No. 16-1294

IN THE

Supreme Court of the United States

William B. Trescott
Petitioner

v.

The United States Department of Transportation,
Federal Motor Carrier Safety Administration,
and the United States
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Hobbs Act limits jurisdiction in some agency review cases to just one court with a strict sixty day time limit. However, the DC Circuit ruled that it grants exclusive jurisdiction over Department of Transportation agencies only if the action is taken pursuant to authority transferred from the Interstate Commerce Commission. The 5th Circuit granted a motion to dismiss a petition for review as untimely even though the agency action lacked such authority.

If in a case of obvious judicial corruption the Hobbs Act does not violate the 7th Amendment, does denial of due process in one court toll time limits in other courts the same way denial of agency due process tolls time limits?

PARTIES

Petitioner is:

William B. Trescott, a trucker by trade who has not issued debt securities to the public recently employed by Swift Transportation, the nation's largest truck-load carrier, and Groendyke Transportation, a bulk transporter of hazardous chemicals.

Respondents are:

The United States Department of Transportation (DOT), Federal Motor Carrier Safety Administration (FMCSA), and the United States of America.

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GLOSSARY

DOT	Department of Transportation
ELD	electronic logging device
FMCSA	Federal Motor Carrier Safety Admin.
ICC	Interstate Commerce Commission
MAP–21	Moving Ahead For Progress in the 21st Century transportation act
NTSB	National Transportation Safety Board
OOIDA	Owner-Operator Independent Drivers Association

OPINIONS BELOW

The opinion of the National Transportation Safety Board is reproduced on page 1 of the Appendix.

The order of the Court of Appeals for the Fifth Circuit denying a petition for review for lack of jurisdiction is reproduced on page 13 of the Appendix.

JURISDICTION

The Order of the Court of Appeals of the 5th Circuit was entered February 2nd 2017. That court had original jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(3)(A). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law … abridging the freedom … to petition the government for a redress of grievances.

The Seventh Amendment to the United States Constitution provides:

> the right to a trial by jury shall be preserved

The Fourteenth Amendment to the United States Constitution provides:

> No state shall make or enforce any law …

> without due process of law; nor the equal protection of the laws.

28 U.S.C. § 2348 provides:

> any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right.

STATEMENT OF THE CASE

Between 2002 and 2005, the number of truckers killed on the job increased 17% after new hours of service rules announced in 2003 went into effect in 2004, reaching a fifteen year high.[1] Not unexpectedly, the D.C. Circuit vacated the rules because the agency failed to consider their impact on the health of drivers. *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004). In response to the court order, the agency repromulgated the vacated rules with minor changes.

Despite record high rates of seat belt use, the number of heavy truck occupants killed in 2007 remained 16% higher than in 2002 even though passenger car fatalities declined 20% during the same period—a 36% difference in fatal outcomes. The D.C. Circuit again vacated the new rules because the agency violated the Administrative Procedures Act. *Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Administration*, 494 F.3d 188 (D.C. Cir. 2007). A Senate Commerce Commit-

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[1] Traffic Safety Facts 2007 Data Overview, p.2

tee Chairman who confirmed the unqualified administrator without a hearing was convicted of failing to report gifts (USA v. Stevens DDC-08-0231, 10/27/08). After leaving office, the same administrator blew the whistle, explaining his failure to obey the court orders claiming, "I thought I would have a lot of say in truck safety in this country [but] political people tell the appointed people what they're going to do."[2] He re-promulgated the twice vacated rules with minor changes.

In 2009, I obtained a settlement agreement again withdrawing the twice vacated rules after the Department of Justice resigned from our case and refused to defend the agency (Public Citizen v. FMCSA, DC-09-1094). The 7th Circuit also vacated the electronic logging devices rule intended to enforce the twice vacated rules because the agency failed to ensure that electronic monitoring would not be used to harass drivers. *Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 656 F.3d 580 (7th Cir. 2011). The agency re-promulgated the thrice vacated rules with changes the Inspector General of the DOT determined were insignificant (www.oig.dot.gov/library-item/35549).

Tractor-trailer occupant fatalities in California fell more than 60% between 2002 and 2010 after a California court ruled that truckers had to receive meal and rest breaks. *Cicairos v. Summit Logistics, Inc.*, 133 Cal App.4th 949 (2006). On July 6th 2012, after I circulated draft legislation proposing alternative hours of service rules similar to Section 11090 of the California Labor Code, Congress enacted the *Commercial Motor Vehicle Safety Enhancement Act*

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[2] www.truckinginfo.com/news/news-detail.asp?news_id=73580

of 2012 as part of the *Moving Ahead For Progress in the 21st Century* transportation bill (MAP–21). This required the Federal Motor Carrier Safety Administration (FMCSA) to promulgate regulations equipping trucks with electronic logging devices by October 1st 2015 "capable of recording a driver's hours of service and duty status accurately and automatically" similar to my proposed smart card system. *See* www.truckingvideo.com/hos.htm, 49 U.S.C. § 31137 (f)(1)(A).

Although the FMCSA implemented some automatic features of my smart card system, A-10, the results of my testing of the agency's system revealed that it was incapable of accurately recording drivers hours of service as required under § 31137(b)(1)(A) unless the rules were changed to resemble Section 11090 of the California Labor Code. My December 8th 2015 log shows I was falsely imprisoned in violation of § 31137(b)(2)(B)(i) after a mechanic drove my truck during a mandatory break. The system also violated § 31137(b)(2)(D) by failing to recognize that someone other than myself was operating the vehicle. My December 24th 2015 log shows my truck traveled three miles without anyone driving in violation of § 31137(b)(1)(A)—concealing an hours of service violation. On April 13th 2016, my logging device recorded twenty eight minutes of driving time in violation of section 31137(b)(1)(A)(iv) when I was outside the vehicle with the engine turned off.

