MID-YEAR REPORT: THE YEAR 2013 MARKS SIGNIFICANT REGULATORY, LEGISLATIVE AND LITIGATION DEVELOPMENTS FOR TRUCKING INDUSTRY

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The year 2013 has so far marked several important developments in regulations and legislation related to trucking and related litigation. This legal journal article is intended to give a brief synopsis of these year-to-date developments as we head into the fall. The developments, in particular, were with regard to Hours of Service Regulations, CSA, the Port of Los Angeles Clean Truck Program, Mexican Carrier Border Crossings under NAFTA, the E-Logs Use Mandate, and new truck depreciation rules. I address each of these subtopics below.

Hours of Service

Right before Christmas of 2011, the Federal Motor Carrier Safety Administration ("FMCSA") announced the long anticipated changes to the truck driver hours of service regulations. In those rules the FMCSA kept the 11 hour per day allowable driving rule favored by truckers, but made other changes looked upon unfavorably by many trucking company executives and their shipping customers. The compliance date for most of these changes was July 1, 2013. So, trucking companies have been operating under the new system for over two months, but right up to the time the new rules began to be enforced, trucking industry leaders sought to delay the enforcement date by proposing regulatory and legislative initiatives designed to delay the enforcement date.

The American Trucking Associations ("ATA") sought to overturn the changes that were viewed as unfavorable by the ATA leadership, with the filing of a lawsuit on February 14, 2012. At about the same time, safety advocates who wanted a return to the pre-2004 10 hour per day driving rule also filed a lawsuit seeking a return to the pre-2004 rule. The two cases were consolidated for resolution and are now resolved with an opinion from the U.S. Court of Appeals for the District of Columbia Circuit issued[1] and the application for rehearing having recently been denied[2]. For the most part, neither challenge prevailed before the U.S Court of Appeals of the District of Columbia and the HOS Rules changes have now been almost entirely upheld.

The court sided with ATA only in ruling that certain short haul drivers should be exempt from the rest-break mandate[3]. The rulings effectively ended a rulemaking process that began in 1999 and has involved several rounds of legal challenges.[4] The U.S. Court of Appeals for the District of Columbia Circuit, noting the numerous legal challenges filed since the process began, effectively slammed the door on further challenges to the HOS rules as they stand today, when it stated:

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> It is often said the third time's a charm. That may well be true in this case, the third of its kind to be considered by the Circuit. With one small exception, our decision today brings to an end much of the permanent warfare surrounding the HOS rules. Though FMCSA won the day not on the strengths of its rulemaking prowess, but through an artless war of attrition, the controversies of this round are ended.[5]

The main concern that led to the ATA's latest court filing was with the limitations placed on the 34 Hour Restart Rule, whereby drivers may restart the 60 or 70 hour clock on the maximum number of hours under which a driver can be on duty within a 7 day or 8 day window. Under the new 34 hour restart limitations, there can be only one restart within a week's 168 hour time frame and the 34 hours must span two periods between 1 AM and 5 AM. There is also a new requirement that a driver may not drive longer than 8 hours without taking a 30 minute break. According to many trucking industry leaders, these changes shackle the trucking industry with inflexible and unduly restrictive hours of service restrictions that hamper efficiency without adding substantially to safety. However, according to the FMCSA, the restrictions on the 34 hour restart rule are aimed at long haul FTL drivers who had been able to log over 70 hours of on-duty time within a 7 day period and thereby were subject to chronic fatigue. Regardless of the merits of the debate, it appears that the HOS rules are now what they will be for the foreseeable future.

CSA

The FMCSA's Compliance Safety Accountability program ("CSA")[6] continued to have important developments throughout the year. Up to this point CSA, with its SMS methodology, has helped the FMCSA prioritize its safety monitoring and intervention efforts, assisted it in determining carriers subject to Comprehensive Reviews, and has provided the basis for publicly displayed comparative percentile rankings of carriers in the statistical areas the FMCSA has determined to be related to carrier propensity to be involved in vehicular accidents (the SMS Methodology BASICs). In its final phase, SMS methodology will be used in the Safety Fitness Determination process to rate each carrier's safety fitness, based solely on a motor carrier's own performance measure.

The first significant recent development for CSA in 2013 involved a FMCSA advisory subcommittee recommendation that public view be withheld with regard to at least three safety score categories that are part of its CSA program, until related underlying data issues are resolved[7]. The subcommittee, whose report was unveiled in April, proposes the following:

> 1. That the Controlled Substance/Alcohol and Driver Fitness scoring sections of CSA's Behavior Analysis and Safety Improvement Categories (BASICs) become private;
> 2. That the Hazardous Materials Compliance scoring section remain private;

3. That the FMCSA should require only crashes that are fatal or cause serious injuries to be recorded in the DOT's database but that the crash data be excluded from carriers' Crash Indicator score if the carrier was not at fault.

