

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

**REPLY 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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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

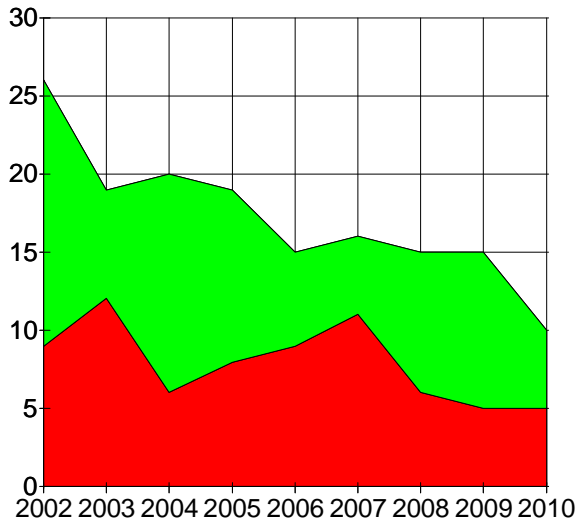
STATUTES AND REGULATIONS

Pertinent statutes and regulations can be found

in the Addendum to the Initial Brief

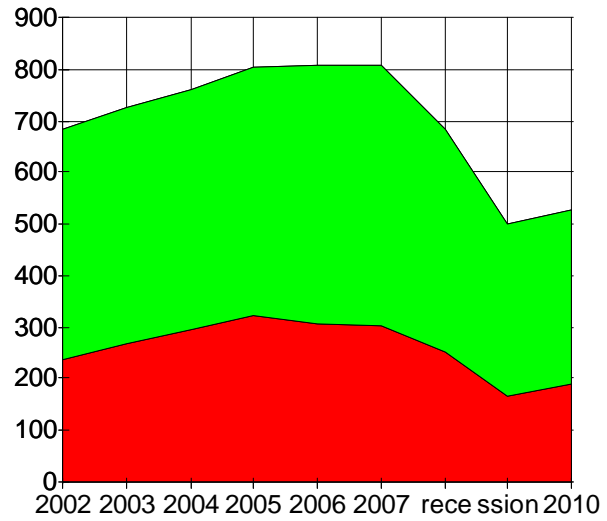
STATEMENT OF FACTS

California Semi Driver Fatalities



multi vehicle all

Nationwide Trucker Fatalities



multi vehicle all

SUMMARY OF ARGUMENT

The indisputable success of California in reducing tractor-trailer occupant fatalities more than 60% simply by allowing truckers the same rights to eat and rest that other citizens enjoy demonstrates the important role of courts in compelling agency action. Although this Court is not obligated to follow the precedent of California courts, it should do so in this case because alternatives based on California law, Int. Addendum D-11, which the FMCSA describes as “without merit,” FMCSA Br. 43(note 9), would have satisfied most of the Petitioners’ objections. Re-litigating cases wherein professional judgment was not exercised is unnecessary.

ARGUMENT

I. Summary Disposition is Appropriate

The Court's Handbook states that summary disposition is appropriate where the merits are "so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's previous] decision." *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985). It is obvious that the challenged rule is virtually unchanged from previous versions vacated by this Court. See *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004) & *Owner-Operator Indep. Drivers' Ass'n v. FMCSA*, 494 F.3d 188, (D.C. Cir. 2007). The record shows that language was added to the vacated rule, not removed. 76 FR 81186-81188. The word "vacated" appears only once at 81164. The FMCSA brings nothing new to show that the Court's mandate compelling the Agency to consider the impacts of the rule on driver health was decided in error. See *Public Citizen* at 1217. Although the Agency included effects of sleep deprivation in its cost benefit analysis, it failed to consider the health effects of missing meals—something that was not a problem before hours of service rules were changed in 2003.

Despite evidence that additional rest breaks dramatically reduced trucker fatalities in California, the FMCSA claims arguments that its obesity

