S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent,

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER and SANTANA ALVARADO,

Real parties in interest.

Petition for Review of a Decision of the Court of Appeal, Fourth Appellate District, Division One, Case No. D049331, Granting a Writ of Mandate to the Superior Court for the County of San Diego, Case No. GIC834348, Honorable Patricia A.Y. Cowett, Judge

APPLICATION OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AND THE CALIFORNIA TRUCKING ASSOCIATION TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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APPLICATION OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AND THE CALIFORNIA TRUCKING ASSOCIATION TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable Robert M. George, Chief Justice:

The American Trucking Associations, Inc. ("ATA") and the California Trucking Association ("CTA") respectfully apply for permission to file the accompanying brief as *amici curiae* in support of petitioners. The reply brief in this matter was filed July 20, 2009. Accordingly, this application is timely under Rule 8.520(f)(2) of the California Rules of Court.

ATA is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before state and federal courts. Because of their effects on the trucking industry, ATA and its members have a strong interest in the interpretation of wage and hour regulations.

CTA is the largest state trucking organization in the United States, providing comprehensive policy, regulatory, legislative and training support to our member companies. CTA members range from one-truck

operators to the largest international trucking companies in the world and who provide safe and efficient goods movement to every sector of the United States economy. In California, 1 out of every 12 jobs is related to the trucking industry.

The views of ATA and CTA will assist this Court by explaining the consequences of the meal-break provisions on the trucking industry. The Legislature is presumed not to enact statutes with unreasonable consequences, so the ramifications of the parties' proposed interpretations of the Labor Code take on great significance. Because the correct interpretation of the meal-break provisions is a matter of vital importance to the trucking industry, ATA and CTA respectfully submit their views on this issue.

CONCLUSION

The application for permission to file a brief as *amici curiae* should be granted.

August __, 2009

Respectfully submitted,

_____

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INTEREST OF THE *AMICI CURIAE*

The American Trucking Associations, Inc. ("ATA") is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 companies and every type and class of motor carrier operation in the United States. ATA regularly advocates the trucking industry's common interests before state and federal courts. Because of their effects on the trucking industry, ATA and its members have a strong interest in the interpretation of wage and hour regulations.

The California Trucking Association ("CTA") is the largest state trucking organization in the United States, providing comprehensive policy, regulatory, legislative and training support to our member companies. CTA members range from one-truck operators to the largest international trucking companies in the world and who provide safe and efficient goods movement to every sector of the United States economy. In California, 1 out of every 12 jobs is related to the trucking industry.

ARGUMENT

Under the Labor Code, an employer must "provide" meal breaks to employees, and incurs liability if it "require[s]" them to work through their breaks. Neither the Code nor the accompanying wage orders require an employer to *force* a work break on employees, as plaintiffs propose. The

Court of Appeal's decision was correct and should, in this respect, be affirmed.[1]

Plaintiffs' theory lacks a statutory or regulatory basis and would create a series of perverse incentives and unreasonable consequences. Those shortcomings would be particularly pronounced in the case of ATA and CTA members. In the trucking industry, there is no practical method by which to ensure that employees take meal breaks at specified times. Imposing such a mandate would require truck drivers to take breaks at inconvenient times or at unsafe locations. The Labor Code should not be interpreted in a manner that would produce such unreasonable consequences.

I. AS THE COURT OF APPEAL CORRECTLY HELD, THE MEAL BREAK REQUIREMENT IS SATISFIED WHEN THE EMPLOYER MAKES MEAL PERIODS AVAILABLE TO EMPLOYEES.

Under the Labor Code and applicable wage orders, an employer is required only to *provide* a meal period, not to *force* an unpaid break on its employees. Although the parties have gone to great lengths to explain their theories, this issue can and should be resolved through the elementary tools of statutory construction. None of plaintiffs' efforts to undermine the plain language of the statute changes this result.

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[1] *Amici* take no position on the remaining issues in this case.

