

WILLIAM B. TRECOTT PETITION FOR WAIVER

of California and Washington

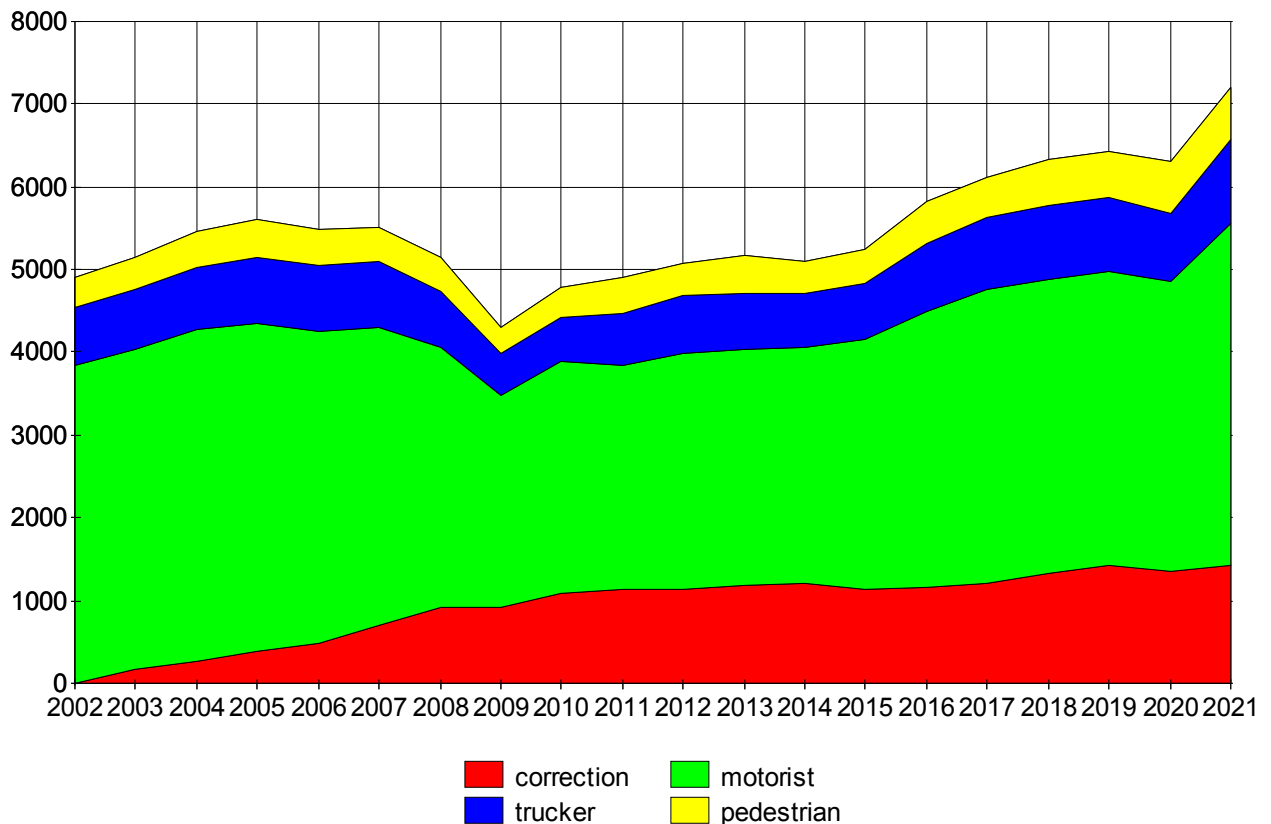
Meal and Rest Break Preemption Determinations

Dockets: FMCSA-2018-0304; FMCSA-2019-0068; FMCSA-2019-0128

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I hereby petition the Federal Motor Carrier Safety Administration to waive the above determinations in the interest of public safety on the following grounds:

