

NO DATE FOR ORAL ARGUMENT HAS BEEN SET

No. 09-1094

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

PUBLIC CITIZEN et al.

Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Respondent

WILLIAM B. TRESCOTT et al.

Intervenors

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

**INITIAL BRIEF
of
INTERVENOR FOR PETITIONERS**

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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 Brief for Petitioners.

B. Rulings Under Review

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

C. Related Cases

References to related cases appear in the Brief for Petitioners except for *Trescott v. Federal Highway Administration et al.*, 09-5280, which is related insofar as a favorable ruling in that case would moot the present case.

Respectfully submitted,



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GLOSSARY

C.F.R.	Code of Federal Regulations
FARS	Fatality Analysis Reporting System
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
F.R.	Federal Register
IFR	Interim Final Rule
NHTSA	National Highway Traffic Safety Administration
P.L.	Public Law
SUV	sport utility vehicle
U.S.C.	United States Code

STATUTES AND REGULATIONS

Pertinent statutes and regulations can be found in the Addendum:

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STATEMENT OF ISSUES

Whether the Hours of Service final rule is contrary to law because it:

- 1) fails to prescribe requirements for **qualifications and** maximum hours of service of employees of a motor carrier;
- 2) allows entry-level drivers to be given responsibilities that exceed their ability to operate commercial motor vehicles safely;
- 3) allows fatigued drivers required to ride with entry level drivers to be exposed to dangerous working conditions;
- 4) compels truckers to drive more during daytime hours when collisions with cars are more likely;
- 5) was promulgated in excess of statutory right or limitations.

Congress established a procedural requirement that only a “person with professional experience in motor carrier safety” may promulgate rules related to motor carriers or motor carrier safety.

STATEMENT OF FACTS

A. *The Negotiated Rates Act of 1993*

The *Motor Carrier Act of 1935* regulated the trucking industry as a public utility with significant barriers to entry allowing truckers to easily negotiate union contracts to facilitate compliance with hours of service rules. After competition between carriers was legalized by the *Motor Carrier Act of 1980* (P.L. 96-296), the *Negotiated Rates Act of 1993* (P.L. 103-180) set off a price war by eliminating shippers' obligations to pay filed tariff rates—allowing a flood of non-union carriers to enter the industry. The number of trucks registered increased 9% in in just two years from 1992 to 1994.¹ Truckers who arrived late with *just in time* deliveries to comply with hours of service rules could lose their jobs and their employers could lose their customers.

Instead of the usual one to two year apprenticeship required by most carriers before deregulation, the non union truck drivers attended two week training courses subsidized by the *Job Training Partnership Act* (P.L. 97-300). Because their trucks had no signs or special markings like high school

¹ *Large Truck Crash Facts 2000*, FMCSA, 2002, p. 4

driver training cars do to distinguish them from trucks driven by experienced professionals, motorists perceived an alarming increase in the number of trucks ominously zooming out of control and tailgating, along with a dramatic 15% increase in the number of motorist fatalities²—killing an additional five hundred victims per year. To protect themselves, motorists began replacing their compact cars with larger heavier sport utility vehicles (SUV's) having bumpers the same height as truck bumpers. SUV registrations skyrocketed 160% in just seven years from 1995 to 2002 after having risen only 49% in the previous thirteen years from 1982 to 1995.³

Cut throat competition altered professional ethics in trucking. Just as an airline pilot would be willing to work any number of hours to prevent a terrorist from flying his plane and a doctor would be willing to work any number of hours to prevent a quack from treating his patients, truckers felt compelled to violate hours of service regulations to protect the public from unqualified trainees attempting to steal their jobs. Violating the law was their only means of preventing their incomes from falling. The average wage of those who obeyed the rules fell from \$40,000 per year in 1978 to \$28,000 in

² *Id* at 16

³ *An Analysis of FARS and Exposure Data 1982-2002*, Anders Longthorne, Umesh Shankar, NCSA, 2004, p. 7

1997.⁴ Technical advances that might have made them more competitive, such as intermodalism, became impossible to develop because states began searching trucks without search warrants to stop trainees from operating with safety defects that they lacked the skill to detect—leaving self-employed professionals without any means of protecting their trade secrets.

B. The *Motor Carrier Safety Improvement Act of 1999*

After these blunders,⁵ Congress noticed that most competitive industries do not suffer such high rates of death and injury as trucking. This is because most large businesses employ industrial safety professionals to prevent on the job injuries by improving the ergonomics of the workplace. To restore order and make the trucking industry as safe as other industries,

⁴ (1997 dollars) *Sweatshops on Wheels*, Michael Belzer, Oxford University Press, 2000, p.122-3

⁵ Congress prohibited the Federal Highway Administration (FHWA) from spending funds to carry out the functions and operations of its Office of Motor Carriers in Section 338 of the *FY 2000 Department of Transportation and Related Agencies Appropriations Act* (Public Law 106–69) 429 to 3 in the House and 88 to 3 in the Senate eight months after I made the front page of the Radio-TV Interview Report, claiming on more than fifty radio talk shows that searches without search warrants were preventing technological development in the trucking industry (*Death on Wheels—How the Government Requires Trucks to be unsafe*, Bradley Media, mid-February 1999, p.10). Thousands responded. Ten days after this was signed by the President, the Secretary re-delegated this power without public comment to the director a new “Office of Motor Carrier Safety” he invented, 49 C.F.R. § 1.73, to be appointed by the Secretary, claiming “the Secretary has authority to take other enforcement actions, such as issuing roadside out-of service orders under 49 C.F.R. 396.9(c) or 395.13.” 64 F.R. 56270.

