

No. 15-3756

THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

BRIEF OF *AMICI CURIAE*
TRUCKING ALLIANCE FOR DRIVER SAFETY AND SECURITY
AND ADVOCATES FOR HIGHWAY AND AUTO SAFETY
IN SUPPORT OF THE BRIEF OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The Trucking Alliance for Driver Safety and Security, certifies that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock, and Advocates for Highway and Auto Safety certifies that it is a non-profit corporation incorporated in the District of Columbia and that it has no parent company and no subsidiaries or affiliates that have issued shares to the public.

INTEREST OF THE *AMICI CURIAE*

The Trucking Alliance for Driver Safety and Security (the “Trucking Alliance”) is a coalition of leading U.S. transportation and logistics businesses focused on promoting a safer and more secure working environment for the nation’s commercial truck drivers and the motoring public through the adoption of progressive safety regulations and new technologies. In particular, since its founding, the Trucking Alliance has been a leading advocate supporting the mandatory use of electronic logging devices (“ELDs”) for recording the hours of service of commercial truck drivers.

Advocates for Highway and Auto Safety (“Advocates”) is a coalition of public health, safety, and consumer organizations, insurers and insurance agents that promotes highway and auto safety through the adoption of safety laws, policies and regulations. Advocates is unique both in its board composition and its mission of advancing safer vehicles, safer drivers and safer roads. In 1995, Advocates and several other safety groups filed a petition with the Department of Transportation (DOT) requesting that the agency issue a rule requiring ELDs on commercial motor vehicles (CMVs).

The Trucking Alliance and Advocates have a considerable interest in the outcome of this case as representatives of the broad coalition that has worked tirelessly to develop, test, and promote the use of ELDs in the interest of highway

safety. Both groups were directly involved in the legislative process that resulted in Congress's determination to mandate the use of ELDs. And, like Petitioner OOIDA, the Trucking Alliance and Advocates participated extensively in the regulatory process through which the Federal Motor Carrier Safety Administration (the "FMCSA") implemented that mandate. Indeed, FMCSA's final rule at issue in this case, Electronic Logging Devices and Hours of Service Supporting Documents, 80 Fed. Reg. 78292 (Dec. 16, 2015), is replete with citations to comments by the Trucking Alliance and Advocates on numerous topics, including the issues raised by OOIDA here. As they did during the legislative and regulatory process that produced the final ELD rule, the Trucking Alliance and Advocates offer their unique perspective as long-time advocates for the mandatory use of ELDs.¹

INTRODUCTION AND BACKGROUND

The operation of commercial motor vehicles by fatigued truck drivers has been a significant public safety problem for as long as there have been trucks.² In 1935, Congress acted to address this problem by authorizing the U.S. Department

¹ All parties have consented to the filing of this memorandum. *See* Fed. R. App. P. 29(a). No counsel for either party authored this memorandum in whole or in part, and no party's counsel, or person, other than *amici*, their members, or their counsel, contributed money to fund preparing or submitting this brief.

² The National Transportation Safety Board (NTSB) has repeatedly cited driver fatigue as a contributor to truck crashes and included reducing fatigue-related crashes on its 2016 Most Wanted List of safety changes. *See* National Transportation Safety Board, 2016 Most Wanted List, accessed at ntsb.gov/safety/mwl/Documents/MWL2016_Brochure_web.pdf.

of Transportation (the “DOT”) to regulate the hours of service of truck drivers. *See* Motor Carrier Act of 1935 (Pub. L. 74-255, 49 Stat. 543, August 9, 1935). The hours of service rules (“HOS” rules) were first promulgated in 1939. They have been in force in one form or another since that time. The current rules, issued by the Federal Motor Carrier Safety Administration (the “FMCSA”), are set out at 49 C.F.R. Part 395.

The HOS rules require truck drivers to record their hours of service, including time a driver is (1) driving, (2) on-duty but not driving, (3) in a truck’s sleeper berth, or (4) off-duty altogether. *See* 49 C.F.R. § 395.8. Until relatively recently, truck drivers had only one way to record their hours of service: by using handwritten paper logs. One of the primary disadvantages to handwritten logs is their susceptibility to falsification, a widespread problem that compromises public safety by circumventing the purpose of the HOS rules. *See Public Citizen v. FMCSA*, 374 F.3d 1209, 1221-1222 (D.C. Cir. 2004) (“Given the large incentives truckers have to falsify their logbooks, ... noncompliance with HOS regulations is no doubt a serious regulatory problem.”). In fact, a survey conducted by the Insurance Institute for Highway Safety (IIHS) indicated that one-third of drivers admitted to manipulating their paper logbooks to conceal hours of service violations on working time, and one in four said they take less time than the

minimum off-duty time required by the HOS rules.³ Some drivers even keep two sets of logbooks, one showing their actual hours and another showing “compliant” hours.

