No. _____

In The
Supreme Court of the United States

OAKLAND PORT SERVICES CORP.
d/b/a AB TRUCKING,

Petitioner,

vs.

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether California's imposition of meal and rest break requirements on federally regulated motor carriers operating in interstate commerce is preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), or as an obstacle to the implementation of federal regulatory purposes?

2. Whether the heightened evidentiary standard applied by the California Court of Appeal in concluding that the state's meal and rest break laws are not "related to a price, route, or service of any motor carrier" under 49 U.S.C. § 14501(c)(1) conflicts with *Northwest, Inc. v. Ginsberg*, 134 S.Ct 1422 (2014), as well as decisions from the First, Fifth, Seventh and Eighth Circuits?

3. Whether the court below disregarded longstanding principles governing the distinction between interstate and intrastate commerce, contravening not only this Court's precedents but those of appellate courts throughout the country?

RULE 29.6 STATEMENT

Petitioner Oakland Port Services Corp. d/b/a AB Trucking is not a publicly held entity, nor does it have a parent corporation. Nor does a publicly held company own 10% or more of Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Oakland Port Services Corp. d/b/a AB Trucking respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, in this matter.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 230 Cal.App.4th 1267, 179 Cal. Rptr. 3d 498. App. 1-36. The trial court's Statement of Decision and Order Re: Judgment (SOD) from which that appeal was taken appears at App. 38-75, and its award of attorneys' fees, costs and class representative enhancements appears at App. 76-78.

JURISDICTION

The California Court of Appeal issued its decision on October 28, 2014, and denied Petitioner's request for rehearing on December 1, 2014. App. 37. On February 11, 2015, the California Supreme Court denied Petitioner's timely Petition for Review. App. 79. On May 1, 2015, Justice Kennedy granted Petitioner's timely request for an extension of time to file a petition for certiorari until June 11, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a). Because 28 U.S.C. § 2403(b) may apply to this matter,

a copy of this petition will be served on the California Attorney General.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution (art. VI, cl. 2) states that "the Laws of the United States . . . shall be the supreme Law of the Land, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Commerce Clause of the U.S. Constitution (art. I, sec. 8, cl. 3) grants Congress the power "to regulate Commerce with foreign nations, and among the several States. . . ."

Pertinent statutory provisions of the FAAAA, 49 U.S.C. § 14501, and Airline Deregulation Act (ADA), 49 U.S.C. App. § 1305 (1988), are reproduced at App. 80. Relevant excerpts from the Federal Motor Carrier Safety Administration (FMCSA)'s regulatory proceedings (70 Fed. Reg. 49,978, 50,011 (August 25, 2005) and 76 Fed. Reg. 81,134, 81,136 (December 27, 2011, effective July 1, 2013)) are reproduced at App. 82 and 84. Relevant provisions of California Labor Code §§ 226.7 and 512(a) are reproduced at App. 87 and 88. California Code of Regulations title 8, § 11090(12)(A) is reproduced at App. 88.

STATEMENT OF THE CASE

A. The FAAAA and California's Meal/Rest Break Regulations

In 1994, Congress passed the FAAAA to prevent the states from undermining federal deregulation of the trucking industry. *See Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 368 (2008). The FAAAA sought to eliminate non-uniform state regulation of motor carriers, rules which had caused "significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology, and curtail[ed] the expansion of markets." *Californians for Safe and Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184, 1187 (9th Cir. 1998) (quoting from H.R.. Conf. Rep. No. 103-677, at 86-88 (1994)), *cert. denied*, 526 U.S. 1060 (1999).

The preemption clause of the FAAAA provides that "A State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1), App. 80. This language was adapted from the ADA, which likewise included a preemption provision designed "to 'ensure that the States would not undo federal deregulation with regulation of their own.'" *Rowe*, 552 U.S. at 368 (quoting *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992)). This Court has looked to ADA precedents for purposes of interpreting the near-identical preemption clause of the FAAAA. *E.g., Rowe*, 552 U.S. at 371.