The above computer malfunctions occurred because in 2013 the D.C. Circuit reversed itself and upheld the twice vacated rules contrary to the principle of res judicata claiming that truckers such as myself lack standing to challenge a trucking regulation. American Trucking Ass'ns v. FMCSA, 724 F.3d 243, 249 n.7 (D.C. Cir. 2013)("Trescott offers nary an

argument in his briefs as to why his lobbying activities would establish standing. For this reason, we need not reach the merits of his arguments.")(Cert. denied, 13-509, January 13th 2014). This decision allowed President Obama to nominate a lawyer to head the FMCSA in violation of The *Motor Carrier Safety Improvement Act of 1999* (Pub. L. 106-159, 113 Stat. 1748) which requires the President to appoint "an individual with professional experience in motor carrier safety." 49 U.S.C. § 113(c). Like his predecessor, T. F. Scott Darling III had never driven a truck for a living, much less met the minimum standard for employment in the motor carrier safety profession—an above average safety record driving 18 wheelers. Nor did he publish articles, videos, or patents demonstrating expertise designing trucks or testing safety devices as any reasonable person would expect of an individual who had professional experience in motor carrier safety.

On December 16th 2015, in defiance of the opinion of the National Transportation Safety Board, A-4, Mr. Darling re-promulgated the vacated electronic logging devices rule—requiring considerably more carriers and drivers to use his malfunctioning system. 49 C.F.R. § 395.8 et seq., 80 F.R. 78383. The Owner-Operator Independent Drivers Association, Inc., Mark Elrod, and Richard Pingel, filed a petition for review in the 7th Circuit the very next day (docket number 15-3756).

On January 7th 2016, I filed a Motion for Leave to Intervene by right in support of petitioners claiming that Mr. Darling's final rule was invalid on grounds that he "lacks the statutory right to promulgate this type of rule"—a claim disposed of without due process in our 2013 case before the DC Circuit I also raised in my petition to reconsider. This set in

motion a chain of events that further offended due process. On January 14th 2016, the Acting Chief Judge of the District of Columbia Circuit dismissed complaints of judicial misconduct[3] preventing Mr. Darling's confirmation which alleged that chief judges covered up non random panel assignments in our 2013 case.[4] In a belated effort to grant retroactive authority that would moot my claims, The Senate Commerce Committee announced a confirmation hearing for T.F. Scott Darling III on the same day. On January 20th 2016, The Judicial Council of the DC Circuit refused to release the acting chief judge's opinion until after Mr. Darling's hearing.[5] To cover up evidence that his system was causing computer malfunctions, Respondents filed an Opposition to my Motion to Intervene on the same day. On January 27th 2016, without waiting for Respondents to effect service as required by Circuit Rule 25(b) or Rule 25(c) of the Federal Rules of Appellate Procedure or allowing time to file a reply as required under Rule 27(a)(4), the 7th Circuit denied my Motion to Intervene by right without explanation in violation of 28

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[3] DC-15-90023, DC-15-90024

[4] DC-14-90026, DC-14-90027: A former president's assistant at the time an unqualified Federal Motor Carrier Safety Administrator was confirmed without a hearing in violation of 49 U.S.C. § 113(c) causing a Commerce Committee Chairman to be convicted of failing to report gifts was assigned to three consecutive panels in my truck safety cases (DC-07-1327, DC-09-5280, DC-12-1113). He and the acting chief judge who dismissed the complaints ordered our briefs to be edited to half the usual length requiring deletion of arguments of standing.

[5] The Deputy Circuit Executive stated he did not know why the opinion had not been released, but promised to call me when it was received. His secretary called at 11:48 AM approximately ten minutes after the hearing ended.

U.S.C. § 2348. On February 8th 2016, I filed a Motion to Reconsider on grounds that service of Respondents' opposition was not perfected until after the court had ruled, which was denied on February 11th 2016. On March 15th 2016, the Judicial Council of the DC Circuit upheld the opinion of the acting chief judge. In a further effort to cover up the non random panel assignments, President Obama nominated the chief judge who recused himself to become an associate justice of This Court the following day on March 16th. After receiving assurances from members of the Senate Judiciary Committee that the nomination would be stopped for obvious reasons, I filed a petition for certiorari on April 8th which was denied June 6th 2016 (15-1263).

On September 12th 2016, I filed a complaint demanding rehearing be granted under Rule 11(d)(2) of the Rules for Judicial Conduct and Disability Proceedings[6] which was dismissed on September 27th 2016. On October 12th 2016, I filed a petition for review in the Judicial Council of the 7th Circuit on grounds that the denial of two consecutive motions constituted a pattern of violations.[7] Nevertheless, on Halloween the 7th Circuit reversed itself and upheld the vacated electronic logging devices rule. See related petition for certiorari now pending before this court under docket number 16-1228.

On November 28th 2016, the Judicial Council

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[6] CA7-16-90072

[7] The Commentary on Rule 3 states: "an inadvertent, minor violation of any one of these Rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the statute. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct."

of the 7th Circuit upheld the Chief Judge's opinion. Having exhausted all legal remedies to the many delays of due process described above, I filed a petition for review in the 5th Circuit the same day on grounds my motion had been filed on time and my right to intervene under 28 U.S.C. § 2348 had been violated. On Friday the 13th of January, Respondents filed a Motion To Dismiss Petition For Review As Untimely two days after the 7th Circuit dismissed a petition for rehearing the original case on January 11th 2017. On February 2nd 2017, the 5th Circuit cut off judicial review without explanation. A-13.

REASON FOR GRANTING THE WRIT

The Fifth Circuit has entered a decision that has decided an important federal question in a way that conflicts with a relevant decision of this Court.

