NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 12-1092
(consolidated with No. 12-1113)

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioner,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; and UNITED STATES OF AMERICA,

Respondents.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC.; NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; WILLIAM B. TRESCOTT; HEALTH & PERSONAL CARE LOGISTICS CONFERENCE, INC.; NATIONAL SHIPPER'S STRATEGIC TRANSPORTATION COUNCIL, INC.; and TRUCKLOAD CARRIERS ASSOCIATION,

Intervenors for Petitioner.

On Petition For Review of a Final Rule
Issued by the Federal Motor Carrier Safety Administration

BRIEF OF AMICI CURIAE AMERICAN BAKERS ASSOCIATION, *ET AL.*, IN SUPPORT OF PETITIONER

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July 31, 2012

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing in this court are listed in the Initial Brief for Petitioner and Intervenors in Support of Petitioner ("ATA Brief") filed on July 24, 2012.

The American Bakers Association ("ABA") is a national trade association located in Washington, D.C. representing the interests of the wholesale baking industry, including more than 700 baking facilities and baking company suppliers. The wholesale baking industry currently operates the fourth largest fleet of vehicles behind the United States Postal Service, FedEx, and UPS, for the distribution of their products to market as well as the distribution of supplies to baking facilities. ABA is organized as a not-for-profit corporation and has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in ABA.

The Food Marketing Institute ("FMI") is a national trade association representing large, multi-store chains, regional firms and independent operators both in the United States and internationally. Its member companies, including food retail and wholesale operators and pharmacies, as well as FMI's associate members in the supply chain, rely on the transportation of goods by commercial motor vehicles. FMI is a not-for-profit corporation located in Arlington, Virginia

and has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in FMI.

The Intermodal Association of North America ("IANA") is a national trade association representing the combined interests of intermodal freight transportation companies and their suppliers. IANA is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in IANA.

The International Foodservice Distributors Association ("IFDA") is a national trade association located in McLean, Virginia representing the interests of companies which distribute food and related products to restaurants and institutions by commercial motor vehicles. IFDA is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in IFDA.

NASSTRAC, Inc. (also known as National Shipper's Strategic Transportation Council and formerly as National Small Shipments Traffic Conference) is a national trade association whose regular members include manufacturing and distribution companies of all sizes that require the services of trucking companies for dependable transportation of goods. NASSTRAC also has associate members, including many motor carriers. NASSTRAC is a not-for-profit

trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in NASSTRAC.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. NAM is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in NAM.

The National Chicken Council ("NCC") is a nonprofit member organization representing companies that produce and process over 95 percent of the broiler/fryer chickens marketed in the United States. NCC promotes the production, marketing and consumption of safe, wholesome and nutritious chicken products both domestically and internationally. NCC serves as an advocate on behalf of its members with regard to the development and implementation of federal and state programs and regulations that affect the chicken industry. NCC is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in NCC.

The National Grocers Association ("NGA") is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry, most of which are serviced by wholesale distributors, while others may be partially or fully self-distributing. NGA members include retail and wholesale grocers, state grocers associations, as well as manufacturers and service suppliers. NGA is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in NGA.

The National Private Truck Council ("NPTC") is a trade association representing the interests of over 500 companies that operate private truck fleets in furtherance of non-transportation primary businesses. NPTC members include both Fortune 500 companies and small local distribution companies. Its members are heavily represented in the food, retail, chemical and manufacturing industries, but encompass a broad cross-section of American business interests. NPTC members provide both long-haul trucking and local distribution service, depending on the type of industry and distribution requirements. They operate both tractor-trailers and a variety of straight trucks in meeting their transportation needs. All NPTC member companies and their drivers are subject to the driver hours of service ("HOS") regulations. NPTC is a not-for-profit trade association which has

no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in NPTC.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. NRF represents retailers of all types and sizes from the United States and more than 45 countries abroad including department stores, specialty, apparel, discount, online, independent, grocery and chain restaurants, among others. NRF also includes the National Council of Chain Restaurants as an affiliated member entity. Retailers operate more than 3.5 million U.S. establishments that support one in four U.S. jobs – 42 million working Americans -- and contribute $2.5 trillion to annual GDP. NRF is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in NRF.

The National Turkey Federation ("NTF") is the national advocate for all segments of the turkey industry. NTF provides services and conducts activities which increase demand for its members' products by protecting and enhancing their ability to profitably provide wholesome, high-quality, nutritious products. NTF is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in NTF.

The Retail Industry Leaders Association ("RILA") is a national trade association located in Arlington, Virginia representing the interests of retailers, product manufacturers, and service suppliers, all of which comprise some of the largest users of the supply chain, including transportation of goods by commercial motor vehicle. RILA is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in RILA.

The Snack Food Association ("SFA") is a national trade association representing the interests of domestic and international firms that manufacture and market snack foods. It includes associate members whose firms operate businesses associated with the snack food industry but are not themselves manufacturers. SFA advocates on behalf of its members at the international, federal and state government levels, provides educational and training opportunities, and promotes the snack food industry to the general public. Its members rely on commercial motor vehicles for the distribution of their products. SFA is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in SFA.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents the interests of 300,000 direct members and indirectly represents the interests of more than three

million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber routinely represents the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. The members of the Chamber have a fundamental interest in the hours of service regulations, because the Chamber's members depend on commercial motor vehicles for the movement of goods, and many operate truck fleets. The Chamber is a not-for-profit trade association which has no parent corporation. No publicly held corporation owns any portion of the Chamber, and the Chamber is neither a subsidiary nor an affiliate of any publicly owned corporation.