In a recent Editorial, the editors of the ATA's *Transport Topics* urged that CSA BASIC scores not be made public because of the flawed data that the scores are based upon, stating specifically that "[t]he trucking industry has long contended that, because not all CSA BASICs — i.e., Behavior Analysis and Safety Improvement Categories — correlate well to future crash risk, and many carriers with low crash rates have mistakenly high BASIC scores and vice-versa, it is inappropriate to provide these "scores" to the public.[8].

CSA has also been under legal challenge in litigation challenging the validity of, proper use of and interpretation of data generated under CSA. The Courts will soon have the opportunity to rule on the validity of the CSA system. On July 19, 2012 a coalition of shippers, small trucking companies and brokers led by ASECTT sued the FMCSA over the "guidance" the agency provided in May of 2012 on the use of CSA data. The suit challenges the agency's issuance in May of 2012 Factsheet entitled "FMCSA Data — Information for Shippers, Brokers, and Insurers" and a subsequent Power Point presentation entitled "Shipper and Insurer Briefing Addendum" intended to supplement the previously issued Factsheet. In these guidance materials, shippers, brokers and insurers are discouraged from attempting to select a safe carrier by relying solely upon a Safety Fitness Determination classification that a carrier is "Satisfactory," and invites shippers, brokers and insurers to review all data available from the FMCSA on a particular carrier before making a decision to use the carrier[9]. According to the Plaintiffs, the guidance materials amount to an abdication of the agency's duty to make safety fitness determinations of carriers and leaves shippers and brokers to make their own judgments based upon all the data provided by the FCMSA, without adequate guidance, thus exposing shippers and brokers to potential liability for choosing carriers whose ultimate Safety Fitness Determinations are Satisfactory or Conditional, but whose CSA BASICs scores may approach or exceed CSA BASIC categories threshold monitoring levels.

Briefing by both sides to the lawsuit filed in the U.S. Court of Appeals for the District of Columbia was complete by mid-January of 2013. The Court will hear arguments by the litigants on September 10, 2013[10], so a decision could be coming before the end of the year.

Still coming in the CSA implementation process is an expected Notice of Public Rulemaking ("NPRM") to amend existing regulations to allow for the use of SMS data in making Safety Fitness Determinations. Until that rule change is made, SMS data will serve simply as a tool to determine when the intervention of the FMCSA is necessary, based on the carrier's percentile BASICs in relationship to other carriers.

Port of Los Angeles Clean Truck Program

Recently the U.S. Supreme Court ruled in favor of the ATA in its long litigation battle over the validity of the regulations applicable to drayage operators at the Port of Los Angeles[11].

Previously the 9th Circuit Court of appeals had ruled in *American Trucking Associations vs. the City of Los Angeles*[12] that the Port could not ban Owner Operator drayage truckers, but that it could impose other restrictions and requirements, such as the submission of detailed off street parking plans, ensuring that the maintenance of the drayage trucks is in conformance with the manufacturer's instructions, detailed placard requirements and the need to demonstrate financial capability to perform obligations under the Concession Agreement. The ATA challenged these requirements on the basis that Federal Law (the "FAA") preempts the attempted regulatory action by the local government because these actions impact the price, routes and service of the motor carriers.

In reversing much of the previous 9th Circuit Court decision, the United States Supreme Court unanimously ruled in June that portions of the Port of Los Angeles clean truck plan violate federal preemption law and cannot be enforced. The court's June 13 decision said the port cannot force fleets to submit parking plans or display placards before being allowed to operate.

The USSC ruling resulted in a recent final local Federal Court order enjoining enforcement of the rules[13]. In her order, U.S. District Court Judge Christina Snyder banned off-street parking and placarding requirements[14] and issuing an injunction permanently barring the port from enforcing its 2008 move to force drivers who enter the port to be company employees[15].

Mexican Carrier Border Crossings Under NAFTA

In April the U.S. Court of Appeals for the District of Columbia Circuit rejected the legal challenge made by the Owner/Operator group OOIDA to the on again/off again Federal Motor Carrier Safety Administration pilot program that allows a limited number of Mexico-based companies to operate in the interior of the United States, finding that the program complies with applicable law, including NAFTA and U.S. safety requirements. According to FMCSA spokesman Duane DeBruyne, the decision found "that we apply the same rigorous safety standards under the program that we require of all U.S. carriers[16]." The Court found that the carriers in the pilot program operated under Mexican equivalents U.S. FMCSA safety regulations.