California law specifically designates when and how rest breaks and meal periods must be taken by employees in all industries. *See Brinker Restaurant Corp. v. Superior Court,* 53 Cal.4th 1004, 1040-41, 1049 (2012). Those laws require a duty-free 30 minute meal break "no later than the start of an employee's fifth hour of work," and a second duty-free 30 minute meal break "after no more than 10 hours of work," plus a 10-minute rest break every four hours throughout the workday or major fraction thereof. *Brinker,* 53 Cal.4th at 1041. *See* Cal. Labor Code 512(a), App. 88; 8 Cal. Code Regs. § 11090(12)(A), App. 88.

The state's meal and rest break regulations further provide that an employer may not require an employee to work during any required meal or rest period. Cal. Labor Code § 226.7(b), App. 87. The California Supreme Court has clarified that "an employer must relieve the employee of all duty for the designated [meal] period." *Brinker*, 53 Cal.4th at 1034. For truck drivers, this would mean that they are able to leave their vehicles for the mandated breaks. *E.g.*, App. 51.

B. Proceedings Below

The instant lawsuit was brought by Respondents Lavon Godfrey and Gary Gilbert in Alameda County Superior Court, State of California on behalf of themselves and all others similarly situated. Their Second Amended Complaint pled violations of the California

Labor Code and Unfair Business Practices law, relating primarily to Petitioner's alleged failure to comply with California meal and rest break requirements. Clerk's Transcript (CT) 1 *et seq*.

The plaintiff class, as certified, consisted of truck drivers who performed work for Petitioner between March 28, 2004 and March 15, 2011. CT 363. Those drivers typically picked up containers arriving at the Port of Oakland from overseas and delivered them to customer locations throughout the San Francisco Bay Area and Northern California. Reporter's Transcript (RT) 3-4, 157. Due to scheduling uncertainties inherent in the trucking industry (including frequent closures and congestion at the Port), drivers were asked to fit their rest breaks and meals in when their schedule permitted. RT 182, 238, 252, 532, 683-84. For example, drivers had significant down-time while waiting in line at the Port, or when customers loaded or unloaded shipments at their warehouses. RT 161-62, 253-54, 584. However, eating lunch in one's cab does not constitute "off-duty" time under California's meal and rest break law, and hence was deemed actionable by the lower courts in this case. Respondents' primary contention at trial and on appeal was that such informal meal and rest breaks failed to comply with California law.

Following a court trial, Judge Robert B. Freedman of the Alameda County Superior Court issued the SOD on May 21, 2013, which awarded Respondents $724,903.90 in damages and penalties plus $239,653.28 in pre-judgment interest, almost all of

which was predicated upon Petitioner's alleged meal and rest break violations. App. 74. Subsequently, Respondents were awarded $487,810.50 in attorneys' fees, plus $42,106.16 in costs and a total of $20,000 in class representative enhancements. App. 76.

The theories of relief upon which damages and penalties were assessed consisted of: (1) a purported failure to allow employees to take meal and rest breaks required under California law; (2) an alleged failure to pay drivers for all hours worked; and (3) an asserted failure to pay employees classified as trainees. *See* App. 45-51. The second theory of relief was dependent upon the first, inasmuch as the trial court's damage award under the second theory was predicated upon its conclusion that drivers did not receive adequate meal breaks, and hence should not have had an hour deducted from their pay for having taken them. App. 42, 46, 55. All but one of the claims underlying the judgment below are, accordingly, subject to preemption under the principles discussed below. The only non-preempted theory of relief for which damages were awarded was Respondents' misclassification of trainees claim, as to which a $23,482.70 award was entered. CT 719.

