



## Big Brother Riding Shotgun: Future Fourth Amendment Challenges To The FMCSA's Looming EOBR Requirement

It is no secret that the Federal Motor Carrier Safety Administration ("FMCSA") has spent the last twenty-five years seeking to require the installation of electronic onboard recorders ("EOBRs") on all trucks.<sup>1</sup> Although FMCSA rules commanding the use of EOBRs have met judicial resistance, most notably in *Owner-Operator Independent Drivers Association, Inc. v. FMCSA*,<sup>2</sup> the FMCSA has not been deterred.

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With congressional go-ahead in hand, the FMCSA is currently working on broad new rules requiring the entire trucking industry to install EOBRs on all trucks.<sup>3</sup> Once proposed, the new rules will undoubtedly face legal challenges – a number on Fourth Amendment grounds (i.e. unreasonable search and seizure). The tracking of millions of individual truckers by the FMCSA through EOBRs certainly raises serious Fourth Amendment questions, which courts will be tasked with addressing. Without regard to how these issues are resolved, the FMCSA's unrelenting pursuit of a wide-ranging EOBR requirement and the general willingness of courts to bow to government where heavily regulated industries are concerned, make it apparent that an EOBR requirement is imminent. Here's what to expect in the meantime.

### The Recent History of EOBR Regulations

The FMCSA's dissatisfaction with the conventional way it has regulated truckers' Hours-of-Service ("HOS") is evidenced by its quest for broad EOBR regulations. To the FMCSA, paper log books containing truckers' duty status and geographic location are no longer sufficient to regulate the hours during a day and week a trucker operates his or her truck.<sup>4</sup> As was well advertised, in 2010, the FMCSA dramatically altered how it required truckers to track their HOS. The 2010 rule required trucking companies with a history of HOS violations and drivers of newly manufactured trucks to replace their paper logs with EOBRs.<sup>5</sup>

A group of truckers and the Owner-Operator Independent Drivers Association ("OOIDA") challenged the new EOBR regulation in the United States Court of Appeals for the Seventh Circuit.<sup>6</sup> The petitioners argued that the regulation was arbitrary and capricious because it did not "ensure that the devices are not used to harass vehicle operators," as required by U.S.C. § 31137(a), that the FMCSA's cost-benefit analysis was arbitrary and capricious because it failed to demonstrate the benefits of requiring EOBRs, and finally, that mandating EOBRs violated the Fourth Amendment.<sup>7</sup> The court vacated the regulation as arbitrary and capricious, thereby avoiding having to reach the question of whether the regulation was constitutional.<sup>8</sup> Nonetheless, Judge Diane Wood, writing for the Seventh Circuit panel, generously provided the FMCSA with a detailed roadmap for redrafting the rule in accordance with U.S.C. § 31137(a).<sup>9</sup>

The Seventh Circuit's decision led to the FMCSA's rescission of the 2010 EOBR rule in 2012.<sup>10</sup> Later that year, however, Congress passed, and the President signed, the Moving Ahead for Progress in the 21<sup>st</sup> Century Act, requiring the FMCSA to issue new regulations by July 2013 mandating the use of EOBRs.<sup>11</sup> While the FMCSA will not meet this deadline, FMCSA Administrator, Anne Ferro, has stated that a new draft of the regulations will be proposed by September 2013.<sup>12</sup> The FMCSA has made it clear that when the new regulations are finally proposed, they will address the "issues raised by the [Seventh Circuit]" in *OODA*.<sup>13</sup> By fashioning a rule that traces the Seventh Circuit's guidelines, the FMCSA may avoid further claims that the regulations are arbitrary and capricious. Yet a new rule ordering the use of EOBRs, which constantly monitor and document the movement of individual truckers, has no prospect of completely evading Fourth Amendment scrutiny.

### **Future Fourth Amendment Challenges to the EOBR Requirement**

The FMCSA defines an EOBR as "an electronic device that is capable of recording a driver's hours of service and duty status accurately and automatically."<sup>14</sup> This is a deceptively innocuous definition given the amount of information an EOBR actually monitors and records (or can potentially monitor and record). The FMCSA will require truckers to connect EOBRs to their engines *and* their cell phones in order to monitor duty status and geographic location through both cellular towers and satellites. Truckers will be required to install EOBRs that observe and document, among other information, a truck's location at least every hour, the distance a truck travels, and identify the shipper of goods carried.<sup>15</sup> This requirement can obviously be classified as an intrusion into "the right of the people to be secure in their persons . . . against unreasonable searches and seizures"<sup>16</sup> and is certain to be litigated on Fourth Amendment grounds once proposed in the coming months. To the extent that the trucking industry and others see this as unwarranted government intrusion on their livelihoods, they must be prepared for the arguments the FMCSA will make against Fourth Amendment challenges and be aware of those that can be made against the impending EOBR requirement.

