ORAL ARGUMENT SET FOR APRIL 15, 2004

No. 03-1165

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN INC. et al.,
Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
and THE UNITED STATES.
Respondents.

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

***AMICUS CURIAE* BRIEF OF INSURANCE INSTITUTE FOR HIGHWAY SAFETY IN SUPPORT OF PETITIONER AND SEEKING REVERSAL OF THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION'S ORDER**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners.

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* states as follows:

Amicus Insurance Institute for Highway Safety, Inc., states that it is a non-profit organization incorporated under the laws of the District of Columbia.

Amicus Curiae have not issued shares to the public nor does it have any parent corporation, subsidiaries or affiliates that have issued shares to the public.

Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioners.

Related Cases

The case on review has not previously been before this Court or any other court. References to cases related to the present case appear in the Brief for Petitioners.

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[*]TABLE OF AUTHORITIES

Federal Rulemaking

Other Authorities

[*] There are no authorities upon which we chiefly rely. All authorities are equally relevant.

GLOSSARY

FMCSA	Federal Motor Carrier Safety Administration
Institute	Insurance Institute for Highway Safety
NPRM	Notice of Proposed Rulemaking

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Petitioner.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Insurance Institute for Highway Safety (the Institute) is a nonprofit research and communication organization, supported by U.S. motor vehicle insurers that identifies ways to reduce motor vehicle crashes and crash losses. Hours of Service rules for commercial drivers and the part it plays in reducing highway losses is the subject of a considerable body of research by the Institute. The findings from this research have been submitted in comments to federal rulemakings conducted by the Federal Motor Carrier Safety Administration (FMCSA) and its predecessors. In addition, an Institute staff member has served as a member of the Board of Directors for the National Sleep Foundation.

The Institute's supporters have a humanitarian and financial interest in reducing the deaths and injuries from motor vehicle crashes. And the Institute is concerned that if the recent regulations adopted by the FMCSA are implemented there could be an increase in the risk of serious injury in motor vehicle crashes. Therefore, the Institute supports the Petitioners in this case.

On August 27, 2003 this Court granted leave to the Institute to participate in this case as Amicus Curiae. Further, on September 25, 2003, this Court ordered that Amici Curiae may file separate briefs not to exceed 3,500 words each. Amici Curiae have filed separate briefs.

SUMMARY OF ARGUMENT

The United States Department of Transportation limits the on-duty hours of some workers (e.g., pilots, train engineers, and commercial truck drivers) in order to reduce fatigue-related crash risks for the traveling public. The current limits on hours of service for commercial vehicle drivers have been in effect since 1962, even though the highway system and driving conditions have changed dramatically in that time. Today there are far more vehicles, greater traffic densities, and as a result driving is more stressful than ever before and requires more concentration to avoid crashes. Fatigue is much more likely to result in crashes. Yet the federal limits on truck drivers are the least restrictive of all of the Department's work restrictions even though more deaths occur in crashes involving commercial motor vehicles than in commercial plane and train crashes.[1]

A. The Proposed Rule

Recognizing that commercial driver fatigue is a significant contributor to highway crashes and deaths, in 2000 the Federal Motor Carrier Safety Administration (FMCSA) proposed a series of changes to the hours-of-service rules that were intended to address the problem. The agency included provisions

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[1] U.S. Department of Transp., Bureau of Transp. Statistics, Transportation Fatality Rates, Transp. Statistics Annual Report, Oct. 2003 at 91.

proposing not only to increase the hours a driver could drive from 10 to 12 hours but also to increase the mandatory daily rest period from 8 to 12 hours. The proposed rule also included a provision to replace truck drivers' ineffective paper logbooks with tamper-resistant electronic onboard recorders to accurately track the number of hours a driver spends behind the wheel. Although the Insurance Institute for Highway Safety (Institute) strongly opposed the proposed increase in the driving hours because of the increased crash risk, the Institute supported providing commercial vehicle drivers with longer rest periods and the use of electronic onboard recorders – provisions with the potential to yield a net increase in highway safety despite the proposed longer driving hours.