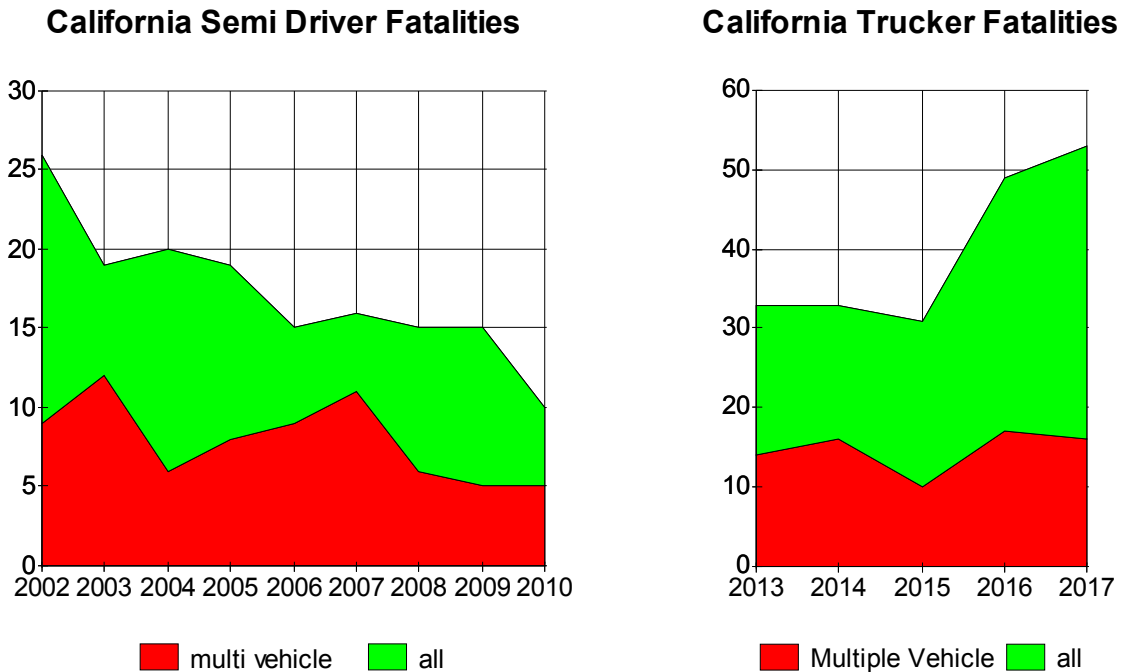
Corrected Heavy Truck Fatalities¹



As shown above, except for a slight decline in 2020 due to COVID shutdowns, the ELD mandate on December 16th 2016 (the 242nd anniversary of the Boston Tea Party) caused a steady increase in heavy truck fatalities when tracking devices incompatible with state meal and rest

¹ The correction is calculated by multiplying the number of motorist fatalities by the percentage decline in passenger car fatalities to compensate for the effect of air bags, crash absorbent body panels, drunk driving enforcement, economic effects, and other improvements in car safety affecting overall truck fatalities since 2002. Sources: FARS; *Traffic Safety Facts*; DOT HS 813110, 813141, 813435; crashstats.nhtsa.dot.gov

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break laws were mandated in a misguided effort to prevent a nationwide trucker strike. 49 C.F.R. § 395.8 et seq. 80 F.R. 78383. As a result, more than a thousand truckers were killed on the job in 2021—a 35 year high. As shown on the chart above left, due to its meal and rest break laws, California semi-truck driver fatalities fell almost 60% between 2002 and 2010. As shown on the chart above right, single vehicle trucker fatalities (shown in green) more than doubled 118% in California between 2014 and 2017 after the mandate—killing an additional 20 truckers per year.

BACKGROUND

In 2004, the DC Circuit Court of Appeals vacated the Federal Motor Carrier Safety Administration’s truckers’ hours of service rules promulgated under 49 C.F.R. 395 because the agency failed to consider their impact on driver health. For instance, bus drivers (unable to stop for breaks) were found to have an increased risk of bladder cancer, while men able to drink additional fluids had reduced risk.²

“It may be the case, for example, that driving for extended periods of time and sleep deprivation cause drivers long-term back problems, or harm drivers’ immune systems. The agency may of course think that these and other effects on drivers are not problematic...but if so it was incumbent on it to say so in the rule and to explain why.” *Public Citizen v. FMCSA*, 374 F.3d 1209, 1217 (D.C. Cir. 2004)

Consistent with this decision, a California court ruled that truckers had to receive meal and rest

² R.C. Reulen et al., “A meta-analysis on the association between bladder cancer and occupation”; M. Brinkman, M.P. Zeegers, “Nutrition, total fluid, and bladder cancer,” *Scandinavian Journal of Urology and Nephrology*, Sept. 2008

