Nos. 12-1092 & 12-1113

(no date for oral argument has been set)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN TRUCKING ASSOCIATIONS INC.
consolidated with
PUBLIC CITIZEN et al.

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Respondent

OWNER OPERATOR INDEPENDENT DRIVER'S ASSOCIATION et al.

intervenors

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

INITIAL BRIEF OF INTERVENOR IN SUPPORT OF PUBLIC CITIZEN ET AL.

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CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS AND RELATED CASES (D.C. CIR. R. 28(a)(1))

A. Parties and Amici

All parties, intervenors, and amici appearing in this court are listed in the Briefs for Petitioners.

B. Rulings Under Review

The ruling under review is a final rule entitled "Hours of Service of Drivers," Docket No. FMCSA-2004-19608, issued by the *Respondent* Federal Motor Carrier Safety Administration on December 16, 2011, and published on December 27, 2011, in Volume 76 of the Federal Register on page 81134.

C. Related Cases

References to related cases appear in the Briefs for Petitioners.

Respectfully submitted,

William B. Trescott

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STATUTES

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MISCELLANEOUS

GLOSSARY

C.F.R.	Code of Federal Regulations
CMV	Commercial Motor Vehicle
FARS	Fatality Analysis Reporting System
FMCSA	Federal Motor Carrier Safety Administration
FR	Federal Register
GAO	Government Accountability Office
HOS	Hours Of Service
NHTSA	National Highway Traffic Safety Administration
P.L.	Public Law
RIA	Regulatory Impact Analysis
SCE	safety critical event
U.S.C.	United States Code

STATUTES AND REGULATIONS

Pertinent statutes and regulations can be found in the Addendum

STATEMENT OF ISSUES

Whether the Hours of Service final rule is arbitrary, capricious, or otherwise contrary to law because it:

1) fails to prescribe requirements for **qualifications and** maximum hours of service as required in 49 U.S.C. § 31502(b);

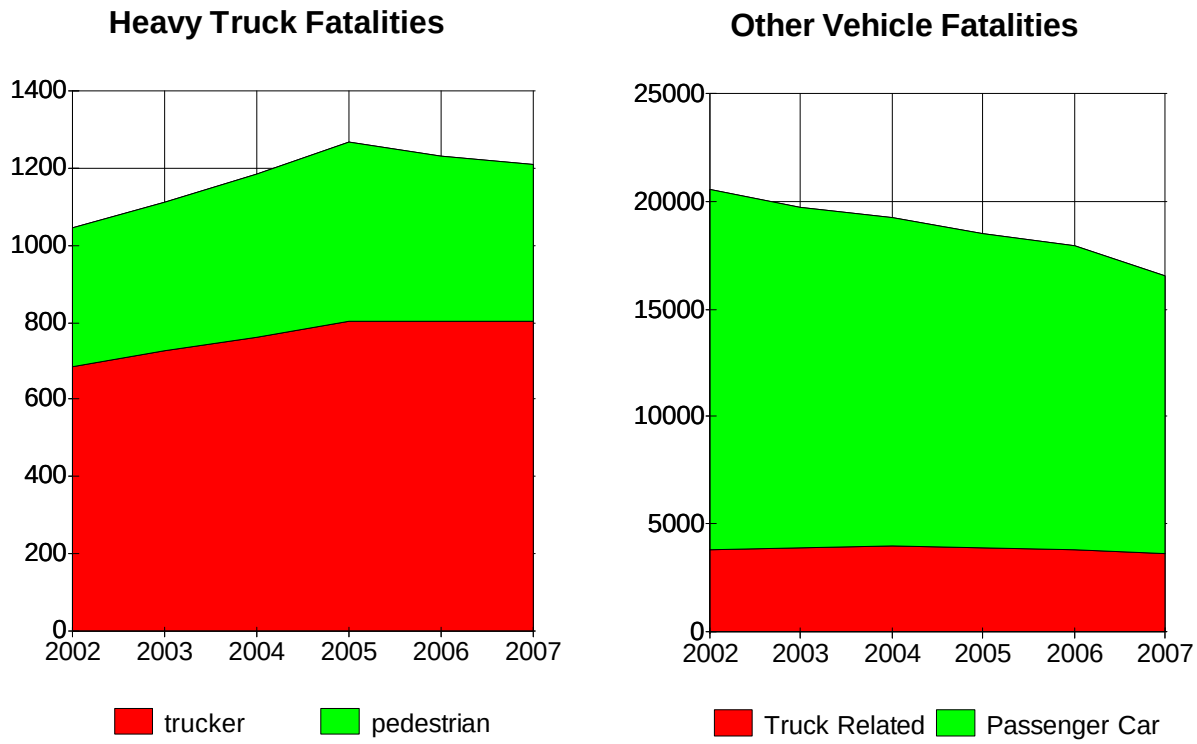
2) fails to prevent responsibilities from being imposed on entry-level drivers that impair their ability to operate commercial motor vehicles safely as required in 49 U.S.C. § 31136(a)(2);

3) fails to prevent fatigued drivers required to ride with entry level drivers from being exposed to dangerous working conditions as required in 49 U.S.C. § 31136(a)(4);

4) fails to provide drivers with adequate meal and rest breaks as required in Sections 512(a) & 11090(11)&(12) of the California Labor Code;

5) was promulgated in excess of statutory right or limitation by extending the rules to persons who are not employees of a motor carrier without a showing of substantial necessity or that professional judgment was exercised as required in 49 U.S.C. § 31502(b)(2) and 49 U.S.C. § 113(c).

STATEMENT OF FACTS



On July 11th, 2007, the Federal Motor Carrier Safety Administration (FMCSA) claimed in sworn testimony before Congress that "2005 enjoyed one of the lowest large-truck fatality rates in 30 years." D-8. As shown in the above charts,[1] the number of truckers killed on the job increased 17% between 2002 and 2005—a 16 year high. D-2. New hours of service rules compelling truckers to drive more during daytime hours increased the number of pedestrians and bicyclists killed by trucks almost thirty percent. Despite

[1] Sources: NHTSA: FARS; Large Truck Fact Sheet; Traffic Safety Overview (p.2)—http://www-fars.nhtsa.dot.gov/Trends/TrendsLargeTruckRel.aspx www-nrd.nhtsa.dot.gov/Pubs/810993.pdf, www-nrd.nhtsa.dot.gov/Pubs/810989.pdf

record high rates of seat belt use,[2] improvements in trauma care, and three orders from this Court to prevent it,[3] the number of heavy truck occupants killed in 2007 remained 16% higher than in 2002 even though passenger car fatalities decreased 20% during the same period.

According to Petitioner *American Trucking Associations, Inc.*, large truckload fleets replaced 117% of their drivers in 2007 as truckers voted with their feet to escape dangerous working conditions.[4] This means at least 17% of their replacement drivers also quit. In contrast, less-than-truckload fleets that allowed drivers to work regular hours replaced only 7% of their drivers in 2011. *id.* The FMCSA's claim based on 15 year old (1997-1999) data in its Regulatory Impact Analysis gathered before hours of service regulations were changed (p.6-25, Exhibit 6-33) that replacement drivers are only 6.8% more dangerous than experienced drivers, contradicts affidavits before the agency that after changes to hours of service rules in 2003, "drivers in their first year of driving are about 3 times more likely than a veteran driver to be involved in

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[2] www.fmcsa.dot.gov/about/news/news-releases/2008/080325.htm

[3] *Public Citizen v. FMCSA*, 374 F.3d 1209, 1218, D.C. Cir. 2004; *Advocates for Highway and Auto Safety v. FMCSA*, DC Court of Appeals, No. 04-1233, Dec. 2005; *Owner-Operator Indep. Drivers' Ass'n v. FMCSA*, 494 F.3d 188, (D.C. Cir. 2007)

[4] Fourth-Quarter Driver Turnover Makes Surprise Drop, *Trucking info.com*, 4/12/2012 www.truckinginfo.com/news/news-print.asp?news_id=76627

an accident." 72 FR 71268. Old Dominion Freight Line, named by Forbes Magazine as one of "America's 100 Most Trustworthy Companies,"[5] stated that out of 1,971 accidents in 2006, "[d]rivers in their first year made up 12% of the driver workforce, yet they had 526 or 27% of the total accidents." *id.*

The Bureau of Labor Statistics estimated that employment in the trucking industry fell 9-13% due to the recession. 75 FR 82180. According to the National Highway Traffic Safety Administration (NHTSA), truck fatalities declined 30% between 2007 and 2009[6]—proving that approximately 10% of truck drivers were indeed responsible for 30% of the 2007 fatalities. The reasonable person must therefore conclude that replacement drivers who attend diploma mills instead of being apprenticed in the trade are three times more dangerous than veteran drivers who quit their jobs as a result of changes to hours of service rules.