Section 101 of the *Motor Carrier Safety Improvement Act of 1999* (Pub. L. 106-159, 113 Stat. 1748) required that a person possessing “professional experience in motor carrier safety” carry out the duties and powers related to motor carrier safety vested in the Secretary.⁶ 49 U.S.C. § 113(f). But, President Bush appointed impostors to head the new Federal Motor Carrier Safety Administration (FMCSA) who had never driven a truck for a living, much less worked as motor carrier safety professionals as required by statute, 49 U.S.C. § 113(c), who were then confirmed without the usual adversarial hearings in the Senate. This was possible because, in an apparent conflict of interest, the wife of the Senate Commerce Committee Chairman owned a type of trucking company called a beer distributorship. It is well known that in distribution companies, sales personality is often given more consideration

⁶ Congress reacted to the unauthorized creation of the “Office of Motor Carrier Safety” in 49 C.F.R. § 1.73 by enacting the *Motor Carrier Safety Improvement Act* in only a month without a single opposing vote in either the House or the Senate—transferring all duties and powers related to motor carriers or motor carrier safety to a motor carrier safety professional appointed by the President unless the power was delegated to an agency other than the Federal Highway Administration as of October 8th, 1999, the day before funding was cut in the *FY 2000* transportation bill (Public Law 106-69) on October 9th. 49 U.S.C. §§ 113(c) & (f)(1). Rather than transfer jurisdiction over regulations on commercial motor vehicle safety promulgated under Chapter 311 authority in 23 C.F.R. 658 as required by the *Motor Carrier Safety Act*, 49 U.S.C. § 31136(d), the Secretary merely renamed his “Office of Motor Carrier Safety” the “Federal Motor Carrier Safety Administration” (FMCSA) and only transferred authority to do research under 23 U.S.C. 502, 49 C.F.R. § 1.73(o)—reserving authority to promulgate safety standards similar to those in Chapter 301 of Title 49 to himself. 49 C.F.R. § 1.73 (g). 65 F.R. 221.

than driving ability. One beer distributor was quoted as saying, “We start them out as merchandisers and then teach them how to drive.”⁷ Not surprisingly, none of President Bush’s appointees had accumulated the hundreds of thousands of crash free miles and numerous safety awards driving commercial vehicles a motor carrier safety professional would normally need to qualify for employment advising other truckers on matters concerning their personal safety. The industrial safety profession requires a knowledge of ergonomics and working conditions having nothing in common with business administration or law enforcement.

C. The Effect of the 2003 Hours of Service Final Rule

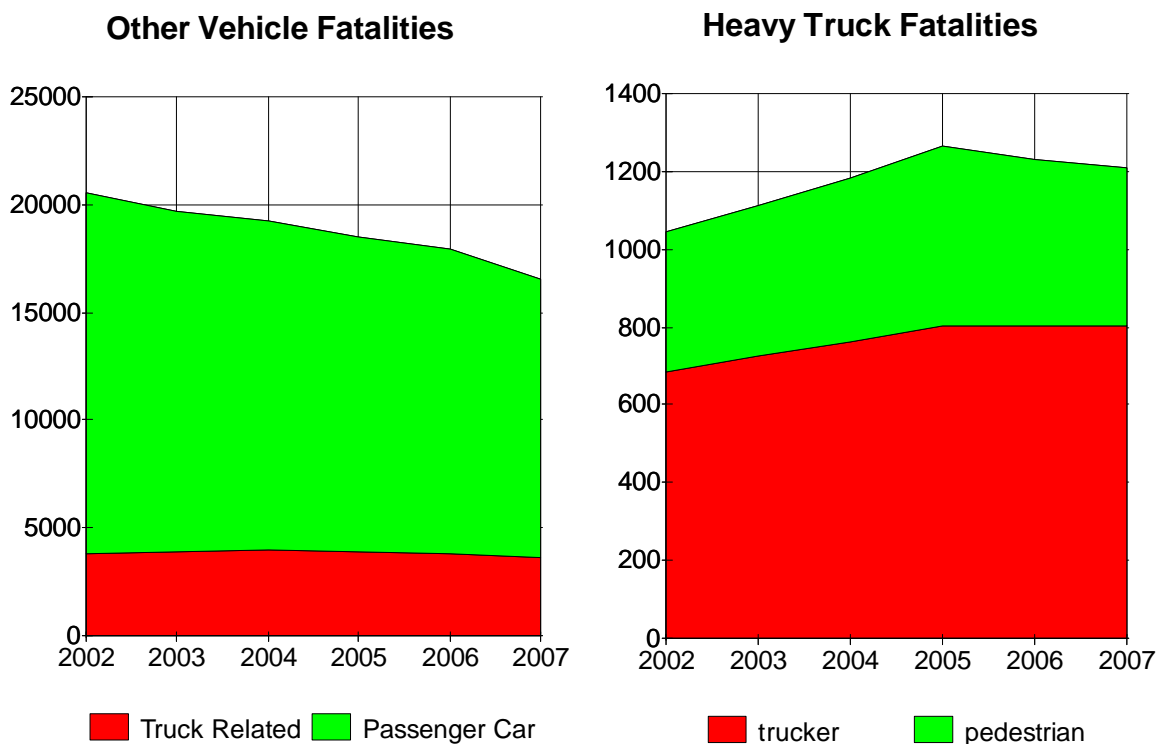
Despite record high rates of seat belt use⁸ and three separate orders from This Court to prevent it,⁹ the impostors caused the number of truckers killed on the job to increase 17% between 2002 and 2005—a 16 year high.¹⁰ The number of pedestrians and bicyclists killed by trucks increased 29%! Incredibly, in sworn testimony before Congress, FMCSA claimed: “2005

⁷ *Good People, Good Trucks*, BeverageWorld May 2006 Fleet Profile Supplement, p. 16.

⁸ <http://www.fmcsa.dot.gov/about/news/news-releases/2008/080325.htm>

⁹ *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)

¹⁰ Traffic Safety Facts 2007 Data Overview (p.2)



enjoyed one of the lowest large-truck fatality rates in 30 years” (D-11).¹¹

D. The Effect of the 2005 Hours of Service Final Rule

The number of heavy truck occupants killed in 2007 remained 16% higher than in 2002 even though, as shown on the above charts,¹² D-2, passenger car fatalities decreased 20% during the same period. The miles driven by large trucks rose only 4% between 2002 and 2006¹³—less than the

¹¹ July 11th, 2007 testimony of FMCSA Administrator John H. Hill before the House Subcommittee on Surface Transportation (D-11)

¹² Sources: NHTSA: FARS; Large Truck Fact Sheet; Traffic Safety Overview (p.2)—
http://www-fars.nhtsa.dot.gov/finalreport.cfm?title=Trends&stateid=0&year=2005&title2=Large_Truck_Related
http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/TSF/2007/810993.pdf
http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/TSF/2007/810989.pdf

¹³ Traffic Safety Facts 2007 Large Trucks (p.1)

5.5% increase in miles traveled by all vehicles¹⁴—so the 36% difference in fatal outcomes between heavy truck and passenger car occupants after changes to hours of service limits were imposed cannot be explained by changes in miles driven.