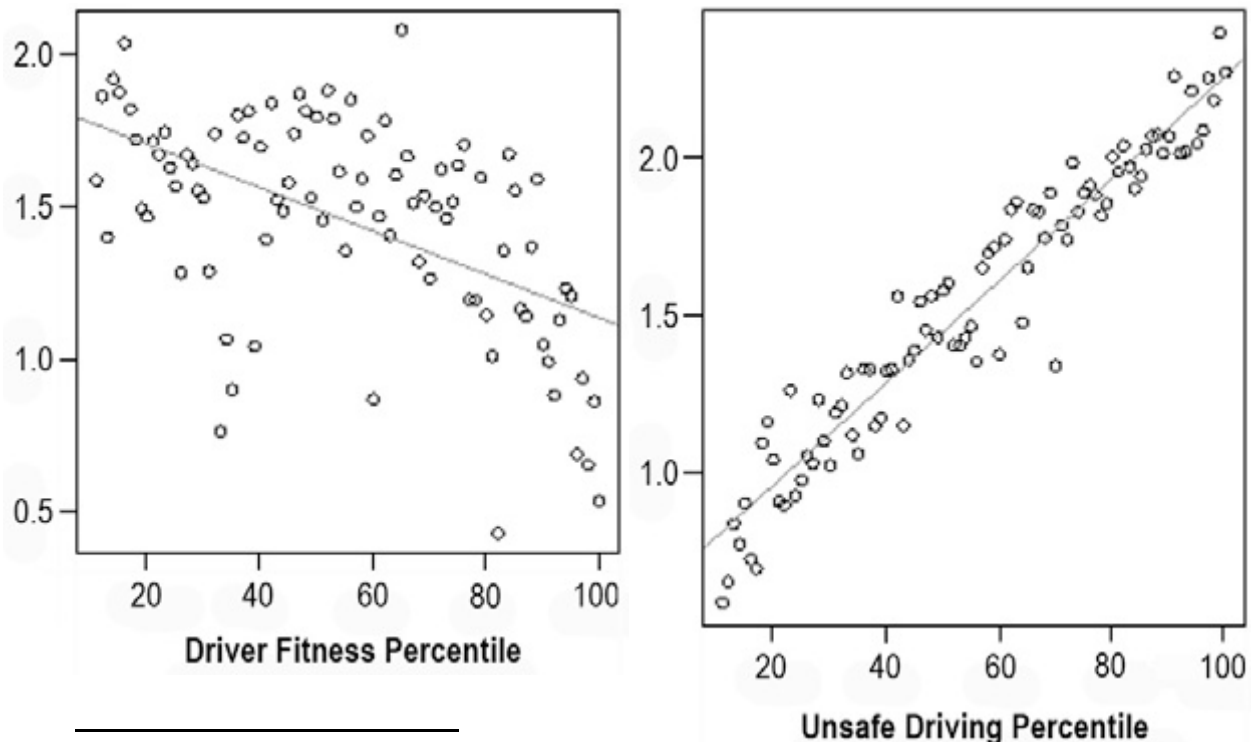
data should be used to assign a value to health effects of missing meals, Int. Br. 24, D-11, are “equally without merit and do not warrant further response.” FMCSA. Br. 43(note 9). Because the FMCSA failed to show that the Court’s previous mandate to consider effects on health has been obeyed, the Court’s inquiry need not reach the questions posed by Petitioners. The vacated parts of the rule should be summarily re-vacated on grounds of res judicata.

II. Professional Judgment Was Not Exercised

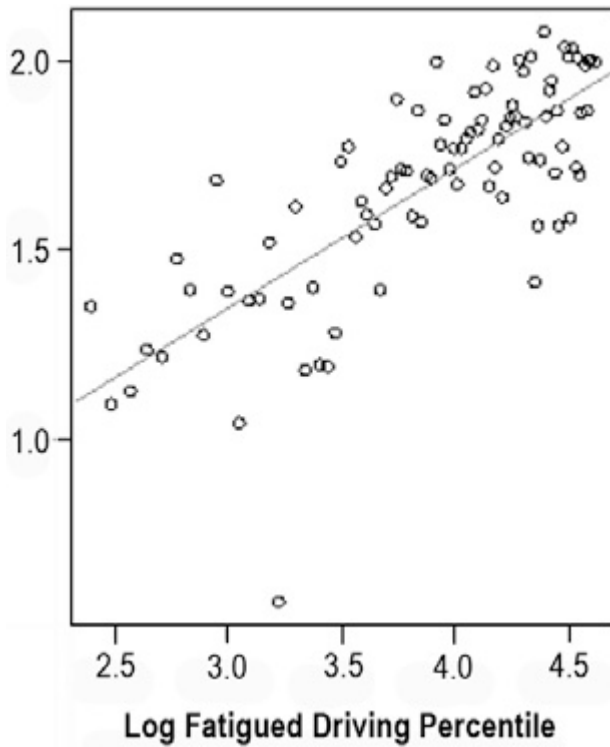
While the FMCSA understandably objects to Petitioners’ assertions of bad faith, improper motives, referring to the agency’s cost-benefit analysis as a sham, that the agency invented evidence, and egregiously misrepresented data, FMCSA Br. 23(note 2)(citations and quotes omitted), it failed to contest Intervenor’s claim in support of these provocative statements that the person who promulgated the rule lacks the “professional experience in motor carrier safety” required under 49 U.S.C. § 113(c). Int. Br. 30. The FMCSA merely states “we do not believe it is necessary to address them.” FMCSA Br. *id.*

