No.

_____

In the
United States Court of Appeals
for the Seventh Circuit

_____

OWNER-OPERATOR INDEPENDENT
DRIVERS ASSOCIATION, INC.,
(a.k.a. "OOIDA", WILLIAM J. CULLIGAN,
ADAM D. BURNETT and DOUGLAS A. OLDHAM

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATON,
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Respondents.

PETITIONERS' MOTION FOR A SPECIFIC MANDATE DIRECTING FMCSA TO CEASE AND DESIST CONDUCT INCONSISTENT WITH THIS COURT'S PRIOR OPINION

STATEMENT OF THE CASE

Petitioners filed this appeal challenging the Federal Motor Carrier Safety Administration's (FMCSA's) final order[1] promulgating regulations respecting the use of electronic on-board recorders (EOBR's) to enforce hours-of-service (HOS) regulations. FMCSA's final order did two things. First, it mandated the use of EOBR's for motor

[1] Electronic On Board Recorders for Hours-of-Service Compliance, Final Rule, 75 Fed.Reg. 17208 (April 5, 2010).

carriers "that have demonstrated a serious noncompliance with HOS rules…" 25 Fed.Reg. 17208-1. Second, FMCSA changed its compliance review procedures "to encourage industry-wide use of EOBRS." On August 26, 2011, this Court vacated FMCSA's final order because the agency failed to comply with 49 U.S.C. §31137(a) requiring that any regulation "about the use of monitoring devices…to increase compliance…with hours of service regulations…shall ensure that the devices are not used to harass vehicle operators." *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 656 F.3d 580, 589 (7th Cir. 2011).

Section 31137(a) is broadly written and covers all regulations "about the use of…monitoring devices." The determination by this Court to "VACATE the Agency's final rule and REMAND for proceedings consistent with this opinion" necessarily implicated all regulations promulgated or amended by the final order including both those that implemented a mandate to use EOBRs as well as those that encouraged voluntary industry-wide use of EOBRs.

Following this Court's decision, Respondent FMCSA embarked on a policy of encouraging motor carriers to require drivers to use electronic monitoring devices to record their hours-of-service without taking any steps to ensure that the devices are not used to harass drivers. See Declaration of Paul D. Cullen, Sr. filed simultaneously in support of this motion. FMCSA's conduct directly conflicts with this Court's ruling. Unless restrained by this Court, FMCSA's current policy and practice will deprive Petitioners and thousands of commercial vehicle operators of protection from harassment that this Court specifically found that they were entitled to under in 49 U.S.C. §31137(a).

While it is generally not the practice of this Court to issue a mandate in administrative proceedings (Practitioner's Handbook for Appeals, XXX Issuance of Mandate at 102), FMCSA's blatant disregard for this Court's prior opinion requires a more focused approach to remedial order in this case.

WHEREFORE, Petitioners hereby move for the issuance of a mandate by this Court directing the Federal Motor Carrier Safety Administration to cease and desist from authorizing, sanctioning or in any way encouraging the use of electronic monitoring devices to increase compliance with hours-of-service regulations until it has promulgated regulations that ensure that such devices will not be used to harass drivers.

STATEMENT OF FACTS

In the months following this Court's August 26, 2011 opinion, it came to the attention of counsel for Petitioners that FMCSA was pursuing a policy of encouraging motor carriers to adopt the use of EOBRs without first promulgating regulations ensuring that such devices are not used to harass drivers. See attached Declaration of Paul D. Cullen, Sr., Counsel to Petitioners. 49 C.F.R. 395.16 was promulgated pursuant to the now vacated April 5, 2010 final order. 75 Fed.Reg. at 17246-1. That regulation authorized motor carriers to require drivers to use EOBRs and required drivers to use EOBRs in response to the motor carrier's demands. Since FMCSA's final order was vacated, Section 395.16 no longer has any force and effect.

On November 8, 2011, counsel for the Petitioners wrote to Alais L.M. Griffin, Chief Counsel, FMCSA taking the following position:

> "There is no longer any provision in the rules for the adoption of a device called an "EOBR," either under an agency mandate or voluntarily. Under no circumstance should FMCSA permit or facilitate the deployment of a device to be used as an hours-of-service enforcement tool that the Seventh Circuit declared was non-compliant with a federal statute."

