

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Small Business in Transportation Coalition)
1775 I St., NW Suite 1150)
Washington, D.C. 20006)
Plaintiff)
v.) AMENDED COMPLAINT
U.S. Department of Transportation) CIVIL ACTION NO: 1:19-cv-01311 JEB
1200 New Jersey Ave., SE)
Washington, DC 20590) Judge James E. Boasberg
and)
Elaine L. Chao, *in her official capacity as*)
Secretary of the Department of)
Transportation)
1200 New Jersey Ave., SE)
Washington, D.C. 20590)
and)
Federal Motor Carrier Safety)
Administration)
1200 New Jersey Ave., SE)
Washington, D.C. 20590)
and)
Raymond P. Martinez, *in his official*)
capacity as Administrator of the Federal)
Motor Carrier Safety Administration)
1200 New Jersey Ave., SE)
Washington, D.C. 20590)
Defendants)

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. The Small Business in Transportation Coalition (“SBTC”), by and through the undersigned Counsel, files this Amended Complaint for declaratory and injunctive relief against

Defendants United States Department of Transportation (“the Department”), Secretary Elaine L. Chao (“Secretary”), Federal Motor Carrier Safety Administration (“FMCSA”) and Raymond P. Martinez, Administrator (“Administrator”), collectively, “the Defendants,” for violation of the Administrative Procedure Act, the Fixing America’s Surface Transportation Act and the First Amendment to the United States Constitution, and hereby alleges the following:

JURISDICTION

2. This action arises under the Administrative Procedure Act (APA), 5 U.S.C. §§553, 701-706. This Court has subject matter over this action because it is a cause arising under federal law. 28 U.S.C. §1331. In addition, this Court has the authority to issue declaratory relief sought pursuant to 28 U.S.C. §2201.
3. This is an action against officers and agencies of the United States. Therefore, venue is proper in this Court under 28 U.S.C. §1391(e). Venue and personal jurisdiction are also proper in this Court because Defendants the Department and the FMCSA reside in this judicial district. Defendants Elaine L. Chao and Raymond P. Martinez perform their official duties in this judicial district, and the events giving rise to this action took place in this judicial district.

THE PARTIES

4. The SBTC is a 501(c)(6) trucking industry trade group representing interstate truckers and motor carriers, among other small players in the transportation industry. SBTC brings this lawsuit on behalf of its members.
5. The SBTC has standing to bring this lawsuit against Defendants because (1) the individual members of the SBTC are injured by the actions of the Defendants, (2) the interest this lawsuit is trying to protect is germane to the SBTC’s purpose, and (3) neither the claim

asserted nor the relief requested requires participation of individual members of the SBTC in the lawsuit.

6. The United States Department of Transportation is a federal Cabinet department of the U.S. government concerned with regulating transportation in the United States.

7. Secretary Elaine L. Chao is the Secretary of the United States Department of Transportation and is in charge of administering the rules and regulations of the Department and has delegated authority to the FMCSA in accordance with 49 U.S. Code § 322.

8. The Federal Motor Carrier Safety Administration is an agency within the Department that regulates the trucking industry in the United States.

9. Administrator Raymond P. Martinez is the administrator of the FMCSA and is in charge of administering its rules and regulations.

FACTUAL ALLEGATIONS

10. This lawsuit challenges the FMCSA's summary and unlawful delay in the decision of the SBTC's Electronic Logging Device ("ELD") Exemption Application, which SBTC filed on behalf of its membership; and FMCSA's summary and unlawful delay in the publication of the Notice of SBTC's Hours of Service ("HOS") Exemption Application relating to the City of Midland, Texas in the Federal Register. Both delays violate the APA because Congress has enacted a statute that expressly requires the FMCSA to take specific actions by a specific date.

11. On February 1, 2018, the SBTC filed an ELD Exemption Application on behalf of its members with the FMCSA, in a letter addressed to FMCSA Deputy Administrator Cathy Gautreaux.

12. On May 21, 2018, the ELD Exemption Application filed by the SBTC on February 1, 2018 was entered into the Department's Docket and given Docket number FMC-180205-002. .

13. On or about June 5, 2018, the FMCSA posted a Notice in the Federal Register requesting public comments on the SBTC's ELD Exemption Application on behalf of its members. Public comments were due by July 5, 2018.

14. Nearly 2,000 public comments were made in response to the posting of the Federal Register Notice regarding the SBTC's ELD Exemption Application.