The overly coincidental coordination of the Judicial Councils, the Senate Commerce Committee, the President, and The Department of Justice could not have been achieved without ex parte communication contrary to the principle of Constitutional separation of powers—strongly supporting former FMCSA Administrator and head of the Indiana Department of Homeland Security John Hill's allegations that "political people tell the appointed people what they're going to do"[8] and that Mr. Darling's predecessor was "getting marching orders."[9] If a president tampers with the integrity of a court by assigning a

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[8] www.truckinginfo.com/news/news-detail.asp?news_id=73580
[9] www.truckinginfo.com/news/news-detail.asp?news_id=73560

former assistant to three consecutive cases or rewards a chief judge with an appointment to This Court in return for covering up non random panel assignments or tells judicial appointees what to do after they are appointed, offending due process, his policies *must not* be considered settled law just as agency rules must not be considered final until due process is complete. Time limits must be expanded in cases of obvious judicial misconduct to ensure due process.

I. If a court denies due process, the equal protection clause requires time limits to be expanded just as they would if an agency denies due process

A. Denial of due process tolls time limits

The Hobbs Act requires a petition for review to be filed within sixty days following issuance of an agency's final rule. 28 U.S.C. § 2344. Although the statute is silent on the subject, there are a vast number of cases where the 5th Circuit has blatantly ignored the sixty day time limitation. "It is the general rule that filing a petition for reconsideration …will toll the 60-day period for filing a petition for review of the agency's action in this court." *City of Arlington v. FCC*, 668 F.3d 229, 237 (5th Cir. 2012). The "general rule" referred to in *Arlington* flows from the 14th Amendment's due process clause which states, "No state shall make or enforce any law… without due process of law; nor the equal protection of the laws." The 60 day period is *not tolled* when an agency responds to petitions immediately. Thus, it is not filing a petition that tolls the 60 day period, but the lack of due process in responding to it.

B. Due process does not demand the impossible or the impracticable

This court ruled that "[t]he Constitution as a continuously operative charter of government does not demand the impossible or the impracticable." *Yakus v. United States*, 321 U.S. 414, 425 (1944). The issues raised in *Yakus* were similar to those in the present case wherein Congress requires an Administrator with expert knowledge under 49 U.S.C. § 113(c) to design electronic recording devices:

> "it was thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. In addition the present Act seeks further to avoid that confusion by restricting judicial review of the administrative determination to a single court. Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process." *Yakus* at 433.

Because the DC Circuit ruled that truckers such as myself lack standing[4] and I live within the 5th Judicial Circuit, the Hobbs Act limits judicial review to a single court. 28 U.S.C. § 2343. Because This Court ruled that an opportunity to present evidence must be "reasonable," the question raised is whether it is "reasonable" for litigants to exhaust all due process remedies available in the court of first impression before petitioning another court?

It is impossible and impracticable for every person who has a right to present evidence in a case to file separate petitions for review simultaneously in different courts. Aside from the fact that multiple cases would be an inefficient use of judicial resources, there would be a problem with plagiarism. As a pro se litigant, I cannot produce the quality of legal work presented by the Cullen Law Firm before the 7th Circuit. Petitioners in that case (CA7-15-3756) claimed on page 7 of their motion for extension of time, which was granted on February 18th 2016:

> "[t]he case raises complex issues under the Fourth Amendment … Even if given due diligence and priority by counsel, this brief will require more time than allowed under the current schedule to present these complex issues adequately to the court."

Even if I had filed my 5th Circuit petition within the 60 day time limit, it is impossible and impracticable for a pro se litigant to present such complex issues in the time allotted if expert counsel cannot.

Federal Rule of Civil Procedure 24(a)(2) states: intervention is warranted when "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." The proper role of intervenors is not to plead identical arguments in different courts, but to provide evidence in support of petitioners' arguments. Because I am just a truck driver, I lack the resources to protect my interest in any other way than as an intervenor. Even if I copied from petitioners' briefs without attribution, my duplicate case would be as disadvantaged from lack of legal expertise as theirs was from lack of evidence.

Even if this court remands the 5th Circuit to decide my narrower 14th Amendment claims that the agency is causing computer malfunctions, my only "reasonable opportunity to be heard and present evidence" in support of petitioners' broader 4th Amendment claims once my statutory right to intervene was denied was to file a petition for review to be combined with theirs in the 7th Circuit—which is forbidden under the Hobbs Act because I live in the 5th Circuit. The only recourse that would preserve our rights to a fair hearing was to exhaust all due process remedies available in the 7th Circuit.

This Court ruled that judicial review must not be cut off unless there is a persuasive reason to believe such was the purpose of Congress. *Barlow v. Collins,* 397 US 159 (1970). The 5th Circuit stated no such reason. A-13. The purpose of Congress was made clear when it required the agency's system to be "capable of recording a driver's hours of service and duty status accurately and automatically." 49 U.S.C. § 31137(f)(1)(A). The Hobbs Act is therefore unconstitutional as applied in this case unless time limits are tolled the same way for courts offending judicial due process as they are for agencies offending administrative due process.

