NO DATE FOR ORAL ARGUMENT HAS BEEN SET

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

PUBLIC CITIZEN et al.	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 09-1094
	)	
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION,	)	
	)	
Respondent,	)	
	)	
WILLIAM B. TRESCOTT et al. Intervenors	)	
	)	

MOTION TO PROCEED

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and D.C. Cir. Rule 27, I hereby respectfully move this Court for an order to proceed on the following grounds:

1. The Respondent Agency has declared its intent to violate the settlement agreement

The October 26th, 2009 settlement agreement requires the Federal Motor Carrier Safety Administration (FMCSA) to publish a final rule by July 26th, 2011. Because of two recently published studies, FMCSA now intends

to delay publication of the final rule until October 28th, 2011. *See* Second Status Report filed May 20th, 2011, page 3. The Respondent Agency did not seek or obtain consent of the Intervenors.

2. The recently published studies contain no new information that would justify delaying the rulemaking

The Virginia Tech Transportation Institute (VTTI) study found that "[t]he benefits from breaks from driving ranged from a 30–50-percent reduction of rate of [safety critical event] occurrence in the hour following a break."[1] The Penn State University (PSU) study found that a "recovery period of 34 hours or longer is associated with a 50-percent increase in the odds of a crash on the 1st day back compared to a return to work with no recovery."[2] Random sampling methods were not used in selecting the four or five motor carriers participating in each study, so by themselves, these studies are no more scientific than a telephone survey where 90% of respondents immediately hang up. As VTTI admits, "with any study that uses volunteers,

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

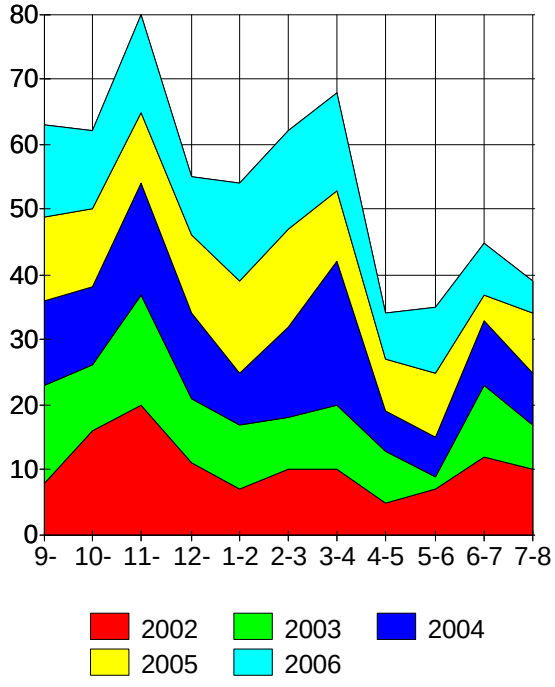
[2] Jovanis, Wu, Chen, *Hours of Service and Driver Fatigue*, page 59, www.fmcsa.dot.gov/facts-research/research-technology/report/HOS-Driver-Fatigue.pdf

the drivers may not be representative of the entire population of commercial drivers" (p. xii). The several dozen additional deaths and crippling injuries that will result from retaining the present hours of service rules for three additional months, many of them children, cannot be justified by research which falls short of the standards of the motor carrier safety profession.

3. Identical information was posted in the rulemaking docket two months before these studies were published

In docket number FMCSA-2004-19608-7726.1 on February 16th, 2011, I provided the Respondent Agency with the chart below left[3] which clearly shows that breaks from 12 to 2PM and 4 to 6PM reduced drivers' probability of being killed in fatigue related crashes by 30-50 percent (page 3, *see also* Int. Br. at 29). I also asserted on page 5 that "the likelihood of being killed in a fatigue related crash will almost

Single Vehicle Semi Driver Fatalities



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

double during seven hours of non stop driving" and "[t]he effect of the Agency's 34 hour restart provision in section 395.3(c) is to prevent employees from driving home or to a place they can recuperate after working 60 or 70 hours, therefore, a restart cannot be considered off duty unless it is spent at home or a bona fide recreational establishment." Because I relied on the National Highway Traffic Safety Administration's Fatality Analysis Reporting System as my source of information, the Court can be certain that my calculations are representative of the entire population of tractor-trailer drivers. Because both VTTI and PSU obtained the same results I did, these studies are relevant insofar as they support my conclusions—but the Agency cannot justify delaying the rulemaking by treating these findings as previously unknown information. These things are common knowledge in the motor carrier profession. Any FMCSA Administrator who did not know these things would be guilty of fraudulently obtaining a professional level income.