B. The Final Rule

In its final rule the agency reduced the limit on the maximum driving hours compared with its proposed rule, but it still increased maximum hours from the current limit of 10 to 11, disregarding the research showing an increased crash risk associated with longer driving hours.

In the final rule the agency substantially increased from 60 to 77 the maximum number of hours in a week that a driver can operate a commercial vehicle. This change further increases the likelihood that drivers will become fatigued. Yet this provision, because it was not discussed in FMCSA's Notice of

Proposed Rulemaking (NPRM), was adopted without any opportunity for public comment on the safety risks associated with the longer hours. The agency compromised safety even further by decreasing its proposed requirement for 12 hours off-duty daily to 10 hours in the final rule.

The agency also refused to address the long-standing deficiency in the ability of authorities to enforce these rules. Instead of requiring the use of electronic recording devices, drivers will continue to be allowed to self-report their driving hours through the use of written logbooks. The entries in these logbooks are so frequently fraudulent that many drivers refer to them as "comic books." The agency disregarded the evidence of the need for tamper-resistant electronic onboard recorders submitted by motor carriers,[2] the National Transportation Safety Board,[3] and other safety groups[4] by claiming the devices are not economically feasible. In reaching this conclusion, FMCSA ignored submitted evidence about the availability of inexpensive tamper-resistant electronic onboard recorders. The

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[2] California Trucking Association, Comment on the Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, FMCSA Docket No. 97-2350-22955 (Dec. 15, 2000). See also, Werner Enterprises, Inc., Comment on Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, FMCSA Docket No. 97-2350-22642 (Dec. 14, 2000).

[3] Nat'l Transp. Safety Board, Comment on Hours of Service of Drivers, FMCSA Docket No. 97-2350-563 (July 15, 1997).

[4] Advoc. for Highway and Auto Safety, Comment on Hours of Service of Drivers: Driver Rest and Sleep for Safe Operations, FMCSA Docket No. 97-2350-22593 (Dec. 15, 2000). See also, Ins. Inst. for Highway Safety, Comment on Hours of Service of Commercial Drivers, FMCSA Docket No. 97-2350 (Aug. 4, 2000).

agency also ignored the fact that countries in Europe have been mandating devices that record driving time since the early 1950s.[5] Each of these decisions is detrimental to safety and not supported by the scientific research submitted to the agency. The final rule provides no underlying rationale based on science for these highly significant changes. For all of these reasons, the agency's decision should be overturned.

[5] Telephone interview with Johanis Wieczorek, German Embassy, in Washington, D.C. (Dec. 8, 2003).

SCHEDULED FOR ORAL ARGUMENT: APRIL 15, 2004

ARGUMENT

FMCSA Added a Provision Allowing Driving for Up to 77 Hours in 7 Days, Which Was Not Included in the Notice of Proposed Rulemaking.

In its proposed rule FMCSA limited weekly driving hours to 60 or fewer and proposed two consecutive nights off, based on the well-documented need for sleep between midnight and 6 a.m.[6] The new rule includes a provision that allows a driver to "restart" the weekly clock after taking 34 consecutive hours off. By adding this provision, FMCSA increased the maximum number of driving hours in a 7-day period from the current 60 to 77, an increase of up to 25 percent. Further, a driver may drive up to 88 hours in an 8-day period under the new rule, an increase of up to 30 percent compared with the old rule that allowed up to 70 hours of driving over 8 days.[7] This provision was not discussed in the NPRM, so there was no opportunity for the Institute and others to comment on the adverse safety effects.

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[6] Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,588 (proposed May 2, 2000).

[7] For, example, assume a 7-day work week with continuous shifts of 11 hours of driving followed by 10 hours off duty, a schedule allowed under the final rule. A driver would be close to the 60-hour limit in fewer than five days. However, the same driver could drive 55 hours, and then take 34 hours off. Then, using the restart provision, he/she could resume driving by the sixth day and drive another 22 hours that week. Without this provision, the driver could not resume driving until the eighth day. The new rules will encourage drivers to live according to a 21-hour schedule so as to maximize driving time, rather than the preferred 24-hour daily schedule the agency proposed in the NPRM.