Although the FMCSA argues at 20 that an agency is entitled to “an extreme degree of deference,” this Court made clear that such deference is appropriate only “when it is evaluating scientific data within its technical expertise,” *Huls Am., Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996)

(citation and internal quotations omitted). The FMCSA has not shown that it possesses the required technical expertise. As shown in the chart below left appearing in a recent study by the University of Michigan,¹ the FMCSA's *Driver Fitness* scores are negatively correlated with crash risk. This means drivers the Agency considers qualified are more likely to crash than drivers the Agency considers unqualified—demonstrating that the Agency lacks the technical expertise needed to determine who is qualified to work long hours. As shown in the chart below right,¹ *Unsafe Driving* behavior easily detected during apprenticeship is highly correlated with crash risk. This begs the



¹ Paul E. Green, Daniel Blower, *Evaluation of the CSA 2010 Operational Model Test*, University of Michigan Transportation Research Institute, p.41, <http://csa.fmcsa.dot.gov/Documents/Evaluation-of-the-CSA-Op-Model-Test.pdf>



question why hours of service rules were changed to make apprenticeship dangerous. *See* Int. Br. 15-17. As shown in the chart at left from the same study,¹ the FMCSA's *Fatigued Driving* scores are less correlated with crash risk than its *Unsafe Driving* scores. Some carriers with high rates of hours of service violations (dots to the right of the slanted line) are safer than carriers with fewer violations—showing that the Agency lacks the technical expertise needed to consistently determine which drivers are likely to crash as a result of fatigue and that the Agency's one-size-fits-all hours of service rules are inappropriate for this data set.

Surely the *Browner* Court did not mean to imply that someone with bogus qualifications is entitled to deference! The Supreme Court said, “[b]y “professional” decisionmaker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue.” *Youngberg v. Romeo*, 457 U.S. 307, 323(1982)(note 30). The FMCSA's

Large Truck Crash Causation Study has shown that the usual methods of education and training are ineffective at improving motor carrier safety. 72 FR 73231. Therefore, there must be a showing that the decision maker had adequate experience safely driving trucks, designing safer trucks, and testing modern safety devices to satisfy the “professional experience in motor carrier safety” requirements of 49 U.S.C. § 113(c). Absent such a showing, the rule must be vacated on grounds that the Court cannot “make certain that professional judgment in fact was exercised.” See *Youngberg* at 321.

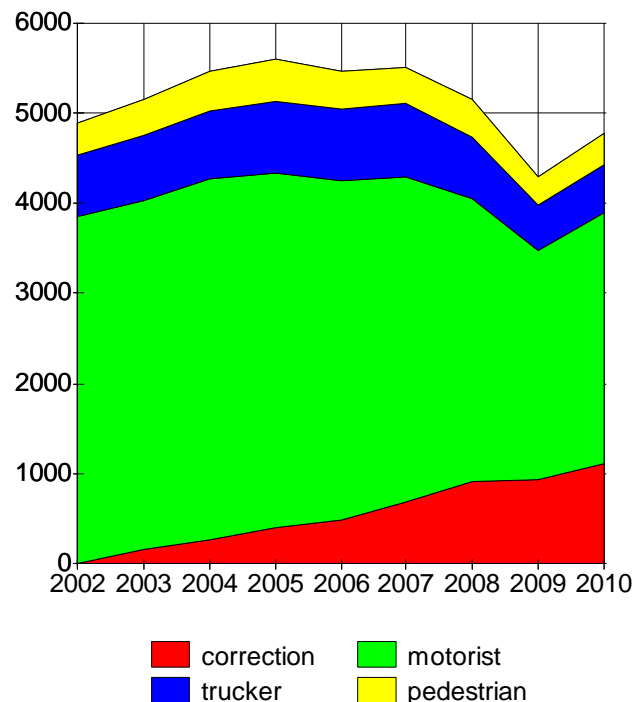
A. Hours of Service Changes Did Not Improve Safety