15. On July 9, 2018, the FMCSA posted a Notice in the Federal Register extending the comment period for the SBTC's ELD Exemption Application to July 16, 2018.

16. The FMCSA has yet to render and publish a decision in the Federal Register regarding the SBTC's ELD Exemption Application, which was originally submitted November 20, 2017 and resubmitted at the FMCSA's direction on February 1, 2018.

17. FMCSA's failure to make a decision on the SBTC's ELD Exemption Application and publish that decision in the Federal Register violates 49 U.S. Code §31315(b)(7), which states:

(7) Applications to be Dealt With Promptly – The Secretary shall grant or deny an exemption request after a thorough review of its safety implications, but in no case later than 180 days after the filing of such request. (Emphasis added).

18. It has been well over one year since the SBTC filed its ELD Exemption Application and the FMCSA has still not rendered a decision on the application and filed it in the Federal Register.

19. It is the SBTC's belief that every other ELD exemption application that has been submitted to the FMCSA for consideration and published in the Federal Register by other trucking associations, was decided upon within 6 months from the date of filing, as per 49 U.S. Code §31315(b)(7).¹

20. The FMCSA purposely and intentionally discriminated against the SBTC and its members by treating it differently than every other trucking association that filed an ELD Exemption Application.

21. In delaying and refusing to render and publish in the Federal Register a decision regarding the SBTC's ELD Exemption Application, FMCSA failed to complete notice and comment rulemaking within the specific time period of 180 days prescribed by Congress, failed to provide a reasonable justification for its delay, acted arbitrarily and capriciously and in excess of statutory justification, authority, or limitations or short of statutory right, and withheld or unreasonably delayed agency action, all in violation of the Administrative Procedure Act, 5 U.S.C. § 552, et. seq.

22. On June 14, 2018, SBTC filed a petition with the FMCSA for class exemption rules to allow SBTC to file requests for exemptions to certain FMCSA regulations on behalf of its members.

¹ For instance, an ELD Exemption Application to FMCSA was filed by the Owner-Operator Independent Driver Association (OOIDA) on Nov. 21, 2017, just one day after the SBTC announced it had submitted its application on Nov. 20, 2017;It took FMCSA a total of 6 months to publish the SBTC's application in the Federal Register compared to just 6 weeks in the OOIDA matter; FMCSA completed the OOIDA application process (which entailed over 4,000 comments to the docket) within 180 days of publishing same in the Federal Register in accordance with the law; FMCSA is now more than 9 months late beyond the 180 day period in the SBTC matter, which requires FMCSA read only 1,900 comments.

23. In its list of petitions received by organizations for actions on its website www.fmcsa.gov, FMCSA listed SBTC's June 14, 2018 petition, but has placed an N/A in the corresponding column for the 'Date of Acknowledgement' of petitions. SBTC has received no such acknowledgement that its June 14, 2018 petition was acknowledged and/or accepted. It is unclear to SBTC why FMCSA would believe that a response to SBTC is not applicable when Section 5204 of the Fixing America's Surface Transportation Act states:

(a) In General.--The Administrator of the Federal Motor Carrier Safety Administration shall--

- (1) publish on a publicly accessible Internet Web site of the Department a summary of all petitions for regulatory action submitted to the Administration;
- (2) prioritize the petitions submitted based on the likelihood of safety improvements resulting from the regulatory action requested;
- (3) not later than 180 days after the date a summary of a petition is published under paragraph (1), formally respond to such petition by indicating whether the Administrator will accept, deny, or further review the petition;
- (4) prioritize responses to petitions consistent with a petition's potential to reduce crashes, improve enforcement, and reduce unnecessary burdens; and
- (5) not later than 60 days after the date of receipt of a petition, publish on a publicly accessible Internet Web site of the Department an updated inventory of the petitions described in paragraph (1), including any applicable disposition information for those petitions.

Fixing America's Surface Transportation Act Pub. L. No. 114-94 §5204 (2015).

24. SBTC questioned FMCSA officials regarding the status of its June 14, 2018 petition on May 8, 2019, classified as “N/A” in the Date of Acknowledgement column, but has received no response from FMCSA officials regarding this notation to date.

25. FMCSA has failed to officially acknowledge receipt of the June 14, 2018 petition, and therefore has failed to act on it, in violation of Federal law.