Occupants of other vehicles killed in crashes with heavy trucks fell only 7% between 2002 and 2007¹⁵—13% less than the 20% reduction in passenger car occupant fatalities due to improvements in trauma care, ergonomics, air bags, seat belt use, drunk driving enforcement, and lower speeds due to increased congestion. In its response,¹⁶ D-9, to my Second Petition to Reconsider,¹⁷ FMCSA claimed the conclusion I reached by comparing fatalities of passenger car occupants with occupants of other vehicles killed in crashes with heavy trucks, attributing 625 additional fatalities per year to changes in hours of service regulations, is “not statistically meaningful” because “A control group must be statistically identical to the test group except for the variable in question.” While it is known that motorists killed in crashes exhibit higher rates of intoxication and

¹⁴ Traffic Safety Facts 2007 Data Overview (p.3)

¹⁵ Large Truck Fact Sheets 2002 (p.2) & 2007 (p.2)

¹⁶ This response was not properly docketed. It appears in the record as an attachment to my Third Petition to Reconsider under Docket # FMCSA–2004–19608-3530.1.

¹⁷ Docket # FMCSA–2004–19608-3526.1

speeding than ordinary motorists and many replaced their smaller cars with light trucks during this period, FMCSA can cite no evidence that motorists killed in car crashes are not statistically identical to motorists killed by trucks. Except for differences in body style, SUV's and light trucks are mechanically identical to cars and their operators exhibit identical 23% rates of intoxication.¹⁸ Therefore, passenger car occupants and occupants of other vehicles killed in crashes with heavy trucks are merely subsets of the same population. Because sampling is not used in compiling fatality statistics, the 13% difference in fatality trends between these two statistically identical groups is statistically significant. The number of pedestrians and bicyclists killed by trucks increased 12.5% between 2002 and 2007 while the number of heavy truck occupant fatalities increased 16%, therefore, the reasonable person must conclude that approximately 13% of the 4,808 persons killed by large trucks in 2007, or 625 of them (3,000 killed since 2003),¹⁹ died as a result of changes to hours of service rules.

The economic benefit of these deaths to trucking companies and the oil companies that supply them have been considerable: the nation's largest

¹⁸ Traffic Safety Facts 2007 Data Overview (p.5)

¹⁹ Due to the recent recession, only 11% of the 4229 persons killed by large trucks in 2008 died as a result of changes to Hours of Service Rules—2008 Traffic Safety Highlights.

truckload carrier, J.B. Hunt,²⁰ announced record earnings of \$60.3 million in the 3rd quarter of 2008; Landstar²¹ reported record third quarter revenue of \$733 million; Conway, Celadon, Marten, Knight, Werner, Old Dominion, Heartland, Covenant, and UTS all reported revenue increases of 10 to 24 percent.²² Because most of the revenue increases resulted from fuel surcharges when the price of Diesel exceeded \$4 per gallon (a side effect of motorists replacing compact cars with less fuel efficient SUV's), the largest single beneficiary was Exxon²³—the oil company convicted of causing the nation's largest oil spill by allowing an unqualified person to control one of its supertankers—which announced record earnings of 14 billion.

SUMMARY OF ARGUMENT

The Federal Motor Carrier Safety Administration is deceptively relying on external factors to conceal a dramatic 13% increase in heavy truck fatalities attributable to changes in hours of service rules that compel truckers to drive more during daytime hours when collisions with cars are more likely—killing an additional 600 people per year. These one-size-fits-all rules

²⁰ http://www.truckinginfo.com/news/news-detail.asp?news_id=61646

²¹ http://www.truckinginfo.com/news/news-detail.asp?news_id=61672

²² http://www.truckinginfo.com/news/news-detail.asp?news_id=61739, 61735, 61717, 61740, 61674, 61738, 61708, 61766, 61794

²³ http://www.businesswire.com/portal/site/exxonmobil/index.jsp?ndmViewId=news_view&ndmConfigId=1001106&newsId=20081030005627&newsLang=en

fail to consider the statutorily mandated factor of driver qualification—allowing inexperienced drivers to be overworked and fatigued drivers who are required to train inexperienced drivers to be exposed to dangerous working conditions. Allowing unqualified 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. A secondary effect of reducing the wages of self employed professionals is to prevent the development of safer, more efficient intermodal technology.

ARGUMENT

I. Driver Qualifications Must Be Considered

This final rule as adopted from the interim final rule published on page 71247 in Vol. 72 of the Federal Register 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 separately from 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)

If Congress intended that hours of service rules should be promulgated without considering driver qualifications, a comma separating these words would have been sufficient. This Court has already ruled that the Agency’s driver qualification standards are arbitrary and capricious. *Advocates for Highway and Auto Safety v. FMCSA*, DC Court of Appeals, No. 04-1233, Dec. 2005. The complete absence of any discussion of a statutorily mandated factor makes the agency’s reasoning arbitrary and capricious. *United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989). 5 U.S.C. § 706(1).

A. Qualifications of Relief Drivers Must be Sufficient

Persons with professional experience in motor carrier safety understand that if motor carriers are to comply with hours of service regulations, relief drivers must be sufficiently qualified that the crash risk in their first hour of driving is less than the crash risk of fatigued drivers in their final hour of driving according to the following formula:

$$\text{relief driver crash rate} < \text{fatigued driver crash rate}$$

(where crash rates are measured in crashes per million miles traveled)

