

# TRANSTRENDS

THE TRANSLAW GROUP, INC.

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### 34-HOUR ROLL BACK

The new mandate that 2 periods of 1:00 AM to 5:00 AM must pass in order to use the 34-hour restart is being attacked once again. The bill filed by Rep. Richard Hanna R-NY would mandate that the old provisions of the one period of 1:00 AM to 5:00 AM be restored and observed while a comprehensive study is conducted. This bill may take off and restore the old 34-hour restart rule on a permanent basis.

### THERE IS NOTHING THAT SAYS "HOME FOR THE HOLIDAYS" LIKE A GOOD ROAD KILL WITH ALL THE TRIMMINGS

***EVEN TRANSTRENDS  
COULD NOT PUT A  
PICTURE TO THIS  
STORY DURING THE  
HOLIDAY!***

In **Ohio**, there is a bill that would lengthen the list of animals that drivers can salvage from roads in the state. Specifically, HB199 would add wild turkey, wild boar and feral hog to the list. Ohio law now permits drivers to carry off deer for consumption.

The issue was brought to the attention of the legislature out of concern about not being able to claim a feral hog

struck by a vehicle.

**Utah** and **Michigan** lawmakers are also looking to ease rules on keeping animal carcasses. Michigan State Sen. Darwin Booher, R-Evart, has introduced a bill that would give drivers the first crack at claiming the carcass. Claimants would only need to keep a written record of the time and place where they found the remains in case law enforcement requests the information.

Utah law now permits people to take and bake animal carcass only after getting the approval of a Division of Wildlife Resources officer. A new law already on the books in Montana makes it easier to get permits necessary to salvage deer, elk, moose and antelope struck by vehicles. The process is intended to be complete within 24 hours of the crash. One permit per animal is required.

***Picking up dinner on the way home from work has taken on a new meaning. Harvesting of road kill is supported by PETA. The animal rights group notes on its website that “if people must eat animal carcasses, road kill is a superior option.” And, Martha Steward was said to comment “...and that’s a good thing!”***

### **ARE ALL OF YOUR PERMITS RENEWED FOR 2014?**

Each year our office reminds everyone at least a dozen times to make sure all permits, decals, registrations, etc. are renewed well before the Christmas and New Year holidays. Remember, there is not a single state government employee who will give an “expletive” if you did not renew a credential.

They will be sitting by the fireplace dreaming of sugar plums, whatever they are, and will not be the least bit concerned that you did not take care of business.

Call the office if you need assistance.

### **ARIZONA TRUCKER ON FACEBOOK AT TIME OF DEADLY CRASH**



A truck driver was reportedly using his cellphone to look at pictures of women on Facebook when he crashed into emergency workers on an Arizona interstate and killed a police officer. The allegations stem from a public records request filed by *The Arizona Daily Star*, which published the story on Nov. 1.

According to the details of the report, trucker Jorge Espinoza was using his phone at the time of the May 6 crash on eastbound Interstate 8 in Yuma County, which killed Officer Tim Huffman.

Espinoza has been charged with second-degree murder, endangerment and criminal damage in Yuma County Superior Court. Espinoza was driving an empty fuel tanker at 65 mph when he collided with three police cars and two fire trucks that were responding to an earlier crash.

A dashcam camera in Espinoza's rig shows both the view in the cab and of the roadway in the moments leading up to the crash. The video shows Espinoza's phone fly out of his hand in the crash, although the view of the driver is initially obstructed by what appears to be a wallet.

Newspaper reports state that Espinoza was logged into his Facebook page at the time of the crash, and those records from his phone show that he had also looked at YouTube, female escort websites, porn sites and social networks, according to investigators.

***A very busy man indeed!***

### **FOR THE HAIR CHALLENGED**



A bill has been filed in Congress to allow drug testing through hair samples. Current regulations allow hair samples only in conjunction with urine samples.

There are many issues surrounding hair samples such as differing results due to age, race, sex, etc. Further drug use may take as long as 10 days to appear in a hair sample.

It has been alleged that the Trucking Alliance, a group of large carriers is pushing this effort in order to raise costs to the small carrier hoping to put them in deeper financial straits.