SUMMARY OF ARGUMENT

The Federal Motor Carrier Safety Administration is deceptively relying on a faulty cost-benefit analysis to conceal a dramatic 16-17% increase in

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[5] Jacquelyn Smith, America's Most Trustworthy Companies, Forbes Magazine, 3/20/2012 www.forbes.com/sites/jacquelynsmith/2012/03/20/americas-most-trustworthy-companies/

[6] NHTSA, Fatality Analysis Reporting system, www-fars.nhtsa.dot.gov/Trends/TrendsLargeTruckRel.aspx

trucker fatalities attributable to changes in hours of service rules. These one-size-fits-all rules fail to consider the statutorily mandated factor of driver qualification—allowing inexperienced drivers to be overworked and fatigued drivers who are required to train new drivers to be exposed to dangerous working conditions. Allowing students to replace experienced professionals cannot improve safety. The only possible motive for such a policy is to prevent labor unions from organizing workers by insuring an abundant supply of scabs for the purpose of union busting. The Agency's cost benefit analysis must consider the effect of low wage labor delaying the development of safer, more efficient intermodal technology.

ARGUMENT

I. Driver Qualifications Must Be Considered

The Hours of Service final rule is contrary to law because it fails to:

> "prescribe requirements for—
>
> (1) **qualifications and** maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier"

as required by *The Motor Carrier Act of 1935*. 49 U.S.C. § 31502(b) (emphasis added). If Congress intended that hours of service rules should be promulgated without considering driver qualifications, the word "and" found

between the words "qualifications" and "hours of service" would be surplus.

> "[A] statute ought, on the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

This Court ruled that the FMCSA's driver qualification standards are arbitrary and capricious. *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005). The complete absence of any discussion of a statutorily mandated factor makes the agency's reasoning arbitrary and capricious. See *United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989). 5 U.S.C. § 706(1).

A. Drivers Must Be Qualified To Work Long Hours

The Supreme Court ruled that unskilled pickup and delivery drivers are different than skilled long haul truckers. See *Teamsters v. United States*, 431 U.S. 324, 370 (1977) ("City drivers…have regular working hours…and do not face the hazards of long-distance driving at high speeds."). The Supreme Court also ruled that short haul driver qualifications are not the same as long haul driver qualifications ("seniority could not be awarded for periods prior to the date when…the class member met…the qualifications for employment as a line driver"). *id* at 333. The FMCSA's claim that "[t]here is no clear evidence…that "first year drivers" are 3 times as likely to crash as more

senior drivers," D-16, contradicts the above affidavits found at 72 FR 71268. An agency's explanation may not run counter to the evidence before it. See *Chemical Mfrs. Association v. EPA*, 217 F.3d 861, 866 (D.C. Cir. 2000).

The FMCSA claimed that drivers driving more than 10 hours have only a 5-7% elevated crash risk and drivers driving more than 17 hours in violation of hours of service regulations have a 20-30% elevated crash risk. 72 FR 71255. Anyone possessing common sense will recognize that it is unsafe for a fatigued driver to obey hours of service regulations if the danger to the public is increased ten times more by a replacement lacking the qualifications for employment as a line driver hauling the load (125-200% increase in crash risk) than if the fatigued driver violates the regulations (20-30% increase in crash risk). If carriers order fatigued drivers to ride in the same truck with trainees not having qualifications for employment as line drivers, complying with hours of service rules will increase their risk of being killed or injured by 175 to 250 percent. The hours of service rules are therefore contrary to law because the Motor Carrier Safety Act prohibits the Secretary from allowing carriers to impose responsibilities on entry-level drivers that impair their ability to operate commercial motor vehicles safely and to expose fatigued drivers to dangerous working conditions. 49 U.S.C. § 31136(a)(2) & (4).

5 U.S.C. § 706(2)(A).

B. Hours of Service Limits for Student Drivers Must Be Reduced

The FMCSA's claim that "reducing the driving time of inexperienced drivers would simply prolong the period before they become experienced," D-16, contradicts the Agency's own evidence "that [driver] turnover, until the recent recession, was 100 percent or more in the truckload sector" and "many of the new drivers leave the industry within a few months because of long hours…" 76 FR 81147. Petitioner *American Trucking Associations, Inc.* stated that 90% of drivers in large truckload fleets quit in 2012, compared to just 8% in less-than-truckload fleets which allow their drivers to work regular hours.[7] Anyone with common sense will recognize that overworking drivers until they quit prolongs the period before they become experienced indefinitely.

The FMCSA's Large Truck Crash Causation Study did not identify any statistically significant difference between trained and untrained truck drivers. 72 FR 73231. This proves that long haul trucking is a skilled trade that cannot be learned in a classroom. Requiring new drivers to sign yellow-dog

[7] Truckload Driver Turnover Pushes Higher in First Quarter , *Trucking info.com*, 4/12/2012, http://www.truckinginfo.com/news/news-print.asp?news_id=77224

contracts or obtain student loans to pay for worthless training is just a pay-to-play scheme that enslaves them so they can be exploited.

The Canadian Trucking Alliance stated "[a] minimum standard of entry level apprenticeship or apprenticeship-like truck driver training should be mandatory."[8] Under the challenged rules, an instructor who has driven eleven hours can legally train a co-driver for only three hours before stopping to rest. No one argues that first year drivers should be prohibited from driving smaller trucks with shorter stopping distances on local roads at low speed in the daytime, but if they are required to drive 18 wheelers long distances across state lines at high speed or at night, their hours of service limits should not exceed the amount of time their instructors have available to supervise them. As the Supreme Court stated 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). 5 U.S.C. § 706(2)(A).

[8] Canadian Trucking Alliance Tells Carriers to Take Responsibility for Driver Shortage, 4/13/2012, http://www.truckinginfo.com/news/news-print.asp?news_id=76631

C. The Agency's Cost-Benefit Analysis Must Consider the Economic Benefits of Limiting the Hours of First Year Drivers

The Government Accountability Office (GAO) reported that pollution, accident, and congestion costs of heavy trucks exceeded 112.2 billion dollars in 2007 (GAO-11-134, p.4 & 23).[9] Of the $16.3 billion the GAO attributed to accidents, about 30% or $4.9 billion can be attributed to accidents caused by inexperienced truck drivers in 2007 (see p.12 above). In its 2003 RIA, the FMCSA found "the effects of hiring new drivers were almost exactly counterbalanced by the reduced volume of long-haul trucking caused by shifting some traffic to rail." 75 FR 82180. Therefore, if first year drivers had been prevented from driving long distances by more restrictive hours of service limits in 2007, most or all of the freight they hauled would likely have been diverted to rail. The GAO found that pollution, accident, and congestion costs of trains were only one sixth as much as trucks (p.27). Diverting 10% of truck volume to rail in 2007 would therefore have saved an additional $9.35 billion or a total of $12.6 billion including accident reduction. Thus, the four thousand additional deaths attributable to inexperienced drivers

[9] *A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers*, GAO, 2011, http://www.gao.gov/products/GAO-11-134

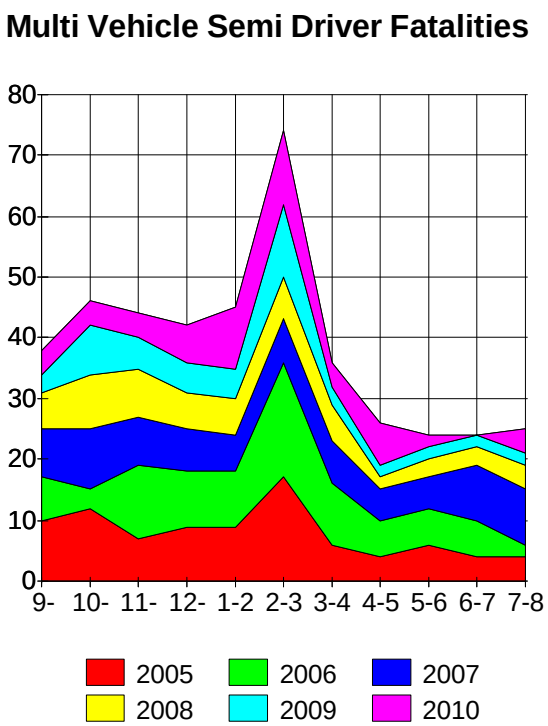
attempting to drive long haul trucks from 2006 to 2008 (*see* pp.10-12 above) cannot be justified by the Agency's cost benefit analysis.