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breaks—reducing tractor-trailer occupant fatalities sixty percent between 2002 and 2010 (see above).³ *Cicairos v. Summit Logistics, Inc.*, 133 Cal App.4th 949 (2006). However, on April 26th 2006, four students and an employee of Taylor University, a small Evangelical Christian college, were killed by an overworked trucker who allegedly fell asleep at the wheel near Fort Wayne Indiana. Due to a mix-up by the coroner, a student so horrifically crushed she was unrecognizable was buried in the wrong grave while another was nursed back to health by the dead girl's parents.⁴ Though the mix-up had nothing whatsoever to do with motor carrier safety, three weeks later in response to sensational media outrage, President Bush appointed an alumnus of Taylor University to lead the Federal Motor Carrier Safety Administration in violation of the *Motor Carrier Safety Improvement Act of 1999*, which required him to appoint “an individual with professional experience in motor carrier safety” to head the agency—collectively punishing three million truckers for the negligence of a single individual. 49 U.S.C. § 113(c).

Though John H. Hill's performance as a law enforcement officer was impeccable prior to his joining the Bush Administration, he never met the minimum standard for employment in the motor carrier safety profession—an above average safety record driving 18-wheelers. Nor did he publish anything demonstrating expertise designing trucks or testing safety devices as any reasonable person would expect of someone with professional experience in motor carrier safety.

When Hill chose not to legalize modern safety devices found on cars such as rollover protection, crash absorbent bumpers, and under-ride beams, I filed a petition under 49 U.S.C. 30162, requiring the Secretary of Transportation to explain the reason for the ban within 120 days or to begin a rulemaking to replace obsolete vehicle size and weight limits with cargo size and weight limits that did not ban modern safety features. When Hill stopped Bill Mahorney, head of the Federal Highway Administration's Size and Weight Division, from responding by promoting him to head his Enforcement Division, the House Subcommittee on Surface Transportation summoned Hill to appear on the day the response was due.

On July 11th 2007, Hill claimed before the Transportation Committee that “2005 enjoyed one of the lowest large-truck fatality rates in thirty years” when in fact the number of truckers killed on the job increased 17% from 2002 to 2005 and the number of pedestrians and bicyclists killed by trucks increased 29%—a 14 year high (see chart page 1). Truckers killed in daytime multi-vehicle crashes doubled.⁵ Three weeks later, the FBI raided the home of the Senate Commerce Committee Chairman who confirmed him without a hearing, who was subsequently convicted of failing to report gifts (*USA v. Stevens*, DDC-08-0231, 10/27/08)(my 49th birthday). Charges were abruptly dropped after I sent the FBI a complaint alleging that a dozen truckers killed in Texas had a greater than fifty-fifty chance of being victims of wrongful death⁶; subsequently provoking a mentally ill trucker to murder eleven Jews at a synagogue near Pittsburgh on the tenth anniversary of his conviction, allegedly because they replaced him with immigrants when truckers voted with their feet to escape dangerous working conditions—the deadliest attack on Jews in the history of the United States.⁷ The only historical precedent for this was in 1934 when the Boeing company decided to replace rickety biplanes with modern airliners and President

³ Fatality Analysis Reporting System, NHTSA, www-fars.nhtsa.dot.gov

⁴ www.taylor.edu/news/taylor-university-observance-of-2006-crash-is-next-week

⁵ Fatality Analysis Reporting System, NHTSA, www-fars.nhtsa.dot.gov

⁶ www.truckingvideo.com/litigation/complaint.pdf

⁷ Rich Lord, *Pittsburgh Post Gazette*, 10/29/2018

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Roosevelt transferred its airmail contracts to the Army, causing a dramatic increase in crashes—which World War I Ace Eddie Rickenbacker called “legalized murder.”⁸

Leaving office, Hill blew the whistle claiming, “I thought I would have a lot of say in truck safety in this country [but] political people tell the appointed people what they’re going to do.”⁹ Without an army to enforce its order, the DC Circuit could only re-vacate the vacated rules when they were re-promulgated in violation of the *Administrative Procedures Act*. See *OOIDA v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007).

Consistent with this decision, the agency denied a petition to preempt California’s meal and rest break rules, 73 F.R. 79,204 (Dec. 24th 2008), and in 2009 it agreed to obey the orders of the DC Circuit after the Department of Justice refused to defend the agency (*Public Citizen v. FMCSA*, DC-09-1094). The California Supreme Court also upheld the rest break rules. *Brinker v. Superior Court of San Diego*, 273 P.3d 513 (Cal. 2012). Just hours after the settlement agreement, however, the Commerce Committee confirmed Anne Ferro, President of the Maryland Motor Truck Association, as President Obama’s Federal Motor Carrier Safety Administrator.

