we have discussed, that transition took eight months and involved a significant amount of effort. What petitioners want here is an instant reversion to the old rule. Even if states wished to conform as rapidly as possible, they could not possibly do so immediately. Moreover, unlike the situation that existed when the agency made the change to the current rule, the states are well aware that the regime that will exist once the mandate issues will almost certainly be changed significantly in the

foreseeable future. Given the resources necessary to adjust to new HOS rules, states that adopted the current requirements have a far greater incentive simply to wait for a new rule than to change back to the old rule, only to change again within a few years. *See* Paden Aff., ¶ 17. Petitioners never address this important concern.

Petitioners' contention (Opp. 14) that the agency “apparently has the discretion to set an earlier deadline” for states to amend their laws is unavailing. 49 C.F.R. part 355, Appx. A, which petitioners cite for that proposition, makes clear that states have up to three years to adopt and enforce compatible requirements, and states that “[t]he FMCSA would specify the deadline when promulgating future Federal Safety requirements.” Even assuming this language could be read as stating that the agency could set a deadline for state compliance when it promulgates a new safety rule, any such change would require notice and comment and therefore could not be accomplished immediately.

Petitioners also assert (Opp. 15) that the Secretary of Transportation can solve any problem of incompatible state regulations simply by preempting them under 49 U.S.C. § 31141. Yet that statute hardly contemplates immediate action, requiring the Secretary to make specific findings and to entertain requests by states for waivers with the opportunity for a hearing on the record and subsequent judicial review. *Id.* § 31141(c), (d), and (f). Even if the Secretary could preempt incompatible state HOS

rules immediately, doing so would not cause a new state law to take its place, but would in fact leave no state law in effect. In either case, FMCSA will lose an important element of the federal/state enforcement scheme, finding itself unable to rely upon the state officers who conduct nearly all roadside inspections.

Petitioners also point out (Opp. 16) that the FMCSA declared a 60-day grace period in enforcement (and asked the states to follow suit) when the current rule went into effect in January 2004. Yet petitioners stop short of suggesting that this provides the agency with a solution to the problem at hand. Indeed, it is precisely because the agency wishes to avoid a situation in which widespread confusion results in an inability to enforce the HOS regulations that we seek the instant stay. An announcement that only egregious violators will receive punishment, while sometimes necessary in times of transition, is by no means a solution to the problem created by inconsistent state laws and the loss of the FMCSA's ability to rely upon state officers to enforce HOS requirements.

Finally, petitioners' contention (Opp. 16 n.9) that the agency has “enforcement tools of its own,” such as the ability to impose civil penalties, issue compliance orders, and put drivers out of service, again misses the point. Before the FMCSA can impose sanctions or issue compliance orders, it must identify the violators. However, because the agency does not employ large numbers of roadside inspectors to identify

violators, it relies heavily on state authorities to conduct roadside enforcement activity; indeed, state authorities account for 95 percent of total HOS enforcement resources and conduct 96 percent of roadside inspections. *See* Paden Aff., ¶ 8. It is fanciful to assume that the FMCSA, with a total of just over 1000 employees in the entire agency, can simply step into the breach created by the loss of over 10,000 state officers involved in enforcing the HOS regulations applying to the 670,000 motor carriers operating throughout the United States. *See* Paden Aff., ¶¶ 8, 18.

4. With respect to the effect of a stay on the public interest, petitioners accuse the agency and the intervenors of relying upon speculation, but at the same time provide nothing but speculation to support their assertion (Opp. 16) that truck drivers “face a very real risk of suffering permanent and irreparable damage” if the current rule remains in effect. The sole basis for this assertion appears to be petitioners' belief that “the new rules are much worse” than the old rules (Opp. 18). This Court, however, made no such holding, and most certainly did not hold that the current rule is inconsistent with safety, or is even less safe than the old rule. Rather, the Court's holding was merely that the agency had failed to consider driver health.

There is no question that data on the effect of the current rule is preliminary. However, there is no basis upon which one can conclude that the current rule – which is more stringent in some respects than the old rule – has resulted in diminished

safety. Petitioners cite nothing to suggest that accident rates have risen, which one would expect if the new rule were as egregiously unsafe as they believe. While petitioners are undoubtedly concerned about some aspects of the current rule, given the lack of a holding that the current rule is unsafe, coupled with the severe enforcement void that would result from issuance of the mandate, a stay is warranted here.

CONCLUSION

For the foregoing reasons and those stated in our motion, Respondent FMCSA respectfully request an order staying issuance of the mandate.

Respectfully submitted,

ROBERT S. GREENSPAN
(202) 514-5428

MATTHEW M. COLLETTE
(202) 514-4214
Attorneys, Appellate Staff
Civil Division, Room 7212
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I certify that on September 20, 2004, I served the foregoing Reply In Support of Motion To Stay Issuance of the Mandate by mail upon the following counsel:

Bonnie I. Robin-Vergeer
Brian Woflman
Public Citizen Litigation Group
1600 20th St., N.W.
Washington, D.C. 20009

Stephen L. Oesch
Insurance Institute for Highway
Safety
1005 N. Glebe Road, Suite 800
Arlington, VA 22201

Henry M. Jasny
Advocates for Highway
and Auto Safety
750 First St., N.E. Suite 901
Washington, DC 20002

Kevin M. Williams
President & General Counsel
Distribution & LTL Carriers
Association
2200 Mill Road, Suite 600
Alexandria, VA 22314

Kenneth Siegel
Strasburger & Price
1101 Pennsylvania Ave., N.W.,

7th Floor
Washington, DC 20004

Robert Digges, Jr.
Deputy General Counsel
American Trucking
Associations
2200 Mill Road
Alexandria, VA 22314

Erika Z. Jones
David M. Gossett
Mayer, Brown, Rowe & Mawe
1909 K St., N.W.
Washington, DC 20006

Paul D. Cullen
The Cullen Law Firm
1101 30th St.
Suite 300
Washington, DC 20007

John M. Cutler, Jr.
McCarthy, Sweeney & Harkaway
2175 K St., N.W. Suite 600
Washington, DC 20037

Nicholas J. DeMichael
Thompson Hine LLP
1920 N. St., N.W. Suite 800
Washington, DC 20036

Matthew M. Collette, Attorney