### **TEXAS TRUCKING COMPANY OWNER SUES DEA, SHERIFF OVER BOTCHED DRUG STING**



Craig Patty, owner of Craig Thomas Expeditors, is suing Javier Pena, head of the Houston DEA office, the Harris County Sheriff's Office, and at least a dozen or more unknown government employees for their role in orchestrating a botched drug sting that ended in a gun battle on the street of Houston.

The suit describes what it calls "a bizarre set of facts that, were they not true, would almost seem implausible."

"In this case, you've got the government using the private commercial property of a small truck owner, using it for their own means and ends,

effectively destroying it. Then when he asked for them to repair the property, they tell him it's his problem, not theirs," Patty's attorney Fred Shepherd stated.

According to the documents, one of Patty's trucks was being driven by a man who was allegedly a confidential informant for the DEA. "I want to be as crystal-clear as I can on this point," said Shepherd. "Craig Patty had absolutely no knowledge that either his driver or his truck was being used by any government agency in the furtherance of their law enforcement mission. He had no knowledge of it, and he did not consent to it."

The truck – which had a load of marijuana concealed in it – was attacked in broad daylight in Houston on Nov. 21, 2011, by three SUVs reportedly full of members of a Mexican drug cartel. The



ensuing shootout, which occurred under the surveillance of the DEA and other local law enforcement agencies, left the driver dead in the bullet-riddled cab of the truck. An undercover Harris County Sheriff's deputy was also wounded by a Houston police officer.

Patty's suit alleges that "without either the knowledge or consent" of the plaintiff, agents of the federal and state government

commandeered his business property and used it for a sting operation against Mexican drug lords. He is seeking damages of more than \$133,000 for lost time and repairs to the truck, as well as a multimillion-dollar claim for damages to himself and his family, which Shepherd said has been living in fear of retaliation from the cartel.

"When the government's plans went awry, and Patty's commercial truck was riddled with bullet holes, wrecked, and his driver killed inside the truck, instead of apologizing to this law-abiding citizen and paying for the damage to his property and his business, the government, which had betrayed him, actually turned on him," the lawsuit stated.

According to the lawsuit, Chapa, unbeknownst to Patty, had a history of arrests including one for cocaine possession. Patty's suit alleges that a check of Chapa's record with the Department of Transportation was free of criminal convictions. The suit alleges that the DEA arranged for Chapa to have a clean record and orchestrated his hiring by Patty.

"We have constitutional rights and liberties," said Patty's attorney. "Expectations of privacy and freedom from government intrusion in our lives.

This was a national law enforcement agency that was spearheading this operation. They did it to this one citizen in Texas, but what's to stop them from doing this to somebody else in any other state?"

## **ADMINISTRATOR FERRO GETS A FRESH PERSPECTIVE ON TRUCKING DURING RIDE-ALONG**

FMCSA Administrator Anne Ferro says a two-day ride-along with experienced owner-operator Leo Wilkins has given her a “much different and much clearer view” on the issues and problems facing truckers on the highway and in the regulatory realm.



This was not some ride around the D.C. Beltway, either. Wilkins in his 2012 Peterbilt 379 picked up Ferro on Sunday, Nov. 2, in Marlboro, Md., made a delivery in Harrisburg, Pa., and proceeded to Indianapolis before stopping for the day. Then, they made a second delivery in Riverton, Ill., on Monday morning before Wilkins dropped Ferro off at the St. Louis International Airport.

Ferro says trip planning and time management were the first things that really stood out.

“I wouldn’t call it as much of a surprise as much as a new perspective to me,” Ferro stated on Monday. “I’ve been one of those people who have said a driver just needs to plan his or her trip that they just need to plan better. Well, smack in the face to me, I think I’m finally getting why it’s so hard to plan.”



“Certainly the shipper and receiver have a lot to do with that, but so does traffic, so does the weigh inspection station, and clearly being stuck between that 14-hour window creates one heck of a challenge and pressure and stress for the driver that they’ve got to deliver,” Ferro said.

“The challenges the owner-operator faces are much more real to me as a result of this trip with Leo,” she said. “It’s not that I wasn’t aware of that. I’ve certainly always known it in theory and from reality from conversations I’ve had, but experiencing it firsthand as a passenger gives me a much different and a much clearer view.”

For example, Ferro says she can relate to the call from drivers during listening sessions and in comments to the agency to include more flexibility in the hours-of-service regulations. She also realizes that truckers don’t have a lot of choices on the road. That revelation became clear during the overnight stay in Indianapolis.