Intervenors for Respondent argue at 8 that large-truck crashes declined sharply between 2003 and 2009

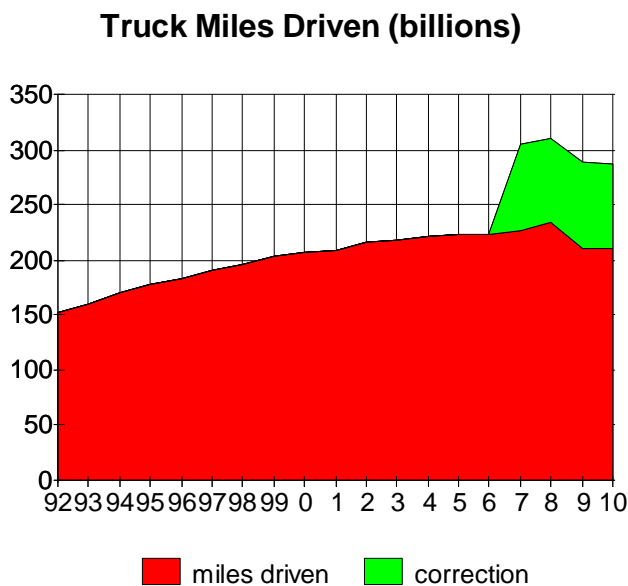
and that the improvements began in 2004, the first year in which drivers and carriers operated under the new rules. The chart at right² debunks this view.

When a correction is applied to truck safety data to compensate for improvements in car safety

Corrected Heavy Truck Fatalities



such as air bags, seat belt laws, crash absorbent bumpers, and better drunk driving enforcement,² truck safety in 2010 was no better than it was in 2002.



As shown in the chart at left,³ the dramatic *increase* in truck miles traveled in 2007 resulted from a change in accounting practices. *See* 76 FR 81142. When a correction is applied for this,³ trucks drove 5 billion

fewer miles in 2010 than in they did in 2002. The safety gains in 2009 are therefore, as Public Citizen suggests, an artifact of the 2008 recession as evidenced by the unprecedented drop in miles driven in 2009. *See* PC Br. 31. The steady increase in miles driven from 1975 to 2008⁴ shows employment in the trucking industry had never before been affected by previous recessions.

² The correction is calculated by multiplying the number of motorists killed in truck crashes by the percentage decline in passenger car fatalities since 2002. *Traffic Safety Facts 2010*, www-nrd.nhtsa.dot.gov/Pubs/811659.pdf, p.24,28

³ The correction is calculated by subtracting the difference from *Traffic Safety Facts 2010* and data reported in NHTSA's *2008 Large Truck Fact Sheet*, <http://www-nrd.nhtsa.dot.gov/Pubs/811158.pdf>, E-2

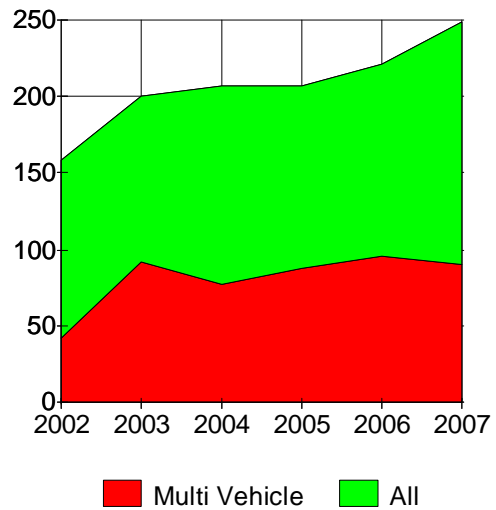
⁴ *id.* p.28

B. Hours of Service Changes Increased Daytime Fatalities

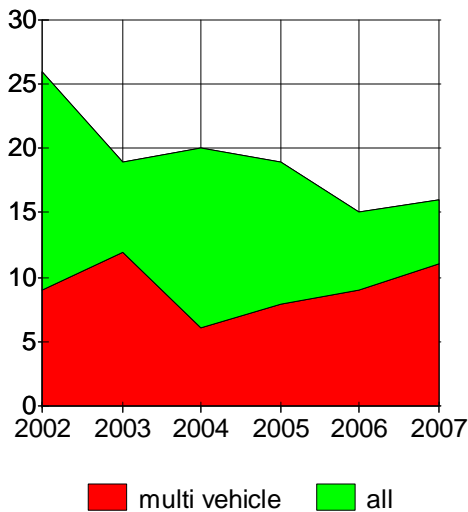
Anyone with common sense will recognize that to measure the effect of a change, one must measure before the change and again after the change. As shown above, corrected truck fatalities increased 14% from 2002 (before hours of service rules were changed) to 2005 (after the rules were changed).