E-Logs Use Mandate

The latest transportation funding bill passed by Congress, the "Moving Ahead for Progress in the 21st Century Act", or MAP-21, directs the FMCSA to write an electronic logging rule (EOBR) that would mandate electronic logging devices for all commercial trucks (with the mandate being effective two years after the final regulations are in place). In early April, FMCSA administrator Anne Ferro announced that the agency would not be able to meet the deadline set forth in the Act for regulations to be in place mandating electronic logging devices in all commercial trucks[17]. Current plans are for a notice of a proposed rulemaking to be filed in September, with a final rule in place a year later, with the implementation of enforcement of the rule likely to be two years after the final rule is adopted. Nevertheless,

the existence of CSA and the Congressional mandate for a mandatory e-logging rule is already pushing fleets to replace paper logs with electronic logging[18].

New Truck Depreciation

The legislation passed by Congress to avoid the "fiscal cliff" crises preserved a tax benefit valued by truck dealers and trucking companies alike. Under the legislation, fleets will be able to continue to be able deduct half of the cost of equipment purchases on 2013 tax returns[19]. Without this legislation, the favorable deduction rule would have expired on December 31, 2012.

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[1] *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 2013 U.S. App. LEXIS 15934, 2013 WL 3956992 (D.C. Circuit, 2013).

[2] *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin*., 2013 U.S. App. LEXIS 17804 (D.C. Cir. Aug. 22, 2013).

[3] **Court Upholds HOS Rule**, By Timothy Cama, Staff Reporter*, Transport Topics*, August 12, 2013.

[4] **SEE** *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin,* **2013 U.S. App. LEXIS15934 at page 3**: "This protracted rulemaking traces its beginnings to 1999, the year Congress passed the Motor Carrier Safety Improvement Act, Pub. L. 106-159, 113 Stat. 1748, and created the FMCSA. Tasked with making the nation's roads safer, the new agency's first rulemaking proposed significant revisions to the regulations that had governed trucking operations since 1962. *See Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations*, 65 Fed. Reg. 25,540 (May 2, 2000) (2000 NPRM). That effort concluded three years later in 2003 with the promulgation of a final rule that increased the daily driving limit from 10 to 11 hours; reduced the daily on-duty limit from 15 to 14 hours; increased the daily off-duty requirement from 8 to 10 hours; and created a new exception to the weekly on-duty limit known as the 34-hour restart. *See Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations*, 68 Fed. Reg. 22,456, 22,457 (April 28, 2003) **[4]** (2003 Final Rule).

But as is often the case, the interested public did not go quietly. Trucking industry associations and safety-oriented public interest groups long at odds with each other — and the agency — pushed back against the rule. Public Citizen challenged the 2003 Final Rule as arbitrary and capricious. We agreed. *See Public Citizen v. FMCSA*, 374 F.3d 1209, 1216, 362 U.S. App. D.C. 384 (D.C. Cir. 2004). Because FMCSA had "failed to comply with [the] specific statutory requirement" to "ensure that . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators," 374 F.3d at 1216 (internal quotation marks omitted), we vacated the rule in its entirety, *id.* at 1223.1 In response, Congress enshrined the 2003 Final Rule as law until FMCSA could promulgate a new rule, *see* Pub. L. No. 108-310, 118 Stat. 1144 (2004), which the agency did in 2005, *see Hours of Service of Drivers*, 70 Fed. Reg. 49,978 (Aug. 25, 2005) (2005 Final Rule).

Nearly identical to its 2003 **predecessor**, the 2005 Final Rule failed to win over agency critics. Interested groups again challenged the rulemaking as arbitrary and capricious, and this Court once more agreed. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA*, 494 F.3d 188, 206, 377 U.S. App. D.C. 356 (D.C. Cir. 2007) (*OOIDA*). But rather than vacate the contested provisions on broad grounds, we rested our holding on two technical shortcomings: the agency's failure to (1) timely

disclose its methodology for determining its time-on-task multipliers, *see id*. at 201, and (2) "provide a reasoned explanation for a number of the methodology's critical elements," *id*. at 203.