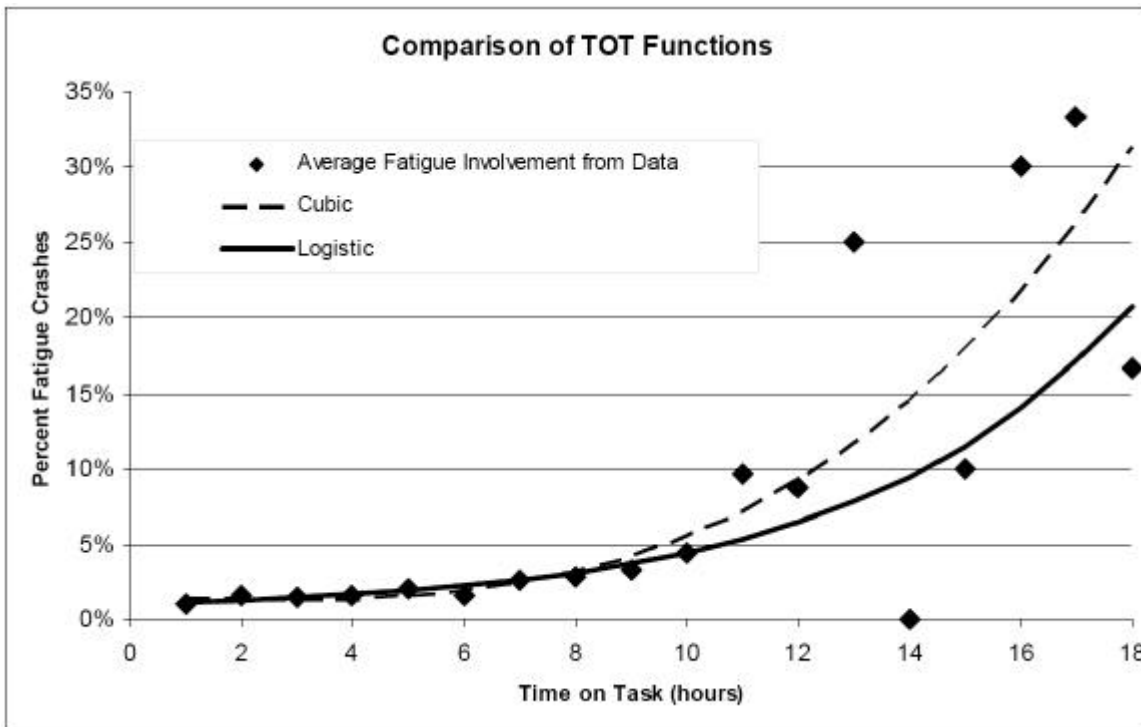


Exhibit 2

In the Hours of Service of Drivers Interim Final Rule published in Docket No. FMCSA-2004-19608, RIN-2126-AB14, 72 FR 71255 (Exhibit 2, above), the agency claimed that drivers driving in the 11th hour had a 5-7% elevated crash risk and drivers driving in the 18th hour (in violation of hours of service regulations) had a 20-30% elevated crash risk. On page 71268 in the same IFR the following affidavits also appeared:

In our industry the safety record of new drivers in their first year of work is not as good as that of experienced drivers. In 2006, Old Dominion had 1,971 accidents. Drivers in their first year made up 12% of the driver workforce, yet they had 526 or 27% of the total accidents (Affidavit, Brian J. Stoddard, August 31, 2007).

FFEG's [The Frozen Food Express Group's] experience shows that drivers in their first year of driving are about 3 times more likely than a veteran driver to be involved in an accident (Affidavit, David Hedgepeth, September 4, 2007). 72 FR 71268.

Any person having common sense will recognize that it is unethical for fatigued drivers to obey hours of service regulations if the danger to the public is increased ten times more by a trainee taking the wheel (125-200% increase in crash risk) than if they continue to drive while tired (20-30% increase in crash risk). If fatigued drivers are required to ride with unqualified trainees, compliance with hours of service rules increases their risk of being killed on the job by 175 to 250 percent! The hours of service rules are contrary to law because 49 U.S.C. § 31136(a)(2) prohibits the Secretary from allowing entry-level drivers to be given responsibilities that exceed their ability to operate commercial motor vehicles safely and Subsection 31136(a)(4) prohibits the Secretary from allowing fatigued drivers to be exposed to dangerous working conditions. 5 U.S.C. § 706(2)(A).

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

The FMCSA's assertion stated in reply to my first petition that "There is no reason to assume that a novice would necessarily replace a veteran driver who had reached the driving limit," D-7, ignores the usual method of

training in the trucking industry. It is well known that in truck driver training, a student usually rides with an instructor. The Agency's claim that "if a replacement were assigned to operate the vehicle...he or she would be just as safe as the driver who went off duty," D-8, contradicts the evidence in the above affidavits 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. An agency's explanation may not run counter to the evidence before it.

Chemical Mfrs. Association v. EPA, 217 F.3d 861, 866 (D.C. Cir. 2000).

Instruction is thought to be safe because the instructor can intercede if a student appears inattentive. Under the present rules, an instructor can legally train a co-driver for up to three hours after reaching the 11 hour driving limit. Assuming that the wording of FMCSA's claim was made in error and the Agency actually intended to say that a student would be "just as safe as the driver who went off duty" ...if he or she was being supervised by an instructor—that is—if the instructor was not off duty, then the Agency must present a reasoned argument why student drivers should be allowed to drive more than 3 hours per day or 20 hours per week. Allowing first year drivers to attempt to drive more than this triples the danger to the public and reduces "seat time"—the time that the student spends riding in the jump seat

observing an expert driving. Seat time is usually considered more important than driving time for inculcating safe practices. It is well known that in the aviation, rail, and maritime industries, copilots, brakemen, midshipmen and other types of apprentices spend most of their time observing an expert. 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." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43(1983). 49 U.S.C. § 113(b), 5 U.S.C. § 706(2)(A).

C. Scab Drivers Should Be Banned

FMCSA's Large Truck Crash Causation Study did not identify any statistically significant difference between trained and untrained drivers. 72 FR 73231. This proves that trucking is a skilled trade requiring special talents and abilities—not an unskilled occupation that can be taught to ordinary people in a training course. Sitting in a classroom reading textbooks or listening to lectures from an instructor is largely a waste of time. Because the width of trucks is statutorily limited to 8½ feet, 49 U.S.C. § 31113(a)(1), the stopping distance of most heavy trucks is twice as long as that of a car,

light truck, or SUV.²⁴ 74 F.R. 37158. The following perceptual abilities of truckers must therefore be twice as good as those of the average motorist:

- (1) twice the depth perception;
- (2) twice the night vision;
- (3) twice the alertness (insomnia).

Without these skills (or an instructor possessing the required skills being present), a student driver will not be able to see obstacles in time to stop the vehicle and the public will be endangered by sudden evasive maneuvers.