The chart at right⁵ shows that in 2003 truckers killed in daytime crashes with other vehicles doubled when carriers switched from nighttime to daytime operations in preparation for hours of service changes starting January 2004.

Daytime Semi Driver Fatalities



California Semi Driver Fatalities



Although multi-vehicle fatalities also increased in California after the switch to daytime driving,⁵ deaths thought to be fatigue related (not involving collisions with other vehicles) fell 70% because

⁵ Source: *Fatality Analysis Reporting System*, www-fars.nhtsa.gov, E-2

state mandated rest breaks prevented carriers from using the restart provision to overwork their drivers. D-6. Drivers in California could not log 70 hours in less than 6 days or restart their logbooks until the following week. Public Citizen is therefore correct that the increase in driving hours permitted by the restart caused the 11% increase in single vehicle trucker fatalities nationwide from 2002 to 2007 instead of the 70% reduction seen in California.

C. Decreases Likely Resulted From Under-Reporting

The Court must take a dim view of litigants who say one thing in a brief and another in sworn testimony. Two weeks after testifying before Congress that “15 states report less than 75% of their crashes,”⁶ Intervenors for Respondent argue at 9 that “crashes per miles traveled decreased by 3.7%” in 2004. It should surprise no one that, according to the University of Michigan, the worst offender was Maryland—reporting only one crash⁷ after its former Motor Vehicle Administrator⁸ became the FMCSA Administrator.

⁶ Scott Mugno, *Written Statement of American Trucking Associations, Inc. Before the Committee on Transportation and Infrastructure*, 9-13-2012, p.5

⁷ Green, Blower, *id.* p.36 (“Maryland typically reports about 114 crashes per month to the crash file. However, by June 2010, Maryland reported only one crash that occurred in March of the same year.”)

⁸“Prior to her appointment to the FMCSA, Ms. Ferro led the Maryland Motor Truck Association as its President and Chief Executive Officer from 2003 to

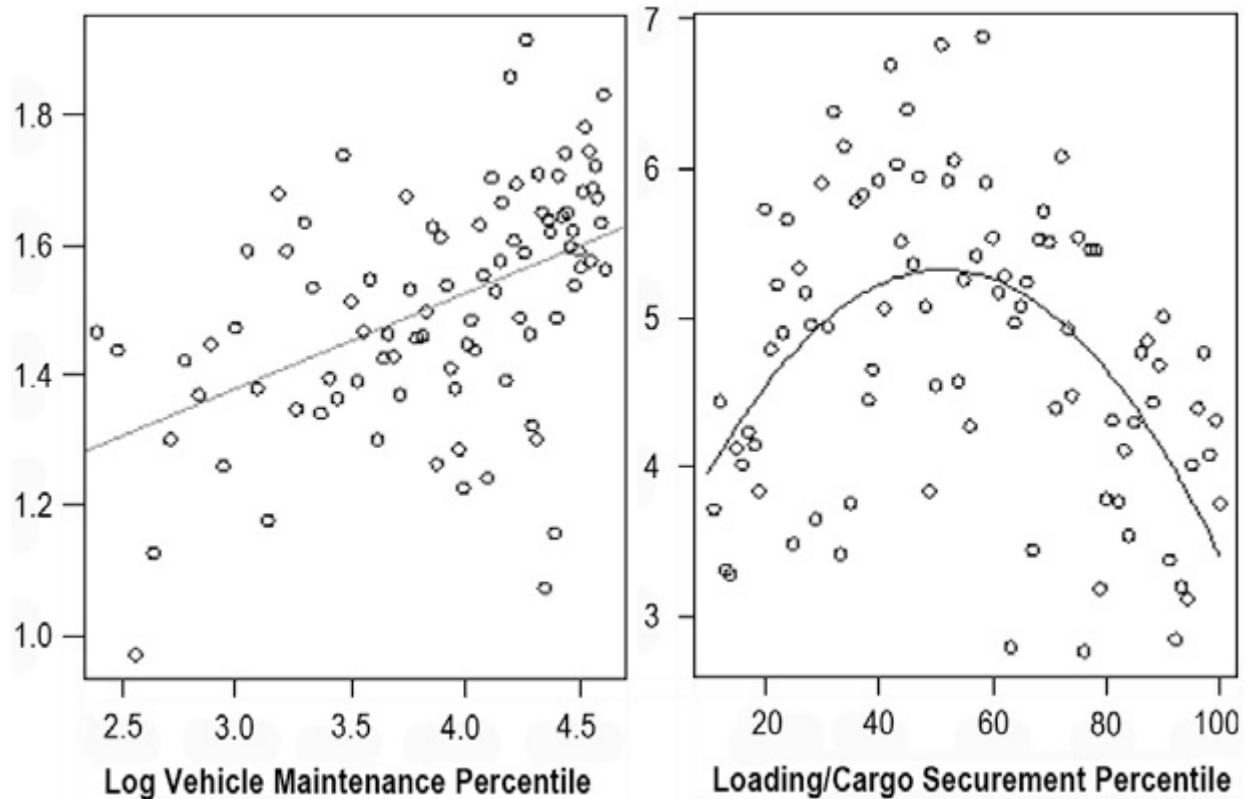
Obviously, if truck crashes are under-reported and miles driven are exaggerated, administrators with no apparent qualifications can appear to improve safety. This is why Congress mandated that the administrator of FMCSA possess “professional experience in motor carrier safety” and not just *administrative* experience. 49 U.S.C. § 113(c). Manipulating statistics is simply not the equivalent of designing trucks and testing safety devices. One cannot measure the effect of a change after it has occurred.