The U.S. Poultry & Egg Association ("U.S. Poultry") is the world's largest poultry organization, whose membership includes producers of broilers, turkeys, ducks, eggs and breeding stock, as well as allied companies. U.S. Poultry focuses on research, education and technical services, as well as communications to keep members of the poultry industry current on important issues. U.S. Poultry is a not-for-profit trade association which has no parent companies. No publicly-held company owns a ten percent (10%) or greater ownership interest in U.S. Poultry.

B. Rulings Under Review

References to the rulings at issue appear in the ATA Brief.

C. Related Cases

Case No. 12-1092 has been consolidated with Case No. 12-1113. *Amici* are aware of no other pending cases. Previous cases in this court concerning HOS rulemakings were *Public Citizen v. FMCSA*, No. 03-1165, *OOIDA v FMCSA*, No. 06-1035, and *Public Citizen v. FMCSA*, No. 06-1078, and Public Citizen v. FMCSA, No. 09-1094.

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GLOSSARY

ABA	American Bakers Association
ATA	American Trucking Associations
FMCSA	Federal Motor Carrier Safety Administration
FMI	Food Marketing Institute
HOS	Hours of Service
IANA	Intermodal Association of North America
IFDA	International Foodservice Distributors Association
NAM	National Association of Manufacturers
NASSTRAC	National Shippers Strategic Transportation Council
NCC	National Chicken Council
NGA	National Grocers Association
NPRM	Notice of Proposed Rulemaking
NPTC	National Private Truck Council
NRF	National Retail Federation
NTF	National Turkey Federation
OOIDA	Owner-Operator Independent Drivers Association
RIA	Regulatory Impact Analysis
RILA	Retail Industry Leaders Association
SFA	Snack Food Association

INTEREST OF THE *AMICI CURIAE*

I. Identity of the *Amici Curiae*

The *amici curiae* consist of the following national trade associations:

American Bakers Association
Food Marketing Institute
Intermodal Association of North America
International Foodservice Distributors Association
National Shippers Strategic Transportation Council (NASSTRAC)[1]
National Association of Manufacturers
National Chicken Council
National Grocers Association
National Private Truck Council
National Retail Federation
National Turkey Federation
Retail Industry Leaders Association
Snack Food Association
U.S. Chamber of Commerce
U.S. Poultry and Egg Association

Each of the associations represents a segment of commercial interests with a vested interest in the HOS rules. The companies represented herein include manufacturers, shippers, retailers and transportation service providers; in addition, some of these entities operate their own private commercial truck fleets. All of the associations have members that rely on truck transportation for the movement of goods and, as explained below, are significantly affected by any changes to the

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[1] NASSTRAC participates as an *amicus* in Case No. 12-1092. It participates as an intervenor in Case No. 12-1113. Because the Court's Order of June 13, 2012 requires all *amici* to file a single brief for both cases, NASSTRAC is included as an *amicus* here.

HOS rules. A more detailed description of each association and its membership is included in the corporate disclosure statement above.

II. Interest of the *Amici Curiae*

The *amici* all have members who have a vested interest in the HOS rules. They support retaining the HOS rules as they are currently in effect, without any changes from the December 27, 2011 final rule of the Federal Motor Carrier Safety Administration ("FMCSA"). 75 Fed. Reg. 81133. They support the Petitioner American Trucking Associations ("ATA") in opposing changes to the 34-hour restart provision and the requirement to log breaks as off duty in Case No. 12-1092, and support the FMCSA's retention of the 11-hour daily driving limit in Case No. 12-1113.

Each association submitted comments to the proposed rule in the most recent rulemaking, 75 Fed. Reg. 82170 (December 29, 2010), and many of their member companies have also submitted comments to the docket and participated in public hearings and information gathering activities conducted by FMCSA on this issue. In light of this extensive participation in this and other HOS rulemakings, the impacted industries are particularly frustrated by the FMCSA's dismissal of many arguments vital to their interests, most egregiously the Agency's failure to consider the cost of the rule changes on the shippers, manufacturers, and retailers that make up the associations' membership.

The associations' members rely extensively on trucking. Virtually all goods in commerce travel by truck for some part of various movements: raw materials to manufacturing centers, finished products to distribution centers and then to retail stores, returns or packaging materials back to the manufacturing sites, and trucking drayage services to and from inland intermodal facilities and ports. This involvement in the entire stream of interstate and global commerce gives these entities a valuable insight into how the HOS rules affect the entire economy, not just the motor carrier community.

The *amici's* members represent the core of the American economy. For example, the Food Marketing Institute's United States members operate approximately 26,000 retail food stores and 14,000 pharmacies with combined annual sales of $680 billion. IFDA's members operate more than 700 distribution facilities with annual sales of more than $110 billion. IANA represents the combined interests of 950 railroads, ocean carriers, motor carriers, and intermodal marketing companies. Their members transport over 90% of all intermodal freight. NPTC's members include both Fortune 500 companies and small enterprises over a broad cross-section of American business interests. The baking industry represented by the ABA generates more than $70 billion a year and employs nearly a half a million people. RILA represents over 200 retailers, manufacturers and suppliers which account for more than $1.5 trillion in annual sales, millions of

jobs, and over 100,000 facilities. NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. American manufacturing produces $1.7 trillion of value each year, or 11.7 percent of U.S. GDP. For every $1.00 spent in manufacturing, another $1.35 is added to the economy.