Like many in the transportation industry, the Trucking Alliance and its members have consistently sought to develop, test, and promote new technologies to improve highway safety. The development and implementation of technologies to make trucks and truck driving safer is part of an industry-wide commitment to improving safety generally that, along with the work of Advocates and others, has contributed to consistent improvements in highway safety over the years. *See, e.g.*, Federal Motor Carrier Safety Administration, Analysis Division, Large Truck and Bus Crash Facts 2014 (2016), <https://www.fmcsa.dot.gov/safety/data-and-statistics/large-truck-and-bus-crash-facts-2014> (last visited June 21, 2016); However, the number of truck crashes remains unacceptably high, particularly where they are the result of preventable driver fatigue. National Highway Traffic Safety Administration Traffic Safety Facts, 2014 Data, Large Trucks, DOT HS 812 279 (2016) available at <http://www-nrd.nhtsa.dot.gov/Pubs/812279.pdf>. (last visited June 21, 2016).

As part of this broader (and effective) push for safer highways and for the technologies to make that happen, Advocates, other safety groups and members of

³ *Status Report*, Insurance Institute for Highway Safety, Vol. 40, No. 6, July 16, 2005. Also *see*, *Status Report*, Insurance Institute for Highway Safety, Vol. 41, No. 8, Oct. 7, 2006.

the Trucking Alliance and others in the industry sought a technological solution to the compliance problems concomitant with traditional handwritten logs. This led to the development of ELDs, devices that automatically record the time a driver is driving a truck, enable a driver to contemporaneously record duty status changes, and maintain the integrity of the recorded data to avoid falsification.

ELDs are superior to paper logs for recording hours of service and have substantial and far-reaching benefits.⁴ By eliminating handwritten paper logbooks and replacing them with electronic records, ELDs shorten the time it takes drivers to record their time and substantially reduce the effort required on the part of carriers to audit and manage their drivers' compliance with the HOS rules. By automatically (and immutably) recording driving time and prompting the contemporaneous recording of duty status changes, ELDs make HOS compliance easier and make cheating harder. This in turn reduces HOS violations, promotes a culture of safety and professionalism within organizations using ELDs, and helps to keep our highways safer by improving compliance with the HOS rules.

It is precisely for these reasons that Congress expressly mandated the adoption of ELDs when it passed the Moving Ahead for Progress in the 21st Century Act ("MAP-21") in 2012. The ELD rule carries out Congress's command.

⁴ All European Union (EU) countries require tamper-proof electronic tachographs, and, according to major manufacturers, other countries in addition to those in the EU require recording devices, including Morocco, Argentina, Brazil, Peru, Uruguay, Venezuela, Israel, Turkey, Japan, South Korea, and Singapore. See *Lehmann, Dr. Gerhard. "Highway Recording Systems: A Report on European and US Experiences."* May 1999.

Given their clear and well-established advantages, ELDs will continue to be adopted even if OOIDA successfully delays mandatory ELD implementation. The problem will be that unscrupulous operators who wish to reserve the opportunity to circumvent the HOS rules will retain an unfair competitive advantage over those who seek to comply with the rules, all at the expense of the safety of the motoring public.

Moreover, paradoxically, blocking the ELD rule will create the risk of the very kind of harassment OOIDA complains of. The ELD rule bans driver harassment and includes strong technical and procedural safeguards against harassment. Without the ELD rule, those protections will be gone.

Fortunately, FMCSA's final rule is a model of thoughtful, thorough, and reasoned analysis. With input from the Trucking Alliance, Advocates, and many others (including OOIDA), FMCSA was presented with, and expressly considered all sides of the issues and created a final rule that works for everyone. While some may be reluctant to adopt ELD technology, that reluctance should not thwart the collective and broadly-shared interest in a modern, safe, and efficient transportation system. FMCSA's final rule should be upheld and OOIDA's Petition should be denied.

ARGUMENT

I. CONGRESS MANDATED ADOPTION OF ELDS BECAUSE ELDS IMPROVE HOS COMPLIANCE, AND THEREFORE SAFETY

In OOIDA's view, FMCSA was required to establish a link between ELD use and improved HOS compliance and safety to justify the ELD mandate. This ignores the fact that Congress commanded FMCSA to mandate use of ELDs precisely *because* they improve HOS compliance, and misunderstands the tortuous regulatory history leading to Congress's action.