The FMCSA's claim that the Agency has a "statutory mandate to improve the safety of commercial motor vehicle operations…not to manage private decisions about the choice of transportation options," D-16, contradicts Section 5001 of *The Intermodal Surface Transportation Efficiency Act of 1991* (P.L. 102-240) which requires the Agency to "promote development of a national intermodal transportation system…to…obtain the optimum yield from the Nation's transportation resources." 49 U.S.C. § 302(e). Section 104 of the *Motor Carrier Safety Improvement Act of 1999* (P.L. 106-159) requires the Agency to reduce the number and rates of crashes. 49 U.S.C. § 113(b). Once an agency undertakes a cost-benefit analysis, "it cannot put a thumb on the scale by undervaluing the benefits" simply by stating it is "not clear that new drivers are more prone to fatigue-related crashes" at 76 FR 81153. *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1198 (9th Cir. 2008). The RIA must include GAO estimates. See *Owner-Operator Indep. Drivers Ass'n*, 494 F.3d at 205-206 (finding the Agency's previous hours of service rule arbitrary and capricious because regulatory impact analysis ignored factors affecting costs). See also

Advocates at 1146 (holding training standards arbitrary and capricious because the agency said "practically nothing about the projected benefits"). 5 U.S.C. § 706(2)(A).

II. Additional Rest Breaks Must Be Considered

As shown on the chart below right,[10] multi-vehicle trucker fatalities double at 2-3PM due to an unethical business practice called "preloading" which requires drivers to skip lunch, then eat, talk on cell phones, read maps, and operate dispatch devices while driving as fast as they can on congested urban freeways to arrive at their next customer by 3:30 because businesses that close at 5PM usually refuse to load trucks that arrive late. Prior to 2003, there was no economic benefit to preloading because the 70 hour rule limited the number of hours a driver could work in a week. The 34 hour restart provision in 49 C.F.R. § 395.3(c) requires drivers to spend



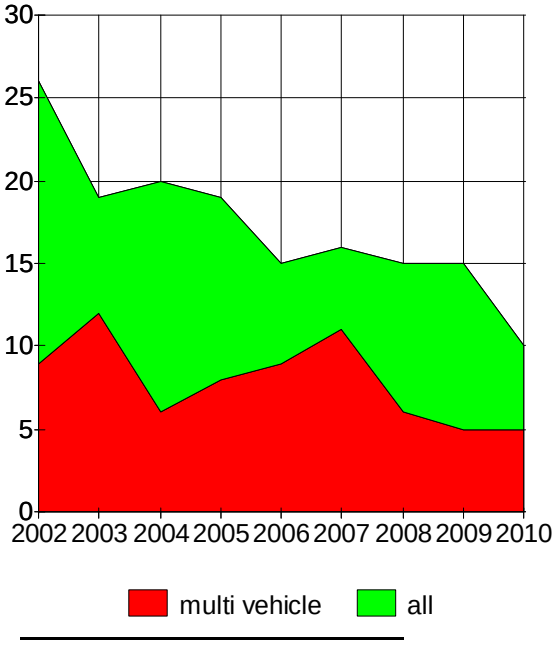
[10] Source: Fatality Analysis Query System, http://www-fars.nhtsa.dot.gov, D-2

most of their off duty time at the end of their work week or suffer a loss of income. 76 F.R. 81188.

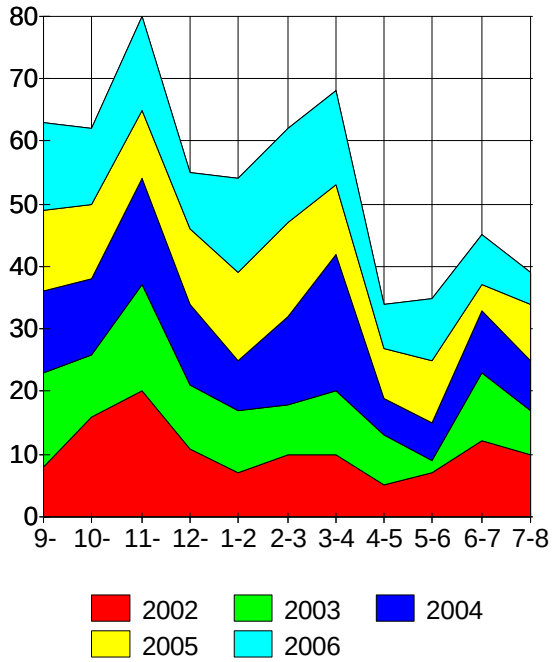
A. Eight Hours Without a Break is Inadequate Rest

In 2006, a California court ruled that truckers had to receive meal and rest breaks. *Cicairos v. Summit Logistics, Inc.*, 133 Cal App.4th 949 (2006). As shown on the chart below left, tractor-trailer driver fatalities in California fell more than 60% between 2002 and 2010—almost three times the 23% reduction nationwide due to the recession. The chart below right shows that breaks from 12 to 2PM and 4 to 6PM reduced drivers' odds of being killed in fatigue related crashes by 30-50 percent from 2002 to 2006.[11] This agrees

California Semi Driver Fatalities



Single Vehicle Semi Driver Fatalities



[11] Sources: Fatality Analysis Query System http://www-fars.nhtsa.dot.gov, D-2

with Virginia Tech Transportation Institute (Blanco) findings that "[t]he benefits from breaks from driving ranged from a 30–50-percent reduction of rate of [safety critical event] occurrence in the hour following a break."[12] Increases occurring from 2 to 4 PM and 5 to 7 PM suggest that fatigue related crashes increase by 8-10% per hour if no breaks are taken (8.3% in Blanco).

The FMCSA's claims that "[n]othing in the rule prevents drivers from taking rest breaks whenever they wish," D-15, and "[d]rivers will have great flexibility in deciding when to take the break," 76 FR 81136, contradict evidence before the agency that "[s]ome carriers schedule driver meals to take place at carrier facilities…so that unloading, sorting, and loading of outbound shipments can take place during the break." 73 FR 79205. *Chemical Mfrs. id.* at 866. A temporary relief from duty where employees must remain in the vicinity has long been held to held to be a form of on duty time. *United States v. Southern Pacific Co.* 245 Fed. 722 (9th Cir. 1917). This is also true when employees are subject to call during their lunch hour. *Chicago R.I. & P. Ry. Co. v. United States*, 253 Fed. 555 (8th Cir. 1918). The Supreme Court of California ruled "an employer may not undermine a formal

[12] Blanco, Hanowski, Olson, Morgan, Soccolich, Wu, Guo, *The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations*, p.78, www.fmcsa.dot.gov/facts-research/research-technology/report/Work-Hours-HOS.pdf

policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." *Brinker v. Superior Court of San Diego,* S166350 (4/12/2012), quoting *Cicairos* at 962-963.