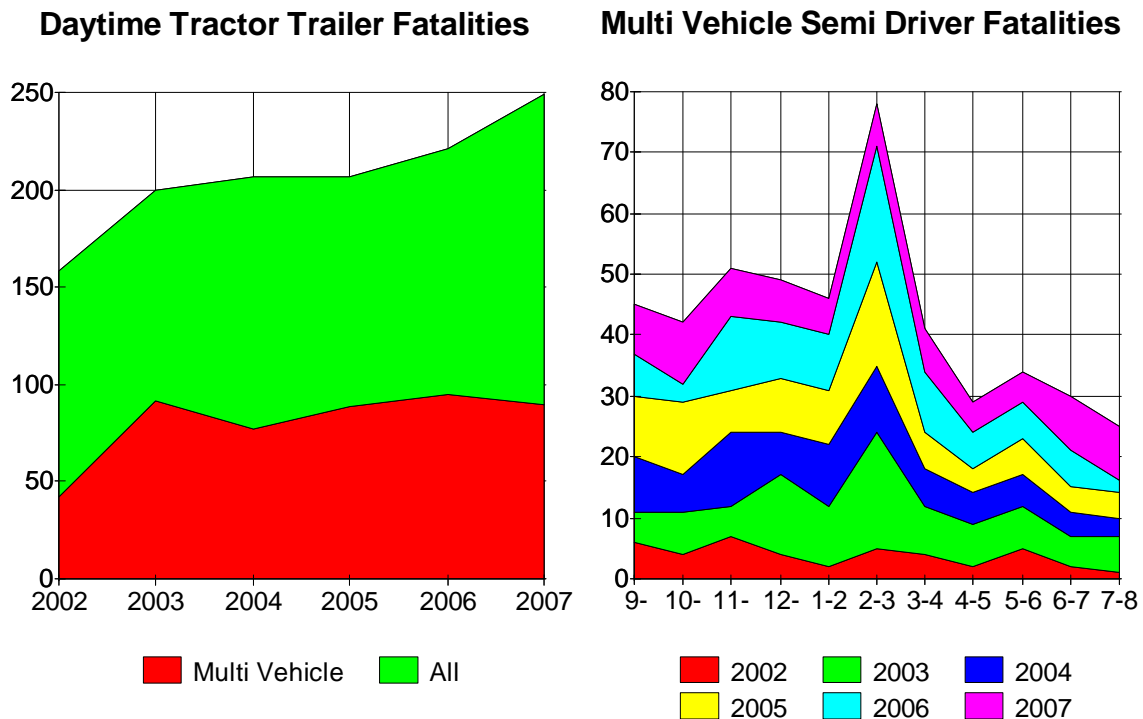
While inborn perceptual abilities are believed to improve after years of experience, the Agency can provide no evidence that vision or depth perception can be improved in a training course. No one ever developed insomnia or increased alertness sitting in a classroom. The claim that “FMCSA is developing training requirements to improve the safety of entry-level drivers,” D-8, does not address the problem of unskilled people attempting to drive heavy trucks long distances at high speed or at night

²⁴ Maximum Safe Deceleration [ft/sec²]= WG/H: where W=Track Width; H=Height; G=Gravitational Constant=32 ft/sec². Because the track width of trucks is limited to 7½ feet with single tires and 6½ feet with dual tires and shipping containers on dual wheel chassis are 13 feet tall, the maximum safe deceleration is 16 ft/sec²—half that of a 5 foot tall, 6 foot wide SUV, which is 32 ft/sec². If the tires’ coefficient of friction is too aggressive, they become tripping mechanisms causing the truck to roll over rather than slide sideways in an evasive maneuver, possibly killing the driver. “FHWA lacks the power to modify these statutorily-mandated size and weight restrictions.” *Trescott v. LaHood*, 09-5280 (DDC #08-731, p. 6, June 8th, 2009).

without supervision. That is an hours of service issue—not a training issue. A passing reference to relevant factors is insufficient. *Missouri Pub. Service Commission v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000). 5 U.S.C. § 706(1).

The likely reason FMCSA promulgated identical rules for all drivers regardless of skill or ability is so students can be employed as scabs for the purpose of union busting if their instructors go on strike. Requiring students to obtain loans to pay for worthless training or sign yellow-dog contracts to reimburse their employers if they quit their jobs is just a pay-to-play scheme that enslaves them in the event of a strike. If first year drivers were allowed to learn to drive only under the supervision of an instructor, they would have to be laid off during a strike. 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 or that beer salesmen should not be allowed to work their way up in the industry—everybody has to start somewhere—but, if first year drivers attempt 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. Government agencies must make a “rational connection between the facts found and the choice made.” *State Farm* at 43.

II. Daytime Breaks Must Be Considered



*Between the hours of 9AM and 8PM²⁵

As shown on the chart above left, according to the Fatality Analysis Reporting System, the number of tractor-trailer occupants killed between the hours of 9AM and 8PM increased 37% from 2002 to 2007 while the number of truck drivers killed in daytime crashes with other vehicles doubled! D-2. While this increase can partly be explained as an effect of unqualified drivers preferring to drive in daylight, **inexperience does not cause fatality rates to double between 2 and 3PM** as shown in the chart above right. Persons with

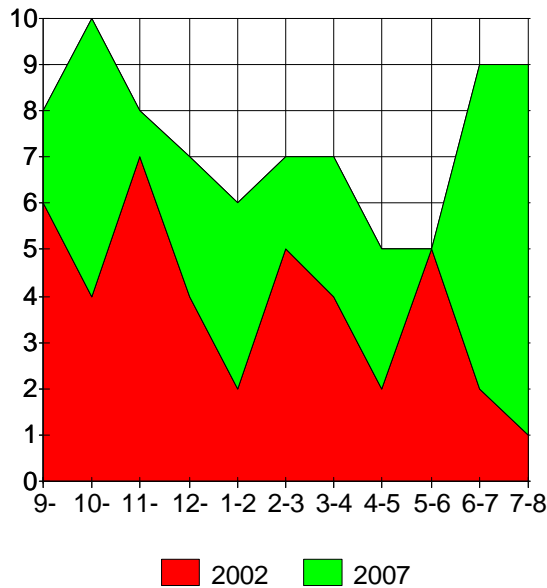
²⁵ Source: Fatality Analysis Query System, <http://www-fars.nhtsa.dot.gov>

professional experience in motor carrier safety understand that this 2-3PM death spike results from an unethical business practice called “preloading” in which drivers are scheduled to reload their trucks immediately after unloading. This forces them 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, 49 C.F.R. § 395.3(c), requires drivers to take their break time at the end of their work week or suffer a loss of income.