26. On October 1, 2018, the City of Midland, Texas enacted a law that prohibited the parking of commercial vehicles on public streets and private areas citywide (local City of Midland ordinance).

27. The local City of Midland ordinance prevents operators of commercial motor vehicles operating under ELDs from parking their vehicles to cease operation after 11 hours of driving time, and from parking their vehicles to cease operation after having been on duty for 14 hours, and from parking their vehicles to take their mandatory 30 minute break, as per FMCSA regulations, within the city limits of the City of Midland.

28. The local City of Midland ordinance imposes a \$500 fine on interstate truck drivers who park their vehicles in the City of Midland, when attempting to comply with Federal HOS regulations.

29. On February 12, 2019, in response to the City of Midland’s ordinance, the SBTC filed an application with the Secretary for a class exemption of the HOS rules on behalf of SBTC members, as well as all other truck and bus drivers who operate in interstate transportation and pass through the City of Midland, Texas.

30. The SBTC’s February 12, 2019 exemption application was in full compliance with the Federal regulations relating to the process and procedure for filing an exemption request with the FMCSA.

31. On February 18, 2019, in response to an email from the SBTC’s government affairs consultant inquiring as to the status of the SBTC’s exemption application against the City of Midland, Larry W. Minor, Associate Administrator for Policy with the FMCSA responded:

“We acknowledge the complaint against the City of Midland but do not believe the complaint should be construed to serve as an application for an exemption. The exemption statute and implementing regulations clearly require that you present an alternative to the regulations from which you seek relief. And you should present your assessment how the alternative would achieve the requisite level of safety.”

32. On February 19, 2019 SBTC President James Lamb wrote an email to FMCSA Associate Administrator for Policy, Larry W. Minor disagreeing with his analysis and stating that the FMCSA does not have the legal authority to unilaterally determine what is an exemption application and what is not. And further, the FMCSA has a duty to publish the document that is intended to be an exemption to HOS regulations for truck drivers traveling through the City of Midland, Texas “upon receipt”.

33. The FMCSA continues to refuse to publish the SBTC’s HOS Exemption Application relating to the City of Midland, Texas in the Federal Register for notice and public comment in violation of its lawful obligation to do so.

34. The FMCSA's failure to publish the SBTC's HOS Exemption Application relating to the City of Midland, Texas in the Federal Register violates 49 U.S.C. §31315(b)(6)(A), which states as follows:

(6) Notice and Comment—(A) Upon receipt of a request. – Upon receipt of an exemption request the Secretary shall publish in the Federal Register (or, in the case of a request for an exemption from the physical qualification standards for commercial motor vehicle drivers, post on a website established by the Secretary to implement the requirements of section 31149) a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request. This subparagraph does not require the release of information protected by law from public disclosure. (Emphases added).

35. In failing to publish in the Federal Register notice of receipt of the SBTC's HOS Exemption Application relating to the City of Midland, Texas "upon receipt," the FMCSA failed to engage in the mandatory notice and comment process, failed to provide a justification for its inaction, acted arbitrarily and capriciously and in excess of statutory justification, authority, or limitations or short of statutory right, and withheld or unreasonably delayed agency action, all in violation of the APA, 5 U.S.C. § 552, et. seq.

CAUSES OF ACTION

COUNT 1

Failure To Adhere To Procedures Required By Law

36. Paragraphs 1 through 35 of this Complaint are incorporated herein by reference.

37. The APA provides a general cause of action for parties adversely affected or aggrieved by agency action for which there is no other adequate remedy in court. 5 U.S.C. §§ 702-704.

38. Under the APA, a reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. §706 (1).

39. The APA requires all agencies to give “(g)eneral notice of proposed rule-making” and provide “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” 5 U.S.C. § 553(b), (c).

40. The FMCSA violated 49 U.S.C. § 31315(b)(7) by failing to grant or deny the SBTC’s ELD Exemption Application request **within 180 days** after the filing date of such request. (Emphasis added.)

41. The FMCSA violated 49 U.S.C. § 31315(b)(6)(A) by failing to publish in the Federal Register the SBTC’s HOS Exemption Application request “**upon receipt**” of said exemption request and commence a notice and comment period. (Emphasis added.)

42. As a result of FMCSA’s failure to adhere to procedures required by law, the SBTC’s members suffered a direct injury.

43. The FMCSA should therefore be required to immediately grant or deny the SBTC’s ELD Exemption Application request and publish that decision in the Federal Register pursuant to 5 U.S.C. § 706(2)(D).