Taking a break at 5PM after eight continuous hours on duty as allowed in Section § 395.3(a)(3)(ii), 76 FR 81188, will do nothing to reduce fatalities that peak between 2 and 3PM (*see* chart p.20 above). Sections 11090(11) & (12) of the California Labor Code require "the first meal break at any point during the first five hours on duty"—not eight hours. D-6. When a group of carriers petitioned the Agency to supercede the California rules under 49 U.S.C. § 31141(c)(4)(C), the FMCSA ruled that breaks every five hours would not "cause an unreasonable burden on interstate commerce." 73 FR 79206. Yet the Agency did not explain why carriers in other states should be allowed to order inexperienced drivers to drive eight hours when breaks from 2 to 3PM would likely reduce fatalities. More exacting scrutiny is needed where an agency has demonstrated inconsistent judgments on a particular question. *Natural Resources Defense Council, Inc. v. SEC,* 606 F2d 1031 (1979). 5 U.S.C. § 706(2)(A).

B. The Agency's Cost-Benefit Analysis Must Consider Health and Economic Benefits of Additional Breaks

Anyone with advanced math skills can calculate that if fatigue related crashes increase at 8-10% per hour (see p.22 above) and only one break is taken during 11 hours of driving, then approximately 18% of all crashes will be fatigue related. D-10. If three or four breaks are taken, only 6-8% of crashes will be fatigue related. *id.* According to the Agency's own data at 76 FR 81179 (Table 13), reducing fatigue related crashes from 18% to 7% will result in an annual $240 million net benefit.

The Agency claimed that "obese CMV drivers were between 1.22 and 1.69 times as likely to drive while fatigued [and] 1.37 times more likely to be involved in [a safety critical event]." 76 FR 81178. The Agency presents no evidence that obesity causes crashes. Persons with professional experience in motor carrier safety understand that missing meals causes fatigue and eating junk food while driving causes obesity as well as distraction related crashes. The Agency cannot just claim that "CMV drivers are both heavier for their height and less healthy than adult males as a whole," as though sick fat people are disproportionately attracted to trucking. 76 FR 81181. The RIA must assign a value to the health effects that accrue from missing meals. See

Public Citizen v. Mineta, 340 F.3d 39, 55-62 (2d Cir. 2003) (finding the rule arbitrary and capricious because the cost-benefit analysis was incomplete).

III. The FMCSA May Not Restrict Drivers' Individual Liberties

Funk and Wagnall's Standard Desk Dictionary defines "employee" as "one who works for another in return for a salary." Section 31132 of Title 49 defines employee as "an operator of a commercial motor vehicle." However, Section 31132 limits this peculiar definition, relied on in the challenged rule at 76 FR 81162, to "[i]n this subchapter" which is titled "SUBCHAPTER III" of "CHAPTER 311." The FMCSA's authority to limit "hours of service of employees" is found in "CHAPTER 315--MOTOR CARRIER SAFETY," not in "CHAPTER 311--COMMERCIAL MOTOR VEHICLE SAFETY." 49 U.S.C. § 31502(b).

If Congress intended that hours of service rules should apply to citizens who do not receive a salary from a motor carrier, the clause "Motor Carrier and Private Motor Carrier Requirements" heading Section 31502(b) would be "superfluous, void, or insignificant." See *Duncan id.* at 174. The regulatory language "nor shall any such driver drive…unless the **driver complies** with the following requirements" found under 49 C.F.R. § 395.3(a) at 76 FR 81188 (emphasis added) is therefore "in excess of statutory jurisdiction" because it

imposes requirements on drivers—not just motor carriers. 5 U.S.C. § 706(2)(C). " Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States." *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012)(slip op. at 26). Ensuring that "the responsibilities imposed on operators…do not impair their ability to operate the vehicles safely" is the Secretary's responsibility, not the driver's responsibility. 49 U.S.C. § 31136(a)(2). It is well known that self employed truckers usually decide their own schedules and do not have "responsibilities imposed on" them like employees do.

A. The FMCSA is Acting Under The Color of State Law

Page 4 of the Agency's 2012-2016 Strategic plan[13] states:

> "grant funding to State and local entities currently comprises more than half of FMCSA's entire annual budget. As a result, State and local grantees of FMCSA currently conduct more than 3.4 million of the 3.5 million CMV roadside inspections conducted each year…"

The Texas Transportation Code states:

> A motor carrier safety rule adopted by a local government, authority, or state agency or officer must be consistent with corresponding federal regulations. TRC § 644.051(e).

This shows that the FMCSA controls hours of service limits in Texas and that

[13] www.fmcsa.dot.gov/documents/STRATEGIC-PLAN/FMCSA_StrategicPlan_2012-2016.pdf

"the procedural scheme created by the statute obviously is the product of state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-942(1982) ("It is enough that [the Agency] is a willful participant in joint activity with the State or its agents," quoting *United States v. Price*, 383 U.S. at 794).

By taking an additional step of utilizing state roadside inspections to limit truckers' personal mobility instead of merely auditing motor carriers to ensure their employees are not being overworked, the regulatory language "nor shall any such driver drive" of Section 395.3(a) violates "liberty interests in freedom of movement and in personal 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). "[Spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

B. Fourteenth Amendment Rights Must Be Respected

The Agency has not shown that limits on personal liberties are needed as required under Section 31502(b)(2). 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."[14] Based on GAO estimates (p.18 above), this 50% increase in crashes permitted under Section 395.3(c) every other week, 76 FR 81188, will cost up to $815 million (2007$) annually compared to a 70 hour per week schedule with no recovery. These calculations reveal there is no overriding state interest that would justify detaining drivers against their will for 34 hours or reducing their incomes if they decide to stop for meals. The FMCSA therefore lacks the statutory right to impose maximum civil penalties under Part 386 if off duty truckers choose to drive loaded trucks home or to a restaurant the same way ordinary motorists carry home groceries. 79 FR 81186. 5 U.S.C. § 706(2)(C). "[W]hen 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 [such as meals] it transgresses the substantive limits on state action set by the…Due Process Clause." *DeShaney v. Winnebago County Dept. of Social Servs*., 489 U.S. 189 at 199-200 (1989). "[A] grant of federal funds conditioned on invidiously discriminatory state action…would be an illegitimate exercise of the Congress' broad spending power." *South Dakota* at 210-211. "The power to regulate commerce presupposes the

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

existence of commercial activity to be regulated." *Sebelius* at 18. Personal trips are not commercial activity. 5 U.S.C. § 706(2)(B). The Supreme Court of California ruled, "we conclude an employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done." *Brinker id.*

C. Fourth Amendment Rights Must Be Respected

No one argues that obtaining personal information to improve safety violates 4th Amendment rights. That was settled in *Cooper's Express Inc. v. Interstate Commerce Commission,* 330 F. 2d 338(1964). However, this decision did not contemplate that private industry would create devices to prevent fatigued driving without gathering personal information, D-7, or that a decade after intermodal vehicles were invented to eliminate the need for truckers to work long hours,[15] roadside inspections would be conducted not to improve safety, but to facilitate police supervision of scab labor for union busting—causing a 16-17% increase in trucker fatalities (pp.10-11 above). The Agency cannot simply ignore correct cost-benefit calculations, D-9, by

[15] U.S. Patents 6,494,313; 6,776,299; 6,840,724; 6,910,844; & 7,070,062

dismissing mathematically correct alternatives, D-11, as "your own preferred HOS regulations." D-15. The Agency must adequately consider alternatives to unwarranted searches. See *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 817(D.C. Cir. 1983).

D. Courts Must Make Certain Professional Judgment is Exercised

The *Motor Carrier Safety Improvement Act* requires that the FMCSA administrator "shall be an individual with professional experience in motor carrier safety." 49 U.S.C. § 113(c). The Agency presents no evidence that the person who promulgated the challenged rule 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 eighteen wheelers. Nor is there evidence of any articles, videos, or patent applications demonstrating expertise designing trucks or testing safety devices as any reasonable person would expect of someone who had professional experience in motor carrier safety. If Congress intended that an unqualified political appointee should be allowed to promulgate motor carrier safety regulations, the use of the phrase "professional experience" in the statutory construction would have been superfluous. *Duncan id.* at 174. 5 U.S.C. § 706(2)(C).