II. Certiorari is needed to clarify the scope of the Hobbs Act

A. Statutory time limits were not met

The DC Circuit ruled that the Hobbs Act, 28 U.S.C. 2342, only grants the courts of appeals exclusive jurisdiction to review actions of Department of Transportation agencies if the action is taken pursuant to authority that was transferred from the

Interstate Commerce Commission (ICC). See *Aulenback, Inc. v. FHWA*, 103 F.3d 156 (D.C. Cir. 1997); *Owner-Operator Independent Drivers Ass'n v. Pena*, 996 F.2d 338 (D.C. Cir. 1993). While no one disputes that authority under Section 9104 of the *Truck and Bus Safety and Regulatory Reform Act* (Pub. L. 100–690, 102 Stat. 4181, 4529, November 18, 1988) was transferred from the ICC (Pub. L. 103-272, § 1(e), 108 Stat. 1004, July 5, 1994), 80 FR 78303, that authority was superceded by the *MAP–21* (Pub. L. 112–141, 126 Stat. 405, 786–788, July 6, 2012), which states:

"Not later than 1 year after the date of enactment of the Commercial Motor Vehicle Safety Enhancement Act of 2012, the Secretary of Transportation shall prescribe regulations--

> (1) requiring a commercial motor vehicle…be equipped with an electronic logging device…" 49 U.S.C. § 31137(a).

This authority enacted after the ICC ceased to exist (see *ICC Termination Act,* Pub. L. 104-88, § 101, 109 Stat. 804, 1995), expired on October 1st 2013 because the regulations were not prescribed within one year after the date of enactment. Therefore, authority could not have been transferred from the Interstate Commerce Commission and the time limits of the Hobbs Act should not apply.

B. Statutory requirements were not met

Under 49 U.S.C. § 31137(f)(1)(A), "electronic logging device" (ELD) is defined as "an electronic device" that is "capable of recording a driver's hours of service and duty status accurately and automatic-

ally." The Agency's final rule "[a] driver must input the driver's duty status" found under 49 C.F.R. § 395.24(b), 80 FR 78386, reveals that the device described in the regulation is not automatic; thus it does not satisfy the statutory definition of "electronic logging device." This makes the regulation arbitrary and capricious. 5 U.S.C. § 706(2)(A). As This Court ruled in *Motor Vehicle Manufacturers v. State Farm*, an agency's rule normally is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem … Government agencies must make a "rational connection between the facts found and the choice made." 463 U.S. 29, 43(1983).

To grasp why the twice vacated rules killed so many people, let us imagine women were jailed for refusing to testify after being raped as the Harris County Prosecutor in Houston did just before being voted out of office. Would not women deny being raped to avoid jail just as truckers deny they are overworked to avoid being fined for hours of service violations? A-7 & 9. Would not the number of rapes increase once rapists learned there was little chance of being prosecuted just as fatalities increased once motor carriers learned in 2003 that the twice vacated rules allowed them to overwork their drivers with impunity? A-2 & 6. If states can fine a driver for failing to provide information "required by the motor carrier" under §395.24(a) even if the driver is not overworked, 80 FR 78386, would that mean a prosecutor could jail a woman for not supplying personal information to a rapist even if she was not raped? Would that not be a form of harassment? The authority transferred from the ICC merely stated:

> "If the Secretary of Transportation prescribes a regulation about the use of monitoring

> devices … the regulation shall ensure that the devices are not used to harass vehicle operators." 49 U.S.C. § 31137(a)(superceded).

Therefore §395.24(a) was not promulgated pursuant to authority transferred from the Interstate Commerce Commission and the time limits of the Hobbs Act should not apply.

C. The ICC never possessed such authority

This Court ruled in *National Federation of Independent Business v. Sebelius* that "[a]ny police power to regulate individuals as such, as opposed to their activities, remains vested in the States." 567 U.S.____(2012)(slip op. at 26). Under the challenged rule, driving to a safe place to eat or sleep when off duty is automatically recorded as a violation unless carriers configure ELD's for authorized personal use under §395.26(i). 80 FR 78386. According to the Department of Labor, 22% of truckers killed on the job died in non-driving incidents in 2014 (16% in 2015). 12% of these non driving fatalities were due to violent acts (20% in 2015).[10] Under ICC authority, drivers using old fashioned paper logbooks were able to park in a safe place after they logged off duty. By taking the extra step of utilizing state power to enforce limits on truckers' personal mobility under §395.3(a) instead of automatically monitoring motor carriers to ensure drivers are not overworked as Congress intended, the final rule violates "liberty interests in freedom of movement and in personal

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[10] Bureau of Labor Statistics, *Fatal occupational injuries by industry and event or exposure,* 2014-15

security [that] can be limited only by an overriding, non-punitive state interest." *Youngberg v. Romeo*, 457 U.S. 307, 313 (1982)(internal quotes omitted). *The Motor Carrier Act of 1935* only allowed the ICC to regulate "maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier," not to restrict the freedom of off duty truckers to drive home to sleep or visit a restaurant to eat. 49 U.S.C. § 304(a)(1976), now 49 U.S.C. § 31502(b).

As was the case in *Sebelius*, the challenged rule compels individuals to *become* active in commerce by inputting the driver's "duty status" under §395.24(b) and complying with commercial vehicle regulations when they are *off duty*. What is different here is that, rather than levy a tax to offset any societal cost of noncompliance, police deprive truckers of their liberty. "The power to regulate commerce presupposes the existence of commercial activity to be regulated." *Sebelius* at 18. Personal travels to eat or sleep are *not* commercial activity. The individual mandate thus cannot be sustained under Congress's power to "regulate Commerce." *id* at 3.

Though this court ruled that personal activity could be regulated "if it exerts a substantial economic effect on interstate commerce," see *Wickard* v. *Filburn*, 317 U. S. 111 at 125 (1942), the opposite is true in this case. Penn State University found that a "recovery period of 34 hours or longer is associated with a 50-percent increase in the odds of a crash on the 1st day back compared to a return to work with no recovery."[11] Violating the hours of service rules

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[11] Jovanis, Wu, Chen, *Hours of Service and Driver Fatigue,* page 59, www.fmcsa.dot.gov/facts-research/research-technology/report/HOS-Driver-Fatigue.pdf

causes only a 20-30% increase in crash risk. 72 FR 71255. Thus, it is the police action of detaining truckers against their will for 34 hours in places where they are unable to eat or sleep, 49 C.F.R. § 395.3(c), that exerts a substantial economic effect by increasing crash risk when they return to work—not driving home or to a restaurant. This Court ruled, "when the State by the affirmative exercise of its power so restrains an individual's liberty that it…fails to provide for his basic human needs…it transgresses the substantive limits on state action set by the … Due Process Clause." *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 at 199-200(1989). 5 U.S.C. § 706(2)(B). Thus the ICC never possessed authority restricting drivers' individual liberties, so the time limits of the Hobbs Act should not apply.

