

No. 14-1183

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In Re: Advocates for Highway and Auto Safety; the International
Brotherhood of Teamsters; and Citizens for Reliable and Safe Highways,

Petitioners.

On Petition for a Writ of Mandamus

**MOTION TO TAKE PETITION OUT OF ABEYANCE AND TO REQUIRE
RESPONDENTS TO ISSUE A FINAL RULE BY SEPTEMBER 2016**

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GLOSSARY

DOT	Department of Transportation
FMCSA	Federal Motor Carrier Safety Administration
NPRM	Notice of Proposed Rulemaking

INTRODUCTION

This motion is filed in response to the Court's March 10, 2015, order, directing the parties to file by December 31, 2015, motions to govern future proceedings in this case. Petitioners hereby move this Court to issue an order directing respondents Department of Transportation (DOT), et al., to issue a final rule establishing minimum entry-level training requirements for commercial motor vehicle drivers by September 2016.

In 2012, Congress directed DOT to issue final regulations establishing minimum entry-level training requirements for commercial motor vehicle drivers by October 1, 2013. In September 2014, when the deadline and an additional 11 months had passed without the agency even issuing a proposed rule, Advocates for Highway and Auto Safety, the International Brotherhood of Teamsters, and Citizens for Reliable and Safe Highways petitioned this Court for a writ of mandamus directing the agency to issue the required rule. In its response to the petition, DOT stated that it was establishing a negotiated rulemaking committee to develop proposed regulations and that it expected to issue a final rule by September 2016. On March 10, 2015, this Court ordered the petition for writ of mandamus to be held in abeyance to permit DOT to issue final regulations by September 30, 2016.

Since the Court's order, the negotiated rulemaking committee has made consensus recommendations for the rule. However, even with those recommendations, the agency has repeatedly pushed back the date for issuing a proposed rule, and its regulatory agenda indicates that the agency believes it has no legal deadline for acting. This Court should lift the abeyance and direct the agency to issue a final rule establishing minimum entry-level driver-training requirements by September 2016.

BACKGROUND

This case follows a long history of agency inaction and delay on entry-level driver-training requirements. In 1991, Congress required the Secretary of Transportation to complete a rulemaking proceeding on the need to require training of entry-level commercial motor vehicle drivers by December 18, 1993.¹ The agency submitted a report to Congress in 1996 indicating that driver training was inadequate.² Nonetheless, it did not issue a rule establishing entry-level driver-training requirements.

In November 2002, almost nine years after the date that the rulemaking was supposed to be completed, organizations concerned about vehicle safety filed a

¹ Intermodal Surface Transportation Efficiency Act, Pub. L. No. 102-240, § 4007(a), 105 Stat. 1914 (1991).

² See Federal Highway Administration, *Assessing the Adequacy of Commercial Motor Vehicle Driver Training: Final Report* (1995).

petition for a writ of mandamus in this Court, seeking an order directing DOT to promulgate overdue regulations relating to motor-vehicle safety, including the regulation on entry-level driver training.³ As part of a settlement agreement, DOT agreed to issue a final rule on entry-level driver training by May 31, 2004.⁴

In May 2004, DOT published a final rule (through the Federal Motor Carrier Safety Administration (FMCSA)) that required training only on driver qualifications, hours of service, driver wellness, and whistleblower protection.⁵ Organizations concerned about vehicle safety petitioned this Court for review of the final rule, arguing that the rule was arbitrary and capricious because it did not require drivers to receive training in how to operate a commercial motor vehicle. In a decision dated December 2, 2005, this Court agreed, declared the rule arbitrary and capricious, and remanded the rule to the agency for further rulemaking.⁶

Two years later, FMCSA issued a notice of proposed rulemaking (NPRM) on entry-level driver training.⁷

³ Petition for a Writ of Mandamus and for Relief from Unlawfully Withheld Agency Action, *In re Citizens for Reliable and Safe Highways*, No. 02-1363 (D.C. Cir. Nov. 26, 2002).

⁴ Settlement Agreement, *In re Citizens for Reliable and Safe Highways*, No. 02-1363 (D.C. Cir. Feb. 24, 2003).

⁵ FMCSA, *Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators*, 69 Fed. Reg. 29384, 29385 (May 21, 2004).

⁶ *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005).

⁷ FMCSA, *Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators*, 72 Fed. Reg. 73226 (Dec. 26, 2007).

When the agency had yet to issue a final rule four-and-a-half years later, Congress spoke again, directing the Secretary of Transportation to issue by October 1, 2013, “final regulations establishing minimum entry-level training requirements for an individual operating a commercial motor vehicle.” Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 32304, 126 Stat. 405, 791 (July 6, 2012), *codified at* 49 U.S.C. § 31305(c).