Even if President Obama knew nothing about trucking or the standards of the motor carrier safety profession, he had a statutory obligation to appoint a qualified professional. When lives are in danger, this obligation also falls upon the court which must "make certain that professional judgment in fact was exercised." *Youngberg* at 321.

CONCLUSION

For the forgoing reasons stated above, the court should vacate and remand.

Respectfully Submitted,

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RULE 32(a)(7)(C) CERTIFICATE

Pursuant to the Court's July 6th, 2012 Order limiting the briefs of intervenors to 4,375 words, I hereby certify that the foregoing Initial Brief of Intervenor in support of Public Citizen et al. complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B). It is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and the D.C. Circuit Rules), it contains exactly 4,375 words.

Respectfully Submitted

William B. Trescott

CERTIFICATE OF SERVICE

I certify that I caused the foregoing to be filed through the Court's ECF system, which will serve notice of the filing on counsel for all parties.

William B. Trescott

Nos. 12-1092 & 12-1113

ADDENDUM
to
INITIAL BRIEF OF INTERVENOR
IN SUPPORT OF PUBLIC CITIZEN ET AL.

STATISTICAL TABLES **Page**

STATUTES AND REGULATIONS

EXHIBITS

Heavy Truck Fatalities

Year	trucker	pedestrian
2002	684	360
2003	726	384
2004	761	423
2005	803	465
2006	805	424
2007	802	405

Other Vehicle Fatalities

Year	Truck Related	Passenger Car
2002	3853	20569
2003	3879	19725
2004	4006	19192
2005	3944	18512
2006	3766	17925
2007	3601	16520

Sources: NHTSA: FARS; Large Truck Fact Sheet; Traffic Safety Overview (p.2)
http://www-fars.nhtsa.dot.gov/Trends/TrendsLargeTruckRel.aspx ,
www-nrd.nhtsa.dot.gov/Pubs/810993.pdf , www-nrd.nhtsa.dot.gov/Pubs/810989.pdf

Multi Vehicle Semi Driver Fatalities

	9-10AM	10-11	11-12	12N-1	1-2PM	2-3	3-4	4-5	5-6	6-7	7-8PM
2005	10	12	7	9	9	17	6	4	6	4	4
2006	7	3	12	9	9	19	10	6	6	6	2
2007	8	10	8	7	6	7	7	5	5	9	9
2008	6	9	8	6	6	7	6	2	3	3	4
2009	3	8	5	5	5	12	3	2	2	2	2
2010	4	4	4	6	10	12	4	7	2	0	4

Source: Fatality Analysis Query System, http://www-fars.nhtsa.dot.gov
Vehicle Forms = 2-19, Injury Severity = 4, Vehicle Configuration = 6 (tractor/one trailer)

California Semi Driver Fatalities

	2002	2003	2004	2005	2006	2007	2008	2009	2010
multi vehicle	9	12	6	8	9	11	6	5	5
single vehicle	17	7	14	11	6	5	9	10	5

Source: Fatality Analysis Query System, http://www-fars.nhtsa.dot.gov
Injury Severity = 4, Vehicle Configuration = 6 (tractor/one trailer)

Single Vehicle Semi Driver Fatalities

Time	9-10AM	10-11	11-12N	12-1PM	1-2	2-3PM	3-4	4-5	5-6	6-7	7-8PM
2002	8	16	20	11	7	10	10	5	7	12	10
2003	15	10	17	10	10	8	10	8	2	11	7
2004	13	12	17	13	8	14	22	6	6	10	8
2005	13	12	11	12	14	15	11	8	10	4	9
2006	14	12	15	9	15	15	15	7	10	8	5

Source: Fatality Analysis Query System, http://www-fars.nhtsa.dot.gov
Vehicle Forms = 1, Injury Severity = 4, Vehicle Configuration = 6 (tractor/one trailer)

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

49 U.S.C. § 113

``(b) Safety as Highest Priority.--In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation.

``(c) Administrator.--The head of the Administration shall be the Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be an individual with professional experience in motor carrier safety. The Administrator shall report directly to the Secretary of Transportation…

49 U.S.C. § 3O2 (e)

Intermodal Transportation. - It is the policy of the United States Government to encourage and promote development of a national intermodal transportation system in the United States to move people and goods in an energy-efficient manner, provide the foundation for improved productivity growth, strengthen the Nation's ability to compete in the global economy, and obtain the optimum yield from the Nation's transportation resources.

49 U.S.C. § 31132 (Motor Carrier Safety Act of 1984)

In this subchapter--

(1) ``commercial motor vehicle'' means a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle--

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater;

(B) is designed or used to transport more than 8 passengers (including the driver) for compensation;

(C) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

(2) ``employee'' means an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who--

(A) directly affects commercial motor vehicle safety in the course of employment; and

(B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of the employment by the Government, a State, or a political subdivision of a State.

49 U.S.C. § 31136(a)

[T]he Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that

(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely;

(2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely;

(3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and

(4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators."

49 U.S.C. 31141(c)(4)

Additional or more stringent regulations.--If the Secretary decides a State law or regulation is additional to or more stringent than a regulation prescribed by the Secretary under section 31136 of this title, the State law or regulation may be enforced unless the Secretary also decides that--

``(A) The State law or regulation has no safety benefit;

``(B) The State law or regulation is incompatible with the regulation prescribed by the Secretary; or

``(C) Enforcement of the State law or regulation would cause an unreasonable burden on interstate commerce."

49 U.S.C. § 31502(b) (Motor Carrier Act of 1935)

Motor Carrier and Private Motor Carrier Requirements. - The Secretary of Transportation may prescribe requirements for -

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.

Section 11090(11) of the California Labor Code:

``(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.

``(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and employee only if the first meal period was not waived.

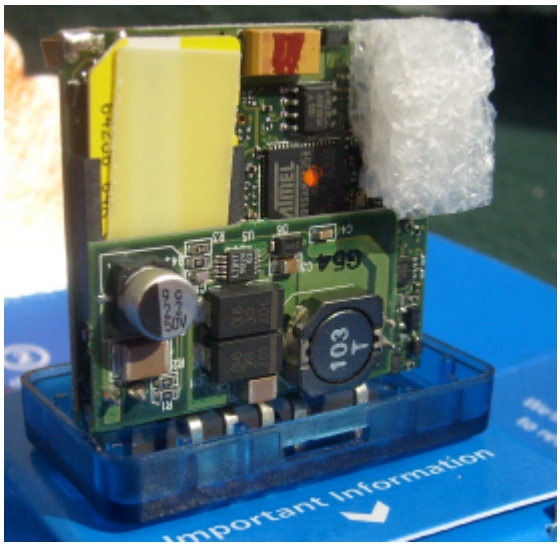
``(C) Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an `on duty' meal period and counted as time worked. An `on duty' meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

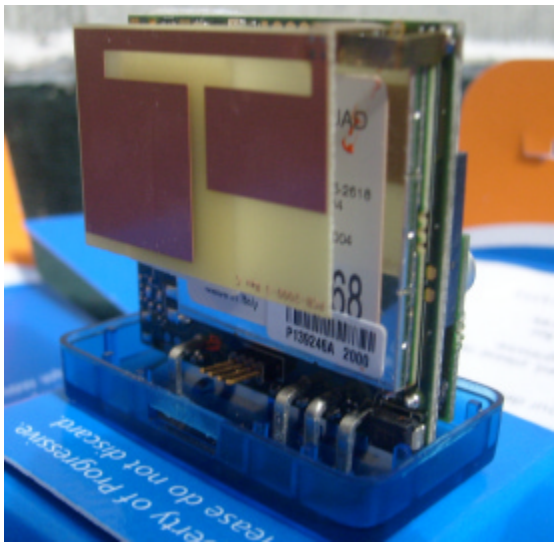
Section 11090(12) of the California Labor Code:

``(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hour worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

AFFORDABLE ELECTRONIC ON BOARD RECODERS

The wireless bicycle cyclometer shown above costs $19.95 at www.nashbar.com. The sending unit at right can store 20 seconds of data and transmit up to 10 feet. Adapting it for use in trucks would require reprogramming and a larger display with more data storage capacity. Law enforcement would require similar devices to receive its transmissions.