Members of the Trucking Alliance, along with others in the industry, as well as interested safety advocacy groups including Advocates, have long advocated for a technological solution to the compliance problems attendant with handwritten driver logs. The ELD rule's winding regulatory history is set out in the briefs of the parties, in the FMCSA's explanation of the Final Rule, and in this Court's decision addressing an earlier phase of the rulemaking. *See* Resp. Br. 2-9; Pet. Br. 5-5; SA7-8; *Owner-Operator Indep. Drivers Assoc., Inc. v. FMCSA*, 656 F.3d 580, 582-585 (7th Cir. 2011). The critical point to appreciate is this: after FMCSA's latest attempt to promulgate an ELD rule was struck down by this Court in *Owner-Operator Indep. Drivers Assoc.*, Congress stepped in the very next year and replaced what had been a discretionary, agency-driven process with a simple

command and a simple explanation: FMCSA was to mandate the implementation of ELDs precisely because ELDs would improve compliance with the HOS rules.

The language Congress used could not have been clearer. The Secretary of Transportation was commanded to “prescribe regulations ... requiring a commercial motor vehicle involved in interstate commerce and operated by a driver subject to the [HOS rules] ... be equipped with an electronic logging device to improve compliance by an operator of a vehicle with hours of service regulations.” 49 U.S.C. § 31137(a)(1). With this statute, Congress ruled out objections to ELD adoption generally, expressly justifying its mandate on the ground that adoption of ELDs would improve compliance with the HOS rules. Whether ELDs should be adopted, and whether ELDs would improve compliance, were no longer open questions.

The legislative history confirms that Congress meant what it said about the link between ELD use and HOS compliance. It also highlights the role that *amici* and others in and out of the industry played in convincing Congress to cut through the regulatory gridlock and mandate implementation of ELDs in the interest of improving HOS compliance.

Senator Mark Pryor, co-sponsor of the Commercial Driver Compliance Improvement Act, S. 695, 112th Cong., which contained the ELD mandate that would eventually be incorporated in the broader Moving Ahead for Progress in the

21st Century Act (“MAP-21”), noted that “compliance with HOS regulations is often spotty due to inaccurate reporting by drivers as they are only required to fill out a paper log, a tracking method that dates back to the 1930s,” and that while “[i]naccurate reporting may result from an honest mistake or an intentional error by a driver seeking to extend his work day,” non-compliance with the HOS rules for any reason “can lead to too much time on the road, leaving the driver fatigued and placing other drivers at risk.” 157 Cong. Rec. S2048-01 (Statement of Sen. Pryor for himself and Sen. Alexander). Senator Pryor explained that mandatory adoption of ELDs would “not only improve compliance with HOS regulations,” but would “reduce the number of fatigued commercial motor vehicle drivers on the road,” which would “have a profound impact on highway safety and reduce accidents and fatalities on our highways and interstates.” *Id.*

Senator Pryor explained that the idea of mandating the use of ELDs to solve the intractable compliance problem posed by handwritten logs was spurred by input from interested parties, including members of the Trucking Alliance (Senator Pryor particularly mentioned J.B. Hunt and Maverick U.S.A.) as well as Advocates, during meetings and hearings before the Senate’s Commerce, Science, and Transportation Committee. *Id.* In the words of Senator Pryor, “[a]fter listening to the many interest groups and experts on this issue ..., I have come to learn that there is an available and affordable twenty-first-century technology that can ensure

accurate logs, enhance compliance, and reduce the number of fatigued drivers on the road. ... I believe that widespread utilization of these devices as soon as possible will significantly reduce further loss of life resulting from driver fatigue.”

Id.

While Senator Pryor’s Commercial Driver Compliance Improvement Act did not become law, the ELD mandate that he proposed was included in MAP-21. In MAP-21, Congress explicitly charged the FMCSA with mandating the adoption of ELDs, not in the hope that ELDs might improve compliance or on the condition that ELDs would improve compliance, but because Congress explicitly concluded that ELDs will improve compliance.

As the legislative history recounted above demonstrates, Congress understood that improving compliance with the HOS rules promotes highway safety. That is, after all, the very point of the HOS rules, as OOIDA recognizes:

As the driver of a large, heavy truck, you have a lot of responsibility as you drive down the road. The biggest concern is safety. That brings us to the main reason for the hours-of-service regulations – to keep fatigued drivers off the public roadways. These regulations put limits in place for when and how long you may drive, to ensure that you stay awake and alert while driving, and on a continuing basis to help reduce the possibility of driver fatigue.