FMCSA responded in 2008 by reissuing the 2005 Final Rule with supplemental explanations and analysis. *See Hours of Service of Drivers*, 73 Fed. Reg. 69,567 (Nov. 19, 2008) (2008 Final Rule). Only after dissatisfied parties sought judicial review of the 2008 Final Rule did the agency agree to undertake a more responsive rulemaking. This most recent effort began with the 2010 notice of proposed rulemaking, *Hours of Service of Drivers*, 75 Fed. Reg. 82,170 (Dec. 29, 2010) (2010 NPRM), and ended in 2011 when FMCSA promulgated the final rule now before the Court. *See Hours of Service of Drivers*, 76 Fed. Reg. 81,134 (Dec. 27, 2011) **[6]** (2011 Final Rule). For our purposes, the 2011 Final Rule resembles the earlier rules in all essential respects save for the addition of several new, safety-enhancing provisions:

• *30-Minute Off-Duty Break*. The 2011 Final Rule bars truckers from driving past 8 hours unless they have had an off-duty break of at least 30 minutes.

• *Once-Per-Week Restriction*. To prevent drivers from abusing the 34-hour restart, the 2011 Final Rule allows truckers to invoke the provision only once every 168 hours (or 7 days).

• *Two-Night Requirement*. To ensure that drivers using the 34-hour restart have an opportunity to get two nights of rest, the 2011 Final Rule also mandates that the restart include two blocks of time from 1:00 a.m. to 5:00 a.m.

See 2011 Final Rule at 81,135-36.

Unsatisfied, industry associations and public interest groups promptly petitioned for review."

[5] *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin*., 2013 U.S. App. LEXIS15934 at page 7.

[6] "CSA" first came into being in 2008 as the CSA Op-Model Test in a small number of pilot test states. During the time the FMCSA was continuing the pilot tests in a small number of states and readying CSA for nationwide implementation, it became known as "CSA 2010" (Comprehensive Safety Analysis 2010). In 2011, CSA 2010 expanded from pilot states testing to nationwide implementation and became known simply as "CSA", which now stands for "Compliance Safety Accountability".

[7] "**FMCSA Should Slow Some CSA Score Releases Until Data Woes Are Fixed, Advisory Panel Says,"** By Eric Miller, Staff Reporter, *Transport Topics*, April 22, 2013.

[8] **Opinion: CSA Data Too Flawed to Be Made Public**, By P. Sean Garney, *Transport Topics*, August 26, 2013.

[9] The Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety, Accountability (CSA) program is now providing resources specifically geared towards shippers, brokers, and insurers about the agency's publicly available data. FMCSA makes three sources of safety and compliance data available to the public. These sources are the Safety and Fitness Electronic Records system; the Licensing and Insurance Online Website; and CSA's Safety Measurement System (SMS). The new resources for shippers, brokers, and insurers consist of two factsheets and one PowerPoint presentation. FMCSA developed these new resources in response to feedback from safety stakeholders. One of the factsheets identifies and clarifies all three of FMCSA's publicly available data sources and the other factsheet offers important facts about CSA's SMS. In addition,

the PowerPoint presentation gives an overview of FMCSA's publicly available data sources that includes screenshots from each of those sources. All three resources can be found at this link: https://csa.fmcsa.dot.gov/resources.aspx?locationid=115. (http://ntassoc.com/uploads/PressRelease/050f0d4a31724a04bb41081de8a50408/FMCSA_Release_New_Shipper_Broker_Resources.pdf)

[10] **Appeals Court Sets Date to Hear CSA Challenge**, B*y* Timothy Cama, Staff Reporter*, Transport Topics,* August 5, 2013.

[11] **Supreme Court Overturns Port of L.A.'s Truck Rules,** By Eric Miller and Timothy Cama, Staff Reporters, *Transport Topics*, June 17, 2013.

[12] *American Trucking Associations, Inc. v. City of Los Angeles* ("*ATA II*"), 133 S.Ct. 2096, 186 L. Ed. 2d 177 (June 13, 2013).

[13] **Calif. Court Finalizes Port of L.A. Ruling**, By Staff Reporter, *Transport Topics*, August 27, 2013.

[15] **Judge Permanently Bars Los Angeles' Owner-Operator Ban,** By Rip Watson, Senior Reporter*, Transport Topics*, September 2, 2013.

[16] "**Court Denies Teamsters, OOIDA Bids to Stop Cross-Border Mexican Truck Program"** By Timothy Cama, Staff Reporter, *Transport Topics*, April 19, 2013

[17] "**FMCSA Will Miss Deadline for ELD Rule, Ferro Says"** By Timothy Cama, Staff Reporter, *Transport Topics*, April 8, 2013

[18] **U.S. Rules Spur E-Log Use, According to Fleets, Vendors "** By Seth Clevenger, Staff Reporter, *Transport Topics*, January 14, 2013

[19] **Tax Deal Keeps Bonus Depreciation"** By Michele Fuetsch, Staff Reporter, *Transport Topics*, January 7, 2013