Cullen Declaration at ¶4 and Exhibit 2 at 2.

FMCSA's Chief Counsel responded by letter dated November 28, 2011. Cullen Declaration, Exhibit 3. The Chief Counsel did not deny that motor carriers are continuing to use EOBRs. The Chief Counsel took the position that this Court's opinion did not preclude motor carriers for voluntarily using EOBRs and that 49 C.F.R. §395.15, a regulation promulgated in 1988 applicable to first generation electronic monitoring devices known as Automatic On-Board Recording Devices (AOBRDs), authorized the agency's current policy regarding EOBRs. FMCSA's Chief Counsel explained the agency's position:

> The Seventh Circuit's ruling vacates the final rule on EOBRs issued April 5, 2010, including the regulatory provisions that mandated the use of EOBRs as a remedial directive. It has no bearing whatsoever on motor carriers who wish to install and use HOS monitoring devices that satisfy *preexisting regulatory requirements*.

Cullen Declaration, ¶4 and Exhibit 3 at 1. (Emphasis Added). The Chief Counsel identified 49 C.F.R. §395.15 as such a "preexisting regulatory requirement" and went on to explain further that:

> "…a motor carrier may use *any* recording device, including an EOBR, which meets the minimal requirements of section 395.15, regardless of whether that device is referred to as an AOBRD, an EOBR, or some other name."

Cullen Declaration, Exhibit 3 at 2.

A side by side comparison of Sections 395.15 and 395.16 is instructive. Section 395.16 is new and was first promulgated by the April 5, 2010 final order at issue in this proceeding. Section 395.15 was first promulgated in 1988, but was amended by the April 5, 2010 final order to include the underlined language shown below:

Section 395.15	**Section 395.16**
§ 395.15 Automatic On-Board Recording devices (a) Applicability and authority to use. This section applies to automatic on-board recording devices (AOBRDs) used to record drivers' hours of service as specified by part 395. (1) *A motor carrier may require a driver to use an AOBRD* to record the driver's hours of service in lieu of complying with the requirements of § 395.8 of this part. <u>For commercial motor vehicles manufactured prior to June 4, 2012, manufacturers or motor carriers may install an electronic device to record hours of service if the device meets the requirements of either this section or § 395.16.</u> (2) *Every driver required by a motor carrier to use an automatic on-board recording device shall use such device to record the driver's hours of service.* (Emphasis added). (Language Added by Final Order Underlined).	§ 395.16 Electronic on-board recording devices. (a) Applicability and authority to use. This section applies to electronic onboard recording devices (EOBRs) used to record the driver's hours of service as specified by part 395. Motor carriers subject to a remedial directive to install, use and maintain EOBRs, issued in accordance with 49 CFR part 385, subpart J, must comply with this section. (1) *A motor carrier may require a driver to use an EOBR to record the driver's hours of service* in lieu of complying with the requirements of § 395.8 of this part. For commercial motor vehicles manufactured after June 4, 2012, any electronic device installed in a CMV by a manufacturer or motor carrier to record hours of service must meet the requirements of this section. (2) *Every driver required by a motor carrier to use an EOBR shall use such device to record the driver's hours of service*.

	(Emphasis added.)

Thus, FMCSA has adopted the position that even though this Court has vacated Section 395.16 that directly authorized motor carriers to demand that drivers use EOBRS and required drivers to obey such demands, it may nevertheless authorize motor carriers to require drivers to use EOBRs under Section 395.15, a provision that was promulgated prior to the final order vacated by this Court, but that, on its face, deals only with AOBRDs. FMCSA is silent on the question of what a driver's legal rights or responsibilities may be if she refuses a carrier's demand to install an electronic monitoring device.

SUMMARY OF ARGUMENT

A federal appeals court has inherent ability to enforce or modify its mandates in order to effectuate its opinions. This Court has the authority to order FMCSA to cease and desist from: (a) authorizing motor carriers to require their drivers to use electronic monitoring devices for HOS enforcement; and (b) requiring drivers to obey demands by motor carriers that they use such electronic monitoring devices to record their hours of service until such time as it promulgates regulations ensuring that such electronic monitoring devices are not used to harass drivers.

