

## Trucker Hour Limits Don't Improve Safety, DC Circ. Hears

By Erica Teichert

*Law360, Washington (March 15, 2013, 7:27 PM ET) --* Trade group American Trucking Associations Inc. on Friday urged the D.C. Circuit to toss a federal rule that imposes strict workweek hours and break limitations on truckers, claiming the Federal Motor Carrier Safety Administration couldn't show the changes would significantly affect safety issues associated with driver fatigue.

The ATA alleges the FMCSA relied on outdated data and unreliable conclusions when it came up with the 2011 "Hours of Service of Drivers" rule that is slated to go into effect in July, arguing there was no reason to update the prior rules of the road.

"The current policy is actually working very well, meaning the 2003 rule," the ATA's counsel Erika Jones of Mayer Brown LLP told the appeals court. "There's a lot of uncertainty in this data. You can't simply fall back on uncertainty. You're the agency. You have to find out."

Under the new rules, truckers' workweeks will be limited to 70 hours on the road. Drivers can currently restart their duty time calculations if they have taken at least 34 consecutive hours off, but under the new rule, those 34 hours have to include two periods between 1 a.m. and 5 a.m., which the ATA claims will unfairly affect truckers making early morning deliveries to restaurants and grocery stores.

While the agency cited various studies that emphasized the relationship between driver fatigue and accidents on the road, ATA said the data was more than 10 years old and not reliable.

U.S. Circuit Judge Thomas B. Griffith noted that the association had brought up several "powerful and persuasive policy points," but questioned whether it had met its burden and proved the agency's new rule was arbitrary and capricious.

"What's arbitrary and capricious about the agency balancing it differently?" the judge said. "It may be bad policy, but we're not here to judge policy."

According to Jones, the FMCSA's new rule wasn't supported by the rulemaking's record, which justified the challenge.

Consumer advocacy organization Public Citizen Inc. also challenged the rule, but claimed the FMCSA should have reverted back to a 10-hour shift rather than an 11-hour shift, saying the agency had a duty to place safety and health concerns above economic consequences.

But government counsel Jonathan H. Levy maintained that the agency had “acted very carefully, very rationally and fully scientifically” when it issued the trucking rule, claiming the petitioners’ appeals were merely differences in opinion and that Public Citizen’s proposal would be impossible to implement properly.

“Generally these are the kinds of decisions agencies make all the time,” Levy said. “You need to show the agency acted unreasonably. That hasn’t happened here.”

Judges Janice Rogers Brown, Thomas B. Griffith and A. Raymond Randolph sat on the panel for the D.C. Circuit.

The ATA is represented by Erika Jones and Adam Sloane of Mayer Brown LLP and in-house counsel Richard Pianka and Prasad Sharma.

Public Citizen is represented by in-house counsel Gregory A. Beck and Scott L. Nelson.

The case is American Trucking Associations Inc. v. Federal Motor Carrier Safety Administration et al., case number 12-1092, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Ben James. Editing by Elizabeth Bowen.

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