A. The Plain Language Of Labor Code Sections 226.7 And 512 Requires Only That A Meal Period Be Made Available.

In construing statutory language, this Court's "fundamental task . . . is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272. The first step is always to "examin[e] the statutory language, giving the words their usual and ordinary meaning." *Id.* Absent ambiguity, that plain language governs. *People v. Lawrence* (2000) 24 Cal.4th 219, 230-31.

The Legislature's meal-break requirements unambiguously impose a duty upon employers to make a meal period available, but they do not impose upon the employers an enforcement obligation to ensure that the employees take these unpaid breaks. The parties agree that two Labor Code provisions are relevant: Section 226.7 and Section 512(a). The terms of these enactments preclude plaintiffs' interpretation of employers' obligations.

Section 226.7 defines the employer's obligation and specifies a penalty for noncompliance. Both of these subsections are satisfied when an employer makes a meal period available, regardless of whether the employee opts to forgo the meal:

> (a) No employer shall *require* any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

> (b) If an employer fails to *provide* an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

(Emphases added.) Likewise, under Section 512(a),

> [a]n employer may not employ an employee for a work period of more than five hours per day without *providing* the employee with a meal period of not less than 30 minutes . . . .

(Emphasis added.)

The key term used by the Legislature in both Section 226.7 and Section 512(a) is "provide." Employing the "usual and ordinary meaning" of that word, the employer's responsibility is to make a meal period available. *See, e.g.*, *Brown v. Fed. Exp. Corp.* (C.D. Cal. 2008) 249 F.R.D. 580, 585 ("The word 'provide' means 'to supply or make available.'") (quoting *Merriam Webster's Collegiate Dictionary* (10th ed. 2002) 937). Including *Brown*, ten federal courts have concluded, as did the Court of Appeal, that the employer's duty is discharged when it makes a meal break available.[2] Those courts are correct, and no further analysis is required.[3]

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[2] *See Marlo v. United Parcel Serv., Inc.* (C.D. Cal. May 5, 2009) 2009 WL 1258491, at *9 (Pregerson, J.); *Watson-Smith v. Spherion Pac. Workforce, LLC* (N.D. Cal. Feb. 20, 2009) 2009 WL 426122, at *1 (White, J.); *Wren v. RGIS Inventory Specialists* (N.D. Cal. 2009) 256 F.R.D. 180, 208 (Spero, J.); *Kimoto v. McDonald's Corps.* (C.D. Cal. Aug. 19, 2008) 2008 WL 4690536, at *4 (Gutierrez, J.); *Gabriella v. Wells Fargo Fin., Inc.* (N.D.

Plaintiffs' response to Section 512(a) is unavailing. They contend that the word "providing" cannot take on its customary meaning because such an interpretation would nullify the remainder of the provision, which specifies that certain employees may waive their meal periods. Reply Br. at 11. As plaintiffs view Section 512(a), if *some* employees may waive their meal periods, then it must be the case that other employees may not. *Id.* This approach misunderstands the nature of a meal-period waiver. "[T]he waiver applies to the employer's obligation to 'provide' a meal break, not to the employee's decision to take a meal break." *Kenny v. Supercuts, Inc.* (N.D. Cal. 2008) 252 F.R.D. 641, 645. Thus, a waived meal period need not be offered by the employer, a different issue entirely than an employee's decision to forgo a meal break on a certain day.

B. The Orders From The Industrial Welfare Commission Do Not Impose Different Requirements.

Notwithstanding the weight of authority suggesting the opposite conclusion, plaintiffs view the Labor Code as performing no function other

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Cal. Aug. 4, 2008) 2008 WL 3200190, at *3 (Illston, J.); *Perez v. Safety-Kleen Sys., Inc.* (N.D. Cal. 2008) 253 F.R.D. 508, 515 (Hamilton, J.); *Salazar v. Avis Budget Group, Inc.* (S.D. Cal. 2008) 251 F.R.D. 529, 534 (Gonzalez, C.J.); *Kenny v. Supercuts, Inc.* (N.D. Cal. 2008) 252 F.R.D. 641, 646 (Breyer, J.); *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F.Supp.2d 1080, 1089 (Walker, C.J.).