“Leo took a hotel room so I could sleep in the truck,” she said. “It is a lovely sleeping cabin. I looked at that and thought about what it would be like to be in a normal sleeper berth, and how difficult it is to change your clothes, how difficult it is to get fresh water, how you have to get up in the middle of

the night or in the middle of your rest period to go to the bathroom at the truck stop if you don't have something like this accommodation; how little access you have to healthy food if you're in a regular-sized sleeper berth. So that has been very enlightening for me."

Although traffic was light, Ferro did get to witness some interactions with four-wheelers including one on Monday that caught her off-guard.

"This morning we had, of all things, a police car come in on a ramp right into Leo's blind spot, and that police car had no plans on slowing down, even though it was clear that if we would have had a car on the other side of Leo we would have been in real trouble," she said. "But fortunately that was not the case. That's just one example."

Ferro says she'll take away a lot from her trucking trip halfway across the country.

***Very refreshing to see Administrator Ferro taking the time to see first-hand the results of some of the rules and regulations she has had a hand in formulating. Perhaps Mr. Obama needs a first-hand look at health care by going to an inner city emergency room as a private citizen and see how he likes it under Obamacare!***

### **CARRIER SHUT DOWN**

Another carrier has been shut down by the FEDS. Moonlight Express of Cherryville, NC and its owner Rocky Lee Brown have been put out of service. Operations can resume when the carrier is in full compliance and has submitted a meaningful remedial plan. Moonlight has a 97.7 maintenance CSA that puts them in the bottom. There are several other glaring issues facing Mr. Brown including falsification of the MCS-150 form and operating dual carriers that were both in safety jeopardy.

### **TOO MANY RENEWALS**



The expense of renewals can be staggering – you have to renew IFTA every year, IRP registrations every year, Commercial plates every year, CDL license every five years, NY HUT every three years, NM HUT every year, OR HUT every year, KY HUT every year, the MCS-150 every two years unless your base state wants it done every year, the UCR every year. I should also mention that in 24 short months the FEDS are combining many of these items into one big filing of some 16+ pages of extemporaneous BS. It is still in the planning stages.

I think that you are getting the picture! But there is only one license that never needs renewing and perhaps it is time to put a renewal on that license – the marriage license. It just goes on forever, it seems, and to cancel it can be a real challenge not to mention costly. It would be nice to have all of these

licenses related to trucking live on in perpetuity and only need be canceled at the holder's pleasure - just like the marriage license. ***Just my thoughts.***

## **NTSB RECOMMENDS AUDITS OF FMCSA OVERSIGHT PROGRAMS**

### **THE AUDITOR GETS AUDITED**

***This is kind of like a "man bites dog" type of story.*** Two truck wrecks and two bus crashes – all resulting in multiple fatalities – and their ensuing investigations prompted the National Transportation Safety Board on Nov. 7 to call for audits of the Federal Motor Carrier Administration's oversight of the truck and bus industries.



The NTSB investigated four separate crashes that resulted in 25 deaths and 83 injuries. During the course of those investigations, NTSB investigators identified safety deficiencies and noted red flags that were present before the crashes, but unnoticed or not acted upon by FMCSA, an NTSB press

release states.

The wrecks prompting the recommended audits include two truck crashes.

The first happened on March 2 near Elizabethtown, Ky. A truck operated by Highway Star was traveling approximately 67 mph north on Interstate 65 when it encountered slowing traffic. The NTSB press release states the driver did not brake until just before hitting the rear of a 1999 Ford Expedition. The Ford burst into flames after impact and six of the eight occupants died as a result of the crash. The NTSB recommendation for an audit of FMCSA's compliance oversight is also prompted by two bus crashes this year that resulted in 16 fatalities and 70 injuries combined.

The NTSB is calling for more thorough audits. The CSA program was an effort to reduce the number of full audits and to rely on focused audits due to cost and manpower.

The FMCSA pointed to recent enforcement activity which has issued 84 imminent hazard out-of-service orders to truck and bus companies since the beginning of 2011. In 2013 there have been an additional 25 bus companies shut down following compliance reviews and the issuance of "unsatisfactory" compliance ratings. The FEDS have also put individual drivers out of service due to excessive violations, something they have not done in the past to any great extent.