Alternatively, FMCSA's determination that it has authority under 49 C.F.R. §395.15 to authorize motor carriers to demand drivers to use EOBRs for HOS enforcement and to require drivers to obey such demands constitutes a *de facto* amendment to a rule accomplished without following the notice and comment

requirements of the Administrative Procedures Act, 5 U.S.C. §533, *et seq.*. FMCSA's determination is evidenced by its Chief Counsel's November 28, 2011 letter to Counsel for Petitioners and constitutes final agency action. Cullen Declaration, ¶¶ 8, 9 and Exhibit 3. This motion should be deemed to be a petition for review of FMCSA's amendment to Section 395.15 timely filed pursuant to the Hobbs Act, 28 U.S.C. 2344. FMCSA's determination to apply 49 C.F.R. §395.15 to the use of EOBRs to enforce HOS regulations should be set aside because: (1) FMCSA promulgated this *de facto* amendment to Section 395.15 without notice and comment rulemaking; and (2) the amended regulation authorizes the "use of monitoring devices…to increase compliance…with hours of service regulations…[without ensuring] that the devices are not used to harass vehicle operators" in violation of 49 U.S.C. §31137(a).

ARGUMENT

I. A MANDATE SHOULD ISSUE DIRECTING FMCSA TO CEASE AND DESIST FROM AUTHORIZING THE USE OF ELECTRONIC MONITORING DEVICES UNTIL IT PROMULGATES REGULATIONS TO ENSURE THAT SUCH DEVICES ARE NOT USED TO HARASS DRIVERS

A U.S. Court of Appeals has authority to enforce the terms of its opinions and prior mandates. The District of Columbia Circuit addressed the scope of this plenary authority in *Int'l Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922 (D.C. Circ. 1984), where it observed:

> At the outset, we note that this panel clearly has the authority to grant the relief sought by the appellants. The power of an original panel to grant relief enforcing the terms of its earlier mandate is clearly established in this Circuit, both with respect to cases that have been remanded to a District Court for further proceedings, *Dilley v. Alexander*, 627 F.2d 407

> (D.C.Cir.1980) (original panel recalled and clarified mandate); *Yablonski v. United Mine Workers of America*, 454 F.2d 1036 (D.C.Cir.1971) (per curiam) (original panel granted petition for further relief to enforce its prior mandate and opinion), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1609, 31 L.Ed.2d 816 (1972), as well as in cases that have been remanded directly to an administrative agency. *E.g., National Classification Committee v. United States*, No. 81-1600 (D.C.Cir. Apr. 23, 1984); *Action on Smoking and Health v. CAB*, 713 F.2d 795 (D.C.Cir.1983).

Despite complexities surrounding a number of issues implicated in FMCSA's final order, this Court's August 26, 2011 opinion is both direct and straightforward:

> Though the briefing raises a litany of issues that would make for a difficult and exhaustive Administrative Law final exam, in the end we find that we can dispose of the petition on a narrow basis. We conclude that the rule cannot stand because the Agency failed to consider an issue that it was statutorily required to address. Specifically, the Agency said nothing about the requirement that any regulation about the use of monitoring devices in commercial vehicles must "ensure that the devices are not used to harass vehicle operators." 49 U.S.C. § 31137(a). We therefore grant the petition and vacate the rule.
>
> * * * *
>
> For these reasons we VACATE the Agency's final rule and REMAND for proceedings consistent with this opinion.

656 F.3d at 582, 589.

The effect of this Court's vacatur is that each of the regulations promulgated or amended by FMCSA's final order are void. As the court made clear in *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 798 (D.C. Circ. 1983):

> As a result, the opinion clearly and unequivocally *vacated* the offending portion of ER–1245. To "vacate," as the parties should well know, means "to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside." 91 C.J.S. *Vacate* (1955); *see Stewart v. Oneal*, 237 F. 897, 906 (6th Cir.1916). Thus, by vacating or rescinding the rescissions proposed by ER–1245, the judgment of this court had the effect of reinstating the rules previously in force….

The implications in this case are clear. 49 C.F.R. §395.16 is gone in its entirety. 49 C.F.R. §395.15 reverts to its status prior to the amendment made pursuant to the now vacated final order.