IV. The Vacated Rules Do Not Have Congressional Approval

The FMCSA agrees at 63 that “Congress would presumably not knowingly jeopardize the health and safety of millions of Americans.” This is why Congress cut funding to the Office of Motor Carriers in Section 338 of the *FY 2000 Department of Transportation and Related Agencies Appropriations Act* (Public Law 106–69) after Intervenor’s story appeared on the front page of the Radio-TV Interview Report⁹ claiming searches without search warrants were preventing technological development in the trucking industry.

2009; and served as the State of Maryland's Motor Vehicle Administrator from 1997 to 2003.” <http://fmcsa.dot.gov/about/contact/hq/anneferrobio.aspx>

⁹ William B. Trescott, *Death on Wheels—How the Government Requires Trucks to be unsafe*, Bradley Media, mid-February 1999, p.10



As shown in the above charts,¹⁰ vehicle inspections are almost uncorrelated with crash risk and cargo inspections are completely uncorrelated—revealing that the true purpose of roadside inspections is to supervise scab labor, not to improve safety. The Agency did not adequately consider alternatives to hours of service regulations such as decriminalizing intermodal vehicles that would eliminate the need for truckers to work long hours. D-14. Anyone with common sense will understand that innovation would be impossible in any industry if trade secrets were subject to unwarranted searches.

¹⁰ Green, Blower, *id.* p.41

When the Secretary of Transportation re-delegated police powers to a new “Office of Motor Carrier Safety” in defiance of Congressional command, 64 F.R. 56270, Congress reacted swiftly to letters received from listeners of Intervenor’s numerous radio interviews—passing the *Motor Carrier Safety Improvement Act* in only a month without a single opposing vote, transferring all duties and powers related to motor carriers to an experienced professional appointed by the President. 49 U.S.C. §§ 113(c) & (f)(1). A dozen years later, the President has yet to appoint a qualified person.

When this Court vacated unsafe hours of service rules, an unqualified administrator allegedly conspired to codify them. E-3. After draft legislation containing safer rules, E-5, was personally explained to policy advisors on the Transportation and Commerce Committees, Congress decided not to renew the stay in the *Surface Transportation Extension Act of 2004*.

A. Congress Did Not Intend to Violate Constitutional Rights

The FMCSA’s claim at 61 that “[t]he restart relates only to working hours, and does not create an unacceptable safety risk” is unsupported. According to the Department of Labor, 16% of truckers killed on the job died in non-driving incidents in 2011 (27% in 2010, though traffic fatalities were underreported)—and 18% of these non driving fatalities were due to violent

acts.¹¹ Motor carrier safety professionals understand that truckers are unable to sleep where they fear being robbed. Citizens cannot “implicitly consent” to regulations that require them to sleep in dangerous industrial areas as the FMCSA claims, D-16, because “personal security” is a Constitutionally protected interest. *Youngberg* at 313. This Court should therefore follow the precedent of the California Supreme Court that an off duty employee is “at liberty to use the [rest] period for whatever purpose he or she desires”—even driving home, to a restaurant, or to a safe place to sleep or rest. *Brinker v. Superior Court of San Diego*, _____ Cal. S. Ct. No. S166350 (4/12/2012).