### **THEY CAN'T DO THAT, CAN THEY?**

You bet they can and they have. It may not seem fair but other states can tax your business even if you only make a delivery or two in that state each year! We are talking about New York, New Jersey and Pennsylvania in particular; however, almost all states have similar tax regulations on

the books but may not be as active as the above named states in their enforcement actions. In fact, we just learned that Connecticut is pursuing carriers in a similar nature. So much for neighborliness.



It was in the days of James Madison that he saw the need for relief that allowed the free flow of commerce free from undue taxation, interruption of the flow of commerce and arbitrary regulations. The Commerce Clause was born by the Continental Congress to address these very issues.

The Commerce Clause is more than an affirmative granting of power it additionally has an inverse side known as the Dormant Commerce Clause. The Dormant Commerce Clause prohibits certain state action that interferes with interstate commerce originally the Supreme Court saw the Dormant Commerce Clause as prohibiting any form of state taxation on interstate commerce. This was stated in *Leloub v Port of Mobile* 127 U. S. 640, 648 (1888) (stating, “No state has the right to lay a tax on interstate commerce in any form). Strong language, but soon to fall.

One might think that standard is still in effect, however, the courts began to change the standard by allowing certain indirect “burdens” on interstate commerce without destroying the prohibition. This action began in the late 1890’s and early to mid-1900.

What we have today is a scheme that allows for taxation of interstate commerce when there is a showing of a substantial nexus. In addition, in recent years the standard for “substantial nexus” has eroded to the point that a single shipment is enough to trigger the particular states taxation laws. The only good news is that not every state is as aggressive as other states such as Pennsylvania, New York and New Jersey. Many carriers see the occasional property rendition tax forms that yield little tax such as Arkansas, Kentucky and Kansas. In fact, Kansas has eliminated its property tax rendition and have lumped the tax into the IRP fees. However, as states seek new revenues you can expect to see a more aggressive stance towards such taxation and collection.

**RANSOM:** The three states mentioned above are very aggressive in assessing business tax and, in fact, New Jersey is so aggressive that they will even impound your vehicle until you pay them a “ransom” to release your vehicle and you still have to make the necessary tax filings. You may find that the ransom was much more than the actual tax and you will have a difficult time trying to get the balance back, if ever.

New Jersey has subcontracted out this function and a private company does the roadside collection. The aggressiveness is directly tied to their compensation.

As previously stated, the Dormant Commerce Clause slowly eroded during the first part of the 1900’s. It was in 1977 in *Complete Auto Transit, Inc. v Brody* 430 U. S. 274 (1977) that the courts brought the Dormant Commerce Clause and due process considerations together. Under the *Complete Auto* case a tax will be sustained if it is

- Applied to an activity with a substantial nexus with the taxing authority.
- Is fairly apportioned.
- Does not discriminate against interstate commerce
- Is fairly related to the services proved by the state.

The states that do enforce the collection of such taxes have obviously made sure they are in compliance with this 4-prong test. Routinely we see various trucking interests fighting the imposition of new taxes if they are not in compliance with the above test.

Motor carriers can be subject to literally hundreds taxing jurisdictions. The motor carrier industry as a whole has been on the front line fighting efforts to place additional tax burdens on carriers.

The case that probably best explains the current climate and the aggressiveness of Pennsylvania, New Jersey and New York was a 1948 case, Central Greyhound Lines, Inc. v Mealy when Central Greyhound was assessed taxes for all gross receipts on a trip that originated in New York but traversed New Jersey and Pennsylvania and back into New York on the way to Buffalo. Greyhound Central argued that PA and NJ wanted their portion of tax as well and that only 57 percent of all miles were actually in New York. **New York wanted all of the tax! Now, New York is entitled to only its portion of the tax!** This same type of tax structure is now the norm by all taxing authorities.

**THE SOLUTION:** There is no solution other than to fight each new tax. Changing existing laws to eliminate these taxes would certainly not be met well by the individual states. However, from time to time the states offer an amnesty program that will enable a wayward carrier the unpleasantness of an impoundment while avoiding the unreasonable ransom. The program allows the carrier to come forward, file documents and determine what taxes are due. The carrier is given an opportunity to file the appropriate tax filings and not be stopped in a routine highway check resulting in impoundment.

Call the office for more information on the various amnesty programs that are available at this time. That is your best course of action.

END

***MERRY CHRISTMAS***



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