[3] This case arises in the context of class certification. The Court of Appeal determined that, absent evidence of a policy prohibiting meal breaks, class treatment was inappropriate. 165 Cal. App. 4th at 59. Given the wide array of reasons individual employees may have for taking or forgoing their meal breaks, this conclusion should be affirmed.

than incorporating the wage orders issued by the Industrial Welfare Commission ("IWC"). Reply Br. at 6-7. They see the wage orders as imposing on employers an affirmative duty to *prevent* their employees from engaging in any work activities during the meal period provided. *Id.* at 8-10. That approach is doubly flawed.

First, although both Section 226.7(a) and Section 226.7(b) reference the IWC wage orders, they are very specific in their requirements. Section 226.7(a) prohibits an employer from "requir[ing]" an employee to work during an IWC-mandated meal or rest break, and Section 226.7(b) specifies premium wages if an employer fails to "provide" an IWC-mandated break. Thus, the Legislature did not delegate to the IWC the authority to impose more onerous requirements.[4]

Second, the applicable wage order is entirely consistent with the statutory mandate. The current wage order, No. 5-2001, provides that "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes." 8 Cal. Code

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[4] Indeed, the Legislature foreclosed the possibility of the IWC superseding the statutory enactment in Section 516 of the Labor Code, which provides:

> ***Except as provided in Section 512***, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.

(Emphasis added.)

Regs. § 11050, subd. (11)(A). Although this language is silent on whether an employer may provide the meal period or must also require the employee to take it, the accompanying remedy provision resolves any confusion, in terms that track Section 512 of the Labor Code:

> If an employer fails to ***provide*** an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

Id. § 11050, subd. (11)(B) (emphasis added). Thus, read in context, the applicable wage order is entirely consistent with the statutory text discussed above. Indeed, at the hearing at which this remedy was announced, IWC Commissioner Barry Broad explained that it was intended to apply to "an employer who says, 'You do not get lunch today, you do not get your rest break, you must work now.'" *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1110 (quoting Transcript, IWC Public Hearing (June 30, 2000), at 30). This limited role differs dramatically from plaintiffs' approach, which is simply inconsistent with the applicable legislative and administrative pronouncements.

II. PLAINTIFFS' CONTRARY INTERPRETATION OF THE MEAL BREAK REQUIREMENT WOULD HAVE SERIOUS EFFECTS ON THE TRUCKING INDUSTRY.

The Labor Code, read in conjunction with the operative wage orders, requires the conclusion that an employer is required only to make a meal

break available to its employees. However, even if the language were ambiguous, the same result would be compelled. "Where more than one statutory construction is arguably possible, [this Court's] 'policy has long been to favor the construction that leads to the more reasonable result.'" *Comm'n on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290 (quoting *Webster v. Superior Court* (1988) 46 Cal.3d 338, 343). "This policy derives largely from the presumption that the Legislature intends reasonable results consistent with its apparent purpose." *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1291.

Here, a policy that would require employers to *impose* meal breaks on their employees would be manifestly unreasonable, particularly as applied to employers within the trucking industry. Such a policy would be impossible to enforce, would prove unsafe and inconvenient for drivers, and would create perverse incentives. Each of these considerations counsels against plaintiffs' interpretation of the Labor Code.

A. Mandatory Meal Periods Would Be Impossible To Enforce For Motor Carrier Operators.

Requiring employers to enforce meal breaks would be logistically impossible for certain industries such as trucking. In the trucking industry, most employees are located far from their supervisors. Monitoring employee compliance with meal-break requirements—as contemplated by

plaintiffs—would be difficult. Enforcing those requirements would be impossible.