FMCSA's inclusion of the restart provision ignores studies showing that drivers who reported working longer than 60-70 hours per week or other hours-of-service violations were about 80 percent more likely to report falling asleep while driving than drivers reporting fewer work hours.[8] Further, FMCSA did not provide scientific evidence that taking 34 hours off would provide sufficient recovery time to enable drivers to drive safely for 77 hours over 7 days or 88 hours over 8 days. In the absence of such evidence, the only conclusion justified by the prior scientific record is that the increased driving hours will result in additional fatigue-related crashes.

Commercial Drivers Need More Than 10 Hours of Off-Duty Time Each Day.

FMCSA has increased the total off-duty time after work shifts from 8 to 10 hours. Yet 10 hours off is insufficient to ensure adequate sleep among commercial drivers. FMCSA's statement in the preamble to the final rule that the Institute supported a total of 10 hours off-duty is erroneous and contrary to numerous Institute statements on the issue. In fact, FMCSA's preamble ignored research submitted by the Institute showing that commercial drivers need at least 12 hours off-duty each day. Scientific literature consistently indicates that sleep deprivation

[8] Ins. Inst. for Highway Safety, Comments on the Federal Highway Administration, Docket No. MC-92-30 (Nov. 4, 1992). See also, Anne T. McCartt et al., Factors Associated with Falling Asleep at the Wheel Among Long-Distance Truck Drivers, 32 Accident Analysis & Prevention 493 (2000).

adversely affects task performance, including driving performance.[9] The proposed rule heeded scientific advice regarding the need for sufficient off-duty periods by including a minimum of 12 hours off duty, 10 of which had to be consecutive. The final rule provides no sound scientific justification for reducing the total off-duty requirement from the proposed 12 to 10 hours.

The National Sleep Foundation, the National Institute for Occupational Safety and Health, and the expert panel convened by the Federal Highway Administration in 1998 recommended 12 hours of off-duty time.[10] Optimally drivers should sleep 8 hours.[11] Even though FMCSA has increased the total off-duty time per day from 8 to 10 hours, the mandated10 hours still is not long enough for a driver to eat, shower, complete daily errands or tasks, and still sleep as much as a person needs. Further, the final rule requires no prolonged consecutive period of time off duty, whereas the proposal stipulated that at least 10 hours of off-duty time must be taken consecutively.

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[9] Nat'l Sleep Found., Comment regarding Hours-of-Service Rules for Commercial Drivers and Fatigue Interventions/Countermeasures, FMCSA Docket No. 97-2350-932 (Feb. 24, 2000). See also, Transp. Res. Inst., Report on Potential Hours-of-Service Regulations for Commercial Drivers, FMCSA Docket No. 97-2350-618 (Sept. 10, 1998).

[10] Id.

[11] Id.

The Decision to Reject Tamper-Resistant Electronic Onboard Recorders is Contradicted by the Record.

FMCSA's NPRM proposed to mandate tamper-resistant electronic recording devices on vehicles of commercial drivers who spend at least one night away from home during their trips.[12] Any efforts to improve the hours-of-service rules are meaningless in the absence of a requirement for tamper-resistant recorders. Yet the final rule does not include such a provision, and FMCSA's main rationale of prohibitive cost has no merit in light of the evidence it received from the Institute and other parties.[13] FMCSA did not discuss evidence of the affordable costs in its final rule despite the fact that the evidence was submitted to the agency on at least two occasions.[14]

A great deal of evidence points to the need for electronic recorders. Studies show significantly increased crash risk among drivers who have driven more than 8-10 hours, and there is abundant evidence that the current driving-hour limits are

[12] Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 65 Fed. Reg. 25,540.

[13] Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. 22,456 (Apr. 28, 2003).