OOIDA’s Interstate Truck Driver’s Guide to Hours of Service, February 2013, <http://www.ooida.com/IssuesActions/Regulatory/Issues/> (last visited June 17, 2016).

II. CONGRESS WAS RIGHT: ELDS IMPROVE COMPLIANCE BY AUTOMATICALLY RECORDING HOURS OF SERVICE

Like the Commercial Driver Compliance Improvement Act, MAP-21's ELD mandate defined "electronic logging device" to mean a device that is "capable of recording a driver's hours of service and duty status accurately and automatically." *Compare* 49 U.S.C. § 31137(f)(1)(A) with S. 695, 112th Cong. § (a)(1). For OOIDA, this means Congress required FMCSA to mandate implementation of devices that automatically detect exactly what a driver is doing at any given time without any input from the driver, and that any device that falls short of this standard does not qualify as an ELD. This is clearly not what Congress meant.

Congress contemplated implementation of ELD technology already being used. Senator Pryor explained that he learned from interested parties and experts (like Trucking Alliance members and Advocates) "that there is an available and affordable twenty-first-century technology that can ensure accurate logs, enhance compliance, and reduce the number of fatigued drivers on the road." *See* 157 Cong. Rec. S2048-01 (Statement of Sen. Pryor for himself and Sen. Alexander). The Report of the Committee on Commerce, Science, and Transportation on the Commercial Motor Vehicle Safety Enhancement Act of 2011, S. 1950, which included an ELD mandate like the one in Senator Pryor's Commercial Driver

Compliance Improvement Act (this proposed legislation was likewise subsumed in Map-21), also explicitly contemplated mandating the use of existing technology:

To improve compliance, many motor carriers employ electronic on-board recorders (EOBRs), which are electronic recording devices typically installed in truck power units (“cabs”), to track compliance with the HOS regulations. ... Under this proposal, all motor carriers subject to the HOS rules would be required to use EOBRs to systematically and effectively monitor their drivers’ compliance with the HOS requirements.

S. Rep. No. 112-238 at 4 (2012). The omniscient ELD of OOIDA’s imagination did not exist when MAP-21 was enacted, and it does not exist now. It is not the technology the Trucking Alliance, Advocates, and so many other have championed over the years. It is simply not what Congress had in mind when it decided to mandate the use of ELDs to record hours of service.

Given that Congress knew about existing ELD technology when it required adoption of ELDs, and that Congress determined that implementation of that technology would improve HOS compliance, the capacity of a device to record “a driver’s hours of service and duty status accurately and automatically” should be understood in light of the primary compliance-enhancing function of the rule. Viewed that way, the “automatic” recording of hours of service and duty status changes should be thought of in terms of the capacity of the device to contemporaneously and immutably record those things as they occur, in contrast to the traditional manual method of recording hours of service and duty status

changes, which is susceptible to often undetectable after-the-fact revision or even outright invention to create a fictional account of HOS compliance. By that standard, FMCSA's rule contemplates precisely the kind of technology the Trucking Alliance, Advocates, and others have urged Congress and FMCSA to mandate.

Under FMCSA's specifications, an ELD will automatically record a driver's duty status as "driving" whenever a vehicle is moving. When a vehicle stops and remains stopped for five consecutive minutes, the ELD must prompt the driver to either confirm that the driver is still in "driving" status (such as when the driver is stopped in traffic) or if the driver has entered another status of duty, like resting in the sleeper berth, being on-duty but not driving (such as when the driver is fueling a truck or performing a vehicle inspection), or is off-duty altogether. If the driver does not respond within one minute, the ELD will automatically change the driver's duty status to on-duty but not driving. Thus, while some duty status changes require a driver's input, an ELD automatically and immutably records a considerable portion of a driver's day. Moreover, unlike paper logs, an ELD actively prompts a driver to record certain changes to the driver's duty status as they occur. It is no wonder Congress recognized that this technology would improve compliance with the HOS rules.

III. ELDS MAKE CHEATING HARDER

OOIDA nevertheless portrays ELDs as equally susceptible of falsification as handwritten paper logs. Given that ELDs automatically record driving time, rendering substantial chunks of time off-limits to would-be log violators, it is not surprising that OOIDA employs a considerable degree of creativity in its efforts to identify some flaw in the system. Specifically, OOIDA presents a “hypothetical set of logbooks,” which it claims illustrate how easily drivers can mask non-compliance by manipulating their non-driving time. Pet. Br. at 15-23. Although OOIDA holds these hypothetical logbooks out as typical, “day-in-the-life” examples of log falsification, they are not. In reality, because driving time under the ELD rule would be immutable, drivers would be much more hard-pressed to mask non-compliance.