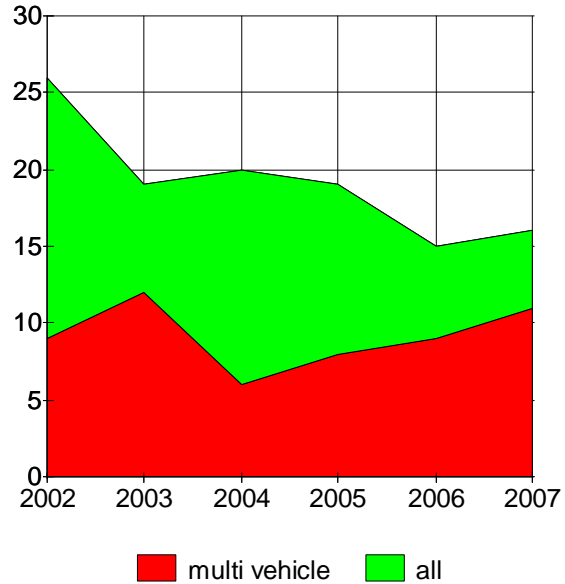
A. Meal and Rest Breaks Reduce Fatalities

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). The 2-3PM death spike observed from 2003-2006 (see chart above right) was not observed in 2007. As shown on the chart below left, peaks in 2007 occurred in the beginning and end of the day while remaining at double 2002 levels. This suggests that if dispatched hours are not reduced, mandatory breaks during the day just cause more crashes to occur later in the evening:

Multi Vehicle Semi Driver Fatalities



California Tractor Trailer Fatalities



Source: Fatality Analysis Query System <http://www-fars.nhtsa.dot.gov>, D-2

While the small numbers shown on the chart above right must be viewed as inconclusive, there was a measurable reduction in tractor-trailer occupant

fatalities thought to be fatigue

related (not involving collisions

with other vehicles) in 2006 and

2007 even though fatal crashes

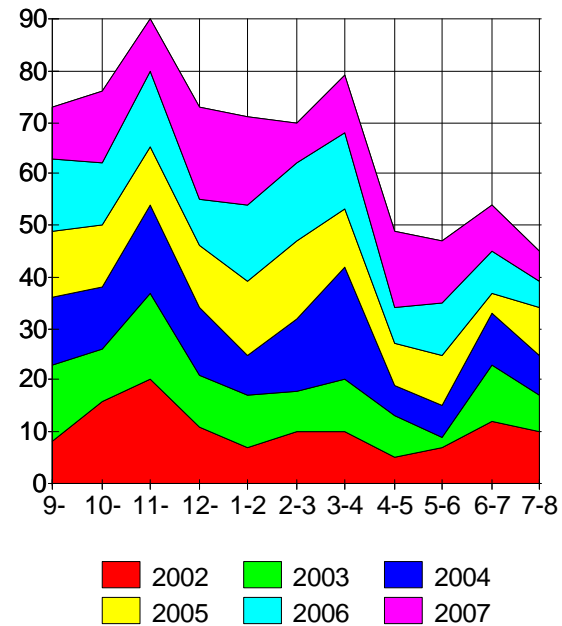
with other vehicles increased.

As shown in the chart at

right, D-3, the science proving the

benefit of meal and rest breaks is

Single Vehicle Semi Driver Fatalities



indisputable. Tractor trailer occupant fatalities thought to be fatigue related (not involving collisions with other vehicles) peak just before lunch, just before dinner (rush hour), and just before stopping for the night, with a significant reduction after the usual break times. Tractor trailer occupant fatalities declined in California because carriers were unable to use the 34 hour restart provision in § 395.3(c) to extend driving hours.

B. Rest Breaks Are Not an Unreasonable Burden

On July 3rd, 2008, a group of motor carriers petitioned FMCSA to preempt the California rules claiming:

Some 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. The Meal and Rest Break Rules, by mandating when meals breaks must be taken, interfere with such arrangements...delaying outbound operations. 73 FR 79205.

A temporary relief from duty where employees had to remain in the vicinity was 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 Agency was required to determine if “the State law or regulation would cause an unreasonable burden on interstate commerce.” 49 U.S.C. § 31141(c)(4)(C). The carriers argued:

...since the driver must be fully relieved of duty during the break, breaks will take much longer as the driver will be required to find a place to pull over and must actually park and shut down the equipment before the break can start...a driver in California has only 12½ hours of on-duty time...73 FR 79205.

The Agency ruled that limiting dispatched hours to 12 per day (not including parking time) or 12½ per day (including parking time) would not create an unreasonable burden and refused to grant the petition:

...the State rules allow the first meal break at any point during the first five hours on duty, and the second within the next five hours. Five-hour windows hardly constitute “set times.” 73 FR 79206.

FMCSA did not explain why truckers in other states should not be given breaks. More exacting scrutiny is useful 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(1).

III. Dispatched Hours Should Be Regulated—Not Driving Hours

If the 27,314 comments received by the Agency could be summarized in a single thought, a reasonable person would conclude that because of traffic congestion, twenty thousand truckers asked the Agency for more time to do their driving and FMCSA did the opposite of what they asked—allowing their employers to assign them more driving to do in less time, causing employee turnover rates to exceed 100% per year as drivers voted

with their feet to escape dangerous working conditions.²⁶

A. Truckers Falsify Logs to Take Breaks and Avoid Traffic

A driver warned the Agency in 2005 that without time to rest, “many drivers would be pressured to forge ahead when a simple break could eliminate much risk of accidents.”²⁷ Another said, “If carriers paid actual miles driven, there would be less need to falsify logs.”²⁸ It is well known that streamlined trucks use less fuel traveling at high speed than in stop-and-go traffic, so drivers feel compelled to lie on their logbooks whenever they must stop to cool overheated brakes or detour longer distances onto interstate highways to avoid congestion. Hours of service fines would need to be very high indeed to persuade self employed truckers to spend an additional several thousand dollars per year on Diesel fuel.

The Court should not be fooled by the Agency’s claim in its response,²⁹ D-9, to my Second Petition to Reconsider,³⁰ that “available data show no decline in highway safety” (internal quotes omitted) just because miles driven

²⁶ http://www.truckinginfo.com/news/news-detail.asp?news_id=58696, 6/21/2007
http://www.oregonlive.com/news/index.ssf/2009/08/oregon_lawsuit_puts_big_trucki.html

²⁷ Matthew R. Buffum, docket number FMCSA-2004-19608-1590, 3-9-2005

²⁸ Harry R. Lee, docket number FMCSA-1997-2350-23654, 7-19-2004

²⁹ This response was not properly docketed. It appears in the record as an attachment to my Third Petition to reconsider under Docket # FMCSA–2004–19608-3530.1.