44. The FMCSA should therefore be required to immediately publish the SBTC’s HOS Exemption Application request as to interstate truck travel through the City of Midland, Texas in furtherance of interstate commerce and commence a notice and comment period in the Federal Register pursuant to 5 U.S.C. §706(2)(D).

COUNT II

Arbitrary and Capricious Action

45. Paragraphs 1 through 44 of this Complaint are incorporated herein by reference.

46. The APA provides a general cause of action for parties adversely affected or aggrieved by agency action for which there is no other adequate remedy in court. 5 U.S.C. § 702-704.

47. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law … [and] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C).

48. When delaying, modifying, amending, and/or repealing a duly promulgated rule, the agency must identify its authority or basis to do so.

49. By failing to acknowledge and to act on SBTC’s June 14, 2018 petition for class exemption rules, the FMCSA violated the Administrative Procedure Act by treating SBTC and its members in an arbitrary and capricious manner.

50. 49 U.S.C. §13541(a) provides that:

(a) “*the Secretary or the Board, as applicable, shall exempt a person, class of persons, or a transaction or service from the application, in whole or in part, of a provision of this part, or use this exemption authority to modify the application of a provision of this part as it applies to such person, class, transaction, or service, when the Secretary or Board finds that the application of that provision—*

(1) *is not necessary to carry out the transportation policy of section 13101;*

(2) *is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope; and*

(3) *is in the public interest. (Emphasis added.)*

51. The FMCSA has no authority to delay decisions on exemption applications beyond the 180-day statutory requirement, yet it has done so in the case of the SBTC's ELD Exemption Application but not in the case of other trade groups' ELD exemption applications.²

52. The FMCSA has no authority to withhold publication of exemption applications in the Federal Register upon receipt of such exemption applications.

53. The FMCSA abused its discretion and acted in excess of statutory jurisdiction, authority, or limitations, or short of statutory right during the course of implementing the enabling legislation that directs the agency to issue exemption applications under specific circumstances and when it failed to render a decision on the SBTC's ELD Exemption Application request within the time period set forth in 49 U.S.C. § 31315(b)(7).

54. The FMCSA abused its discretion and acted in excess of statutory jurisdiction, authority, or limitations, or short of statutory right when it failed to publish the SBTC's Hours of Service Exemption Application request in the Federal Register in accordance with 49 U.S.C. § 31315(b)(6) (A).

²The SBTC's original application was rejected by FMCSA in January 2018; SBTC was directed by FMCSA to meet application filing requirements that are obviously meant for individual motor carriers, not trade groups; To the best of SBTC's knowledge, FMCSA did not require OOIDA to comply with these same regulations and their application was immediately accepted "upon receipt" without issue and published in the Federal Register within 6 weeks, despite three end-of-the-year Federal Holidays. SBTC's application was not published until SBTC protested multiple times. There is a history of FMCSA treating SBTC's president in an arbitrary and capricious matter in the aftermath of two Federal lawsuits brought by Mr. Lamb against FMCSA. For instance, In a previous exemption application over the broker bond increase that Lamb filed as then-president of the Association of Independent Property Brokers & Agents (AIPBA) in August of 2013, the agency took 14 weeks to publish the application in the Federal Register rather than publish "upon receipt," and did not issue a determination until March 2015 in violation of the statute; the docket in the AIPBA exemption application matter shows the agency had to read just 81 comments. Mr. Lamb contends there is now a clear pattern of arbitrary, capricious and discriminatory treatment towards his non-profit trade group activities by FMCSA.

55. As a result of FMCSA's failure to adhere to procedures required by law, the SBTC's members suffered a direct injury.

56. The FMCSA should therefore be required to immediately grant or deny the SBTC's ELD Exemption Application request and publish that decision in the Federal Register pursuant to 5 U.S.C. § 706(2)(D).

57. The FMCSA should therefore be required to immediately publish the SBTC's Hours of Service Exemption Application request as to truck travel through the City of Midland, Texas in the Federal Register pursuant to 5 U.S.C. §706(2)(D).

COUNT III

Action Unlawfully Withheld Or Unreasonably Delayed

58. Paragraphs 1 through 57 are incorporated herein by reference.

59. The APA provides a general cause of action for parties adversely affected or aggrieved by agency action for which there is no adequate remedy in court. 5 U.S.C. § 702-704.