Among other things, the SOD emphatically rejected Petitioner's preemption defense, stating that a "presumption against preemption" barred courts from interpreting the FAAAA to "preempt every traditional state regulation that might have some indirect connection with, or relationship to, rates, routes, or services unless there is some indication

Congress intended that result." App. 57. Analogizing California's meal and rest break statutes to "prevailing wage" laws, the trial court concluded that the regulations at issue here "had 'no more than an indirect, remote, and tenuous effect on motor carriers' and, as such, were not preempted by the FAAAA." App. 58, 73 (quoting *Mendonca*, 152 F.3d at 1185).

The California Court of Appeal affirmed, largely on the basis of the Ninth Circuit Court of Appeals' decision in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), *cert. denied*, 2015 U.S. LEXIS 2990 (2015), which was handed down after briefing in this matter had been completed. In an opinion by Alameda Superior Court Judge Steven Brick, sitting by assignment, the court below reasoned that the scope of "preemption must be tempered by the 'presumption against the preemption of state police power regulations.'" App. 19 (quoting *Tillison v. Gregoire*, 424 F.3d 1093, 1098 (9th Cir. 2005)), and explained that the Ninth Circuit's decision in *Dilts* "was reached after careful, thorough, and, we believe, correct analysis." App. 19.

Abjuring any "need for us to reinvent the wheel by repeating or adding to that analysis here," the court below stated its "full agreement" with *Dilts*' holding that California's meal and rest break laws were not preempted because they consisted of "normal background rules for almost all employers doing business in the state of California," applicable "to hundreds of different industries." App. 19. There was no preemption, the court believed, because those laws

did "'not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly.'" App. 19-20 (quoting *Dilts*, 769 F.3d at 647).

Responding to a suggestion in *Dilts* that the preemption inquiry would differ in the context of motor carriers involved in interstate commerce (as opposed to Penske's local appliance delivery trucks), the lower court opined that because Petitioner's loads were delivered between points within the State of California (the Port of Oakland and, for example, Sacramento), those operations did not fall within the bounds of interstate commerce – despite the fact that all of the containers in question had arrived at the Port from overseas for delivery to Petitioner's customers. See App. 23.

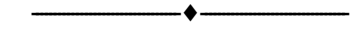
The California Supreme Court subsequently denied review of the case in a one-sentence order. App. 79.

C. Federal Questions Presented

At the trial court's direction, the issue of whether California's meal and rest break requirements are preempted by federal law was addressed in post-trial briefing. Most of the resulting SOD was devoted to explaining that court's rejection of Petitioner's preemption defense. App. 6-26. The preemption issue was also the primary focus of briefing in the California Court of Appeal, which ultimately resulted in an affirmance of the trial court decision. App. 1 *et seq*.

Preemption was also the main subject of the Petition for Review presented by Petitioner to the California Supreme Court.

Questions concerning the distinction between interstate and intrastate commerce first arose at oral argument in the California Court of Appeal, as a result of *Dilts*' suggestion several months earlier that claims concerning an interstate motor carrier might stand on a different preemption footing than those pertaining to an intrastate carrier. That issue was decided adversely to Petitioner by the court below, App. 20-25, and fully briefed by the parties in connection with Petitioner's request for rehearing in the Court of Appeal and Petition for Review to the California Supreme Court.



REASONS FOR GRANTING CERTIORARI

The California Court of Appeal in this case embraced a preemption test promulgated by the Ninth Circuit in *Dilts* only a few months earlier. Those decisions cannot be reconciled with this Court's precedents or those of at least four federal appellate courts. *Dilts* treated generally applicable state regulations as a breed apart for preemption purposes, adopting a test which accords them virtual immunity from the FAAAA's preemptive reach. The court in this case followed suit, reading that statute in a manner which has no basis in its text, legislative history or this Court's precedents, while at the same time

construing interstate commerce in a way which turns decades of settled precedent on its head.

As matters stand, both the state and federal courts in California are bound to follow these published decisions. There are at least a dozen class action lawsuits percolating through those courts raising preemption issues similar or identical to those under consideration here. Pending clarification of the scope of preemption in the motor carrier context by this Court, more lawsuits are likely to follow. If, as a majority of federal district courts which considered the issue prior to *Dilts* concluded, such claims are indeed preempted by the FAAAA, those actions will result in an enormous waste of judicial resources without this Court's intervention.