[14] Ins. Inst. for Highway Safety (Aug. 4, 2000), supra note 4. See also, Ins. Inst. for Highway Safety, Comment on Hours of Service of Commercial Drivers, FMCSA Docket No. 97-2350-23104 (Dec. 15, 2000).

widely flouted.[15] Logbooks, the principal means of enforcing current hours-of-service rules, are easy to falsify. According to a survey of truck drivers, fewer than 20 percent thought logbooks reflected the hours most drivers actually work.[16] Such violations and falsified logbooks, including multiple logbooks, are common.[17] Unlike paper logbooks, electronic recorders reliably indicate when trucks are in motion. Drivers and motor carriers have strong economic incentives to operate trucks longer than is safe.[18] Electronic recorders can supply the necessary counterbalance to these incentives.

Reforming a system that relies on routine violations of work-hour limits and excessive work hours is not only justifiable but, in fact, the only decision an agency charged with keeping our roads safe should make. However, FMCSA chose not to make changes to the record-keeping system. Ignoring data indicating

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[15] Richard Beilock, Schedule-Induced Hours-of-Service and Speed Limit Violations Among Tractor-Trailer Drivers, 27 Accident Analysis & Prevention 33 (1995). See also, Elisa R. Braver et al., Long Hours and Fatigue: A Survey of Tractor-Trailer Drivers, 13 J. of Pub. Health Pol'y 341 (1992); Robin P. Hertz, Hours of Service Violations Among Tractor-Trailer Drivers, 23 Accident Analysis & Prevention 29 (1991); McCartt (2000), supra note 8; and David McKane, Three-State Effort Enforces Hours of Service Regulations, The Guardian, July/Aug. 1994, at 4.

[16] Braver, supra note 15.

[17] Id. See also, Kenneth L. Campbell & Michael H. Belzer, Hours of Service Regulatory Evaluation Analytical Support UMTRI-2000-11, U. Michigan (2000); McCartt (2000), supra note 8; and McKane, supra note 15.

[18] Campbell, supra note 17. See also, Lawrence J.Ouellet, Pedal to the Metal (Paula Rayman & Carmen Sirianni ed., Temple U. Press) (1994).

that recorders are economically and technically feasible,[19] FMCSA stated, "Cost estimates vary enormously, mainly because there is no significant market for such devices at the moment and thus no hard prices available from competing vendors."[20] It is apparent, however, that cost estimates will be dependent on what features are included in such systems.

FMCSA claimed that a limited number of vendors could offer a suitable system in the near future and that such vendors might not be able to satisfy all initial demand if recorders were to be required.[21] Yet it also is apparent that, if FMCSA requires these devices, production would increase. Currently available models costing $500 or less would meet the requirements for automated tamper-resistant records that were specified in FMCSA's 2000 proposal.[22]

In comparison with the proposed rule and in response to comments from the trucking industry, the final rule included higher estimates of the time necessary for drivers to fill out handwritten logbooks and for carriers to review data from these logbooks. These higher estimates have the effect of making automated recorders

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[19] Ins. Inst. for Highway Safety (Aug. 4, 2000), supra note 4. See also, Ins. Inst. for Highway Safety (Dec. 15, 2000), supra note 14.

[20] Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. at 22,488.

[21] Id.

[22] Ins. Inst. for Highway Safety (Aug. 4, 2000), supra note 4. See also, Ins. Inst. for Highway Safety (Dec. 15, 2000), supra note 14.

more cost-effective because automated recorders save both drivers and carriers considerable time.[23] The economic feasibility of electronic devices is demonstrated by motor carriers' widespread adoption of onboard computers, wireless communication systems, and global positioning systems since the 1980s. Most truck engines already contain electronic control modules that could be inexpensively modified to function as electronic logs.[24]

The Institute repeatedly has petitioned the U.S. Department of Transportation to require onboard recorders in large trucks to increase adherence to hours-of-service rules.[25] Other organizations have joined in petitioning: Advocates for Highway and Auto Safety, Parents Against Tired Truckers, Families Against Speeding Trucks, National Association of Governors' Highway Safety Representatives (now known as Governors Highway Safety Association), and

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[23] Agency Information Collection: Driver's Record of Duty Status (OMB Control No. 2126-0001) from Ins. Inst. for Highway Safety, to Joseph M. Clapp, Administrator, FMCSA (Feb. 26, 2002)(on file with IIHS).