4. The studies prove that the present hours of service rules violate truckers' 14th Amendment rights

By placing limits on truckers' personal mobility, the existing rules violate "liberty interests in freedom of movement and in personal security [that] can be limited only by an overriding, non-punitive state interest."

Youngberg v. Romeo, 457 U.S. 307, 313 (1982) (internal quotes omitted). The studies reveal that there is no overriding state interest that would justify increasing crash risk 50 percent by requiring drivers to park at a truck stop for 34 hours or increasing crash risk 30 percent by prohibiting drivers from taking breaks if their employers require them to remain on duty for 14 hours. "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it…fails to provide for his basic human needs [such as adequate rest] it transgresses the substantive limits on state action set by the…Due Process Clause." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 at 199-200 (1989). This case can no longer be held in abeyance because the Constitution requires "that courts make certain that professional judgment in fact was exercised." *Youngberg* at 321.

5. Congress requires the Federal Motor Carrier Safety Administrator to possess professional experience in motor carrier safety

The May 20th, 2011 Status Report failed to establish that the person making the decision to extend these dangerous rules possesses professional experience in motor carrier safety as required under Section 101 of the *Motor Carrier Safety Improvement Act of 1999* (Pub. L. 106-159, 113 Stat. 1748). 49 U.S.C. § 113(c) ("The head of the Administration…shall be an individual

with professional experience in motor carrier safety."). According to *Youngberg*, any person lacking the statutorily required experience[4] falls short of statutory right under the *Administrative Procedures Act*. 5 U.S.C. § 706(2)(C). "The proper standard for determining whether the State has adequately protected such rights is whether professional judgment in fact was exercised." 457 U.S. at 307 (per curiam). Because no effective education or training is possible in motor carrier safety (*see* Int. Br. at 24 & 33), the Court must make certain that the Administrator had not only driven heavy trucks or busses enough miles without a preventable crash to meet the minimum standard for employment in the motor carrier safety profession, an above average safety record driving 18 wheelers (*see* Int. Br. at 13-14), there must be a showing of articles, safety films, or patent applications demonstrating professional expertise designing safer vehicles and testing safety devices to ensure that technological alternatives to restraining personal liberties such as intermodal vehicles or electronic recording devices have been considered. The court must make certain that the FMCSA Administrator is qualified to make a decision that will cost the lives of several dozen citizens. *id.*

[4]"By 'professional' decisionmaker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue." 457 U.S. at 323 (n. 30).

6. The Civil Rights Act may have been violated

The Court must also make certain that political interference had no effect on the Agency's judgment i.e. "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg* at 323. FMCSA's previous administrator publicly alleged, "I can assure you that Anne Ferro is getting marching orders"[5] and "[t]he political people tell the appointed people what they're going to do."[6] It is well known that the Administrator traveled around the country with other FMCSA officials staging talk show type public listening sessions.[7] The *Civil Rights Act* provides: "If two or more persons... conspire or go in disguise on the highway or on the premises of another, for the purpose of preventing or hindering...the equal protection of the laws...the party so injured or deprived may have an action for the recovery of damages. 42 U.S.C. § 1985(3). The Court must consider whether a political appointee impersonating a safety professional and making life and death decisions is a

[5] *Former FMCSA Chief Speaks out on HOS, EOBRs*, Deborah Lockridge, 4/20/2011 http://www.truckinginfo.com/news/news-detail.asp?news_id=73560
[6] *John Hill Talks About Life at the FMCSA*, Deborah Lockridge, 4/25/2011 http://www.truckinginfo.com/news/news-detail.asp?news_id=73580
[7] Docket numbers: FMCSA-2004-19608-3856, 3854, & 9393

type of disguise permitted in *Youngberg*.

7. The existing rules violate the equal protection clause

The Bureau of Labor Statistics has estimated that, due to the recession, employment in the trucking industry declined 9-13% since 2008. 75 FR 82180. This decline occurred concurrently with a 30% reduction in truck related fatalities in 2008 and 2009.[8] Therefore, the allegation 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 (*see* Int. Br. at 21), has been statistically proven and no longer needs to be supported by affidavits. **A ten percent reduction in employment resulted in a thirty percent reduction in fatalities**. Because the danger of allowing inexperienced drivers to drive long haul trucks has been well known since 1995,[9] twenty percent or 2,810 of the 14,048 heavy truck fatalities that occurred from 2006 to 2008 can be attributed to the Agency's refusal to obey the Court's mandate in *Advocates for Highway & Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005) (*see* Int. Br. at 14). If the previous FMCSA Administrator's allegations[10] prove to

[8] NHTSA, http://www-fars.nhtsa.dot.gov/Trends/TrendsLargeTruckRel.aspx
[9] The *Negotiated Rates Act* increased heavy truck fatalities by 15% (*see* Int. Br. at 10-11).
[10] *John Hill Talks About Life at the FMCSA*, Deborah Lockridge, 4/25/2011 http://www.truckinginfo.com/news/news-detail.asp?news_id=73580

be correct, then these deaths were premeditated.

