TRUCK DRIVER HOURS OF SERVICE (HOS) LIMITS OVERTURNED

U.S. COURT OF APPEALS VACATES KEY ASPECTS OF HOS RULE

SECOND UNANIMOUS DECISION AGAINST HOS RULE IN 3 YEARS

Twice in three years, in 2004 and again in 2007, unanimous 3-judge panels of the U.S. Court of Appeals for the District of Columbia Circuit (Washington, D.C.) held that the Hours of Service (HOS) rule issued by the Federal Motor Carrier Safety Administration (FMCSA) was adopted in violation of federal law. The Court first ruled that the FMCSA had not considered the health effects the rule would have on truck drivers required to drive and work the additional hours allowed under the rule change. Concern for driver health is a statutorily mandated consideration. The Court went on to point out that FMCSA had not substantiated the safety of two important aspects of the rule, the increase to a limit of 11 consecutive hours of driving each shift, and the "restart" provision permitting drivers to begin a new week of over 70 driving hours after only 34 hours off-duty. Given agency findings of fact regarding driver fatigue the decision to allow drivers to accumulate more driving and work hours did not appear to be legally justifiable.

In the second case, the Court in 2007 remanded the rule to the FMCSA again this time because the agency had failed to explain critical assumptions and data manipulations and failed to disclose its statistical methodology to public comment before issuing a final rule. In its ruling, the Court restated the findings of the prior decision regarding the agency's lack of reasoned explanations for permitting longer driving and work hours which cast doubt on the safety of the 11-hour daily driving limit and the 34-hour restart requirements. The Court in both decisions ruled that these two critical parts of the rule must be vacated and the rule remanded to the agency for new rulemaking proceedings.

In each case, however, FMCSA reissued the same rule the agency first adopted in April, 2003. The 2003 HOS final rule was vacated by a unanimous 3-judge panel of the Federal Court of Appeals July 16, 2004. The second Court decision, by a different 3-judge panel, vacated the 2005 final rule that reinstated most of the original 2003 HOS rule. Thus, six federal judges of the appellate court that is directly below the U.S. Supreme Court have now found the HOS rule illegal. Beyond the specific legal holding in each case, the Court in both decisions criticized other shortcomings of the FMCSA HOS rule. The attached side-by-side includes quotations from each Court opinion about the various issues considered by the Court panels in each case.

ISSUE	ANALYSIS of July *2004* COURT OF APPEALS DECISION VACATING HOS RULE	ANALYSIS of July *2007* COURT OF APPEALS DECISION VACATING HOS RULE
Driver Health	"The FMCSA points to nothing in the agency's extensive deliberations establishing that it considered the statutorily mandated factor of drivers' health in the slightest" "[The FMCSA's] failure to [explain its reasons for not considering the effect of the rule on driver health], standing alone, requires us to vacate the entire rule as arbitrary and capricious, as the agency's failure to consider this factor, to borrow a phrase from the agency's brief, 'permeated the entire rulemaking process.' "	**N/A**
Cost-Benefit Analysis (Operator-Fatigue Model Methodology)	"[T]his analysis assumes, dubiously, that time spent driving is equally fatiguing as time spent resting – that is, that a driver who drives for ten hours has the same risk of crashing as a driver who has been resting for ten hours, then begins to drive. [citation omitted]. In other words, the model disregarded the effects of 'time on task' because, the agency said, it did not have sufficient data on the magnitude of such effects." "The exponential increase in crash risk that comes with driving greater numbers of hours, presumably caused by time-on-task effects, raises eyebrows about the agency's increase in daily driving time. Yet the agency excluded time-on-task effects from the cost-benefit analysis. That analysis, then, assumes away the exact effect that the agency attempted to use it to justify. The agency's reliance on the cost-benefit analysis to justify this increase is therefore circular, and the rationality of that explanation is correspondingly doubtful."	"FMCSA's decision to plot the data point for Hour 13 and beyond at Hour 17 – instead of at Hour 13 (or some other point) – was entirely unexplained in the RIA [regulatory impact analysis] and final rule. This complete lack of explanation of an important step in the agency's analysis was arbitrary and capricious." "Although we apply a deferential standard of review to an agency's use of a statistical model, we cannot uphold a rule based on such a model when an important aspect of its methodology was wholly unexplained." "FMCSA gives no explanation for the failure of its operator-fatigue model to account for cumulative fatigue due to the increased weekly driving and working hours permitted by the 34-hour restart provision. . . . [t]he agency's failure of explanation renders the restart provision arbitrary and capricious."
Increase in Maximum Driving Time from Ten to Eleven Hours	"The exponential increase in crash risk that comes with driving greater numbers of hours . . . raises eyebrows about the agency's increase of daily driving time." "[P]etitioners' challenge raises very real concerns."	"First, we expressed 'very real concerns' about the increase in the daily driving limit from 10 to 11 hours. [cite omitted]. We noted that the 'agency freely concedes that 'studies show [] that performance begins to degrade after the 8th hour on duty and [the degradation] increases geometrically during the 10th and 11th hours'.' "