Like Hill, Ferro did not meet the minimum standard for employment in the motor carrier safety profession—an above average safety record driving eighteen-wheelers. Nor did she demonstrate experience designing trucks or testing safety devices as required under Section 113(c). Blowing the whistle, Hill claimed, “I can assure you that Anne Ferro is getting marching orders.”⁹ His allegation was not without support. According to the University of Michigan Transportation Research Institute, Maryland reported only one truck crash after Ferro took over, compared to 114 crashes per month when Hill ran the agency.¹⁰ Also, the National Highway Traffic Safety Administration reported that trucks drove one-third more miles under Ferro¹¹ than under Hill.¹² Obviously, if crashes are under-reported and miles driven are exaggerated, an administrator with no apparent qualifications can appear to improve safety.

Defying both court orders, in 2011 Ferro re-promulgated the twice-vacated rules with changes that the Inspector General of the Department of Transportation later determined were insignificant.¹³ Unexpectedly, the DC Circuit then reversed itself, ruling that truckers lacked standing to challenge a trucking regulation despite having won the two previous cases. *American Trucking Ass’ns v. FMCSA*, 724 F.3d 243, 249 n.7 (D.C. Cir. 2013)(“Trecott offers nary an argument in his briefs as to why his lobbying activities would establish standing. For this reason, we need not reach the merits of his arguments.”)(Cert. denied, 13-509, Jan. 13th 2014). Congress responded by mooting this case in the *Consolidated Appropriations Act of 2014* (Pub. L. 113-235, 128 Stat. 2712)—suspending enforcement of Ferro’s reforms. However, the judge who authored the opinion was allowed to retire and keep her pension—provoking another irate trucker to kill seven people and himself on the second anniversary of her retirement.¹⁴

In response, I proposed an automatic system with rest break rules similar to Section 11090

⁸ *Chronicle of Aviation*, JOL, 1992, p. 315

⁹ www.truckinginfo.com/news/news-detail.asp?news_id=73580

¹⁰ csa.fmcsa.dot.gov/Documents/Evaluation-of-the-CSA-Op-Model-Test.pdf

¹¹ www-nrd.nhtsa.dot.gov/Pubs/811628.pdf

¹² www-nrd.nhtsa.dot.gov/Pubs/811158.pdf

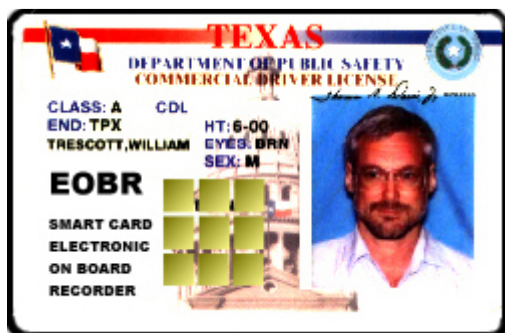
¹³ www.oig.dot.gov/library-item/35549

¹⁴ Lucinda Holt, Manny Fernandez, “West Texas Shooting Spree Terrorized Two Towns and Killed 7,” *New York Times*, 9/1/2019

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of the California Labor Code known as the “Smart Card System” first posted online in December 2008:

SMART CARD SYSTEM



- 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.
- 3) Commercial motor vehicle operators may not be dispatched to drive more than 10 hours in a 24 hour period or be on duty more than 70 hours in any time period unless an equivalent number of hours are logged off duty.¹⁵

This was enacted as the *Commercial Motor Vehicle Safety Enhancement Act of 2012*—requiring the agency to equip trucks with electronic logging devices “capable of recording a driver’s hours of service and duty status accurately and automatically,” 49 U.S.C. § 31137(f)(1)(A)—removing language permitting the devices to “be used to monitor productivity of the operators” (31137(a)-superceded). However, the agency failed to redact 49 C.F.R. § 390.36(b)(2) allowing carriers “to monitor productivity [or strike participation] of a driver.” The proposed device had no tracking

¹⁵ Source: www.truckingvideo.com/hos.htm, ADDITIONAL RULES:

- 4) No more than six consecutive hours of driving or other labor may be performed without an on duty rest period and no more than 12 hours of driving and/or other labor may be performed within any 24 hour period.
- 5) Drivers may inspect and count freight, monitor gauges, inspect their vehicles for safety defects, complete paperwork, wait for dispatch, wait for loading or unloading, or wait for repairs during on duty rest periods.
- 6) Drivers MAY NOT drive, operate material handling equipment, touch or wrap freight, connect hoses, or perform any labor that would prevent eating or sleeping during on duty rest periods. Any task requiring the use of both hands MAY NOT be performed during on duty rest periods.
- 7) Smart card EOBR's will be issued by each of the 50 States with a new Commercial Drivers License (CDL) permanently laminated to the front with a tamper evident seal.
- 8) Commercial vehicles will be equipped with an inexpensive magnetic SENSOR capable of recording and transmitting vehicle speed to nearby EOBR's in the same manner as a wireless bicycle cyclometer.
- 9) ALL movements of the vehicle exceeding 5 minutes and 5 mph will automatically be recorded as ON DUTY.
- 10) Whenever a vehicle is stationary longer than five minutes, EOBR's will automatically record REST periods and log drivers OFF DUTY from the time of the last vehicle movement 14 hours after the first vehicle movement.
- 11) Vehicles must remain stationary during REST periods unless a second EOBR is logged ON DUTY (When riding in the sleeper, off duty drivers must carry their EOBR's in a metal sleeve).
- 12) SENSORS will download and store data from EOBR's to detect violations when a driver operates more than one vehicle.
- 13) When violations are detected, SENSORS will wirelessly transmit a silent alarm to law enforcement officers and record the alarm on the EOBR to prevent violators from changing vehicles.
- 14) SENSORS WILL NOT transmit personal information about drivers' activities or whereabouts unless a violation is detected. If ordered by a court of law, EOBR data can be downloaded by law enforcement officials using a smart card reader. A SENSOR not detecting a violation will transmit only the vehicle speed and an identification code to indicate that an EOBR is present and operating properly. Driving without a working EOBR will result in a silent alarm.

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ability.

In defiance of the new law, on the 242nd anniversary of the Boston Tea Party the agency re-promulgated (with minor changes) an electronic logging devices rule vacated by the 7th Circuit because the agency failed to ensure that electronic monitoring would not be used to harass drivers. 49 C.F.R. § 395.8 et seq., 80 F.R. 78383. See *Owner-Operator Independent Drivers Ass'n v. FMCSA*, 656 F.3d 580 (7th Cir. 2011). Although the agency claimed that the purpose of monitoring citizens with tracking devices was to improve safety, the effect of electronic monitoring was to preempt California's meal and rest break rules rather than extend them nationwide. Instead of receiving additional breaks, truckers could be ordered to drive up to eight hours without a break, then be ordered to remain for thirty minutes at a place of the employer's choosing to prevent them from participating in any protests. This resulted in 28% more truckers being killed on the job in 2017 than in 2014 and 68% more than in 2009¹⁶ (see chart page 1) because they forced truckers to race against the clock to arrive at a safe pace to park before running out of driving time, violate speed limits whenever delayed by weather or traffic, then fall asleep instantly at a time determined by a computer. Other than hypnotism, the only known method for human beings to sleep on command is to take powerful sedatives or drink dangerous amounts of alcohol. Not surprisingly, alcohol related truck fatalities jumped sixty percent in just one year when this politically motivated rule went into effect in 2017—harming both highway safety and driver health.¹⁷

Nevertheless, in contradiction of its 2008 Determination, on December 21st 2018, the agency issued a new Determination preempting California's meal and rest break laws. 83 F.R. 67470. Ignoring both court orders, on Sept. 12th 2019, the agency ordered the hours of service rules twice vacated by the DC Circuit "restored to full force and effect." 84 F.R. 48079. At the height of the Coronavirus epidemic on June 1st 2020, the agency ruled that "the 2005 rule would not have any effect on these potential health issues," 85 F.R. 33403, even though the agency found additional rest provided "health benefits in the form of decreased mortality risk based on decreases in daily driving time, and possible increases in sleep." 85 F.R. 33447. Rather than legalizing safer trucks, an additional 3,200 truckers; 8,035 motorists; and 1,928 cyclists and pedestrians were killed on the highways from 2009 to 2021 as a result of the agency's actions.