The rule's impact on the supply chain cannot be overstated. The distribution of goods involves complex and interwoven systems involving scheduling, logistics, route planning, and inventory control. It requires carriers, shippers and receivers to coordinate the movement and delivery of vast amounts of products every day of the year. The goal of everyone in this chain of supply is to move goods as safely and efficiently as possible.

Shippers and receivers have developed extensive processes to handle inventory and deliveries to maximize productivity and output and to minimize costs. Just-in-time delivery and lean manufacturing practices seek to reduce the amount of inventory that manufacturers, shippers and receivers must carry at any given time. Reducing inventory generates cost savings as companies can reduce the interest costs of carrying inventory as well as the cost of warehouse space and the personnel required to store excess product; these efficiencies also minimize the risk of products becoming spoiled or outdated prior to sale.

Groups that handle perishable items, such as grocery stores, bakeries, and restaurants rely on effective supply chain management to ensure fresh products are available at the optimum time, and to ensure that excess product is not delivered that will spoil before it can be used or sold. Thus, shippers, carriers and receivers must strive to shorten the "lead times" of these products by developing the most efficient delivery schedules possible.

These entities also require flexibility and rely on having products delivered at the most preferred time of day. For some entities, such as grocers, early morning deliveries are not only preferred, they are vital. Stores shelves must be stocked with fresh products when the stores open. Deliveries in the evening or early morning hours are essential. Other entities, such as restaurants, seek to maximize productivity by scheduling deliveries when their facilities are closed to the public. Many entities have moved to night or early morning deliveries because less congestion on the roads leads to shorter delivery times, increasing reliability and reducing costs.

Many manufacturers and other shippers have designed their delivery systems to reach a large portion of their customers in a single day's truck travel. A common industry target is reaching 75% of customers in a single day. *See* NPTC Comments, FMCSA-2004-19608-20887, 10. Large interstate operators build manufacturing and distribution facilities in locations to meet that goal.

All of these systems are affected by even small changes to the HOS rules. A member of the NGA estimated the proposed rule would require new equipment, personnel and maintenance that would cost it hundreds of thousands of dollars. FMCSA-2004-19608-20944, 2-3. The average profit margin for the typical retail supermarket is less than 2% -- meaning any additional transportation costs would have a significant effect on operations. A member of the NRF estimated the proposed rule would increase its costs from 3% to 20%, and one large manufacturer member of the NAM estimated that the proposed rule would cost an additional $80 to $90 million per year. NRF Comments, FMCSA-2004-19608-15922, 2; NAM Comments, FMCSA-2004-19608-20940, 2. Although these estimates were based on the proposed rule, which included a proposal, ultimately not adopted, to reduce daily driving time by one hour per day, they are still relevant in light of the challenge to the 11-hour driving limit by the petitioners in Case No. 12-1113.

Reducing driving time from 11 hours a day to 10 would significantly reduce their members' ability to meet the goal of reaching 75% of their customers in a day. Reducing the daily driving limit by an hour would decrease a driver's range by 50 to 100 miles each day. That mileage reduction means that 8% of shipments will incur an additional day in transit. As a result, manufacturers will lose the ability to serve their customers by 15%. Instead of reaching 75% of customers in a

day, they will only be able to reach 60% of those customers. NPTC Comments, FMCSA-2004-19608-20887, 10.

III. Source of Authority to File

On May 14, 2012, pursuant to Circuit Rule 29(b), the *amici curiae* submitted a Notice of Intent to Participate as *Amici Curiae* by Consent in both cases.

RULE 29(c)(5) STATEMENT

In accordance with F.R.A.P. 29(c)(5), *amici curiae* state as follows:

1. No party's counsel authored this brief in whole or in part;

2. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

3. No person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

Notwithstanding the foregoing, the *amici curiae* note that in Case No. 12-1113, NASSTRAC participates as an intervenor, and in Case No. 12-1092, NASSTRAC participates as both an intervenor and an *amicus*. Thus, NASSTRAC and its counsel have not participated in the authorship of this brief but NASSTRAC, like all of the *amici* herein, has contributed money that was intended to fund preparing and submitting this brief.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Petitioner and Intervenors in Support of Petitioner filed July 24, 2012 (hereinafter "ATA Brief").

STATEMENT OF ISSUES

The *amici* refer to and incorporate herein by reference the statements of issues contained in the ATA Brief and the Initial Brief for Petitioners filed on July 25, 2012 (hereinafter the "Public Citizen Brief").

STATEMENT OF FACTS

The *amici* refer to and incorporate herein by reference the statement of facts contained in the ATA Brief.

SUMMARY OF ARGUMENT

The 2011 Rule must be vacated and remanded to the FMCSA because the changes made to the 34-hour restart provisions are not backed by adequate evidence in the record. The agency relied on information in the Regulatory Impact Analysis ("RIA") that runs counter to its analyses in earlier HOS rulemakings, calling into doubt its conclusions that the rule's benefits outweigh its costs. Importantly, the FMCSA failed to consider substantial costs on entities other than motor carriers, such as the *amici* herein, even though those entities are integral parts of the nation's commercial supply chain and have provided strong evidence

of the rule's impact on their operations. The Agency also failed to consider the impact of the restart changes on night drivers and congestion, and that the changes may be detrimental to safety. The FMCSA concluded that mandating two overnight periods as part of the restart would provide additional rest for drivers, especially those that work at night, even though its reasoning is inconsistent with its goal of having drivers maintain a more regular circadian clock.

The mandatory 30-minute break provision requiring drivers to go off-duty is also unsupported by the record. The *amici* and others submitted evidence that the 30 minute break will impose significant costs on shippers, receivers, and ultimately, consumers. The impact of the requirement to log the break time off-duty as opposed to on-duty, not driving was not adequately considered by the FMCSA, and the decision to include it was arbitrary and capricious.