D. This was not an appeal of a decision of the National Transportation Safety Board

As explained in my motion to intervene before the 7th Circuit, the causes of action in this case were: On October 7th 2015, my employer called me five times during my mother's funeral because I moved my truck without permission at the request of a police officer—necessitating that I turn off my phone so its constant vibrations would not disturb my family. On November 6th, 7th, and 8th 2015, fifteen identical messages were sent during the night to prevent me from sleeping when I refused to purchase fuel during a 34 hour break. Despite having logged 750,000 miles without a preventable crash, I lost more than $1,000 in income due to so called 'safety holds' for being ticketed after our obsolete fleet management system recorded two 34 hour breaks

within a ten day period. While training at a bulk hazardous chemical carrier, my instructor, who regularly hauled epichlorohydrin, a chemical so dangerous it spontaneously ignites emitting lethal chlorine gas on contact with air requiring evacuation of all persons within a one mile radius, was coerced to log pre-trip inspections during darkness when anyone with common sense will recognize that a thorough inspection cannot be performed. When I inspected his truck in daylight, four of his ten tires had to be replaced including one with a foot long sidewall zipper that could have exploded at any moment. The above causes of action differ from those cited by the NTSB. A-6-9. My employers did not violate the law because these events occurred after the October 1st 2013 deadline for promulgating regulations to prevent such harassment unrelated to hours of service violations. By refusing to appoint a qualified safety professional able to enforce the statutory mandate, § 31137(a)(2), in defiance of repeated pleas from the NTSB to "issue a final ELD rule in an expeditious manner," A-2, President Obama violated the *Motor Carrier Safety Improvement Act of 1999.*

While it is understood that a skilled and experienced lawyer like T.F. Scott Darling III can memorize second hand information about motor carrier safety, mnemonics are not a substitute for the "professional experience in motor carrier safety" required by Section 101 of the *Motor Carrier Safety Improvement Act.* 49 U.S.C. § 113(c). If the President had appointed a qualified safety professional, the five hundred page regulation would not only have been issued on time, it would have simply stated 'a driver must download the hours of service app from the FMCSA website' and compliance would have been automatic. 49 U.S.C. § 31137(f)(1)(A).

When my employer, which transferred most features of our obsolete fleet management system onto our smart phones using our state of the art In Gauge™ app, learned my efforts to prevent Mr. Darling from receiving a confirmation hearing had failed, I was immediately dispatched to Maryland without having to ask. Although I was the only trucker to attend the hearing, I was not allowed to testify against him and Commerce Committee staff were only willing to talk to me over the telephone. Because he is Black, instead of being asked safety questions, Mr. Darling was asked questions about sports. In response, he raised his fist in salute of his favorite team. Only one senator asked him if it was wise for truckers to "race against the clock" violating speed limits to comply with hours of service regulations—a question anyone with common sense should have been able to answer. He presented no evidence that he had ever driven a truck for a living, much less met the minimum standard for employment in the motor carrier safety profession—an above average safety record driving 18 wheelers. Nor did he provide any evidence that he published articles, safety films, or patent applications demonstrating expertise designing commercial vehicles or testing safety devices as any reasonable person would expect of "an individual with professional experience in motor carrier safety" as required under 49 U.S.C. § 113(c).

Although the DC Circuit noted that "one could argue that the [agency] is performing a transferred 'function' whenever it regulates motor carrier safety," *International Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1482 n. 1 (DC Cir. 1994), the review provision states, "[a] statutory requirement related to…a duty or power transferred by the act applies to the… Administrator when carrying out the duty or power."

49 U.S.C. § 351(b). Therefore, unless the acting administrator possessed the scientific and technical qualifications needed to design the statutorily required devices, he lacked the statutory right to promulgate the final rule under 5 U.S.C. § 706(2)(C). See also *Yakus* at 433, p.11 above.

The review provision also states that only authority "specifically assigned to the Administrator by [the Department of Transportation] Act [Pub. L. 89-670, 80 Stat. 931] may be reviewed judicially…in the same way as…before the transfer or assignment." 49 U.S.C. § 351(a). The FMCSA did not exist when the transfer occurred in 1966, so the authority could not have been specifically assigned by that act. The ICC was a quasi-judicial body equivalent to a jury for 7th Amendment purposes, so a tribunal was constitutionally adequate to review its decisions. The Hobbs Act however, violates the 7th Amendment because those of us subject to the actions of an impostor impersonating a safety professional were denied access to a jury to defend ourselves. Thus the final rule cannot be reviewed judicially in the same way as before the transfer or assignment.

The 5th Circuit's effort to put a fig leaf of constitutionality on its decision by calling the final rule an action of the National Transportation Safety Board, A-13, is contradicted by the NTSB itself which claims to have merely commented on the proposed rule rather than holding a hearing. A-12, 80 F.R. 78305. Its comments were docketed May 27th 2014, more than a year before the final rule was issued on December 16th 2015. Thus, anyone such as myself who lost more than $20 as a result of the Acting Administrator's failure to obey the statute has a 7th Amendment right to a trial by jury. Just as reasonable people will not board a plane flown by a

hijacker or swallow medicine prescribed by a quack, a jury is unlikely to uphold a regulation promulgated by an impostor. Aside from the fact that tribunals provide opportunity for corruption, it is "impracticable" for pro se litigants to satisfy the strict briefing requirements of courts of appeals when evidence could easily be explained to a jury. *Yakus* at 425.