At least as importantly, motor carriers and other businesses throughout California will be forced to operate under a cloud of uncertainty so long as the lower court's misguided treatment of interstate commerce remains on the books. Plenary review of these issues is warranted.

I. THE PREEMPTION TEST BORROWED BY THE CALIFORNIA COURT OF APPEAL FROM *DILTS* IS IRRECONCILABLE WITH THIS COURT'S FAAAA JURISPRUDENCE

Much like *Dilts*, the court below set the bar for FAAAA preemption so high that only state regulations which specifically refer to motor carriers could

ever be preempted. That, however, is simply not the law as enunciated by this Court.

A. Indirect State Regulation of Motor Carrier Prices, Routes Or Services Violates 49 U.S.C. § 14501(c)(1) No Less Than Laws Which Explicitly Target the Trucking Industry

Decisions of this Court have consistently emphasized the broad preemptive scope of the ADA and FAAAA. As described in *Morales,* Congress' use of the phrase "relating to" in the ADA's preemption clause is indicative of a "broad pre-emptive purpose"; accordingly, state laws "relate to" prices, routes or services if they have "a connection with or reference to" them. *Morales*, 504 U.S. at 383.

Preemption may thus occur even where a state law's effect on prices, routes or services "'is only indirect.'" *Id*. at 386 (citation omitted). Most pertinently, the phrase "relates to" does not require that the state specifically regulate rates, routes or services. Rather, it is enough for preemption purposes if the law has a "significant impact" in that regard. *Rowe*, 522 U.S. at 370-71. Only laws which affect rates, routes or services in a "'tenuous, remote or peripheral . . . manner'" are not preempted. *Morales,* 504 U.S. at 390. The FAAAA's preemption clause has been held to possess the same broad preemptive ambit as that of the ADA. *Rowe*, 552 U.S. at 370-71, 376.

Contrary to these principles, the decision below embraced the Ninth Circuit's elevated standard for finding preemption in cases concerning laws of general applicability. Under that test, any regulation which does not specifically target motor carriers presents a "borderline" situation in which preemption will be rejected if the regulations at issue "do not 'bind' motor carriers to specific prices, routes, or services" or "'freeze into place' prices, routes or services. . . ." App. 20 (quoting *Dilts*, 769 F.3d at 647). That standard, applied by the court below, disregards the plain text of the FAAAA and stands in direct conflict with this Court's precedents.

This Court has consistently held that the phrase "related to" embraces state laws "having a connection with or reference to carrier 'rates, routes, or services,' whether directly or indirectly." *See Morales*, 504 U.S. at 384; *Rowe,* 552 U.S. at 370; *Dan's City Used Cars, Inc. v. Pelkey,* 133 S.Ct. 1769, 1778 (2013); *Ginsberg,* 134 S.Ct. at 1430. *Morales* drew this definition from "[t]he ordinary meaning of these words," which it recognized was quite "broad." 504 U.S. at 383. Moreover, *Morales* expressly rejected the argument that the ADA "only pre-empt[ed] States from actually *prescribing* rates, routes, or services." *Id.* at 385 (emphasis added). That standard, the Court held, "reads the words 'relating to' out of the statute." *Id.* at 386. As Justice Scalia explained in that decision, "[h]ad the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden States to '*regulate* rates, routes, and services.'" *Id.* at 385

(citation omitted). But Congress did not write the statute that way; on the contrary, Congress *rejected* a bill which would have substituted "determining" for "relating to." *Id.* at 386 n. 2.