ARGUMENT

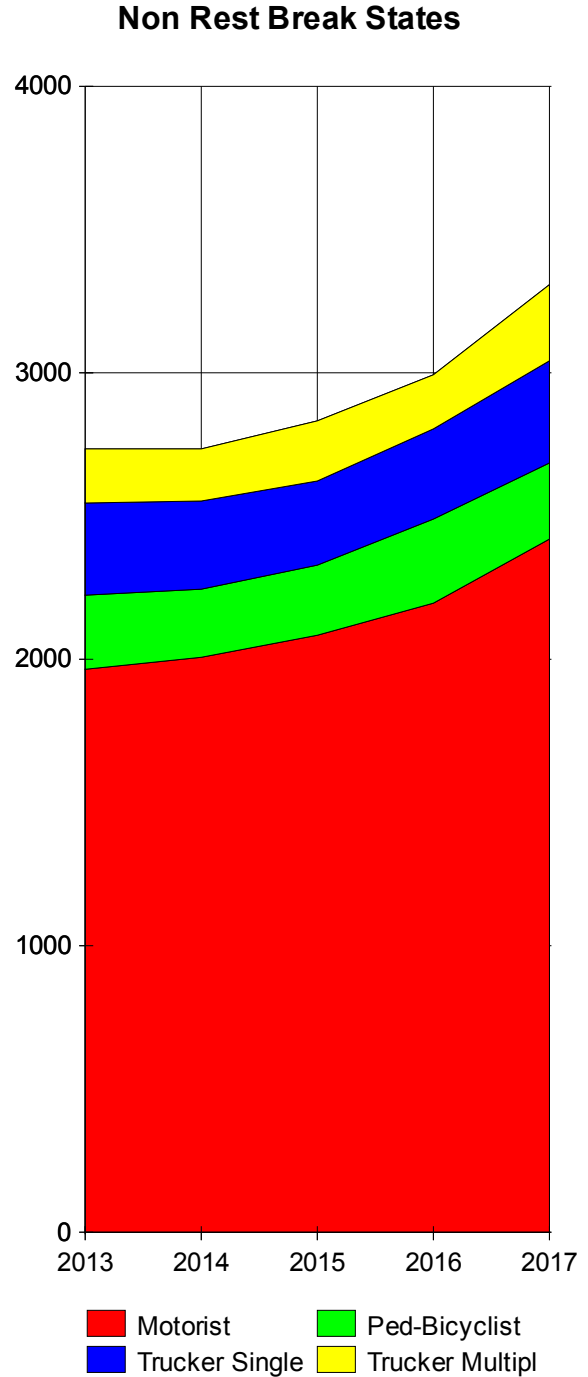
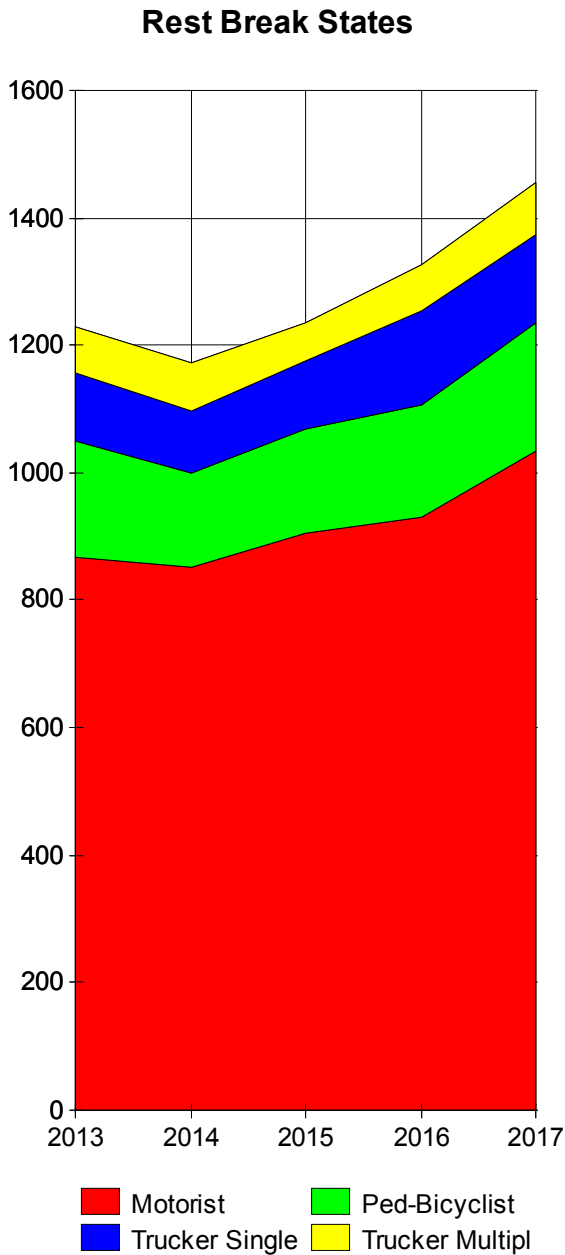
1. The above data show that enforcement of California's meal and rest break laws had a substantial beneficial effect on public safety. On grounds that the Smart Card EOBR was the only device complying with the plain language of the statute at the time it was enacted, waivers should be granted to replace deficient electronic logging devices required under 49 C.F.R. § 395.8 et seq. with a fully automatic system as required by the *Commercial Motor Vehicle Safety Enhancement Act*. 49 U.S.C. § 31137(f)(1)(A). The waivers should extend to all states so the effectiveness of the system can be measured on long haul routes. The agency should also redact 49 C.F.R. § 390.36(b)(2) so that carriers cannot restrict breaks to employer approved locations or pressure drivers to continue driving under the existing HOS rules when they feel the need to stop and rest.