60. Under the APA, a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

61. The FMCSA unlawfully withheld or unreasonably delayed its decision on the SBTC's ELD Exemption Application request within the time period set forth in 49 U.S.C. § 31315(b)(7).

62. The FMCSA unlawfully withheld or unreasonably delayed its publication the SBTC's Hours of Service Exemption Application request in the Federal Register in accordance with 49 U.S.C. § 31315(b)(6) (A).

63. As a result of FMCSA's failure to adhere to procedures required by law, the SBTC's members suffered a direct injury.

64. The FMCSA should therefore be required to immediately grant or deny the SBTC's ELD Exemption Application request and publish that decision in the Federal Register pursuant to 5 U.S.C. § 706(2)(D).

65. The FMCSA should therefore be required to immediately publish the SBTC's Hours of Service Exemption Application request as to truck travel through the City of Midland, Texas in the Federal Register pursuant to 5 U.S.C. §706(2)(D).

COUNT IV

Purposeful Discrimination Against Members of a Lawful Organization Exercising their First Amendment Right to Petition the Government for Redress of Grievances.

66. Paragraphs 1 through 65 are incorporated herein by reference.

67. The First Amendment to the United States Constitution states:

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or **the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.**” (Emphasis added.)

68. The Administrative Procedure Act5 U.S.C §702 provides that “a person suffering legal wrong because of agency action, or adversely affected of aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”

69. FMCSA has a duty as a federal agency to treat all organizations that petition it for redress with the attention and consideration of any petition submitted by an organization whose members are covered by and subject to FMCSA regulations.

70. Time and time again, the FMCSA, through its agents and employees treats the Small Business in Transportation Coalition, and its 15,000 members differently than it treats other similarly situated trucking association, whose members are subject to FMCSA regulations.

71. As a result of FMCSA's discriminatory actions against the SBTC and its members, SBTC members are not given the same opportunity to petition the FMCSA on issues and regulations that affect them as members of other similarly situated trucking associations.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully prays this Court to:

- a. Declare the Defendants' failure to render a decision on the ELD Exemption Application unlawful in violation of the APA and 49 U.S.C § 31315(b)(7);
- b. Declare the Defendants' failure to publish the HOS Exemption Application "upon receipt" relating to the City of Midland Texas unlawful in violation of the APA and 49 U.S.C. § 31315 (b)(6)(A);
- c. Declare the Defendants' failure to acknowledge SBTC's June 14, 2018 petition for class exemption rules an unlawful violation of the APA and FAST Act, Pub. L. No. 114-94 §5204
- d. Order the Defendants to render an immediate decision on the SBTC's ELD Exemption Application and publish that decision in the Federal Register pursuant to 49 U.S.C. § 31315(b)(7);
- e. Order the Defendants to immediately publish the SBTC's HOS Exemption Application as to interstate truck travel through the City of Midland, Texas in the Federal Register, engage in the notice and comment period, and render a decision within 180 days pursuant to 49 U.S.C. § 31315(b)(6)(A);

f. Order Defendants to acknowledge the SBTC's June 14, 2018 petition and act upon it in manner in accordance with all applicable laws pursuant to the FAST Act, Pub. L. No. 114-94 §5204 and the Department's Regulation at 49 CFR § 389.33 Processing of Petition.

g. Enjoin the Defendants from further violating the APA, 49 U.S.C. § 31315(b)(6)(A) and 49 U.S.C. §31315(b)(7) by failing to publish in the Federal Register exemption applications "upon receipt," failing to commence the required notice and comment period through publication in the Federal Register, failing to render decisions on said applications within 180 days; and failing to process petitions for rulemaking in accordance with the FAST Act, Pub. L. No. 114-94 §5204 .

h. Enjoin the Defendants from discriminating against SBTC and its members, and order Defendants to give SBTC and its members the same level of access to petition the FMCSA on issues and regulations that affect them and equal protection of the law.

i. Award all costs and expenses of bringing this action, including attorneys' fees and costs; and

j. Grant any other relief this court deems just and proper.

Respectfully submitted,

/s/ Laurence L. Socci
Law Office of Laurence L. Socci
(D.C. Bar #241318)
7903 Flamingo Dr.
Alexandria, VA 22306
(202) 262-5843
laurence.socci@dc-lawyer.us
Attorney for Plaintiff