While it is understood that the plain language of the Hobbs Act requires that I file in the 5th Circuit, which is not required to follow the precedents of the DC Circuit, certiorari is needed to clarify the scope of the Hobbs Act to determine whether litigants who cannot afford lawyers have a 7th Amendment right to review in district court pursuant to the Administrative Procedures Act, 5 U.S.C. § 704 & 706, under federal question jurisdiction, 28 U.S.C. § 1331.

CONCLUSION

Certiorari should be granted to the 5th Circuit in combination with the related petition before this court to uphold my 14th Amendment right to due process.

I urge this most Honorable Court to grant this Petition for a Writ of Certiorari.

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National Transportation Safety Board
Washington, DC 20594

Office of the Chairman

May 27, 2014

Docket Management Facility
U.S. Department of Transportation
West Building Ground Floor,
Room W12-140 1200
New Jersey Avenue, SE
Washington, DC 20590-0001

Attention: Rules Docket No. FMCSA-2010-0167

Dear Sir or Madam:

The National Transportation Safety Board (NTSB) has reviewed the Federal Motor Carrier Safety Administration (FMCSA) supplemental notice of proposed rulemaking (SNPRM), titled "Electronic Logging Devices and Hours of Service Supporting Documents," which was published at 79 Federal Register (FR) 17656 on March 28, 2014. The SNPRM supplements the FMCSA notice of proposed rulemaking (NPRM), titled "Electronic On-Board Recorders and Hours of Service Supporting Documents," published on February 1, 2011 (76 FR 5537).

The NTSB commends the FMCSA for continuing to move forward on rulemaking requiring electronic logging device[12] (ELD) technology on commercial motor vehicles (CMVs). While the proposed

[12] The term electronic logging device has been substituted for the formerly used term electronic on-board recorders to be consistent with the term used in MAP-21, section 32301(b) (amending 49 U.S.C. § 31137.

rule does not include all CMV operations, the NTSB is pleased that the SNPRM would require considerably more motor carriers and drivers to use ELDs than were required by the ELD final rule published on April 5, 2010 (75 FR 17208).

The NTSB has a long history of advocating scientifically based hours of service (HOS) regulations designed to reduce driver fatigue and crashes. Unfortunately, the NTSB continues to see a disturbing trend of fatigued drivers operating CMVs well in excess of HOS limitations and subsequently being involved in catastrophic crashes. Therefore, it is vitally important that the FMCSA issue a final ELD rule in an expeditious manner to increase compliance with HOS regulations and prevent future crashes, injuries, and deaths. The following comments provide background information regarding the NTSB's history of support for mandating ELDs on CMVs, discuss recent NTSB crash investigations involving HOS violations and fatigue, review technical specifications for ELDs and supporting documents requirements, and give an overview of other ELD provisions outlined in the SNPRM.

Background

The FMCSA defines an ELD as a recording technology that is connected to the engine of a CMV to track the time a CMV is operating. An ELD also allows drivers or motor carrier representatives to make annotations to explain or correct records. Properly designed, used, and maintained ELDs enable drivers, motor carriers, and authorized safety officials to track on-duty driving hours more effectively and accurately, thus preventing both inadvertent and deliberate HOS violations. Driver com-

pliance with the HOS regulations helps ensure drivers are provided time to obtain restorative rest to enable them to operate their CMVs safely.

The NTSB first recommended mandating the use of on-board recorders to enforce HOS regulations in 1990 as the result of a safety study it conducted focusing on fatal-to-the-driver heavy truck crashes.[13] The NTSB recommended that the Federal Highway Administration, the states, Puerto Rico, the Virgin Islands, and the US territories

> Require automated/tamper-proof on-board recording devices such as tachographs or computerized logs to identify commercial truck drivers who exceed hours-of- service regulations. (H-90-28 and -48)

The NTSB added those recommendations to its Most Wanted List in 1990; however, both recommendations were ultimately classified "Closed—Unacceptable Action," due to a lack of progress or response from the recipients. In 1998, the NTSB issued similar recommendations to multiple industry and labor groups following the investigation of a 1997 multiple-vehicle accident in Slinger, Wisconsin.[14] Again, because of the recipients' lack of action or response, the NTSB classified the recommenda-

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[13] National Transportation Safety Board, Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-to-the- Driver Heavy Truck Crashes (Volume 1), NTSB/SS-90/01 (Washington, DC: National Transportation Safety Board, 1990).

[14] National Transportation Safety Board, Multiple Vehicle Crossover Accident, Slinger, Wisconsin, February 12, 1997, NTSB/HAR-98/01 (Washington, DC: National Transportation Safety Board, 1998).

tions "Closed—Unacceptable Action."[15]

In 2007, as a result of the investigation of a rear-end collision involving two tractor-semitrailers and a passenger vehicle that occurred in Chelsea, Michigan, the NTSB recommended that the FMCSA

> Require all interstate commercial vehicle carriers to use electronic on-board recorders that collect and maintain data concerning driver hours of service in a valid, accurate, and secure manner under all circumstances, including accident conditions, to enable the carriers and their regulators to monitor and assess hours-of-service compliance. (H-07-41)

In 2008, Safety Recommendation H-07-41 was added to the NTSB Most Wanted List. Subsequent NTSB reports concerning accidents caused by fatigued CMV drivers reiterated Safety Recommendation H-07-41[16] and encouraged the FMCSA to take

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[15] Safety Recommendation H-98-23 was issued to the American Trucking Associations, the International Brotherhood of Teamsters, and the Motor Freight Carriers Association; and Safety Recommendation H-98-26 was issued to the Independent Truckers and Drivers Association, the National Private Truck Council, and the Owner-Operator Independent Drivers Association, Inc. The recommendations called on the groups to "advise your members to equip their commercial vehicle fleets with automated and tamper-proof on-board recording devices, such as tachographs or computerized recorders, to identify information concerning both driver and vehicle operating characteristics."