Increase in Maximum Driving Time from Ten to Eleven Hours (Continued)	"We have our doubts about whether [the agency's] two justifications are legally sufficient." "The agency freely concedes that 'studies show[ ] that [driver] performance begins to degrade after the 8th hour on duty and increases geometrically during the 10th and 11th hours' on duty. Despite this finding, the agency cited absolutely no studies in support of its notion that the decrease in daily driving-eligible tour of duty from fifteen to fourteen hours will compensate for these conceded and documented ill effects from the increase [in consecutive driving hours]." "The agency did refer generally to studies, but that generalized reference is of doubtful legal sufficiency." ". . . the effects from the increased weekly driving hours may offset any decrease in fatigue flowing from the fact that drivers have overall [one hour] shorter tours of duty. For these [] reasons, it is unlikely that we would find the agency's first explanation legally sufficient." "The agency's reliance on the cost-benefit analysis to justify this increase [in driving hours] is therefore circular, and the rationality of that explanation is correspondingly doubtful."	"Second, we also found suspect the agency's claim that the increase in daily driving limit to 11 hours could be justified by 'the cost-benefit analysis it conducted.' "
34-Hour Restart Provision	". . . this provision has the effect of increasing the number of hours drivers can work [i.e., drive] each week." "While the agency's explanation seems sound enough as far as it goes, it does not even acknowledge, much less justify, that the rule . . . dramatically increases the maximum permissible hours drivers may work [i.e., drive] each week." "And the agency's failure to address it [the increase in the number of weekly driving hours] . . . makes this aspect of the rule's rationality questionable."	"[W]e regarded as 'problematic' the fact that FMCSA's justification for the 34-hour restart provision '[did] not even acknowledge, much less justify, that the rule . . . dramatically increases the maximum permissible hours drivers may work [i.e. drive] each week.' [citation omitted]. That increase, we said, 'is likely an important aspect of the problem[,] [a]nd the agency's failure to address it . . . makes this aspect of the [2003] rule's rationality questionable.' "

Electronic On-Board Recorders (EOBRs)	"The agency's justification for not requiring EOBRs to monitor driver compliance is another aspect of the final HOS rule of questionable rationality." "The agency's explanation in all likelihood does not conform to [its] statutory requirement." "The agency concedes that it 'did not test the (very few) EOBRs currently available.' The agency offers no excuse for not doing so, and we can think of none that would suffice to fulfill the agency's duty to 'deal [] with' the issue of EOBRs." "We cannot fathom, therefore, why the agency has not even taken the seemingly obvious step of testing existing EOBRs on the road, or why the agency has not attempted to estimate their benefits on imperfect empirical assumptions." "The agency has given no good reason for treating this problem with such passivity."	**N/A**
Sleeper Berth Exception	"Despite the premise [that each driver should have an opportunity for eight consecutive hours of uninterrupted sleep every day], the agency offered several justifications for nevertheless permitting drivers to obtain the required continuous period of rest in two chunks, all of which are quite weak." "In sum, we have grave doubts about whether the agency's explanation for retaining the sleeper-berth exception would survive arbitrary and capricious review."	**N/A**