The Snapshot™ device shown above provided by the Progressive® Insurance company is valued at $50. It is less reliable than the cyclometer and came apart as shown above after it had to be removed and reinstalled several times. Plugged into a truck's data port, it can track driving hours as well as speeding and sudden stops of fatigued drivers. The cellular antenna shown at right can transmit several miles and the removable yellow data card at shown at left would likely be admitted as evidence in a court of law. Despite being less reliable, it is superior to the cyclometer because it automatically adjusts insurance rates in response to dangerous driving behavior without any need for involvement by government or law enforcement and it could be programmed to record changes in cargo weight.

STATEMENT OF JOHN H. HILL
ADMINISTRATOR
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT

JULY 11, 2007

Good afternoon, Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee. Thank you for inviting me to testify before you. I am pleased to describe how the Federal Motor Carrier Safety Administration (FMCSA) is working to make the nation's highways safer through better commercial vehicle operations. 2005 enjoyed one of the lowest large-truck fatality rates in 30 years. This means that despite more trucks traveling more miles, the proportion of fatalities was down. In addition, preliminary numbers for 2006 indicate that the number of people killed in commercial motor vehicle (CMV) crashes decreased for the second consecutive year. There are estimated to be 3.7 percent fewer deaths attributed to crashes involving commercial vehicles in 2006 than in 2005. However, we know that despite these gains, the drop in overall highway fatalities has not been consistent.

To meet this challenge we are expanding the use of proven strategies while simultaneously developing and implementing new and improved approaches. We are increasing our effectiveness and efficiency as we continue to coordinate safety strategies with our State partners. We are working closely with stakeholders from the trucking and motorcoach industries and the committed safety organizations through our newly chartered Motor Carrier Safety Advisory Committee.

TARGETING HIGH RISK CARRIERS

The FMCSA is committed to saving additional lives on our nation's highways. Our approach is risk-based – targeting carriers with poor performance and placing special emphasis on motorcoach companies and carriers registered as hauling hazardous materials.

Identifying motor carriers that pose the greatest risk to the motoring public and applying a vigorous compliance review (CR) and enforcement program are integral parts of the strategy FMCSA and its State partners use to reduce crashes involving CMVs. Through the use of available highway performance and compliance data, FMCSA's Motor Carrier Safety Status Measurement System (SafeStat) continues to serve as a valuable tool to identify high-risk motor carriers for prioritization of CR resources.

SafeStat is a reliable tool for identifying high-risk carriers. FMCSA's research has shown this conclusively and it has been confirmed by the Department of Transportation (DOT) Office of Inspector General (OIG) and the Government Accountability Office (GAO). The 2004 OIG report noted that CR results support the ability of SafeStat to

PETITION TO RECONSIDER
the
Hours of Service of Drivers Final Rule

published by the Federal Motor Carrier Safety Administration
Tuesday, December 27, 2011 in Vol. 76 of the Federal Register on page 81134
(Docket No. FMCSA–2004–19608-28408[1], RIN 2126–AB26)
amending 49 CFR Parts 385, 386, 390, and 395

by William B. Trescott

1. The Agency's Regulatory Impact Analysis (RIA) must be redone

The hours of service rules that went into effect in 2004 were vacated by the DC Court of Appeals. The Agency's cost benefit analysis must therefore show costs and benefits relative to the hours of service rules in effect prior to 2003. The 13% increase in heavy truck fatalities between 2002 and 2007 attributable to changes in hours of service rules (after adjusting for the 20% reduction in passenger car fatalities during this period) must be included in the Agency's cost benefit calculations. The RIA fails to include an analysis of the 13% baseline increase attributable to the 2004 rule. Nor did it identify any real increase in productivity that would justify such an enormous increase in fatalities.

2. The Agency's cost benefit analysis failed to account for the 10% increase in crashes attributable to the 2004 rule's restart provision.

The Penn State University (Jovanis) study 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."[1] This research suggests that the 2004 rule 81 hour in 7 day schedule made possible by using a restart increased crashes 10% compared to the 80 hours per week or longer schedule under the 2003 and earlier rules without a restart that was possible by lying on logbooks. While it is understood that the Agency decided to limit the use of the restart provision to once per week, the Blanco study suggests that restarts under the 2013 final rule will increase crashes 5% compared to a 70 hour in 7 day schedule having the same productivity with no restarts (since the total hours worked would be the same). The GAO estimated there were $16.3 billion in unrecovered costs attributed to truck crashes in 2007,[2] therefore the Agency underestimated the annual cost of retaining the restart provision by $815 million (2007$).

3. The Agency failed to consider safety benefits of additional rest breaks.

The Virginia Tech Transportation Institute (Blanco) study found that "[t]he benefits from breaks from driving ranged from a 30–50-percent reduction of rate of [safety

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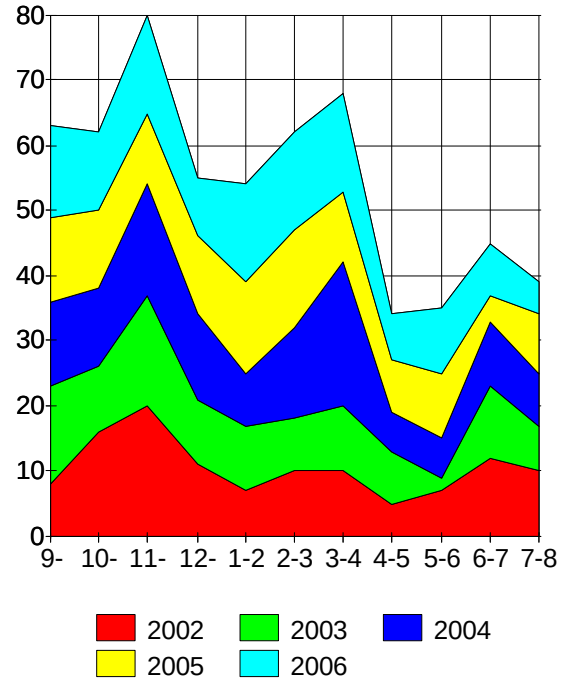
[1] Jovanis, Wu, Chen, *Hours of Service and Driver Fatigue*, page 59, www.fmcsa.dot.gov/facts-research/research-technology/report/HOS-Driver-Fatigue.pdf

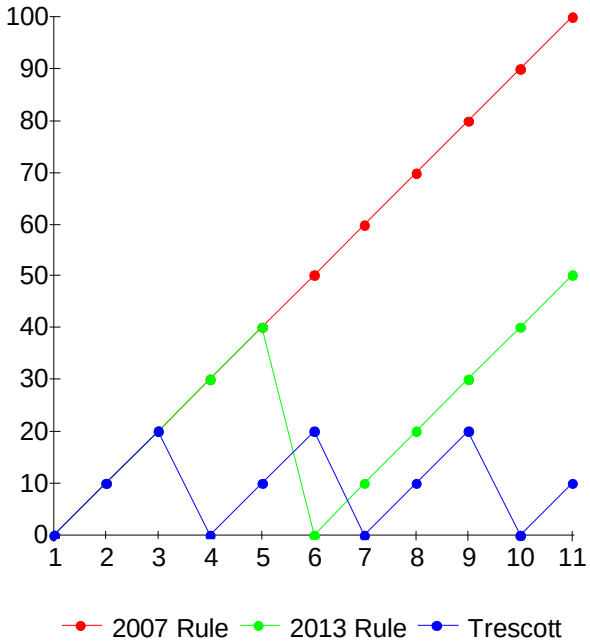
[2] *A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers*, GAO, 2011, http://www.gao.gov/products/GAO-11-134