³⁰ Docket # FMCSA–2004–19608-3526.1

have increased due to traffic detours or because motorists replaced their cars with SUV's. No one disputes that limited access freeways are safer than narrow two lane roads full of traffic lights or that SUV's are safer in truck crashes than compact cars. Such arguments are circular. The carnage would be greater if truckers obeyed the rules! The issue before the Court is not what penalties are appropriate for truckers who are forced to detour when delayed, but how many miles employers should be allowed to dispatch their drivers to drive when traffic is heavy. While it is understood that an unskilled motorist such as a motor carrier enforcement officer, corporate safety director, or engineer can memorize second hand information about motor carrier safety, mnemonics are not a substitute for the "professional experience" required by Section 101 of the *Motor Carrier Safety Improvement Act*. 49 U.S.C. § 113(c). If Congress intended that unskilled government employees should be allowed to promulgate regulations related to motor carrier safety, the use of the word "professional" in the statutory construction would have been superfluous. *Duncan* at 174. This raises a question of whether citizens have a legal duty to obey regulations promulgated by persons who lack the statutory right. 5 U.S.C. § 706(2)(C). After all, motor carrier safety is 90% about vehicle design and making sure that trucks are designed appropriately

for the skills of those who drive them. The decision to replace obsolete long haul trucks with more efficient intermodal vehicles was made over a decade ago.³¹ If modern trucks were legal, hours of service issues would be moot.³² Anyone with religion will understand that an expert with life and death responsibility driving an 18 wheeler, flying an airliner, or commanding a cruise ship is under no moral or ethical obligation to obey nonsensical rules promulgated by an impostor with a conflict of interest. Even if the Agency replaced *lie books* with satellite tracking, corporate safety directors would likely *correct* satellite data to conceal evidence of violations just as they do with logbooks. The agency's conclusions about the effectiveness of rules not being complied with are junk science. Courts should not accord any deference to evidence that does not bear a "rational relationship to the characteristics of the data to which it is applied," *City of Waukesha v. EPA*, 320 F.3d 228, 248 (D.C. Cir. 2003) (citations omitted); *Sierra Club v. Costle*, 657 F.2d at 333, or that is "so oversimplified that the agency's conclusions from it are unreasonable." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 535.

³¹ See *Creation of a Minority Group—The New Danger in America's Trucks*, p. 179

³² See *Trescott v. FHWA*, 09-5280, DDC #08-731, p. 6, June 8th, 2009 ("FHWA lacks the power to modify these statutorily-mandated size and weight restrictions.")

B. Satellite Tracking Devices Prevent Adequate Rest

Almost one hundred years ago, the Supreme Court provided three tests to determine whether employees are on duty or off duty, ruling: “Employees, though inactive, are none the less on duty...

[1]where they are under orders,
[2]liable to be called upon at any moment, and
[3]not at liberty to go away.”

Missouri K.&T. Ry. Co. v. United States. 231 U.S. 112 (1913). Today, any driver with a cell phone is “liable to be called upon at any moment.” Busses, taxis, and streetcars are uncommon. Hitchhiking is unsafe. Unless alternate transportation is available, drivers far from home who are “under orders” not to drive trucks equipped with satellite tracking devices are no more “at liberty to go away” than an ex-con wearing an ankle bracelet. Even if an employer allows its vehicles to be used for personal travel, drivers may not be “at liberty to go away” if electronically monitored by a government agency that will fine them for exceeding hours of service limits while off duty. The Court also ruled that even if employees had nothing to do, they remained on duty if “their duty was to stand and wait.” *id.* Therefore, something more is needed to go off duty than just orders not to drive anywhere for 34 hours. The effect of the Agency’s 34 hour restart provision in § 395.3(c) is to prevent

employees tracked by satellite from driving home or to a place they can recuperate after working 60 or 70 hours. Whether a break constitutes complete relief from duty is a question for a jury (not the employer) to decide. *United States v. Mississippi Export Railroad Co.*, 321 F. 2d 583 (1963).

C. Electronic On Board Recorders Eliminate Probable Cause

Courts have long held that obtaining personal information for a regulatory program designed to improve motor carrier safety does not violate 4th Amendment rights. That question was settled in *Cooper's Express Inc. v. Interstate Commerce Commission*, 330 F. 2d 338 (1964) in accord with *Shapiro v. United States*, 335 U.S. 1(1948) and *Sullivan v. United States*, 274 U.S. 259 (1927). But, none of these decisions contemplated that personal information would be gathered not to improve safety, but to facilitate police supervision of scab labor for union busting—causing a 13% increase in fatalities. No one disputes that unskilled trainees attempting to do the work of skilled self employed professionals need to be supervised. The question before this Court is who should supervise them—their instructors or the police? One would not teach children to play the piano by clubbing them with baseball bats! Police do not arrest high school students for errors on math tests. Why then should first year truck drivers be killed, injured, or

convicted of crimes for errors in their logbooks? Trainees are *expected* to make mistakes! 72 FR 71268. 49 U.S.C. § 31502(b) states:

“Motor Carrier and Private Motor Carrier Requirements. - The Secretary of Transportation **may** prescribe requirements for...hours of service of employees of...a motor carrier” (emphasis added).

There is nothing in this statute requiring or even permitting the Agency to supervise individual employees or trainees. Nothing in it suggests that Congress intended hours of service regulations to reach self employed truckers or instructors who are *not* employees of a motor carrier. FMCSA is supposed to regulate how motor carriers supervise their employees—not how state police supervise the employees of motor carriers. 5 U.S.C. § 706(2)(C).

Anyone with common sense will recognize that punishing a victim has an opposite effect of punishing a perpetrator. Allowing states to fine truckers for hours of service violations increases violations because carriers know that overworked employees are unable to report them. If drivers try to unionize to obtain better working conditions, carriers can fire the organizers for violating the regulations and replace them with trainees. Discussing unsafe working conditions at a union meeting could result in prosecution.

In the past, obtaining personal information was the only means available to determine the compliance of self employed truckers who had no

one to blame but themselves if they took on more work than they could safely handle. Even if the Secretary had wished to exempt them from the rules, such as when instructors exceed hours of service limits to avoid riding with unqualified trainees, state police would still have needed to obtain personal information to determine their employment status. Different limits for drivers having differing qualifications would have increased the cost of training law enforcement officers.