[16] National Transportation Safety Board, Motorcoach Run-Off-The-Road and Rollover, U.S. Route 163, Mexican Hat, Utah, January 6, 2008, NTSB/HAR-09/01 (Washington, DC: National Transportation Safety Board, 2009).

action to mandate ELDs for all interstate CMV carriers as soon as possible.[17]

In 2007, the FMCSA published an NPRM proposing mandatory ELD installation for motor carriers with a demonstrated history of serious noncompliance with HOS rules (72 FR 2340), and, in April 2010, the agency published a final rule (75 FR 17209), which, similar to the 2007 NPRM, mandated ELDs only as a form of "remediation" for motor carriers with a history of HOS violations. In promulgating the final rule, the FMCSA committed to exploring a broader ELD mandate in a future rulemaking process; however, because of the limited scope of the 2007 NPRM and 2010 final rule, the NTSB reclassified H-07-41 "Open—Unacceptable Action."

In its February 1, 2011, NPRM, FMCSA proposed that all motor carriers using records of duty status[18] (RODS) for HOS recordkeeping be required to use ELDs to monitor driver compliance with HOS requirements. The NTSB responded favorably to the NPRM proposal to expand ELD use to considerably more drivers, but encouraged the FMCSA to extend the requirement to all CMV operations subject to the HOS requirements.

Recent NTSB Crash Investigations

In the past year and a half, the NTSB has investigated several multiple-fatality CMV crashes

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[17] National Transportation Safety Board, Truck-Tractor Semitrailer Rollover and Motorcoach Collision With Overturned Truck, Interstate Highway 94, Near Osseo, Wisconsin, October 16, 2005, NTSB/HAR-08/02 (Washington, DC: National Transportation Safety Board, 2008).

[18] RODS are commonly referred to as driver logbooks.

which highlight the critical need for an ELD rule to help improve driver and motor carrier compliance with HOS regulations. The following provides a brief summary of 4 recent crashes, which resulted in 18 fatalities and 48 injuries.[19]

> • **December 30, 2012:** A Prevost motorcoach—operated by Canadian motor carrier Mi Joo Tour & Travel—was traveling westbound on Interstate 84, near Pendleton, Oregon. Snow and ice had accumulated along the route, which traverses a rural area of the Blue Mountains. The motorcoach, upon encountering ice, slid off the roadway, went down an embankment, overturned, and came to rest upright at the bottom of the slope. Nine passengers died. The driver and 37 passengers were injured. The NTSB investigation determined that, at the time of the crash, the driver was operating well in excess of the 70-hour rule under federal HOS regulations for passenger-carrying CMVs. The NTSB also determined that driver fatigue may have contributed to his operational errors. A postcrash review of Mi Joo Tour & Travel discovered that the motor carrier failed to monitor and ensure its drivers complied with HOS requirements. As a result of the NTSB postcrash investigation and a follow-up investigation completed

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[19] Additional information about the specific crashes can be accessed through the NTSB public docket on its website, www.ntsb.gov, under the following report numbers: HWY-13-FH-005 (Pendleton, Oregon), HWY-13-FH- 008 (Elizabethtown, Kentucky), HWY-13-FH-015 (Murfreesboro, Tennessee), and HWY-14-FH-002 (Naperville, Illinois).

by the FMCSA, Mi Joo Tour & Travel was issued an imminent hazard out-of-service order and placed out of business.

• **March 2, 2013:** A Kenworth truck-tractor in combination with a semitrailer— operated by the Troy, Michigan, motor carrier Highway Star, Inc.—was traveling northbound in the right lane of Interstate 65, near Elizabethtown, Kentucky. The combination vehicle, traveling at a recorded speed of 67 mph, came upon a traffic queue and collided with the rear of a Ford Expedition occupied by eight occupants. The Ford was pushed forward into the rear of a Toyota Avalon. The crash resulted in a postcrash fire, which consumed the Ford, and killed six occupants. The two other occupants were transported to the hospital with injuries. The driver of the Toyota also received minor injuries. The NTSB investigation determined that the driver of the Kenworth truck-tractor had falsified his logbook and kept a second fake logbook in the CMV to conceal his HOS violations. A review of supporting documentation revealed that the driver had been driving for 10 consecutive days and had violated HOS regulations for several days leading up to the crash. A further review of his sleep/wake/work profile and cell phone records indicated that he was fatigued at the time of the crash. The NTSB reviewed pay records, fuel receipts, and roadside inspection reports for eight Highway Star drivers, and found falsified records for all eight drivers. Evidence also showed that the motor carrier routinely scheduled its drivers to make

delivery trips that required them to violate HOS regulations. Following the NTSB investigation of Highway Star, the FMCSA conducted a compliance review of the carrier, which resulted in an "Unsatisfactory" rating and an imminent hazard out-of-service order to Highway Star and the driver involved in the crash.