Single Vehicle Semi Driver Fatalities



The chart at right shows the effect of breaks on the percentage increase in crashes per hour driven assuming fatigue related crashes increase at 10% per hour and breaks reduce crashes by 30%. Under the 2007 rule, crashes will increase 100% by the 11th hour, so 33% of crashes for drivers ordered to drive 11 hours without a break will be fatigue related. Under the 2013 final rule, a half hour break reduces crashes 30% after five hours so only 18% of crashes will be fatigue related. Under my proposed rules, which require a driver to take one hour of breaks every seven hours, only 6-8% of crashes will be fatigue related depending on whether three or four breaks are taken. As stated in my previous critical event] occurrence in the hour following a break."[3] The chart at left[4] clearly shows that breaks from 12 to 2PM and 4 to 6PM reduced drivers' probability of being killed in fatigue related crashes by 30-50 percent from 2002 to 2006. Increases from 2 to 4 PM and 5 to 7 PM show the likelihood of being killed in a fatigue related crash will almost double during seven hours of non stop driving." Because I relied on the National Highway Traffic Safety Administration's Fatality Analysis Reporting System as my source of data, these calculations prove that the Banko and Jovanis studies are indeed representative of the entire population of tractor-trailer drivers. Therefore, the Agency may not use its 7% or 13% assumptions of the percentage of crashes due to fatigue for the reasons made obvious in the chart below:

Fatigue Related Crashes



[3] Blanco, Hanowski, Olson, Morgan, Soccolich, Wu, Guo, *The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations*, page 78, www.fmcsa.dot.gov/facts-research/research-technology/report/Work-Hours-HOS.pdf

[4] Source: FARS Query System: Vehicle forms = 1; Injury Severity = 4; Vehicle Configuration = 6

comments, my three simplified rules are:

> Rule 1) Commercial motor vehicle operators must cease all work for 10 uninterrupted hours after each 14 hours on duty.[5]
>
> Rule 2) Commercial motor vehicle operators must rest a total of one hour during each 7 hours on duty.[6]
>
> Rule 3) Commercial motor vehicle operators may not be dispatched to drive more than 10 hours in a 24 hour period or to be on duty more than 70 hours in any time period unless an equivalent number of hours are logged off duty.

Because light duty work such as waiting time or counting freight is considered to be rest time under my proposed rules, it is unlikely that additional breaks would result in a decline in productivity. While I would impose a 10 hour dispatch limit, industry comments make clear that drivers do not usually schedule a trip for more than 10 hours anyway and that they use the 11th hour to deal with crashes, weather, and congestion. 76 FR 81167. My proposal allows two additional hours under such circumstances, so a 10 hour dispatch limit is also unlikely to result in a decline in productivity. All other things being equal, according to Table 13 at 76 FR 81179, reducing the number of fatigue related crashes from 18% to 7% by allowing drivers to take additional breaks will result in an additional $240 million annual net benefit, or a total benefit of up to $1.055 billon per year if restarts are not used. These savings would not have overlooked if the Agency had used the pre 2003 rule as the basis for its cost benefit analysis.

4. The Agency failed to consider the health benefits of additional rest breaks.

FMCSA has not quantified the benefits of improved health that accrue to drivers who have more time off. 76 FR 81178. The Agency's assertion that it does not have "dose-response curves that it can use to associate various health impacts other than sleep loss" is contradicted by its citation on the very same page that "obese CMV drivers were between 1.22 and 1.69 times as likely to drive while fatigued, 1.37 times more likely to be involved in an SCE." 76 FR 81178. Obesity does not cause fatigue. Persons with professional experience in motor carrier safety understand that **missing meals causes fatigue and eating junk food while driving causes obesity as well as distraction related crashes**.

The Agency's assertion that "[d]rivers will have great flexibility in deciding when to take the break," 76 FR 81136, is unsupported. Most trucks are equipped with satellite

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[5] The EOBR will be programmed to log the driver on duty after 15 minutes of vehicle motion from the time of the first vehicle motion and off duty from the time of the last vehicle motion 14 hours after the first vehicle motion. Unless a second smart driver's license card is present, any vehicle motion occurring outside the 14 hour window less than 10 hours after the last vehicle motion will cause the device to transmit an alarm.

[6] If the vehicle is not stationary for a total of one hour in seven, the EOBR will be programmed to transmit an alarm regardless whether a second driver's license is present.

tracking devices allowing their movements to be continuously monitored. The half hour break allowed under the final rule is not enough time to find a parking space, visit a restroom, find and empty table at a restaurant, order a meal, relax and eat, and then pay the cashier. 73 FR 79205. In many parts of the country truck stops are hundreds of miles apart and tend to cluster near each other rather than being equally spaced along the highway, therefore a value must be assigned to the increase in obesity and reduction in life expectancy that results from missing meals. The Agency cannot simply assert that "CMV drivers are both heavier for their height and less healthy than adult males as a whole," as though sick fat people are disproportionately attracted to driving trucks or that "[t]he only way to remove this stress is to allow drivers and carriers to work as many hours as they want regardless of the safety consequences." 76 FR 81181. My proposal would require employers to provide breaks during on duty hours without allowing drivers to work as many hours as they want.

Anyone with common sense will understand that the longer toxins are retained in the body, the higher the risk of bladder cancer. Drivers do not just eat during meals. They also drink. By reducing fluid intake, skipping meals increases the concentration of toxins in the bladder even if drivers are stop to relieve themselves. Driving continuously for eight hours will more than double the risk of bladder cancer. If the Agency does not reconsider its decision to allow employers to order their drivers to drive up to eight hours without meals in violation of California law,[7] the RIA must assign a value to the health effects and changes in life expectancy.

While no one disputes that "blue collar workers have rates of mortality that are roughly 25 percent higher than for 'mixed' collar workers" (RIA p.5-16), truckers have little in common with loggers, miners, and assembly line workers who perform hard labor (or are exposed to toxic substances) all day but take frequent breaks. Trucking is part of the service sector, not manufacturing, therefore **truckers must be compared to mixed collar workers who have normal live expectancy —not blue collar workers** who may have shortened life expectancy due to rigorous labor or chemical exposure. If the life expectancy of truckers is 61 or 62 as asserted by the Administrator and that of store clerks is 77 years and the value of a statistical life is 6 million, adequate meal and rest breaks must be assigned a value of $39,000 per obese driver per year for those drivers who were not in ill health prior to entering the industry. The Agency must compile data from drivers' medical certificates to identify those who's health has deteriorated since obtaining a commercial drivers license and add a prorated amount to the cost of the final rule.

5. The final rule violates 14th Amendment rights

By placing limits on truckers' personal mobility, this final rule violates "liberty interests in freedom of movement and in personal 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 Banko and Jovanis studies reveal that there is no state interest that would justify increasing crash risk 50 percent by requiring drivers to remain against their will at a truck stop for 34 hours or increasing crash risk 30 percent by

[7] Sections 11090(11) & (12) of the California Labor Code

prohibiting drivers from stopping for meals if their employers order them to remain on duty for 14 hours—as was allowed under the 2003 and earlier rules. "[W]hen 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 [such as meals] it transgresses the substantive limits on state action set by the…Due Process Clause." *DeShaney v. Winnebago County Dept. of Social Servs*., 489 U.S. 189 at 199-200 (1989).

6. The final rule violates the equal protection clause

The Bureau of Labor Statistics has estimated that due to the recession employment in the trucking industry declined 9-13% since 2008. 75 FR 82180. This decline occurred concurrently with a 30% reduction in truck related fatalities in 2008 and 2009.[8] It has long been known that "drivers in their first year of driving are about 3 times more likely than a veteran driver to be involved in an accident." 72 FR 71268. **A ten percent reduction in employment resulted in a thirty percent reduction in fatalities**. The 1997-1999 Belman studies (RIA p.6-25) have thus been discredited as obsolete. Surveys of this type no longer reflect the entire industry because employee turnover rates exceeding 90% per year[9] since the introduction of new hours of service rules prevent the vast majority of new drivers from being counted (since they leave the industry in only a few months) and experienced drivers change jobs or become self employed. The U shaped curve invented by the Agency in Exhibit 6-33 is therefore a relic of an age when most new drivers were apprenticed in the trade. Today's new drivers are 200% more dangerous than existing drivers, not 6.8%.