Today, an Electronic On Board Recorder (EOBR) can enforce a variety of different hours of service limits for students, instructors, and beer salesmen without obtaining personal information and without the need for especially trained police officers. Rules can be tailored to the type of vehicle so that a first year trainee learning to drive an 18 wheeler 20 hours per week with an instructor could practice driving a six or ten wheeler 40 hours per week without an instructor to develop perceptual skills. Except for a data storage chip in the driver's license card, smart card EOBR's³³ are mechanically

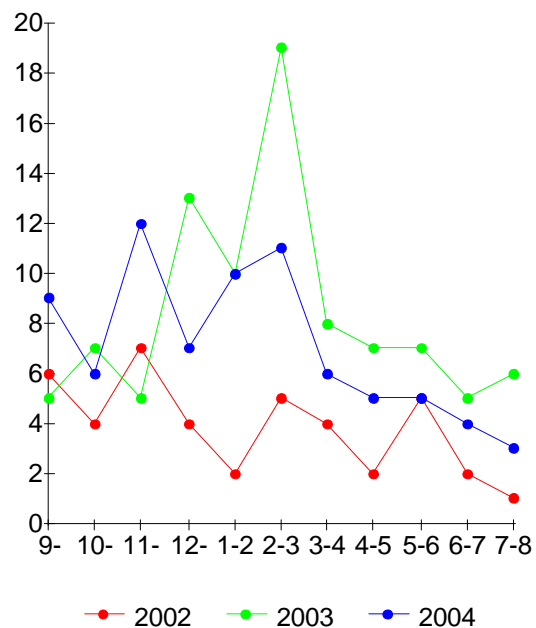
³³ A transmitting unit attached to the transmission of a truck detects motions of its drive shaft. If a valid driver's license card is not present in the cab or if the data stored on the card reveals that a driver is in violation or not qualified to operate the vehicle, a silent alarm will be broadcast when the drive shaft begins to turn incorporating a record of duty status. If no violation is detected, an updated record of duty status will be wirelessly stored on the card. For a complete description, see www.truckingvideo.com/hos.htm.

identical to wireless bicycle cyclometers. They can be programmed to electronically broadcast alarm signals to law enforcement agencies if hours of service violations are detected. When a device is available to automatically determine compliance with the rules, there can be no probable cause for law enforcement officers to obtain personal information for the purpose of employee supervision or union busting. Searching personal papers such as logbooks when devices are available to prove compliance beyond any doubt violates 4th Amendment rights. 5 U.S.C. § 706(2)(B). If it would please the Court, a \$25 wireless bicycle cyclometer can be demonstrated during oral arguments to prove that such devices are available and inexpensive.

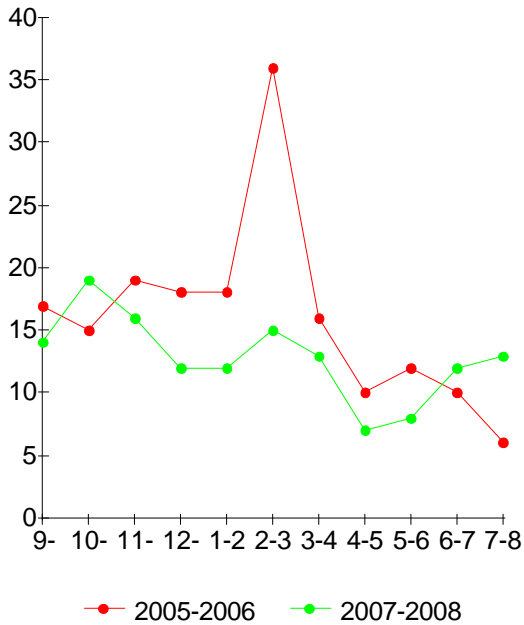
D. Threat of Litigation is a More Effective Deterrent than Fines

The 2003 statistics suggest that carriers began preloading trucks as soon as they learned that such heavy schedules would be legal by the time wrongful death cases came to trial in 2004. As shown on the chart at right, the 2-3PM death spike observed in 2003 declined in 2004

Multi Vehicle Semi Driver Fatalities



Multi Vehicle Semi Driver Fatalities



when increased hours of service limits temporarily reduced the pressure to violate speed limits. Increasing limits on driving time might have saved lives if drivers had not been overworked. As shown in the chart at left, the preloading spike reappeared in 2005 and 2006, but shrank nationwide in 2007 and 2008 after California

required rest breaks because it would have been difficult for carriers to explain to juries why drivers outside California were ordered to skip lunch. Because threat of litigation appears to have the greatest influence on carrier behavior, to reduce speeding, I petitioned the Agency to eliminate driving limits entirely while restricting dispatched driving time to 10 hours per day.

Because using an electronic on board recorder to enforce rules that have already proven to have deadly consequences would likely cause additional deaths, I petitioned the Agency to replace the current trucker's hours of service final rule with the following rules which are in agreement with Section 11090(11) & (12) of the California Labor Code, D-5:

Rule 1) Commercial motor vehicle operators must cease all work for 10 uninterrupted hours after each 14 hours on duty.³⁴

Rule 2) Commercial motor vehicle operators must rest a total of one hour during each 7 hours on duty.³⁵

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.

Under these alternative rules, only the employer can be fined if a driver is overworked, a carrier's vehicle may be used for personal travel when off duty, and a driver can be fined only for failing to stop for the required breaks.

Agencies must explain rejection of reasonable alternatives. *Public Citizen v. Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984).

CONCLUSION

Now that statistical data has proven that changes to hours of service rules have cost the lives of several thousand citizens, including hundreds of unskilled trainees who were exploited to obtain record profits, the Court should hold FMCSA officials who impersonated skilled professionals, refused

³⁴ 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.

³⁵ 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.

to obey its previous orders, and provided misleading testimony to Congress in contempt and **prohibit collection of personal information from individual drivers until an administrator who satisfies the requirements of Section 113(c) is appointed.** Further, the Court should permanently vacate without remand:

the 34 hour restart provision of 49 C.F.R. § 395.3(c);

the 11 hour driving limit of Section 395.3(a)(1); while

preserving undisturbed the 14 hour window of 49 C.F.R. § 395.3(a)(2)

and order the Agency to reconsider rest breaks, dispatch limits, reduced limits for first year drivers, and electronic on board recorders.

Respectfully Submitted



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