The Supreme Court has long recognized that unskilled pickup and delivery drivers are different than skilled long haul truckers (See *Teamsters v. United States,* 431 U.S. 324, 370 (1977) "City drivers…have regular working hours…and do not face the hazards of long-distance driving at high speeds.") and that short haul driver qualifications are not the same as linehaul driver qualifications ("[S]eniority could not be awarded for periods prior to the date when … the class member met … the qualifications for employment as a line driver." *id* at 333). The *Motor Carrier Safety Act* prohibits the Secretary from allowing first year drivers to be given responsibilities that exceed their ability to operate commercial motor vehicles safely. 49 U.S.C. § 31136(a)(2). The Due Process Clause requires the Secretary to provide equal protection from death and injury to all employees of a motor carrier. Therefore, carriers cannot have two classes of employees, one group sitting safely in offices receiving hundreds of thousands of dollars a year while others earning less than a tenth as much are exposed to three times the risk of death and injury of the average employee. FMCSA must reduce the driving hours of first year drivers to one third of experienced drivers or require shorter routes or safer vehicles to drive (*see* Int. Br. at 26). 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).

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

The Government Accountability Office (GAO) recently reported that unrecovered pollution, accident, and congestion costs of long haul trucks exceeded 112.2 billion dollars in 2007 (GAO-11-134, p.4 & 23).[11] Of the $16.3 billion the GAO attributed to accidents, 30%, or $4.9 billion can be attributed to accidents caused by inexperienced truck drivers in 2007. In its 2003 RIA, FMCSA found "the effects of hiring new drivers were almost exactly counterbalanced by the reduced volume of long-haul trucking caused by shifting some traffic to rail." 75 FR 82180. Therefore, if first year drivers had been prevented from driving long haul trucks in 2007, most or all of the freight they hauled would likely have been diverted to rail. The GAO found unrecovered costs of trains were only one sixth as much as trucks (GAO-11-134, p.27). Diverting 10% of truck volume to rail in 2007 would have saved

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

and additional $9.35 billion or a total of $12.6 billion including accident reduction—a savings of more than 100 billion in health care costs over a 10 year period. The Agency has estimated that its proposed hours of service rules will save only 3 billion dollars over a 10 year period. 75 FR 82172. Therefore, the 2,810 additional deaths caused by inexperienced drivers attempting to drive long haul trucks from 2006 to 2008 cannot be justified by the Agency's cost benefit analysis.

ARGUMENT

The GAO estimated that trucks moved two trillion ton-miles of freight in 2007.[12] The Department of Transportation estimated that large trucks traveled 227 billion miles the same year.[13] This means the average truck carried less than nine tons of cargo in 2007—less than half of what a typical 18 wheeler is capable of carrying. Before low wage truckload carriers drove most unionized common carriers out of business, experienced truckers earned high wages[14] by consolidating loads—stacking light bulky freight such as building insulation on top of heavy items like car batteries to make one truck

[12] *A Comparison of the Costs of Road, Rail, and Waterways Freight Shipments That Are Not Passed on to Consumers*, http://www.gao.gov/products/GAO-11-134, p.4
[13] NHTSA 2009 Large Trucks Fact Sheet, http://www-nrd.nhtsa.dot.gov/Pubs/811388.pdf
[14] *Sweatshops on Wheels*, Michael Belzer, Oxford University Press, 2000, p.122-3

to do the work of two (*see* PSU p.5). If railroads and common carriers replaced low wage truckload carriers so that the average truck carried 18 tons of cargo instead of just 9 tons, half of the 112.2 billion dollars of annual pollution, accident, and congestion costs estimated by the GAO could potentially be eliminated—a half trillion dollars in reduced health care costs within ten years.