The Supreme Court has long recognized that unskilled pickup and delivery drivers are different than skilled long haul truckers (See *Teamsters v. United States,* 431 U.S. 324, 370 (1977) "City drivers…have regular working hours…and do not face the hazards of long-distance driving at high speeds.") and that short haul driver qualifications are not the same as linehaul driver qualifications ("[S]eniority could not be awarded for periods prior to the date when … the class member met … the qualifications for employment as a line driver." *id* at 333). The *Motor Carrier Safety Act* prohibits the Secretary from allowing first year drivers to be given responsibilities that exceed their ability to operate commercial motor vehicles safely. 49 U.S.C. § 31136(a)(2). The Due Process Clause requires the Secretary to provide equal protection from death and injury to all employees of a motor carrier. Therefore, carriers cannot have two classes of employees, one group sitting safely in offices receiving hundreds of thousands of dollars a year while others earning less than a tenth as much are exposed to three times the risk of death and injury of the average employee. **FMCSA must therefore reduce the driving hours of first year drivers to one third of experienced drivers** or require shorter routes or safer vehicles to drive. An agency's rule normally is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43(1983). 49 U.S.C. § 113(b).

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[8] NHTSA, http://www-fars.nhtsa.dot.gov/Trends/TrendsLargeTruckRel.aspx

[9] *Truckload Turnover Rises for Fourth Straight Quarter* 12/13/2011 http://www.truckinginfo.com/news/news-detail.asp?news_id=75510

7. Unrecovered costs were not included in the Agency's cost-benefit analysis

The Government Accountability Office (GAO) recently reported that unrecovered pollution, accident, and congestion costs of long haul trucks exceeded 112.2 billion dollars in 2007 (GAO-11-134, p.4 & 23).[10] Of the $16.3 billion the GAO attributed to accidents, 30%, or $4.9 billion can be attributed to accidents caused by inexperienced truck drivers in 2007. In its 2003 RIA, FMCSA found "the effects of hiring new drivers were almost exactly counterbalanced by the reduced volume of long-haul trucking caused by shifting some traffic to rail." 75 FR 82180. Therefore, if first year drivers had been prevented from driving long haul trucks by more restrictive hours of service limits in the 2007 rule, most or all of the freight they hauled would likely have been diverted to rail. Unrecovered costs of trains were only one sixth as much as trucks (GAO-11-134, p.27). Diverting 10% of truck volume to rail in 2007 would therefore have saved an additional $9.35 billion or a total of $12.6 billion including accident reduction. Thus, the 2,810 additional deaths caused by inexperienced drivers attempting to drive long haul trucks from 2006 to 2008 cannot be justified by the Agency's cost benefit analysis.

The GAO estimated that trucks moved two trillion ton-miles of freight in 2007. The Department of Transportation estimated that large trucks traveled 227 billion miles the same year.[11] This means the average truck carried less than nine tons of cargo in 2007—less than half of what a typical 18 wheeler is capable of carrying. Before low wage truckload carriers drove most unionized common carriers out of business, experienced truckers earned high wages[12] by consolidating loads—stacking light bulky freight such as building insulation on top of heavy items like car batteries to make one truck to do the work of two (*see* PSU p.5). If railroads and common carriers replaced low wage truckload carriers so that the average truck carried 18 tons of cargo instead of just 9 tons, half of the 112.2 billion dollars of annual pollution, accident, and congestion costs estimated by the GAO could potentially be eliminated—a half trillion dollars in reduced health care costs within ten years.

According to PSU (p.57), the only drivers who benefited from the present hours of service rules were those who crashed! The fact that the nation's largest truckload carrier was able to announce record profits[13] in the most severe recession since the great depression (*see* Int. Br. at 18) should alert the Court that unrecovered costs of overworked trainees may have been deliberately omitted from the Agency's cost benefit analysis. See *Advocates* at 1146 (holding driver training standards arbitrary and capricious because the Agency said "practically nothing about the projected benefits").

CONCLUSION

The Agency should perform a new cost benefit analysis and reconsider.

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[10] *A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers*, GAO, 2011, http://www.gao.gov/products/GAO-11-134

[11] NHTSA 2009 Large Trucks Fact Sheet, http://www-nrd.nhtsa.dot.gov/Pubs/811388.pdf

[12] *Sweatshops on Wheels*, Michael Belzer, Oxford University Press, 2000, p.122-3

[13] http://www.truckinginfo.com/news/news-detail.asp?news_id=73526

FMCSA-2004-19608-

U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

March 8, 2012

Refer to: MC-PSD

Mr. William B. Trescott
8028 Farm to Market Road 457
Bay City, TX 77414

Dear Mr. Trescott:

This letter is in response to your petition asking the Federal Motor Carrier Safety Administration (FMCSA) to reconsider the final rule on Hours of Service (HOS) of Drivers published on December 27, 2011 [76 Fed. Reg. 81134]. The FMCSA has decided to deny the petition for the reasons given below.

In your petition, you criticized the Agency for failing to adopt your own preferred HOS regulations, which would include longer rest breaks. It appears that you regard the rest-break provision of the new rule as the equivalent of a requirement to drive for 8 consecutive hours. In fact, 8 hours is the longest period a driver may remain on duty without a break if he or she wants to drive after that point. Nothing in the rule prevents drivers from taking rest breaks whenever they wish, including rest breaks longer than 30 minutes when that is needed or desirable. The Federal Motor Carrier Safety Regulations have long prohibited motor carriers from requiring their employees to continue driving when they are too fatigued to do so safely [49 CFR 392.3]. You argue that "[t]he half-hour break allowed under the final rule is not enough time to find a parking space, visit a restroom, find an empty table at a restaurant, order a meal, relax and eat, and then pay the cashier." Actually, the break cannot start until the driver has found a parking space and gone off duty, and impediments to enjoying a quick meal existed long before the 2011 rule was adopted. The fact that you would have preferred a different regulation is not an adequate reason to reconsider the rule.

You argued as well that the Regulatory Impact Analysis (RIA) should have used the pre-2003 HOS rule as the baseline for the comparison of the costs and benefits of the new rule. We disagree. The HOS rule adopted in 2003 has governed motor carrier industry operations since January 2004. The White House's Office of Management and Budget requires that the effect of proposed rules be measured against existing rules. The only reasonable baseline for the 2011 rule is the HOS rule in effect during the immediately preceding years. The FMCSA correctly chose the post-2003 HOS rule as the baseline for the RIA calculations.

In your petition, you claimed that the restart provision infringes truckers' "liberty interests in freedom of movement" in violation of the Fourteenth Amendment to the Constitution by requiring them "to remain against their will at a truck stop for 34 hours . . ." You also contended that the Agency's failure to limit the allowable driving hours of "first year drivers" to one-third that of experienced drivers (in order to compensate for the former's allegedly 3-fold higher crash risk) amounts to a violation of the equal protection clause of the Fourteenth Amendment because it exposes inexperienced drivers to a higher risk of death. Both of these arguments are without

merit. Drivers who voluntarily seek employment in trucking implicitly consent to the safety regulations imposed on that highly regulated industry. There is no clear evidence for your contention that "first year drivers" are 3 times as likely to crash as more senior drivers, and reducing the driving time of inexperienced drivers would simply prolong the period before they become experienced (however long that may be) and thus extend the differential risk (whatever that may be). The Agency's 2011 rule does not violate the Fourteenth Amendment.

You also argued that the FMCSA should have adopted significantly more restrictive HOS rules in order to divert freight from trucks to railroads, which you claim would have reduced macroeconomic costs (of pollution, accidents, and highway congestion) to the country. The Agency has a statutory mandate to improve the safety of commercial motor vehicle operations, which the 2011 rule has done, not to manage private decisions about the choice of transportation options.

Should you need further information, please contact Thomas Yager, Chief, Driver and Carrier Operations Division, at (202) 366-4325 or by e-mail at tom.yager@dot.gov.

Sincerely,

Anne S. Ferro