Section 395.15 applies specifically to AOBRDs, not EOBRs. FMCSA is obviously intent on promoting the use of EOBRs without the slightest concern that this Court has told it that it may not do so unless and until it promulgates a regulation designed to ensure that the devices are not used to harass drivers. FMCSA's position is completely untenable.

First, the language of Section 395.15 deals only with AOBRDs not EOBRs. The Chief Counsel's tortured exercise in reading EOBRs into a preexisting regulation is clearly intended to circumvent this Court's opinion.

Second, the fact that Section 395.15 was originally promulgated in 1988 and pre-existed the final order vacated here is of no consequence. The term "monitoring devices" as used in Section 31137(a) certainly includes both AOBDRs and EOBRs. This Court's opinion covers both. FMCSA's April 5, 2010 final order included an amendment to Section 395.15. That amendment concerned a regulation "about the use of monitoring devices" within the meaning of 49 U.S.C. §31137(a) and clearly falls within the purview of this Court's opinion. Section 395.15 is not preexisting regulatory authority that authorizes use of electronic monitoring devices free from the requirements of Section 31137(a) and exempt from Hobbs Act review because it was first promulgated in 1988.

Third, the proposition that FMCSA's activities are beyond the reach of this Court's opinion because they deal only with "voluntary" adoption of EOBRs by motor carriers cannot survive critical analysis. EOBRs are installed on trucks operated by drivers. The fact that a motor carrier may voluntarily agree to the use of EOBRs (or agree to their use as a part of a settlement in an enforcement proceeding) does not alter the fact that under Section 395.15 drivers are compelled to install and use devices on their trucks in response to a motor carrier demand. There is nothing voluntary about this as far as drivers are concerned.

II. ALTERNATIVELY THE COURT SHOULD SET ASIDE FMCSA'S *DE FACTO* AMENDMENT OF 49 C.F.R. §395.15

A. FMCSA Has Promulgated A De Facto Amendment to 49 C.F.R. §395.15

The regulation directly at issue here, 49 C.F.R. §395.15, was first promulgated in 1988 to permit use of automatic on-board recording devices (AOBRDs). On its face, this regulation applies only to AOBRDs. FMCSA's final order at issue in this litigation promulgated an amendment to Sec. 395.15 as well as a separate provision (Section 395.16) covering EOBRs.

This Court's August 26, 2011 opinion vacated FMCSA's final order thereby eliminating Section 395.16 entirely as well as that portion of Section 395.15 added by the final order. Effective August 26, 2011, there was no regulation in place authorizing motor carriers to demand that their drivers use EOBRs and requiring drivers to comply with such demands. *Actions on Smoking and Health*, 713 F.2d at 798.

In her November 28, 2011 letter, FMCSA's Chief Counsel takes the position that this Court's ruling "has no bearing on motor carriers who wish to install and use HOS monitoring devices that satisfy preexisting regulatory requirements." Cullen Declaration, at¶5, Exhibit 3 at 1. The Chief Counsel then identifies 49 C.F.R. §395.15 as the preexisting regulatory authority. *Id.*

On its face, Section 395.15 applies only to AOBRDs not EOBRs. The Chief Counsel's announcement that Section 395.15 is broad enough to cover EOBRs constitutes a *de facto* amendment to the regulation.

In the *Northwest Tissue Center v. Shalala*, 1 F.3d 522 (7th Cir. 1993) plaintiffs complained that the "agency promulgated a back door amendment to existing regulations" and that the "back door" procedure denied them the right to notice and comment on the amendment to the regulation. The panel in *Northwest Tissue* described plaintiffs' contention:

> The plaintiffs contend that the FDA gave no indication when it promulgated the regulations that allografts were deemed "replacement heart valves," and, therefore, judicial review of their claim is not foreclosed by the thirty-day limitations period imposed by 21 U.S.C. §360g.