CONCLUSION

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

Respectfully Submitted,



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¹¹ Bureau of Labor Statistics, *Fatal occupational injuries by industry and event or exposure*, 2011, p.18 <http://www.bls.gov/iif/oshwc/cfoi/cftb0259.pdf>

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

Pursuant to the Court's July 6th, 2012 Order limiting the Reply Brief of Intervenor to 2,187 words, I hereby certify that the foregoing Reply 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 2,183 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
REPLY BRIEF OF INTERVENOR
IN SUPPORT OF PUBLIC CITIZEN ET AL.

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EXHIBITS

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Daytime Semi Driver Fatalities Truck Miles Driven (billions)

Year	Multi Vehicle	All
2002	42	116
2003	92	108
2004	77	130
2005	88	119
2006	95	126
2007	90	159

year	miles driven	as revised
1992	153	
1993	160	
1994	170	
1995	178	
1996	183	
1997	191	
1998	196	
1999	203	
2000	206	
2001	209	
2002	215	
2003	218	
2004	221	
2005	223	
2006	223	
2007	227	304
2008	234	311
2009	211	288
2010	210	287

Source: Fatality Analysis Query System, Crash Hour = 9-19, Injury Severity = 4, Vehicle Configuration = 6 (tractor/one trailer), <http://www-fars.nhtsa.dot.gov>

Nationwide Trucker Fatalities

year	multi vehicle	single vehicle
2002	237	447
2003	267	459
2004	295	466
2005	323	480
2006	306	499
2007	303	502
2008	252	430
2009	166	333
2010	192	337

Sources: *Traffic Safety Facts 2010*, www-nrd.nhtsa.dot.gov/Pubs/811659.pdf
Traffic Safety Facts, 2008, Large Trucks
www-nrd.nhtsa.dot.gov/Pubs/811158.pdf

Corrected Heavy Truck Fatalities

year	correction	motorist	trucker	pedestrian	passenger car	%decline
2002	0	3853	684	360	20569	0
2003	159	3879	726	384	19725	4
2004	268	4006	761	423	19192	7
2005	394	3944	803	465	18512	10
2006	484	3766	805	424	17925	13
2007	694	3608	805	409	16614	19
2008	907	3151	682	412	14646	29
2009	925	2558	499	323	13135	36
2010	1103	2790	529	356	12435	40

The correction is calculated by multiplying the number of motorists killed in truck crashes by the percentage decline in passenger car fatalities since 2002. Source: *Traffic Safety Facts 2010*, www-nrd.nhtsa.dot.gov/Pubs/811659.pdf

July 18, 2005

Mr. Ken Mead
Inspector General
Office of the Inspector General
Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Inspector General Mead:

It has come to our attention that a meeting allegedly took place between the Administrator of the Federal Motor Carrier Safety Administration (FMCSA), Ms. Annette Sandberg, and representatives of the trucking industry to jointly plan a lobbying strategy to alter the pending highway legislation, H.R. 3, that is before a joint House-Senate conference committee. At the meeting, which occurred on or about July 14, 2005, we understand that a lobbying strategy was developed to advance legislative amendments pertaining to the hours of service (HOS) regulations. In particular, the meeting may have included discussion of a plan to promote amendments sought by the Department of Transportation (DOT), one to codify the current HOS even though rulemaking is pending, another to undercut federal law that now requires health protection for truck drivers, along with a separate proposal to amend the HOS rules by counting daily break time as off-duty time (i.e., “off the clock”) rather than as on-duty time (“on the clock”). The latter proposal would, in effect, extend the length of the driver’s workday to 16 hours and was withdrawn on the House floor because of major opposition. We are concerned that participation in this meeting, and in the discussion regarding HOS legislative strategy, if it indeed occurred, may well constitute a violation of statutory lobbying restrictions and the ethical conduct required of federal officials.

First, federal law prohibits appropriated federal funds from being used, **directly or indirectly**, to pay for actions “**intended or designed to influence in any manner a Member of Congress . . . to favor or oppose by vote or otherwise, any legislation or appropriation by Congress. . .**” Consolidated Appropriations Resolution, 2003, Sec. 322, Pub. L. 108-7 (Feb. 20, 2003), identical language has appeared in previous DOT appropriations bills. A meeting with a major industry lobbying group involving federal agency personnel to jointly plan strategy or discuss actions involving efforts to secure Congressional approval of legislation, or amendments to legislation, may constitute a violation of federal law. **Any expense** of federal agency funds, whether used directly or indirectly, to advance an effort to influence Congress to favor these amendments violates the letter, meaning, and intent of the law. Thus, the cost of the Administrator’s time to attend the meeting, or the presence of agency staff at the meeting, the use of an agency telephone to set up the meeting or convey the results, or the use of agency stationary in furtherance of the intent or design to influence Congress would qualify as an expense and violate the law.