The Agency's decision to retain the 11- hour driving time limit is consistent with the Agency's prior positions and justified by the evidence in the record. There is ample evidence that the 11-hour limit does not have a detrimental impact on safety, and the costs of eliminating one hour of driving time per workday would impose costs that significantly outweigh any purported benefits.

ARGUMENT

Review of the FMCSA's decision is governed by the Administrative Procedure Act, 5 U.S.C. § 706. *Owner-Operator Independent Drivers Assoc., Inc.*

v. FMCSA, 494 F.3d 188, (D.C. Cir. 2007) ("*OOIDA*"). The court must set aside the 2011 Rule if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A) and (E). The agency's decision must be overturned "if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). The agency must "examine relevant data and articulate a satisfactory explanation for its action[s]." *Id*. Agency decisions which are internally inconsistent and inadequately explained are to be discarded. *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (agency decision is arbitrary and capricious because it was "internally inconsistent and inadequately explained").

I. The FMCSA's Regulatory Impact Analysis Does Not Demonstrate that the Changes to the HOS Rules Result in Net Benefits

The RIA is fundamentally flawed in two ways. First, it overstated the percentage of truck crashes caused by driver fatigue, leading to an overstatement of the purported benefits expected from the rule. The Agency's methodology was a marked change from methodologies used in prior HOS rulemakings. Second, it failed to consider the costs the rule imposes on shippers, manufacturers, and consumers.

A. The RIA Overestimates the Percentage of Truck Crashes Caused by Driver Fatigue

The RIA significantly departed from the methodologies used in earlier iterations of the HOS rule. It is arbitrary and capricious for an agency to ignore its earlier policies and precedents, especially when it does not offer a rational explanation for such a departure. *See Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) ("[T]he agency cannot silently depart from previous policies or ignore precedent."); *State Farm*, 463 U.S. 29, 43 (1983) (agency must "articulate a satisfactory explanation for its action[s]".).

The flaws in the RIA are explained in detail in the ATA Brief. The *amici* fully support that analysis. The FMCSA's conclusion that driver fatigue is a cause of 13 percent of crashes is misleading and not based on accurate scientific or statistical data. The Agency makes no adequate explanation as to why a departure from earlier baseline calculations was necessary, or even reasonable. This Court should remand the rule to the Agency to more adequately address this issue. *See Committee for Community Access, supra*, and *State Farm*, *supra*.

B. The Rule Fails to Take Into Account the Costs the Rule Imposes on Shippers, Manufacturers, and Consumers

The FMCSA is required to consider the costs and the benefits of its proposed rules. 49 U.S.C. §§ 31136(c)(2)(A), 31501(d). Those statutes do not include any limitation on the type of costs to be considered, or on whom those costs would be

imposed. Indeed, each agency is instructed to "tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities" and "design its regulations in the most cost-effective manner." Executive Order 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993). The FMCSA utterly failed to take into account the costs the Rule imposes on shippers, manufacturers, and consumers. That failure drives up the Rule's relative costs and casts serious doubt on the FMCSA's conclusion that the benefits of the HOS changes outweigh the costs.

The FMCSA did not consider the costs the rule imposed on shippers, manufacturers, and ultimately consumers. *See* 76 *Fed. Reg. at* 81170 ("The costs of the rule are measured by the cost to the carriers . . ."). The FMCSA unjustifiably claimed that it need not measure the costs to shippers and receivers because "these entities are not subject to FMCSA regulations . . . ." RIA at 7-1. This fatal flaw in the FMCSA's analysis constitutes reversible error.

Although the Agency conducted a cost/benefit analysis, failure to include *any* analysis of the costs to entities other than carriers is a failure "to consider an important aspect of the problem" and leaves the rule "unsupported by substantial evidence." *State Farm*, 463 U.S. at 43. *See also*, *Nat'l Assoc. of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) (agency "gave short shrift to certain of its statutory obligations" and regulations were vacated in part).

Transportation of goods in commerce is not a singular event. The stream of transportation involves a complex system involving manufacturers, shippers, carriers, wholesalers, distributors, retailers, and ultimately ends with the consumer. Each link in that chain is dependent on the other, and anything that affects one link impacts the others. In light of this interwoven web of transportation in commerce, non-carriers and consumers have deemed it vitally important to comment on HOS regulations from the very beginning. The reduction in driver productivity, which equates to increased transportation costs, has a profound ripple effect across many closely-intertwined industries. The FMCSA's intentional disregard of the costs to those entities is the very definition of arbitrary and capricious behavior.

The comments submitted to the latest rulemaking by many of the *amici* illustrate the significant costs associated with the rule. The NGA estimated that the changes proposed in the NPRM would significantly affect its members; one wholesaler member estimated the proposed rule would require it to acquire eight new tractors and ten new trailers, estimated at over $350,000. FMCSA-2004-19608-20944, 2. The added personnel expense would be over $204,000 and costs for maintaining the new equipment would be an additional $100,000. *Id.* at 2-3. The average profit margin for the typical retail supermarket is less than 2%, *id.* at 3, meaning any additional transportation costs would have a significant negative effect on profitability.

NRF members estimated the cost increases from the proposed rule ranged from 3% to 20% depending on the specific retailer's network and operations. FMCSA-2004-19608-15922, 2. One large manufacturer member of the NAM estimated that the proposed rule would cost an additional $80 to $90 million per year. FMCSA-2004-19608-20940, 2.