DOT did not issue a final rule by the statutory deadline. Instead, two weeks before the deadline, FMCSA announced that it was withdrawing the 2007 proposed rule and beginning a new rulemaking.⁸ Eleven months later, FMCSA published a notice indicating that, although the statutory deadline for issuing a final rule had come and gone, the agency had not yet even decided what type of rulemaking process to undertake. Specifically, the agency announced that it was “exploring the feasibility of conducting a negotiated rulemaking,” but had not yet decided whether to do so.⁹

On September 18, 2014, Petitioners filed the petition for a writ of mandamus in this case, asking the Court to direct the agency to publish entry-level driver-training regulations by a date certain. On November 26, 2014, FMCSA announced

⁸ See FMCSA, *Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators*, 78 Fed. Reg. 57585 (Sept. 19, 2013).

⁹ FMCSA, *Minimum Training Requirements for Entry-Level Commercial Drivers’ License Applicants; Consideration of Negotiated Rulemaking Process*, 79 Fed. Reg. 49044, 49044 (Aug. 19, 2014).

that it had decided to proceed through a negotiated rulemaking.¹⁰ FMCSA's notice stated that the agency intended to finish the negotiated rulemaking within the first half of 2015, publish a proposed rule by the end of the year, and publish a final rule in 2016.¹¹ In its response to the petition for mandamus, the agency specified that it intended to issue the final rule by September 2016. Response at 2, 11 n.4.

On March 10, 2015, this Court ordered that the petition for writ of mandamus be held in abeyance pending further order to permit DOT to issue final regulations by September 30, 2016. The Court also directed the agency to advise the Court within 90 days of its progress in issuing the regulations, and directed the parties to file motions to govern future proceedings in the case by December 31, 2015.

On June 5, 2015, the agency submitted a status report stating that the negotiated rulemaking committee had met six times, that the next step was to produce a report making recommendations on how to proceed, and that FMCSA was on schedule to issue a final rule by September 2016.

¹⁰ See FMCSA, *Minimum Training Requirements for Entry-Level Driver Commercial Motor Vehicle Operators; Establishment of a Negotiated Rulemaking Committee*, 79 Fed. Reg. 73273 (Dec. 10, 2014).

¹¹ *Id.* at 73274.

Since the status report was submitted, the negotiated rulemaking committee has issued consensus recommendations for the entry-level driver-training rule.¹² However, despite the committee's work, FMCSA has fallen behind on its schedule. DOT's report on significant rulemakings from August 2015 stated that the agency was scheduled to publish a NPRM on October 15, 2015,¹³ but the agency did not meet that deadline. Earlier in December, DOT projected a publication date of December 28, 2015,¹⁴ but the NPRM was not published on that date either. As of the date of this motion, the agency has not published the NPRM.

In addition to indicating that DOT has fallen behind on its schedule, the report on significant rulemakings indicates that, although Congress mandated that DOT promulgate a rule by October 1, 2013, DOT does not believe it is under any legal deadlines for acting. In a spot intended to list the legal deadline for the rulemaking, DOT wrote "None."¹⁵

¹² See Written Statement of the Entry-Level Driver Training Advisory Committee: Consensus Recommendation on Rule for Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators (June 15, 2015), *available at* <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/ELDTAC%20Written%20Statement.pdf>.

¹³ DOT, *Report on Significant DOT Rulemakings* 48 (Aug. 2015), *available at* <https://cms.dot.gov/regulations/significant-rulemaking-report-archive>.

¹⁴ DOT, *Report on Significant DOT Rulemakings* 48 (Dec. 2015), *available at* <https://www.transportation.gov/regulations/report-on-significant-rulemakings>

¹⁵ *Id.*; see also *Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions*, 80 Fed. Reg. 77710-01, 77840 (Dec. 15, 2015) (same).

ARGUMENT

The Court should take this case out of abeyance and order DOT to issue final regulations on entry-level driver training by September 2016. DOT itself represented to this Court in its response to the petition that September 2016 was feasible. Without a deadline from this Court, DOT's twenty-year recalcitrance is almost certain to continue.

By failing to promulgate regulations on entry-level driver training by October 1, 2013, DOT transparently violated a "clear duty to act." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citation omitted). Despite being in direct violation of Congress's orders, DOT has not shown itself to be in a hurry to promulgate the required regulations: It did not even decide what type of rulemaking to undertake until over a year after its deadline to complete the rule had passed.

