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March 26, 2009

Molly Dwyer
Acting Clerk of Court
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Owner-Operator Independent-Drivers Association, Inc., v. U.S. Department of Transportation, et al.*, Ninth Circuit Case No. 07-73987 consolidated with case 07-73415 - Petitioner OOIDA's Submission Pursuant to this Court's Order dated March 17, 2009

Dear Ms. Dwyer:

Petitioner OOIDA seeks a ruling that the Secretary's determination (through FMCSA) to accept compliance with certain Mexican safety statutes or regulations in lieu of compliance with corresponding U.S. statutes or regulations violates: (1) 49 U.S.C. §§ 13902(a)(1) and (4); and (2) the procedural safeguards given to interested parties under 49 U.S.C. § 31315 when waivers or exemptions from U.S.-regulations are requested. On March 13, 2009, FMCSA issued a Notice of Termination¹ of its demonstration project in response to the withdrawal of all funding for the 2009 fiscal year ending September 30, 2009.² The Court's March 17, 2009 order asks what effect, if any, does the appropriations act have on this appeal.

This Circuit has addressed the question of mootness on a number of occasions. In *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241 (9th Cir. 1988), the Court

¹ 74 Fed.Reg. 11628 (March 18, 2009)

² Omnibus Appropriations Act, Pub. L. No. 111-8, § 136.

observed:

The burden of demonstrating mootness is a heavy one. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979); *Arnold*, 816 F.2d at 1309. A moot action is one where “the issues presented are no longer ‘live’ or the parties lack legally cognizable interest in the outcome.” *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (per curiam); *Sample v. Johnson*, 771 F.2d 1335, 1338 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019, 106 S.Ct. 1206, 89 L.Ed.2d 319 (1986). We have described moot cases as those which have lost their character as present, live controversies. *Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851, 853-54 (9th Cir. 1985).

849 F.2d. at 1245. In determining whether there is a live controversy, the basic question is whether there is a present controversy as to which effective relief can be granted. *Id.* That question turns not on whether the precise relief sought when the action was filed is still available, but whether there can be any effective relief. *Id.*

The issues raised in OOIDA’s appeal are “live,” the parties here have a cognizable interest in the outcome, and this Court remains able to grant effective relief. Even if the request for injunctive relief is rendered moot because of events that have transpired during the litigation, the action itself is not moot if a declaratory judgment would nevertheless provide effective relief. *Forrest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006).

The core of the present dispute revolves around the authority of the Secretary to accept compliance by Mexico-based motor carriers and drivers with Mexican laws and regulations covering CDL’s, drug testing and driver medical qualifications in lieu of compliance with corresponding U.S. laws and regulations. That dispute is alive today because the terms under which the Secretary must entertain applications for operating authority by Mexico-based motor carriers need to be resolved. This is true whether the Secretary were to proceed with another pilot program in fiscal year 2010 or on the basis of its general authority under 49 U.S.C. §§

13902(a)(1) and (4). There are reports that the new Obama Administration is seeking to revive a Mexican truck program in response to Mexico's decision to retaliate against the United States for terminating the demonstration project.³ Unless invalidated, the experience with the terminated pilot program could be relied upon to evaluate a new program. The purpose of a pilot program is to collect data and consider alternative regulatory schemes.⁴ Therefore, the evaluation of the data and experiences from this program could be used by the Secretary as a basis for future action. Unless the DOT has the benefit of the Court's opinion on the lawfulness of this program, then the petitioners' concerns will not be addressed and will need to be relitigated when any Mexican truck program is revived.

The issue of whether the former Secretary of Transportation's decision to accept compliance with Mexican laws and regulations went beyond her authority is squarely before this Court and ought to be resolved. 49 U.S.C. § 13902(a)(1) requires the Secretary to register applicants for motor carrier operating authority only if they are willing to comply with "any safety regulations imposed by the Secretary." 49 U.S.C. § 13902(a)(4) is quite specific with respect to how the Secretary must deal with an applicant for operating authority who is unwilling or unable to meet all statutory and regulatory requirements.

Withholding – If the Secretary determines that a registrant under this section does not meet, or is not able to meet, any requirement of paragraph (1) . . . the Secretary shall withhold registration.

See also 49 U.S.C. § 13902(c)(8).

The Solicitor General specifically renounced any authority on the part of FMCSA to alter the terms and conditions of entry of Mexican motor carriers. *DOT v. Public Citizen*, 541 U.S.

³ It is widely reported that Secretary LaHood will reinstate a program to allow Mexican trucks to operate within the United States. Exhibit 1, 2 and 3. The Government of Mexico has initiated retaliation against the United States for terminating the demonstration project. Exhibit 4.

⁴ 49 C.F.R. § 381.400(c)

752 (2004). The Solicitor General took the position that “Congress did not empower FMCSA to change the fundamental conditions for entry”⁵ of Mexican motor carriers and that “FMCSA had not claimed any power to determine whether or under what conditions Mexican carriers should be allowed to operate in the United States.”⁶ By exempting foreign-based drivers and motor carriers from the requirements of U.S. statutes and regulations, FMCSA exercised in its demonstration project the precise power that it renounced before the Supreme Court in *DOT v. Public Citizen*.

Past approaches to the problem of allowing Mexican-based motor carriers and drivers to operate within the United States have been problematical. On the one hand, a blanket refusal to entertain applications for operating authority by Mexican-based motor carriers was found by the International Arbitral Panel⁷ to violate our national treatment obligations under NAFTA.⁸ On the other hand, Petitioner OOIDA contends here that the Secretary’s decision to grant special treatment to Mexican-based motor carriers by accepting compliance with Mexican laws and regulations in lieu of U.S. laws and regulations conflicts with controlling U.S. statutory law that requires applicants for operating authority to be willing and able to obey all U.S. laws and regulations.

A decision by this Court would be of great value to Petitioner OOIDA and its members

⁵ Reply Brief for Petitioners at 5. Briefs filed on behalf of the United States were submitted to the Court on November 17, 2008 pursuant to Rule 28(j).

⁶ *Id.* at 3

⁷ The Panel’s decision is attached to Petitioner OOIDA’s Brief as Exhibit 2

⁸ The obligation of signatories to NAFTA with respect to cross-border trade in transportation services is set forth in Article 1202(1) which provides:

“each Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers”

This provision establishes an obligation on the part of signatories to NAFTA to accord other signatories “national treatment.” This means that the United States is obliged to treat foreign motor carriers and drivers the same as it

as well as to the United States as it navigates between its NAFTA obligation to provide national treatment and its statutory obligation to provide uniform enforcement of U.S. truck safety laws. The authority of the Secretary to act under Section 13902(a)(1) and (4) is presently before the Court and is critical to any decisions by the Obama Administration respecting how to move forward with Mexico. This case is not moot and ought to be decided forthwith.

Sincerely,

s/ Paul D. Cullen, Sr.
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/elfb

Enclosures

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treats U.S.-based motor carriers and drivers – no better, no worse. This national treatment provision does not authorize the United States to accept compliance with Mexican laws and regulations.

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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