Importantly, these additional costs are not simply the costs passed down from carriers. The FMCSA mistakenly assumed that the costs considered in the rulemaking consisted only of those passed down to shippers and consumers, and that any costs borne directly by shippers would equate to an equal reduction of costs to carriers. 76 *Fed. Reg. at* 81170. However, shippers and other entities in the supply chain must undertake additional costs not considered by FMCSA when other transportation costs go up.

For example, if the two-night restriction in the restart provision causes drivers to start shifts at 5:00 a.m., regular night deliveries are necessarily pushed back to later in the day. In addition to the carrier's cost of possibly adding drivers, the retailer may have to make other arrangements from its suppliers. Grocers who rely on having fresh produce on the shelves when their stores open might pay their suppliers a premium to ensure the best products are available. Manufacturers who rely on lean manufacturing practices, which minimize costs by storing less inventory on site, might have to keep more materials on hand because of changes

in scheduling. Shippers and receivers who rely on just-in-time delivery to reduce the burdens of overstocking might have to hire more workers to handle additional product and deal with paperwork burdens.

These are just some of the estimated costs imposed on shippers, wholesalers, retailers, brokers, and manufacturers that were not considered by FMCSA. The FMCSA's refusal to take those additional costs into account is arbitrary and capricious.

II. The FMCSA Failed to Adequately Consider the Adverse Impact of the Restart Changes on Shippers and that the Changes May Make the Roads Less Safe

Mandating that a driver rest for two overnight periods between 1:00 a.m. and 5:00 a.m. to restart the weekly on-duty period is also arbitrary and capricious. In making those changes, the FMCSA failed to consider the substantial impacts to entities other than carriers. Additionally, the Agency failed to adequately consider that the two-night restriction may negatively impact safety. Thus, it failed to "examine relevant data and articulate a satisfactory explanation" for the changes. *State Farm*, 463 U.S. at 43.

A. Changing the Restart Provisions Will Impose Significant Costs and Unfairly Burden the Distribution of Products Throughout the Supply Chain

The *amici* have already discussed the FMCSA's complete lack of regard for the costs imposed on shippers and other non-carriers imposed by the rule. *See*

Section I, *supra*. The *amici* have also discussed how any change to the supply chain can have major impacts on distribution practices and costs for virtually the entire commercial sector of the country. *See* discussion at 11-15, *supra*. In addition to the effects of the rule on costs, FMCSA failed to adequately consider the impacts of the changes on night drivers and on congestion, in direct contravention of the Agency's obligation to consider important aspects of the problem and offer an explanation for its decision that is consistent with the evidence. *See State Farm*, 463 U.S. at 43.

1. FMCSA Did Not Adequately Consider the Impact of the Restart Changes on Night Drivers

The FMCSA dismissed concerns raised by many commenters that the restart provisions will impact night and early morning deliveries. *See* 76 *Fed. Reg*. 81140 ("Industry claims that the 2-night requirement for drivers would affect nighttime deliveries and increase congestion are also unsupported."). The Agency simply fails to credit consistent industry comments that the two-night requirement will have a significant impact. A flat refusal to deal with substantial evidence in the record does not constitute a "satisfactory explanation for its action[s]." *State Farm*, 463 U.S. at 43.

Many commenters noted that their industries rely on night deliveries from drivers who regularly work night schedules. Because of the two-night restriction, those drivers taking advantage of the restart will have two choices – either begin a

new day in the morning after the second overnight period, or begin their workweek at their normal nightshift time. In either case, the overall off-duty time for those drivers could be significantly more than 34 hours – in some cases over 60 hours. *See* 76 *Fed. Reg.* at 81155 (FMCSA's example of a long-haul driver who normally works 11:00 p.m. to 10:00 a.m. would have 61 hours off-duty to include two nights off and begin his shift again at 11:00 p.m.).

This reduction in available workweek hours will force companies to hire additional drivers and add equipment. Some drivers will start work early in the morning – as opposed to making their deliveries at night as preferred by the shippers and receivers – adding trucks on the road at peak times, and leading to increased congestion and longer delivery lead times.

The NRF's comments showed that a number of its members routinely dispatch drivers prior to 5:00 a.m. so that deliveries can be made before traffic is congested and arrive before stores open. FMCSA-2004-19608-15922, 5. IFDA noted that many in that industry have moved to additional nighttime operations as customers accept "key drops," *i.e.*, deliveries made at night when a restaurant is not open. FMCSA-2004-19608-16883, 2. NGA noted that these changes would disproportionately impact its members. FMCSA-2004-19608-20944, 4. Grocery stores rely on deliveries early in the morning, especially for perishable goods that have a limited shelf life and must be on the shelves when stores open. With the

changes to the rule, lead times for perishable goods will increase, leading wholesalers to increase inventory levels to maintain service. All of these changes would lead to increased costs throughout the supply chain.

2. FMCSA Did Not Adequately Consider the Restart Changes will Result in Increased Congestion

The FMCSA also dismissed the idea that congestion will increase because of the two-night restriction. It assumed that drivers will simply be able to adjust their schedules to avoid congestion, and that most drivers will not be affected anyway. 76 *Fed. Reg.* at 81145. Additionally, the Agency unjustifiably concluded that congestion will not increase because the two-night restriction "will affect only one day per week for the fraction of drivers who routinely work all night and routinely work very long hours per week." 76 *Fed. Reg.* at 81171. Based on its irrational conclusion that congestion will not increase due to the two-night restriction, the Agency compounded its error by making no effort to quantify the effects of congestion on supply chain costs or on public safety. RIA at 6-12 ("no attempt was made to estimate the effects on congestion").