When truckers decided to replace obsolete 18 wheelers with more efficient intermodal vehicles to eliminate the need for long distance driving, the Secretary responded first by enforcing a ban on modern safety features necessary to their operation (see related cases 07-1327 & 09-5280), then by changing the hours of service rules to allow truckload carriers to overwork low wage trainees (*see* Int. Br. at 26)—subsidizing them with free employee supervision at public expense to make the enormous cost of converting the long haul trucking industry to intermodalism unaffordable. It is well known that both the President and Secretary of Transportation were associates of a former governor of Illinois sentenced to six years in prison for issuing commercial driver's licenses to unqualified trainees in exchange for campaign donations. It is difficult to imagine how Maryland's Motor Vehicle Administrator could have become President of the Maryland Motor Truck

Association and subsequently FMCSA Administrator[15] without doing something similar. The only possible motive for an unskilled administrator to impersonate a safety professional is to profit from the deaths of innocent people—which is why hospital administrators are not allowed to treat patients and airline administrators are not allowed to fly planes without professional qualifications. According to PSU (p.57), the only drivers who benefited from the present hours of service rules were those who crashed! The fact that the nation's largest truckload carrier was able to announce record profits[16] in the most severe recession since the great depression (*see* Int. Br. at 18) should alert the Court that unrecovered costs of overworked trainees may have been deliberately omitted from the Agency's cost benefit analysis. See *Advocates* at 1146 (holding driver training standards arbitrary and capricious because the Agency said "practically nothing about the projected benefits").

The FMCSA Administrator's decision to extend the present hours of service rules for three additional months rather than immediately vacating the offending portions upon receiving evidence that they increase crash risk by 30-50% is not only nonsensical, it violates the ethical standards of the motor

[15] http://www.fmcsa.dot.gov/about/contact/hq/anneferrobio.aspx
[16] http://www.truckinginfo.com/news/news-detail.asp?news_id=73526

carrier safety profession. The Court cannot stand by and do nothing while dozens of additional people are killed or the next status report may announce a delay in implementing the final rule for six months or a year. Nor can the Court substitute its judgment for that of the Agency: "the Constitution only requires that courts make certain that professional judgment in fact was exercised." *Youngberg id.* at 321. To satisfy its constitutional obligation to ensure that 14th Amendment rights are being protected and to make certain that professional judgment is exercised, the Court should order the President to appoint an individual with bona fide professional experience in motor carrier safety (*see* page 6 above) to head the Agency. 49 U.S.C. § 113(c). Likewise, as the Supreme Court ruled in *Caperton v. Massey*____ U.S. ____ (2009), if any member of this Court was one of the "people at the White House" met by the previous Administrator when he "made several trips over to the White House to talk about hours of service rules"[17] or otherwise had "knowledge that any of the wrongs conspired to be done…which such person by reasonable diligence could have prevented," 42 U.S.C. 1986, he should recuse himself on grounds that "a person with a personal stake…had a

[17] *Former FMCSA Chief Speaks out on HOS, EOBRs*, Deborah Lockridge, 4/20/2011 http://www.truckinginfo.com/news/news-detail.asp?news_id=73560

significant and disproportionate influence in placing the judge on the case."

CONCLUSION

The Court should order the President to appoint an individual with bona fide professional experience in motor carrier safety to head the Agency or establish a schedule to complete the remainder of the briefing and set a new date for oral arguments.

Respectfully Submitted,

William B. Trescott
Author of:
So You Want to Drive a Truck?
Sargent Texas Reckless Driving Video
How to Succeed as an Owner-Operator
The Secretary of Transportation's Message to Truckers
Creation of a Minority Group—The New Danger in America's Trucks
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979-244-3134

CERTIFICATE OF SERVICE

I certify that I caused to be served the forgoing motion to proceed through the Court's ECF Filing system and by mail on the following:

Gregory A. Beck [ECF]
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009

Matthew M. Collette [ECF]
U.S. Department of Justice
Room 7212
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Paul D. Cullen, Sr. [ECF]
The Cullen Law Firm, PLLC
1101 30th Street, NW, Suite 300
Washington, DC 20007

Inimai Manickam Chettiar [ECF]
Michael Alan Livermore
New York University, School of Law
Institute for Policy Integrity
245 Sullivan Street, Suite 472, Furman Hall
New York, NY 10012

Nicholas J. DiMichael [Mail]
Karyn A. Booth
Thompson Hine
1920 N Street, NW, Suite 800
Washington, DC 20036

Robert Digges, Jr. [Mail]
ATA Litigation Center
950 North Glebe Road
Suite 210
Arlington, VA 22203

Henry M. Jasny [Mail]
Advocates for Highway & Auto Safety
750 First St., NE, Suite 901
Washington, DC 20002

Adam C. Sloane [ECF]
Mayer, Brown LLP
1909 K Street, N.W.
Washington, D.C. 20006

Stephen Gardner [ECF]
Center for Science & Pub. Int.
5646 Milton St., Suite 211
Dallas, TX 75206

Robin S. Conrad [ECF]
National Chamber Litigation Center
1615 H Street, NW, Suite 230
Washington, DC 20062-0000

John M. Cutler [Mail]
McCarthy, Sweeney, & Hardaway
2175 K St., N.W. , Suite 600
Washington, DC 20007

William B. Trescott