Id., 1 F.3d at 527. The Court examined several lines of cases in conducting its analysis including cases where an agency issued new and creative interpretations of rules:

> *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety*, 874 F. 2d 205, 206 (4th Cir. 1989). ("Statement of Interpretation" changing agency's enforcement policy actually substantive amendment to regulation subject to notice and comment), or (2) an agency has announced creative interpretations of regulatory language. *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1117 (10th Cir.1977). In *Usery*, for example, the Secretary

of Labor interpreted a regulation which stated ladders "shall be provided" to mean employers "shall require use" of ladders. *Id.* at 1118-19. The court rejected the interpretation:

> Kennecott was not required to assume the burden of guessing what the Secretary intended plain and unambiguous words employed in the safety regulations to mean. This is especially true when violation of a regulation subjects one to criminal or civil sanctions. A regulation cannot be construed to mean what an agency intended but did not adequately express. If the Secretary were to be permitted to interpret regulations by employing the unusual meaning of words, employers would be deprived of fair notice of that which is expected of them in violation of their due process rights.

Id. [citations omitted]. *See also Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir.1976) ("open-sided floor" could not be interpreted to include "open-sided roof").

1 F.3d at 528.

The *Northwest Tissue* court found that the agency had not provided notice of intent to regulate allografts under the replacement heart valve regulations when it promulgated the regulations and that the plaintiffs there could not have known that they would be governed by the regulations when they were promulgated. *Id.* 1 F.3d at 523. "As a matter of fairness, the sixty day filing period should not begin to run until the public has notice of the final rules content." *Florida Manufactured Hous. Ass'n v. Cisneros*, 53 F.3d 1565, 1574-75 (11th Cir. 1995) citing *Northwest Tissue, supra.*

So too, here, Petitioners could not have known that EOBRs would be governed by Section 395.15 when it was promulgated in 1988 or when it was amended by FMCSA's

final order of April 5, 2010. It was not until the Chief Counsel's November 28, 2011 letter that Petitioners were informed that, once Section 395.16 was vacated by this Court, FMCSA would attempt to authorize the use of EOBRs under the provisions of a 1988 regulation that, by its terms, was limited to AOBRDs.

B. FMCSA's De Facto Amendment Is Currently Reviewable

The Chief Counsel points out that since Section 395.15 was originally promulgated in October 31, 1988, a direct challenge to that Section is beyond reach of this Court's recent opinion because a 2011 Hobbs Act appeal would have been untimely. Cullen Declaration, Exhibit 3 at 1.

The Chief Counsel's November 28, 2011 letter effectively amended Section 395.15 without going through notice and comment rulemaking. As a result there was no formal proceeding to which Petitioners could have become parties and no final order published in the Federal Register to start the Hobbs Act 60 day appeal clock running. In *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 660 F.2d 595, 601-03 (D.C. Cir 1981) the D.C. Circuit held that these circumstances present no bar to judicial review, noting cogently that:

> Indeed, to bar direct review in such circumstances would create a dangerous precedent, for it would grant agencies the power to remove their regulations from direct review by simply promulgating them without notice and comment.

Id., 666 F.2d at 603 note 42. Indeed, the D.C. Circuit held that the petitioner in that case would be denied review because it had not sought judicial review in a timely manner

even where there was no publication of the rule to be challenged. 666 F.2d at 601-02. That is a result that Petitioners here wish to avoid.

Petitioners here were informed of FMCSA's "back door amendment" to Section 395.15 in the Chief Counsel's November 28, 2011 letter. Thus, the review sought here comes within sixty days of that letter and is therefore timely. Hobbs Act review and an injunction pending review were granted under nearly identical circumstances by the D.C. Circuit in *Owner-Operator Services, Inc. v. Interstate Commerce Commission*, (D.C. Cir. No. 90-1274)(June ___ 1990). Cullen Declaration, ¶9 and Exhibit 5. If the Court is not persuaded to address FMCSA's current behavior by issuing a supplemental mandate to the Agency, it should consider this motion to be a Petition for Review of FMCSA's *de facto* amendment to 49 C.F.R. 395.15. The *de facto* amendment should be vacated because: (1) FMCSA did not follow notice and comment rulemaking procedures; and (2) because the amended rule was not accompanied by measures to ensure against harassment as required by 49 U.S.C. 31137(a) and this Court's August 26, 2011 opinion.

CONCLUSION

For the foregoing reasons, Petitioners' motion should be granted.

Respectfully submitted,

Date:

s/Paul D. Cullen, Sr.
Paul D. Cullen, Sr.
Paul D. Cullen, Jr.
Joyce E. Mayers
THE CULLEN LAW FIRM, PLLC
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007

(202) 944-8600

Counsel for Petitioners