The effects of these rule changes on traffic congestion cannot be overstated. Any delays in transportation times equate to increased costs, loss of efficiency, and loss of productivity. The Agency arbitrarily ignored comments indicating that because drivers might be forced to begin their shifts in the early morning hours after the end of the restart, they would be driving at a peak traffic time, leading to

increased congestion. *See, e.g.*, NRF Comments, FMCSA-2004-19608-15922, 4; NAM Comments, FMCSA-2004-19608-20940, 4; IANA Comments, FMCSA-2004-19608-20934, 4. The FMCSA failed to adequately rebut these comments and arbitrarily refused to calculate the costs imposed by congestion.

The FMCSA irrationally concluded that the restart provisions only affect a small number of drivers who maximize their hours. The FMCSA failed to consider evidence provided by carriers and shippers that many drivers use the restart for reasons other than to maximize their hours. The FMCSA arbitrarily undercounted the carriers and shippers who use the restart as a tool to maintain flexibility in their schedules and to ease recordkeeping. Thus, the FMCSA's conclusion that congestion will not increase as a result of the Final Rule is irrational and unsupportable.

Changes to the 34-hour restart have significant ripple effects along the chain of distribution. Because the FMCSA failed to consider the costs of these changes to non-carriers, and also failed to adequately consider that the two-night requirement will increase costs for businesses that rely on night deliveries and how the requirement will increase congestion, the requirement is arbitrary and capricious. S*ee State Farm*, *supra.* The rule should be remanded to the Agency to restore the 34-hour restart as it existed prior to the 2011 Final Rule.

B. The FMCSA's Conclusion About the Safety Benefits Attained from the Two Night Requirement is Internally Inconsistent, Has No Support in the Record, and Might Be Detrimental to Safety

The *amici* fully support ATA's arguments that the two-night restriction in the restart provisions is unsupported by evidence in the record and is irreconcilable with the Agency's earlier views, especially with regard to the FMCSA's abandonment of its prior conclusion that circadian stability was important in ensuring drivers had sufficient rest. *See* ATA Brief at Section III, pp. 41-46. The *amici* wish to add two points.

First, the FMCSA's conclusion contravenes its earlier view that drivers maintain stability in their circadian cycles. Its current conclusion that nighttime sleep is essential to restorative rest is internally inconsistent with the overall HOS scheme. The 2003 Rule established a 14-hour on-duty limit to set drivers on a 24-hour workday (such that drivers could be off-duty for 10 hours, as opposed to 8 hours in the pre-2003 regulation) which better conforms to a regular circadian clock. 68 *Fed. Reg*. 22467. The 34-hour restart was established to allow drivers to get extended rest to counter the effects of long-term fatigue. The key to the entire HOS scheme is to put drivers on a regular 24-hour clock. Even in the current rulemaking, the FMCSA noted that the 2003 Rule "moved drivers toward a 24-hour daily clock . . . reducing the risk of fatigue caused from continually changing sleep periods." 76 *Fed. Reg*. 81134.

The two-night restriction upsets this scheme. If drivers flip their sleep schedules from sleeping during the day to sleeping at night, their 24-hour circadian clocks are disrupted. The benefits of maintaining a 24-hour workday – which stands at the very core of the HOS scheme – are undermined by rotating sleep schedules. Nowhere does FMCSA explain the internal inconsistency of requiring a 24-hour workday and forcing drivers to disrupt that schedule.

The two night restriction is a departure from the Agency's earlier conclusions regarding the benefits of maintaining circadian stability and is internally inconsistent with the entire HOS scheme. As such, it is irrational and the two-night restriction should be struck down as arbitrary and capricious. *See Dillmon v. Nat'l Transp. Safety Board*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) ("Reasoned decision making, therefore, necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent."); *Gen. Chem. Corp*., 817 F.2d at 846.

Second, the purported safety benefits of the two-night requirement are not supported by evidence in the record. ATA notes the flaws in the study FMCSA relies upon to support the change. ATA Brief at 42-43. The *amici* support that analysis and wish to make one additional point.

The study found that a restart under the parameters of the test was effective at maintaining pre-restart performance levels. However, it also showed that a shift

from a nighttime to a daytime wake schedule caused a modest degredation in performance on the first night of work after the restart. Van Dongen, *et al*., *Duration of Restart Period Needed to Recycle with Optimal Performance: Phase II*, FMCSA-2004-19608-4440, 49 ("A caveat to this finding is that there was a transient, modest degradation of performance on the day immediately following the restart period . . ."). In other words, drivers were *less* safe on the first night of work after the restart after having switched to a daytime wake schedule. The study also conceded that if the subjects had been allowed to continue with a nighttime wake schedule, a "gradual circadian adjustment would have occurred, potentially eliminating the post-restart" performance degradation. *Id*. This study simply cannot be the basis of adequate record evidence to support changing the restart provisions.

III. The FMCSA Failed to Consider the Full Impacts of the 30-Minute Rest Break Requirement

The Final Rule requires that if more than 8 consecutive hours on duty have passed since their last off-duty period of at least 30 minutes, drivers must take a 30-minute rest break before driving again. 76 *Fed. Reg*. 81136. The 30-minute rest break must be recorded as off-duty time, and the current 14-hour on-duty window is effectively reduced to 13.5 hours. *Id*. The FMCSA's failure to consider the full impacts of this reduction in on-duty time and the 30-minute break provision is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

Prior to the 2003 Rule, drivers were allowed to work up to 15 hours in a day, and rest breaks were not included in that on-duty limit. The 2003 rule limited on-duty time to 14 consecutive hours after a driver came on duty so that drivers could work on a 24-hour circadian clock. 68 *Fed. Reg*. 22471. The loss of on-duty time significantly affected carriers and shippers, in large part because many drivers must spend a substantial part of their on-duty time doing things other than driving, including loading and unloading. The time spent at shipper or customer facilities (*i.e.* "detention time") can be a significant factor in lost driver productivity. In essence, the longer a driver must wait to load or unload his truck, the less time he spends doing what he is paid for, driving the truck.

