

# “In Brief”

## Trucking Regulation on Electronic Recorders in Legal State of Flux Attorney John F. Fatino and Law Clerk Mickie M. Damstetter

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Recently, the United States Court of Appeals for the Seventh Circuit invalidated certain rules promulgated by the Federal Motor Carrier Safety Administration (FMCSA) concerning Electronic On-Board Recorders (EOBR). See *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 656 F.3d 580 (7th Cir. 2011). The time for a petition for writ of certiorari to the United States Supreme Court has expired and it appears no party has sought such relief from the United States Supreme Court. See Ct. R. 13(1).

### Background:

The FMCSA adopted a final rule in 2010 concerning the use of electronic monitoring devices in commercial motor vehicles. For many years, federal regulators

have limited the number of hours that a commercial driver may operate a commercial motor vehicle pursuant to the Hours of Service Rules (HOS). In order to demonstrate compliance with these rules, drivers would record their hours in paper logbooks. However, as the argument goes, the paper based system was easy to manipulate and falsify. Under the new 2010 rule, motor carriers with a demonstrated serious noncompliance with the HOS rules would be subject to mandatory installation of EOBRs. An EOBR is an electronic device that is capable of recording a driver's hours of service and duty status. It is installed in a commercial motor vehicle and records data about the truck's location and duty status (among other things). This satellite technology allows nearly instant electronic transmission to the driver's employer (the motor carrier). Three commercial drivers and a drivers' association, the Owner-Operator Independent Drivers Association (OOIDA), (plaintiffs/petitioners) sought review of this final rule issued by the FMCSA.

### The Arguments:

Petitioners raised three issues for vacating the 2010 rule. (1) The regulation is arbitrary and capricious because it does not “ensure that the devices are not used to harass vehicle operators,” as required by 49 U.S.C. section 31137(a). (2) The Agency's cost-benefit analysis is arbitrary and capricious because it fails to demonstrate the benefits of requiring EOBRs. (3) Mandating EOBRs violates the Fourth Amendment.

### Analysis:

The United States Court of Appeals for the Seventh Circuit addressed only the first issue.<sup>1</sup> The Seventh Circuit looked to well established federal precedent which holds that if Congress requires an agency to address something before issuing a regulation that factor, by definition, is an important aspect of the problem which the agency

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<sup>1</sup> The reader will recall that in the federal system, review of a final order of an agency, is to the court of appeals.

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must address. Congress foresaw that monitoring devices on commercial motor vehicles could also be used to harass drivers, and therefore, added the following provision:

Use of Monitoring devices.-If the Secretary of Transportation prescribes a regulation about the use of monitoring devices on commercial motor vehicles to increase compliance by operators of the vehicles with hours of service regulations of the Secretary, the regulation shall ensure that the devices are not used to harass vehicle operators. However, the devices may be used to monitor productivity of the operators.  
49 U.S.C. § 31137(a)

The Seventh Circuit concluded this section was mandatory and was binding on the FMCSA. At the same time, the Court concluded that the provision had not been properly addressed by the FMCSA. Therefore, the rule was arbitrary and capricious. Consequently, the rule was vacated.

The Court was also critical of the FMCSA’s position that it had adequately and expressly

considered whether the EOBRs could harass drivers. However, the Court disagreed and concluded that the FMCSA should have revealed how it drew the line between legitimate measures designed to assure productivity and forbidden measures that harass. As the record lacked an adequate explanation addressing the distinction between productivity and harassment, the FMCSA’s position was rejected.

The Court’s position was fortified by the fact that the FMCSA had not addressed the harassment issue when it had been raised in response to a predecessor proposal. The OOIDA had already raised the issue of harassment and had given examples illustrating the concerns of its members. Therefore, because the FMCSA did not respond to the concerns of harassment, which the statute required it to address, the rule was arbitrary and capricious.

At the present time, it appears that FMCSA will have to “go back to the drawing board” and thoroughly examine the issues Congress mandated that it consider when implementing the

EOBR regime for monitoring HOS compliance. For further information about this case and other transportation issues, contact John F. Fatino, [fatino@whitfieldlaw.com](mailto:fatino@whitfieldlaw.com), Chair, Transportation Practice Group.

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