Contrary to OOIDA’s insinuation otherwise, an accurate and unchangeable record of a drivers’ driving time is crucial not only to ensuring compliance with the 11-hour driving limit, but also with the 14- and 60/70-hour limits. Indeed, these latter rules prohibit drivers from *driving* after (1) the 14th consecutive hour after coming on duty without first taking 10 consecutive hours off duty and (2) the 60th or 70th hour after coming on duty in 7 or 8 consecutive days without taking 34 or more consecutive hours off duty. It is the subsequent *driving* time in these scenarios that causes the violation, not the non-driving time that precedes it.

Because that driving time is unchangeable with ELDs, drivers could not manipulate it to mask a violation.

OOIDA clearly strained to develop its hypothetical set of logbook examples presented on pages 17 through 23 of its Opening Brief. These are not, as OOIDA suggests, characteristic examples of how “easily” drivers could conceal hours-of-service violations using ELDs. They are fictional and unrealistic models that force the reader to suspend his or her disbelief. In the first hypothetical, for example, OOIDA would have the reader believe the driver actually spent three hours (from 4 a.m. to 7 a.m.) starting the reefer unit on his trailer and performing his daily pre-trip inspection, tasks that would normally take around 30-minutes combined. Pet. Br. at 17-18.

More fundamentally, OOIDA’s hypothetical assumes the driver had the foresight at 4 a.m. to recognize that he would be in violation of the hours-of-service restrictions at various points later in the day and, therefore, should manipulate his on-duty but not-driving time to conceal those violations. But unless the driver in OOIDA’s hypothetical knew at 4 a.m. that he would be 45 minutes late to take his rest break and would need to drive for an additional hour (beyond the 14-hour restriction) at 6 p.m., there would be no incentive for him to manipulate his on-duty but not-driving time in the morning. This is not a

hypothetical. It is a fantasy. ELDs are not immune from manipulation. But that manipulation is severely circumscribed by the immutability of driving time.

IV. THE ELD MANDATE BENEFITS EVERYONE

OOIDA claims that the expense of transitioning to ELD technology is unjustified because there is no evidence that American highways will be safer if drivers are required to use ELDs to record their hours of service. OOIDA's safety argument is demonstrably wrong for the reasons detailed in the FMCSA's Response and at great length in the final rule. Moreover, OOIDA says nothing at all about the actual costs of ELDs or the benefits to be gained from their use, matters within the unique perspective of the Trucker's Alliance and Advocates.

As FMCSA noted in its final rule, the costs of ELDs are trending downward as the technology becomes more widespread. Smaller operators, many of whom may be OOIDA members, are not being asked to subsidize the implementation and development of untried technology. Rather, early adopters like Trucking Alliance members and others in the industry have already absorbed the initial costs of developing and testing ELD technology. Ongoing adoption is making ELD technology cheaper all the time.

Moreover, the decreasing costs of ELD technology are more than offset by the efficiencies and savings to be gained from their use. Managing compliance with ELDs is much less burdensome and expensive than managing compliance

with paper logs. The only people who will not benefit from ELD technology are those who depend on the ability to circumvent the HOS rules by misrepresenting their hours of service using handwritten logs, or those who do not incur the substantial costs of responsibly managing and auditing HOS compliance under a paper log system. Such operators often extol the “flexibility” paper logs offer. What they mean is that paper logs give them the opportunity to evade compliance by penciling in a version of a duty shift that only appears on a paper log to be compliant with the rules.

CONCLUSION

ELDs are a critical component of the broader trend toward improved highway safety through the modernization of the trucking industry, something the Trucking Alliance and its members have long promoted, with the support of interested groups like Advocates. ELDs make highways safer both for truck drivers and for the motoring public by making it harder to violate the HOS rules. Reluctance to adopt new technology is nothing new, and the Trucking Alliance appreciates that transitioning from handwritten logs to ELD technology will be a significant adjustment for those who are new to the movement to develop and adopt this safety-enhancing technology. But the benefits of adoption are unquestionable. Congress understood this and mandated the adoption of ELDs.

FMCSA's rule properly and reasonably implements this mandate and it should be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Seventh Circuit Rule 32, I certify that the attached Amicus Brief is proportionately spaced in 14 point Times New Roman typeface and contains 3,998 words (as calculated by Microsoft Word 2016 for Windows), excluding the caption page, Disclosure Statement, Table of Contents, Table of Authorities and this Certificate of Compliance.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 22, 2016, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ R. Jay Taylor Jr.

R. Jay Taylor, Jr.