### **Truckers have a Reasonable Expectation of Privacy in their Travels**

The Fourth Amendment prohibits warrantless searches or seizures of persons who have a "reasonable expectation of privacy."<sup>17</sup> This expectation exists when a person subjectively intends to keep matters private and when the circumstances objectively justify that expectation.<sup>18</sup> The proliferation of technology over the last half-century is reflected in Fourth Amendment jurisprudence. Electronic monitoring has been the focus of several Fourth Amendment decisions. In *United States v. Knotts*,<sup>19</sup> the Fourth Amendment was not violated when the government attached a tracking device to a five-gallon drum inside a vehicle and followed it from where it was picked up to where it was dropped off. The Court reasoned that there was no reasonable expectation of privacy when a person drives from one place to another in public. The tracking device *only aided the government in seeing what they could already see with their own eyes*.<sup>20</sup> In *United States v. Karo*,<sup>21</sup> a tracking device placed inside someone's home *did* violate the Fourth Amendment as it allowed the government to see inside the defendant's house – *something outside the public's view*.<sup>22</sup>

Although somewhat short-sighted, the FMCSA could easily mirror the government's argument in *Knott* that EOBRs simply assist the FMCSA in visualizing and recording what it can already see and record with its own eyes. A trucker has no reasonable expectation of privacy in his or her geographic location, the distance they have traveled or how long they have been on the road – these are all things occurring in public and accessible to the naked eye. This argument

may fail when opponents of the EOBR requirement distinguish constant EOBR monitoring from the short and sweet electronic tracking in *Knott*.<sup>23</sup> However, it would be a mistake for opponents of the EOBR requirement to argue that EOBRs are akin to the unconstitutional tracking device in *Karo*. While trucks are homes to many truckers, the Supreme Court has made it apparent that a traditional house does not equate with a house on four wheels (or eighteen).<sup>24</sup> Vehicles do not garner the same expectation of privacy as the home in *Karo*.<sup>25</sup> The EOBR requirement must fall somewhere between *Knott* and *Karo* on the Fourth Amendment electronic tracking spectrum.

The trucking industry will likely argue that there is a reasonable expectation of privacy in the whole of a truck driver's activities.<sup>26</sup> This is the most sound argument the trucking industry could make against the EOBR requirement. EOBRs do not simply monitor trucks going from point A to point B like the tracking device in *Knott*. Rather, the breadth and scope of their electronic vision is much more pervasive. EOBRs monitor and record a truck's movements traveling from point A to point B, how long it takes the truck to get from A to B, what it is carrying from A to B, who owns what it is carrying, how fast the truck traveled, how long it stays at B, where it goes after that and at what speed, how long that takes, and so on. This is non-stop monitoring in a way that was not considered by the *Knott* Court. While a trip from one location to another might be something someone in public could observe with the naked eye, a trucker's travels over an extended period of time – all day, every day, in the case of EOBRs – “is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil.”<sup>27</sup> The trucking industry's argument that the EOBR regulations are an unyielding interference with truckers' reasonable expectations of privacy may only delay the inevitable implementation of the regulation, but if it chooses to take up the battle, the industry needs to be ready for the fight.

### **The Close Regulation of the Trucking Industry does not dispense with Fourth Amendment Protections**

When the Fourth Amendment challenges to the EOBR requirement begin, the FMCSA is likely to argue – as it did in *OODA* – that the EOBR requirement falls within the “closely regulated industry” exception to the Fourth Amendment.<sup>28</sup> The FMCSA will argue that truckers, as participants in the “closely regulated” trucking industry, have less of a reasonable expectation of privacy than other public users of the roadways.<sup>29</sup> In an industry that is so deeply regulated, it is predictable that members of that industry will be subject to government inspections, searches, and in this case, tracking of movement with EOBRs. The FMCSA may claim that Congress, through the Moving Ahead for Progress in the 21<sup>st</sup> Century Act, determined that EOBRs are necessary to further the FMCSA's regulatory scheme to automatically record truckers' hours of service and duty status. The FMCSA may claim that the FMCSA's regulatory presence is so comprehensive and clear that trucking companies must expect that their trucks will be subject to searches, inspections, and now, monitoring and recording via EOBRs.<sup>30</sup>

The closely regulated industry exception to the Fourth Amendment is not without limitation. For it to apply, those monitoring and recording truckers' movements must have limited discretion.<sup>31</sup> That is, the FMCSA's interference into truckers' movements cannot be “so random, infrequent, or unpredictable” that truckers have no expectation when or where their movement will be tracked and recorded by the FMCSA.<sup>32</sup> The trucking industry must argue that the unprecedented access EOBRs give the FMCSA to truckers' whereabouts and other intrusive information leaves the FMCSA with unfettered, not limited discretion.