The federal government has recognized as much. In amending the hours-of-service regulations for interstate motor carriers in 2005, the Federal Motor Carrier Safety Administration considered and rejected mandating a rest break after it "concluded that such a break would be difficult for State and Federal enforcement personnel to verify and would significantly interfere with the operational flexibility motor carriers and drivers need to manage their schedules." Hours of Service of Drivers (Aug. 25, 2005) 70 Fed. Reg. 49,978, 50,011.

Although this concern is particularly pronounced for motor vehicle operators, it is certainly not unique. Indeed, Chief Judge Walker, in addressing the meal-period requirement in *White*, noted that "making employers ensurers of meal breaks . . . would be impossible to implement for significant sectors of the mercantile industry (and other industries) in which large employers may have hundreds or thousands of employees working multiple shifts." 497 F.Supp.2d at 1088. As the U.S. Supreme Court has recognized, "time clocks do not necessarily record the actual time worked by employees," *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 690, so employers would need to employ another layer of supervisors simply to monitor employee break patterns. It is implausible that the Legislature would have intended to impose this burden on

employers without a comparably large benefit for employees. However, no such benefit has been identified.

One reason why meal-period enforcement would be so difficult under plaintiffs' approach is that the interests of employers and employees would be directly at odds. As Judge Fischer explained, a mandatory meal period would "create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws." *Brown*, 249 F.R.D. at 585. That sort of inequitable benefit could not have been the Legislature's intent.

B. Mandatory Meal Periods Would Be Unsafe And Inconvenient For Drivers.

Plaintiffs' approach to meal breaks contemplates workers who punch out, enjoy their lunch, and then seamlessly return to their work. In practice, motor carrier operators cannot simply stop working and then resume 30 minutes later. They must identify a safe and convenient location to park their trucks.

If meal periods were mandated at specified times, then ATA and CTA members would be forced to decide between violating these requirements and putting their employees in potentially unsafe situations. Ordinarily, motor vehicle operators plan their breaks to be convenient and to avoid detours. But if construction or traffic delay a truck's planned break such that a break deadline is imminent, the only possible solution

might be pulling over to the side of the road, which can be dangerous. California law recognizes as much by prohibiting roadside stops except in limited situations, such as emergencies. Veh. Code § 21718(a). Indeed, federal regulations recognize that "breaks can be expected to naturally occur during the course of" a day at times that are convenient for the driver. Hours of Service of Drivers (Apr. 28, 2003) 68 Fed. Reg. 22,456, 22,475.

Plaintiffs' approach denies this flexibility to drivers. Aside from safety considerations, there are any number of reasons why motor vehicle operators—or any other employees, for that matter—may wish to forgo or shorten a meal period on a particular day. The employee could want to return home earlier to satisfy child-care obligations, attend a doctor's appointment, or avoid rush-hour traffic. The employee may not want to clock-out and extend the workday. Or a motor vehicle operator working in a two-person team may not wish to disturb a teammate during his sleep period. Whatever reasons the employee might have, it is indisputable that the employee has greater freedom when he decides whether to use his meal period. This Court interprets statutes governing conditions of employment in order to protect employee rights. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 340. The interpretation of the meal-period requirement that obligates employers to make meal periods available is consistent with that interpretive canon.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be affirmed.

August __, 2009

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(California Rule of Court 8.520(c)(1))

According to the word count facility in Microsoft Word 2002, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3), contains 2569 words, and therefore complies with the 14,000-word limit contained in Rule 8.520(c)(1).

August __, 2009

_____

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Attorney for Amici Curiae

CERTIFICATE OF SERVICE
S166350

I, Donald M. Falk, declare:

I am over the age of eighteen and not a party to the within-entitled action. My business address is Two Palo Alto Square, Suite 300, Palo Alto, CA 94306. On August __, 2009, I served a copy of the within documents:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August __, 2009, in Palo Alto, California.

_____

Donald M. Falk