As commenters explained, requiring the 30-minute rest break period to count as off-duty time results in lost productivity and increased costs. IFDA commented in relation to the NPRM's proposal to reduce on-duty time to 13 hours that their drivers "generally use fewer driving hours but are more impacted by the on-duty time restriction." FMCSA-2004-19608-16883, 5. The 14-hour rule had already "forced distributors to rework their delivery routes, and some distributors were required to bring on additional drivers or equipment." *Id*. The further reduction to 13.5 hours compounds this problem.

The FMCSA failed to consider the economic impacts of the 30-minute break provision to shippers, distributors and consumers. The loss of flexibility needed to

account for unforeseen delays in transportation will affect every aspect of the supply chain. A driver who is running late because of increased detention time will affect shippers, manufacturers, and retailers as well as carriers. Those additional costs, of course, are passed down to consumers in the form of higher prices. The failure of FMCSA to account for the lost productivity for all sectors renders the 30-minute break requirements arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

IV. The FMCSA's Prior Positions and Evidence in the Record Support Retention of the 11-Hour Daily Driving Limit

The FMCSA correctly found no reason to depart from the 11-hour driving limit established in the 2003 Rule. 76 *Fed. Reg*. 81135. To reduce the daily driving limit, the Agency must articulate an adequate explanation for the change in policy. *See State Farm*, 463 U.S. 29, 43 (1983) (agency must "articulate a satisfactory explanation for its action[s]".); *Dillmon*, 588 F.3d at 1089-90 ("Reasoned decision making, therefore, necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent."); *Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) ("[T]he agency cannot silently depart from previous policies or ignore precedent."). The Agency has not found an adequate rationale to depart from the 11-hour rule, and indeed could not have done so given the evidence in the record.

Beginning with the 2003 Rule, the FMCSA has concluded that allowing drivers to drive 11 hours in a day, coupled with restricting total on-duty time, does not diminish safety. 68 *Fed. Reg*. 22473 (April 28, 2003) ("The FMCSA believes that allowing one additional hour of driving activity can be safely accommodated within the context of a somewhat reduced overall tour of duty as discussed above."). The Agency concluded here that there is no reason to reduce daily driving time in light of the lack of significant data showing safety benefits when compared against the cost of eliminating the 11th hour. 76 *Fed. Reg*. 81135 (noting the "absence of compelling scientific evidence demonstrating the benefits of a 10-hour driving limit, as opposed to an 11-hour limit, and confronted with strong evidence than an 11-hour limit could well provide higher net benefits") and 81153 ("Although Blanco found some increase in risk in the 11th hour, the effect is not significant. . . . Given the high cost of eliminating the 11th hour and the ambiguous data, FMCSA has decided that it does not have an adequate basis to change the driving limit.").

The FMCSA's decision to retain the 11-hour daily driving limit is amply justified by the evidence in the record. Given the complexities of a nationwide supply chain, even seemingly small changes to the driver HOS have profound

effects across industries. Adding the 11th hour of driving time[2] was a change that made the supply chain more efficient, increasing reliability and reducing costs without sacrificing safety. Changing back to a 10-hour driving limit would have devastating and costly impacts.

Manufacturers, shippers and receivers have developed their supply chain practices to take advantage of the flexibility of the 11th hour of driving. Without innovations such as lean manufacturing and just-in-time delivery, companies would have to add personnel, equipment and facility space, and incur added paperwork burdens to track the additional inventory. Some shippers and carriers rely on drivers to backhaul (*i.e.*, to pick up product destined for the original shipper after dropping off a load to a receiver) to reduce transportation costs and allow those savings to be passed on to retailers and consumers. Without the flexibility afforded by the 11th hour, the effectiveness of these practices is significantly reduced.

The goal of reaching 75% of customers within one day is more easily reached with the flexibility offered by the 11th driving hour. NAM and NPTC commented that reducing driving time by even an hour reduces a driver's ability to reach a destination by 50 to 100 miles each day, which means that 8% of

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[2] When increasing the daily driving limit from 10 to 11 hours in the 2003 Final Rule, the FMCSA also increased the minimum daily rest period from 8 to 10 consecutive hours.

shipments will incur an additional day in transit. As a result of that mileage reduction, manufacturers will lose the ability to serve customers by 15%. Instead of reaching 75% of customers in a day, they will only be able to reach 60% of those customers. NAM Comments, FMCSA-2004-19608-20940, 4; NPTC Comments, FMCSA-2004-19608-20887, 10.

NRF included in its comments several examples from members of how a reduction to 10 hours would impact their operations. FMCSA-2004-19608-15922, 3-4. One member estimated that the change would increase weekly deliveries from 350 to 515, a 47% increase. Another estimated that their costs would increase because some routes would require team drivers instead of the single driver that is possible because of the flexibility of the 11th hour. Others stated that the loss of one hour would mean increased layovers, the need for more drivers (when qualified CDL drivers are already scarce), and overall loss of productivity.