The EOBR monitoring and recording the FMCSA will propose is not “random, infrequent and unpredictable”; it is deliberate, constant and unavoidable. The FMCSA’s around-the-clock surveillance with global positioning technology would not give truckers a heads-up as to who is watching them, when they are being watched, and what is being watched. Under the regulatory scheme that the FMCSA will propose, the entirety of truckers’ movements will be watched... at all times. The argument will be that no Court envisioned this type of permanent and invasive intrusion into the Fourth Amendment rights of truck drivers when carving out the closely regulated industry exception.

Of course, these are only samples of the Fourth Amendment arguments that will be made for and against the EOBR requirement. Courts will face a whole host of Fourth Amendment questions raised by the specter of non-stop, limitless observation of truck drivers. There is an unstoppable and unavoidable move toward EOBRs in all trucks. Proof of that is found in the FMCSA’s relentless pursuit of an all-encompassing EOBR requirement in the name of “safety” and the courts’ general inclination to bend to government where heavily regulated industries are involved. When the EOBR requirement is met with Fourth Amendment challenges, courts may vacate the regulations, but like the Seventh Circuit in *OOIDA*, send the FMCSA back to the drafting room with an outline for a regulation that meets constitutional muster. Although Fourth Amendment challenges may delay the implementation of the EOBR requirement, the trucking industry needs to prepare for the reality that continuous GPS tracking of truckers’ movements by the government will someday (perhaps soon) be a reality. Meanwhile, the trucking industry can arm itself with arguments against the regulation and anticipate those that the FMCSA will make in support.

<sup>1</sup> Truck and Bus Safety and Regulatory Reform Act of 1988.

<sup>2</sup> 656 F.3d 580 (7th Cir. 2011) (“*OOIDA*”).

<sup>3</sup> 76 Fed. Reg. 5537 (Feb. 1, 2011); See Remarks by Anne Ferro, FMCSA Administrator, Feb. 9, 2012, “Improving Passenger Carrier Safety,” United Motor Coach Association, Long Beach, CA.

<sup>4</sup> 75 Fed. Reg. 17,211 (Apr. 5, 2010).

<sup>5</sup> 75 Fed. Reg. 17,208 (Apr. 5, 2010).

<sup>6</sup> *OOIDA*, 656 F.3d 580 (7th Cir. 2011).

<sup>7</sup> *Id.* at 587.

<sup>8</sup> *Id.* at 587, 589.

<sup>9</sup> *Id.* at 588-89.

<sup>10</sup> 77 Fed. Reg. 28,448 (May 14, 2012).

<sup>11</sup> Highway Transportation Bill, H.R. 4348.

<sup>12</sup> Statement by Anne Ferro, FMCSA Administrator, Mar. 14, 2013, House Subcommittee on Highways and Transit.

<sup>13</sup> 78 Fed. Reg. 1611 (Jan. 8, 2013).

<sup>14</sup> 49 C.F.R. § 395.2 (2011).

<sup>15</sup> 49 C.F.R. § 395.2 (2011); 49 C.F.R. § 395.16 (2010).

<sup>16</sup> U.S. Const., Amend. IV.

<sup>17</sup> *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

<sup>18</sup> *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

<sup>19</sup> 460 U.S. 276 (1983).

<sup>20</sup> *Id.* at 284.

<sup>21</sup> 468 U.S. 705 (1984).

<sup>22</sup> *Id.* at 715.

<sup>23</sup> Brief of Owner-Operator Independent Drivers Association, Inc as Amicus Curiae in Support of Respondent, *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010).

<sup>24</sup> *California v. Carney*, 471 U.S. 386, 392-93 (1985).

<sup>25</sup> *Id.*

<sup>26</sup> Brief of Owner-Operator Independent Drivers Association, Inc as Amicus Curiae in Support of Respondent, *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010).

<sup>27</sup> *Id.* (citing *United States v. Maynard*, 615 F.3d 544, 559-60 (D.C. Cir. 2010)).

<sup>28</sup> Brief of Respondent at 48-52, *Owner-Operator Independent Drivers Ass'n, Inc., et al. v. United States Dept. of Transportation, et al.*, No. 10-2340 (7th Cir. Dec. 6, 2010); *New York v. Burger*, 482 U.S. 691, 702 (1987).

<sup>29</sup> *Donovan v. Dewey*, 452 U.S. 594, 600 (1981).

<sup>30</sup> *Id.* at 600.

<sup>31</sup> *Burger*, 482 U.S. at 703.

<sup>32</sup> *Donovan*, 452 U.S. at 599.

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