¹⁶ Fatality Analysis Reporting System, NHTSA, www-fars.nhtsa.dot.gov

¹⁷ NHTSA, *2017 Fatal Motor Vehicle Crashes: Overview*, p.5

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2. As shown on the charts below,¹⁸ in states with meal and rest break laws¹⁹ motorist



and pedestrian fatalities declined in in 2014, while increasing elsewhere. In 2016, single vehicle

¹⁸ Source: Publication Numbers DOT HS 812 150; DOT HS 812 279; DOT HS 812 373; DOT HS 812 497; DOT HS 812 663 (see individual state tabulations)

¹⁹ California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, and West Virginia per Note 13 of the 2018 Determination

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trucker fatalities such as running off the road or falling asleep at the wheel (shown in blue) increased by one third when state meal and rest break laws were preempted until they matched the high rates seen in non-rest-break states, killing an additional fifty truckers per year. Motorist fatalities (shown in red) increased less in rest break states; but pedestrian fatalities (shown in green) which were higher before preemption because stopping for breaks increases interactions with pedestrians, jumped 60% in California along with a 10% increase in motorist fatalities when tracking devices forced truckers to switch from nighttime to daytime driving, causing the deaths of an additional 55 Californians in 2017. Therefore, waivers allowing resumption of nighttime driving will save lives because overall fatalities are attributable more to time on task fatigue than to frequent stops.

Since truck stops are usually empty during the day when truckers prefer to sleep, the so-called “parking problem” is just a predictable effect of tracking devices requiring unskilled trainees lacking good night vision to park at the same time. Truck stops can hardly be expected to increase capacity when their lots are empty—filled up only at night by foreigners and other dead-beats who cannot afford to buy anything. Aware that 18-wheelers will soon disappear if a qualified safety administrator is appointed, many are planting trees in their lots because campers are better customers. Some may soldier on as farm vehicles or converted into dump trucks, but they are unlikely to spend much time at truck stops. Waivers will reduce the parking problem by allowing truckers to sleep when parking is available until they can replace their obsolete trucks with modern intermodal vehicles.

3. Although most drivers will prefer to use credit cards for personal transactions, linking smart cards to commercial accounts monitored by police offers several advantages in collecting from brokers and obtaining payment for skipping breaks. The CVSA has long argued that tracking devices are needed to link RODS to bills of lading. Downloadable transaction data would eliminate this paperwork, allowing officers to spend more time on patrol. Because the Smart Card system uses readily available off-the-shelf components already used by merchants, card readers will be cheaper than ELD’s and smart cards might even be provided free by banks. Many merchants require photo ID’s, so combining CDL’s with debit cards will simplify transactions—even providing improved security for trucks and trailers with keyless entry. Because the Smart Card system uses a running tally rather than a RODS, brokers will have an instant readout of the expected delivery time as soon as an advance is sent, eliminating the problem of brokers withholding payment to protect themselves when drivers violate HOS regulations. States that adopt the Smart Card system will therefore be seen as business friendly and reap economic benefits.

CONCLUSION

The Determination of Preemption should be waived along with the agency’s HOS, ELD, and RODS requirements for those states wishing to comply with the plain language of the *Commercial Motor Vehicle Safety Enhancement Act*.



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