Kraft Foods, an NPTC member whose experience was included in NPTC's comments, estimated that losing the 11th hour would result in driver productivity losses of 3% to 7%. Kraft noted that, given that driver labor and benefits are a carrier's single largest expense, a 5% reduction in productivity will result in approximately a 2% increase in transportation costs for the entire company. NPTC Comments, FMCSA-2004-19608-20887, 10.

The loss of productivity leads to the need for more equipment and more drivers, which leads to increased congestion. RILA estimated that its members use the 11th hour 60% to 70% of the time to reach their destination. FMCSA-2004-19608-20930, 4. Without this flexibility, additional trucks and drivers would be needed to cover the same routes and maintain delivery performance.

The FMCSA rightly recognized the substantial costs to be incurred by reducing the daily driving time to 10 hours. It wrongly concluded, however, that a reduction in driving time would not affect reliability. 76 *Fed. Reg*. 81144 ("FMCSA sees no reason why changing the daily driving limit from 11 hours to 10 hours . . . would reduce the reliability of motor carrier service.").

A number of commenters stated that the 11th hour is an important tool in providing flexibility to reach customers when unforeseen events cause delays. 76 *Fed. Reg*. 81153; RILA Comments FMCSA-2004-19608-20930, 4, IANA Comments FMCSA-2004-19608-20934, 6. As IANA succinctly put it, "Another unintended consequence of the reduced hours would be an increase in service delays." FMCSA-2004-19608-20934, 7.

Those comments strongly refute the Agency's conclusion that carriers can maintain reliability simply by accurately estimating driving time. 76 *Fed. Reg*. 81144. The 11th hour is used to maintain reliability precisely when carriers cannot accurately estimate driving time. Increased congestion, traffic accidents, and

weather can cause unforeseen delays in delivery times that carriers cannot always plan for. In light of the 11th hour's positive effects on reliability, the case for retaining the daily driving limit is even stronger than FMCSA has articulated.

The 11-hour driving limit is backed by more than eight years of experience and substantial evidence that its benefits far outweigh its costs. A reduction of even one hour would significantly increase the costs of the rule, and would impact the reliability of transportation services. The FMCSA has not, and indeed cannot, articulate an adequate explanation for changing the rule, and its decision to retain the 11-hour limit is not arbitrary and capricious. *See Committee for Community Access*; *Dillmon*; and *State Farm*, *supra*.

V. The 2003 Rule Resulted in Safer Truck Transportation and Should not be Disturbed Without Compelling Evidence of Additional Net Benefits

Despite data showing a marked drop in truck crash, fatality and injury rates, the FMCSA refuses to concede that the safety benefits experienced since 2003 can be attributed to the changes adopted in the 2003 Rule. 76 *Fed. Reg.* at 81142 (claiming that the decline in crash rates are "complex and cannot be attributed to any single factor"). This refusal is contrary to the fact that the FMCSA itself predicted these very same safety benefits when adopting the 2003 Rule. *See*, *e.g.*, 68 *Fed. Reg.* 22471 (Apr. 28, 2003) (the Agency noted that its RIA "demonstrated that the FMCSA staff alternative produces substantial net safety benefits compared to the current rule . . .). It is also contrary to the FMCSA statement in January

2009 pointing to the decline in the large truck fatality rate as a reason to deny a petition for reconsideration of this rulemaking. Letter of FMCSA Administrator John H. Hill to Joan Claybrook (Jan. 16, 2009) at 1 (". . . the significant increase in truck crashes and fatalities that one would have anticipated, based on Petitioners' criticisms, has simply failed to occur. Indeed, the overall large truck fatality rate is at its lowest level since records have been kept.").

The FMCSA now has the impossible task of explaining how the 2003 Rule did not cause safety improvements while simultaneously claiming that the changes made in the 2011 Rule will cause safety improvements. *See Committee for Community Access*, 737 F.2d at 77 ("[T]he agency cannot silently depart from previous policies or ignore precedent."); *Dillmon*, 588 F.3d at 1089-90 (agency must "acknowledge and provide an adequate explanation for its departure from established precedent.")

One fact is clear: the rule as it existed before the 2011 changes did not result in any measurable decrease in safety. Despite the predictions of opponents to the 2003 Rule, there is no evidence that the level of safety declined since that Rule's adoption.

During the over eight years of real-world experience under the 2003 Rule the operational safety of commercial trucking has improved markedly. The burden on anyone seeking to make changes to the Rule, be it the FMCSA or other

interested parties, is to demonstrate clearly that the Rule will produce far more safety benefits than has already been realized, while not imposing significant costs that will burden manufacturers, shippers, and consumers alike.

CONCLUSION

For the reasons set forth above, the *amici* respectfully request that the Court grant the petition in Case No. 12-1092 and deny the petition in Case No. 12-1113.

Respectfully submitted,

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American Trucking v Federal Motor Carrier Safety Admin, et al., No. 12-1092

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by RICHARD P. SCHWEITZER, PLLC, Attorneys for Amici Curiae to print this document. I am an employee of Counsel Press.

On **July 31, 2012**, Counsel for Amici Curiae has authorized me to electronically file the foregoing **Brief for Amici Curie in Support of Petitioner** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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Unless otherwise noted, 8 paper copies have been filed with the Court on the same date via Express Mail.

July 31, 2012

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32(a)

Counsel for the Amici Curiae, certifies the following:

Pursuant to Fed. R. App. P. 32 and Local Rule 32(a), the attached Brief for Appellant was printed using a proportionally spaced 14 point Times New Roman typeface and contains 6,979 words, as counted by MS Word 2007.

July 31, 2012

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