[24] Avery Vise, Big Brother Under Your Hood, Trucking Co., Dec. 1999, at 7.

[25] Ins. Inst. for Highway Safety, Petition to Require Automatic On-Board Recording Devices for Motor Carriers, submitted to Bureau of Motor Carrier Safety (Oct. 1, 1986); See also, Ins. Inst. for Highway Safety, Petition for Reconsideration to Require On-Board Recording Devices for Motor Carriers, submitted to Federal Highway Admin. (Feb. 25, 1987); Ins. Inst. for Highway Safety, Petition to Require Automatic On-Board Recording Devices for Motor Carriers Transporting Hazardous Materials, submitted to Federal Highway Admin. (Dec. 20, 1989); and Ins. Inst. for Highway Safety, Petition to require electronic onboard recording devices for motor carriers, submitted to Federal Highway Admin. (Aug. 3, 1995).

Public Citizen.[26] Starting in 1990, the National Transportation Safety Board also recommended automated tamper-resistant onboard recording devices to monitor driving hours of commercial truck drivers.[27] Another organization calling for mandatory onboard monitoring is the National Sleep Foundation,[28] which recognizes the relationship between excessive driving hours and sleep loss. In addition, some trucking industry representatives supported the use of electronic monitoring devices in lieu of paper logs, including the California Trucking Association,[29] Arkansas Trucking Association,[30] Werner Enterprises,[31] T.F. Boyle Transportation,[32] and the president of Kenan Transport Company.[33]

Throughout the world — including the 15 countries of the European Union, Chile, Israel, Japan, South Korea, Turkey, and Venezuela — onboard recorders are

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[26] Advoc. for Highway and Auto Safety, supra note 4. Ins. Inst. for Highway Safety (Aug. 4, 2000), supra note 4.

[27] Nat'l Transportation Safety Bd., Fatigue, Alcohol, Other Drugs, and Medical Factors in Fatal-to-the-Driver Heavy Truck Crashes, NTSB # SS-90-01 (1990).

[28] Nat'l Sleep Found., supra note 9.

[29] California Trucking Association, supra note 2.

[30] Arkansas Trucking Association, Arkansas Trucking Association Adopts Hours-of-Service Policy (1999), at http://www.arkansastrucking.com/news.html, (on www as of June 2, 2000)(on file with Ins. Inst.).

[31] Werner Enterprises, Inc., supra note 2.

[32] D. L. Whitten, Black Boxes and the Small Carrier, Transp. Topics, June 26, 2000, at 13.

[33] D. Barnes, Shaffer Embraces Black Boxes, Transp. Topics, Nov. 8, 1999, at 27.

required for large commercial vehicles.[34] It is not credible that the United States alone among these countries lacks the technological resources to make onboard recorders practical and economically feasible.

Driving More Than 10 Hours Daily Increases Crash Risk.

Driving should be recognized for what it is: a sedentary and often monotonous task requiring constant vigilance. Momentary lapses of attention can have devastating consequences. Currently commercial drivers are allowed up to 10 hours of driving at a stretch. Driving a large truck safely for 10 hours is taxing, even under the best conditions. Although the Institute supported the NPRM, which included 12 hours of driving time, that support was based on the net safety benefits that would have accrued from the rule as a whole. Under FMCSA's final hours-of-service rule,[35] the purpose of which was to make driving safer, drivers are allowed to drive up to 11 hours at a stretch. Driving 11 hours would place truck drivers and other road users at undue risk without the offsetting benefits of the proposed provisions that FMCSA removed from the final rule.