The negotiated rulemaking process that the agency eventually undertook resulted in consensus recommendations for the entry-level driver-training rule.¹⁶ The committee submitted those recommendations on June 15, 2015.¹⁷ Although a negotiated rulemaking was expected to facilitate issuance of a NPRM, six months later, the agency has yet to issue its proposed rule. As the failure to issue a NPRM

¹⁶ See Written Statement of the Entry-Level Driver Training Advisory Committee, *supra* n. 12.

¹⁷ *Id.*

shows, completion of the negotiated rulemaking does not ensure that DOT is going to move forward expeditiously. Indeed, since the negotiated rulemaking committee issued its recommendations, the agency has fallen behind schedule: DOT's August 2015 report on its significant rulemakings stated that the agency was scheduled to issue a NPRM on October 15, 2015,¹⁸ but the agency did not issue a proposed rule by that date. The agency's September report on significant rulemakings moved the projected publication date to November 16, 2015; its October report moved it to December 11, 2015; and its November report moved it to December 28, 2015.¹⁹ As of the date of this motion, the agency still has not published its proposed rule.

The continued delay is possible because DOT believes that it has no legal deadline. Both DOT's reports on its significant rulemakings and its regulatory agenda state "Legal Deadline: None" in connection with the rulemaking.²⁰

Moreover, even if the agency soon publishes a proposed rule, the Court can have no faith that a final rule will follow in any timely manner, given the history of DOT's rulemakings on entry-level driver training. As explained above, in 2007, DOT issued a proposed rule that it never finalized. Instead, two weeks before the

¹⁸ *Report on Significant DOT Rulemakings* 48 (Aug. 2015).

¹⁹ DOT, *Report on Significant DOT Rulemakings* 48 (Sept. 2015); DOT, *Report on Significant DOT Rulemakings* 48 (Oct. 2015); DOT, *Report on Significant DOT Rulemakings* 48 (Nov. 2015). DOT's reports on significant rulemakings from these months are all available at <https://cms.dot.gov/regulations/significant-rulemaking-report-archive>.

²⁰ *Report on Significant DOT Rulemakings* 48 (Dec. 2015); *Introduction to the Unified Agenda*, 80 FR at 77840.

October 2013 statutory deadline for completing a final rule, it withdrew the 2007 proposal and announced that it would begin again with a new NPRM.

The agency's delay in promulgating the entry-level driver-training rule is particularly troubling because the rule concerns human health and welfare. *See Introduction to the Unified Agenda*, 80 Fed. Reg. at 77840 (“[FMCSA] believes this rulemaking would enhance the safety of commercial motor vehicle (CMV) operations on our nation’s highways.”); *see also Telecomms. Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (explaining that delays “are less tolerable when human health and welfare are at stake”). Every year, people are injured and die in commercial motor vehicle crashes.²¹ The longer the agency delays in issuing the required regulations, the longer entry-level commercial motor vehicle drivers without adequate training will drive on our nation’s highways, endangering both their own lives and those of the people with whom they share the road.

To ensure that DOT promulgates entry-level driver-training regulations within the timeframe that it represented to the Court was feasible—a timeframe three years later than that set by Congress—this Court should take this case out of abeyance and set a date certain by which the agency must publish the final rule.

²¹ In 2013, 3,964 people were killed and an estimated 95,000 people injured in large truck crashes. *See* National Highway Traffic Safety Administration, Traffic Safety Facts 2013 Data, Large Trucks, DOT HS 812 150 (Revised June 2015) (latest available data), *available at* <http://www-nrd.nhtsa.dot.gov/Pubs/812150.pdf>.

Specifically, Petitioners request that the Court require the agency to publish the regulations by September 2016. If DOT still intends to publish the rule by September 2016, as it wrote in its response to the petition, an order of this Court requiring it to do so will cause no hardship. On the other hand, if DOT has interpreted the Court's prior order holding this case in abeyance until that time as a free pass to further delay, an order setting a September 2016 deadline will make clear that the agency cannot indefinitely violate Congress's mandate.

This Court should act now, not wait until September to find that out whether DOT will delay beyond September 2016. To continue to hold this case in abeyance while waiting to see just how long DOT delays will only lead to further delay in the promulgation of regulations that Congress instructed should be issued in 2013.

CONCLUSION

The Court should reinstate the petition and order DOT to issue a final rule establishing entry-level training requirements for commercial motor vehicle operators by September 2016.

Respectfully submitted,

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December 30, 2015

CERTIFICATE OF SERVICE

I certify that on December 30, 2015, I caused the foregoing motion to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on counsel for all parties.

/s/ Adina H. Rosenbaum
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