• **June 13, 2013:** A truck-tractor in combination with a semitrailer—operated by Louisville, Kentucky, motor carrier H & O Transport, Inc.—collided with eight other vehicles near Murfreesboro, Tennessee. The crash occurred when the truck driver failed to slow for traffic ahead on Interstate 24 and struck vehicles in the traffic queue. The resulting collisions killed 2 people in a Honda that overturned and was consumed by a postcrash fire; 6 of the 13 occupants of the other 8 vehicles struck by the truck-tractor semitrailer were injured. NTSB investigators reviewed the driver logbook history for the crash driver and four additional drivers. Investigators identified 14 HOS violations and another 5 potential HOS violations. Investigators examined 386 logbook pages for March 1–June 11, 2013, and, by comparing fuel receipts with driving times, discovered 134 (35 percent) contained false log entries.

• **January 27, 2014:** A Freightliner truck-tractor in combination with a flatbed semitrailer—operated by DND International—was traveling in the right lane of Interstate 88 near Naperville, Illinois. The combination

vehicle struck two emergency vehicles, an Illinois State Police cruiser and an Illinois Toll Authority vehicle, both with activated emergency/warning lights. The crash killed the Toll Authority worker and seriously injured the Illinois State Police officer. In its postcrash investigations,[20] the NTSB and FMCSA determined that the DND truck driver had been on duty in excess of 26 hours and was in violation of HOS regulations. The investigation also revealed that the truck driver had falsified his RODS on several of the days immediately leading up to the day of the crash. Additionally, investigators found evidence of false logs for several other DND drivers. The review of DND International motor carrier operations found that the company did not have in place an effective management oversight and control system to ensure drivers complied with HOS requirements. For example, although DND drivers routinely traveled on Illinois toll roads, the company did not maintain toll transaction records or compare toll records to driver logs to monitor HOS compliance.

Proposed Rule Revisions

The current SNPRM specifically proposes four elements, three of which are germane to NTSB recommendations or investigations: (1) requiring new technical specifications for ELDs that address

[20] The Naperville, Illinois, investigation is ongoing and the information provided here is preliminary in nature.

statutory requirements, (2) mandating ELDs for drivers currently using RODS for HOS record keeping, and (3) clarifying supporting document requirements.

The first element concerns the technical specifications for ELDs. The SNPRM proposes detailed performance and design requirements to ensure providers develop compliant systems that are reliable and tamper-resistant, and facilitate methods for providing authorized safety officials with drivers' ELD data. The technical specifications also address statutory requirements to prevent driver harassment and protect driver privacy. The specifications in the SNPRM address several elements called for in NTSB Recommendation H-07-41 requiring that ELD data be maintained in a valid, accurate, and secure manner. The SNPRM, however, does not include performance standards to ensure that data captured by ELDs survive in the event of a crash. The FMCSA should consider addressing this shortfall in the final rulemaking.

The second element addresses the population of drivers affected by the SNPRM. The FMCSA proposes that interstate motor carriers install ELDs in all CMVs operated by drivers who are required to use RODS. In the SNPRM, the FMCSA clarifies that its preferred option does not include all motor carriers transporting bulk quantities of hazardous materials or all carriers subject to 49 CFR Part 395 (the "true universal" approach). The FMCSA acknowledges that the true universal approach recommended by the NTSB exceeds the estimated safety benefits for most short-haul motor carriers. As such, the NTSB continues to support further expansion of the mandate to include the estimated 15 percent of operations that would be exempt from ELD require-

ments, such as some hazardous materials-transporting and passenger-carrying motor carriers. The NTSB remains concerned that exempting such operations from the final rule could result in an increased risk of HOS violations and, thus, a heightened potential for fatigue-related accidents resulting in mass fatalities. Overall, however, the SNRPM is a significant improvement over the ELD final rule published in April 2010.

The third element focuses on the supporting documents required to be maintained by motor carriers subject to HOS regulations. The FMCSA defines supporting documents as, "any document . . . generated or received by a motor carrier . . . in the normal course of business that could be used, as produced or with additional identifying information, to verify the accuracy of a driver's record of duty status." The SNPRM modifies the categories of required supporting documents proposed in the February 2011 NPRM to accommodate the broad diversity of the motor carrier industry. Specifically, for every 24-hour period a driver is on duty, the motor carrier would be required to maintain not more than 10 supporting documents from 5 categories: (1) bills of lading, itineraries, schedules, or equivalent documents that indicate the origin and destination of each trip; (2) dispatch records, trip records, or equivalent documents; (3) expense receipts; (4) electronic mobile communication records, reflecting communications transmitted through a fleet management system for the driver's 24-hour duty day; and (5) payroll records for the driver's duty day, settlement sheets, or equivalent documents that indicate what and how a driver was paid. The SNPRM adds that those motor carriers who are not required to use ELDs and only use paper logs would

also need to maintain toll receipts. The NTSB has found toll information, such as EZ Pass data and toll receipts, to be some of the most reliable information in verifying HOS compliance. This toll data is also extremely useful in helping to determine if ELDs have been subject to tampering. The FMCSA should consider specifically listing toll receipt and electronic toll data in the five categories of required supporting data.

Summary

The NTSB commends the FMCSA for making progress toward improving HOS compliance and safety by mandating ELDs for most CMV operations. We are pleased with how the FMCSA addresses ELD technical specifications and clarifies supporting document requirements—and we encourage the agency to consider a few additional modifications, as stated above. The SNPRM requires drivers and motor carriers subject to this proposed ELD mandate to install or use an ELD by no later than two years after the effective date of the final rule. It is important that this deadline not be extended, as the installation of this technology on CMVs is long overdue.

The NTSB appreciates the opportunity to comment on this SNPRM.

Sincerely,

Christopher A. Hart
Acting Chairman

Draft 40

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60785

WILLIAM B. TRESCOTT,

Petitioner

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; UNITED STATES OF AMERICA,

Respondents

Petition for Review of an Order of the
Department of Transportation,
National Transportation Safety Board

Before HIGGINBOTHAM, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the respondents' opposed motion to dismiss the petition for review for lack of jurisdiction, is GRANTED.