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[34] Gerhard Lehmann, Highway Recording Systems: A Report on European and U.S. Experiences, International Symposium on Transportation Recorders, National Transp. Safety Board and International Transp. Safety Association (1999).

[35] Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, 68 Fed. Reg. at 22,469.

Multiple studies indicate increased crash risk among drivers operating large trucks for more than 8-10 hours at a stretch.[36] These studies are indicative of what happens after driving for an extended period of time because they are based on real-world crashes, not driving simulator data, and do not rely on subjective assessments by investigating enforcement officers of whether a crash was related to fatigue. Another strength is the use of comparison groups, enabling control of confounding effects from time of day, travel patterns, and other factors affecting crash risks. Increased crash risks associated with long hours of driving have been reported as twofold or higher.[37] Several studies reported a significant correlation between driving long hours, including more than 8-10 hours, and having dozed while driving.[38] By allowing commercial drivers to drive for 11 hours, FMCSA has ignored this critical research.

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[36] Kenneth L. Campbell, Evidence of Fatigue and the Circadian Rhythm in the Accident Experience, Proceedings of Federal Highway Administration Symposium on Truck and Bus Driver Fatigue 20-38 (1988). See also, William J. Frith, A Case-Control Study of Heavy Vehicle Drivers' Working Time and Safety, Proceedings of the 17th Australian Road Research Board Conference 17-30 (1994); Ian S. Jones & Howard S. Stein, Defective Equipment and Tractor-Trailer Crash Involvement, 24 Accident Analysis & Prevention 437 (1989); Tzuoo-Ding Lin et al., Time of Day Models of Motor Carrier Accident Risk, 1467 Transp. Research Record 1 (1994); Frank F. Saccomanno et al., Effect of Driver Fatigue on Commercial Vehicle Accidents, Truck Safety: Perceptions and Reality 157, Waterloo, Canada (1996); and Heikki Summala and Timo Mikkola, Fatal Accidents Among Car and Truck Drivers: Effects of Fatigue, Age, and Alcohol Consumption, 36(2) Human Factors 315 (1994).

[37] Frith, supra note 36. See also, Jones, supra note 36; Lin, supra note 36; and Saccomanno, supra note 36.

[38] McCartt, supra note 8. See also, Campbell, supra note 17.

The agency's own analysis shows a significant increase in fatigue-related crashes as the number of driving hours increase. FMCSA reports that the relative risk of fatigue-related crashes increases 60 percent after driving 8 hours, 90 percent after driving 9 hours, 240 percent after driving 10 hours. The relative risks are even higher after driving more than 10 hours.[39] Given the agency's analysis, together with other research, FMCSA's decision to allow drivers to operate trucks for 11 hours at a stretch is contrary to the scientific evidence and without merit.

CONCLUSION

The Federal Motor Carrier Safety Administration should have recognized the scientific evidence relating to the risks of long work and driving hours by strengthening existing hours-of-service rules. The agency failed to provide an opportunity to comment on a key provision of the final rule, the restart provision, and arbitrarily failed to consider evidence relating to costs of automated onboard recorders. Tamper-resistant electronic onboard recorders and a more scientifically based work and rest schedule should have been required. Instead, FMCSA has extended daily and weekly driving hours, thereby increasing the hazard of fatigue-related crashes. For these reasons the Institute supports the Petioner in this case.

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[39] Campbell, supra note 17.

CERTIFICATE OF COMPLIANCE

Pursuant to District of Columbia Circuit Court Order of September 25, 2003 I, Stephen L. Oesch, certify that the Brief of *Amicus Curiae* Insurance Institute for Highway Safety complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B), has a typeface of 14 points and contains 3,496 words, relying on the word count of the Microsoft Word 2000.

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CERTIFICATE OF SERVICE

The attached Amicus Curiae Brief of the Insurance Institute for Highway Safety in the case of Public Citizen, Inc., et al. v. Federal Motor Carrier Safety Administration and the United States in the District of Columbia Circuit Court of Appeals was mailed via first-class United States mail, postage pre-paid to the following:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 9, 2003 at Arlington, VA.

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