Second, merely holding such a meeting to discuss matters that are the subject of a pending agency rulemaking constitutes a prohibited *ex parte* meeting. In this instance, rulemaking on the HOS regulation is pending, U.S. DOT docket No. FMCSA-2004-19608, and the public comment period closed on March 10, 2004. Moreover, the intent of such a meeting appears to have been to develop a legislative plan that would substantively affect the provisions in the pending rule and thwart the rulemaking process. Participation in a private meeting to discuss ways and means to obviate pending agency rulemaking or to alter or change the substance of the rule behind closed doors could implicate agency personnel in official misconduct. Private meetings between agency officials with stakeholders regarding substantive issues of pending rules at the very least abridge the public's due process rights and violates both the Administrative Procedures Act (APA) and DOT regulations prohibiting *ex parte* meetings while rulemaking is pending.

Finally, participation in a meeting to secretly discuss pending business before the agency presents serious implications regarding the role of agency management in relation to the industry over which they have regulatory authority and their responsibility for public safety. These actions may also constitute an ethical violation of the guidelines published by the federal Office of Government Ethics.

Because such a meeting would have a significant impact on the integrity of a federal agency and the conduct of official government business, we request that you open a formal investigation in order to determine the facts and whether any laws, regulations, and ethical standards may have been violated.

Joan Claybrook
President
Public Citizen

Daphne Izer
Founder
Parents Against Tired Truckers

John Lannon
Executive Director
Citizens for Reliable and Safe Highways

Andrew McGuire
Executive Director
Trauma Foundation

A BILL

To amend titles 23, 29, and 49, United States Code, relating to driver qualifications, hours of service, weight, and width limitations for vehicles operating on Federal-aid Highways, and for other purposes.

*Be it enacted by the Senate and House of Representatives
of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the '**Safer Truck and Infrastructure Preservation Act**'.

SEC. 2. FINDINGS.

The Congress finds the following:

(1) Eight hundred truckers were killed on the job in 2005—a 16 year high no less significant than the number of troops killed in Iraq. Ill conceived hours of service rules requiring truckers to drive more during daytime hours have increased fatal truck crashes in urban areas 26% and multi-vehicle trucker fatalities 36% in only three years, despite record high rates of seat belt use.

(2) Trucking is the deadliest occupation in the United States. One in every seven Americans killed on the job is a trucker. Five thousand Americans are killed by trucks each year, with more than a hundred thousand injured. A sober motorist is twice as likely to be killed by a heavy truck as by a drunk driver. 83% of multi-vehicle truck crashes involve more than two vehicles. The number of fatal crashes involving large sport utility vehicles increased 36% since 2002 as motorists purchased larger, less fuel efficient personal transportation to protect themselves—further endangering occupants of smaller vehicles and dramatically increasing the nation's dependence on foreign oil.

(3) Intermodal technology is available to replace long haul trucks. Computer driven suspensions and road-rail-waterway distribution systems can eliminate damage to roads and bridges. Hybrid drive trains can double the fuel economy of trucks—reducing the nation's dependence on foreign oil. Better brakes, stronger cabs, and crash absorbent body panels can prevent the high rate of death and injury in trucking.

(4) It is in the national interest that truck size and weight limits be adjusted to permit trucks and intermodal vehicles to be fitted with better brakes, heavier computer driven suspension components, batteries to capture energy lost during braking, and crash absorbent safety features.

SEC. 3. DRIVER QUALIFICATIONS AND HOURS OF SERVICE

Section 213(b)(1) of title 29, United States Code, is repealed.

Section 31502(b) of title 49, United States Code, is amended to read as follows:

(b) Motor Carrier and Private Motor Carrier Requirements.—

The Secretary of Transportation shall prescribe requirements for qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier and a motor private carrier such that

(1) commercial motor vehicle operators must cease all work for 10 uninterrupted hours after each 14 hours on duty;

(2) commercial motor vehicle operators must rest a total of one hour during each 7 hours on duty so that no more than 12 hours of driving or other labor may be performed within a 24 hour period;

(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;