Nor has this Court ever suggested that any sort of insurmountable bar for preemption should apply to laws of general applicability, as opposed to those specifically directed at the trucking industry. Rather, the Court has applied the same "related to" test regardless of whether the laws or causes of action directly or indirectly impacted rates, routes, or services. *Cf. Morales,* 504 U.S. at 384 (dealing with generally applicable consumer protection laws); *Ginsberg*, 134 S.Ct. at 1430 (suit based upon implied covenant of good faith and fair dealing); *Rowe*, 552 U.S. at 370-72 (applying identical standard to laws targeting tobacco delivery services). There is thus no basis for utilizing a wholly different test with respect to state "police power" regulations, as did the court below, following *Dilts*. App. 19-20. Congress fashioned *one* test, for *all* laws; namely, whether those laws "relate to" prices, routes, or services.

For these reasons, the decision below directly conflicts with *Morales* and *Ginsberg*, both of which found generally applicable state laws to be preempted. Indeed, the lower court's "binds to"/"freezes into place" test is just a reformulation of the "regulates" or "prescribes" standard rejected in *Morales.* Saying that the FAAAA only preempts laws that set specific prices, routes, or services or freezes them into place is equivalent to saying that it only preempts laws that

"actually *prescribe* rates, routes, or services," a contention which this Court has squarely rejected. *Morales*, 504 U.S. at 385 (emphasis added).

As if to underscore this point, *Ginsberg* reversed the Ninth Circuit's application of its "binds to" preemption test just last year, only for it to be resurrected a few months later in *Dilts* and then adopted by the court below. The unworkability of that standard is amply demonstrated by its application to the instant case. Unlike factory or retail workers, truck drivers cannot simply clock out at the time designated by state law for taking a meal or rest break. By the very nature of their work, motor carriers must contend with numerous external constraints which most other industries do not.

For instance, drivers may be travelling on a highway with no appropriate place for an 18-wheeler to pull off safely; or they may be sitting in line for hours on end at the Port of Oakland to pick up a load, knowing that they would lose their coveted spot by taking a state-mandated break in which they were relieved from all work-related responsibilities as required by California law. Or, perhaps due to such a delay, they could be racing to meet a customer's delivery window, recognizing that they could eat lunch after arrival while the customer was unloading the container (instead of taking the obligatory meal break while still on the road, resulting in a missed delivery appointment, which would have to be rescheduled for the following day).

In recognition of these unique attributes, Congress exempted the trucking industry from such regulation by the states, only to have its intent thwarted by decisions like *Dilts* and that of the court below. Requiring a regulation to specifically mandate a particular price, route or service for preemption to arise is not only inconsistent with *Morales* and *Ginsberg*, it makes no practical sense. Employee break requirements – no less than consumer protection statutes and covenants of good faith and fair dealing implied by state law – can significantly impact prices, routes or services even though they do not target the transportation industry specifically. As was the case in *Morales* and *Ginsberg*, the broadly applicable state laws at issue here have precisely that effect, and likewise warrant preemption.

B. The Heightened Evidentiary Standard For Finding Preemption Applied by the Courts Below Fails to Comport With *Ginsberg* as Well as Decisions of the First, Fifth, Seventh and Eighth Circuits

The trial court in this case predicated its decision, in part, on its view that Petitioner had failed to quantitatively prove the impact of California's meal and rest break laws on its prices, routes or services. As stated in the SOD, "AB presented no evidence of any imposed conditions or costs, let alone rising to the level of creating a 'significant impact' upon its prices. No showing was made regarding the number of

routes or cost of additional drivers, tractors, trailers, or such other factors that AB could have claimed it would face should it have to comply with state law." App. 65. The California Court of Appeal quoted and endorsed this conclusion. App. 17.

This reasoning, however, imposes a far higher evidentiary burden to support a showing of preemption than was contemplated in *Ginsberg* and a host of recent federal circuit court opinions, none of which required any quantitative showing whatsoever regarding the impact of state laws on the carrier's operations. *Ginsberg* was decided on a pleading motion, without requiring a detailed factual showing of the sort demanded by the trial and appellate courts in this case. *Ginsberg,* 134 S.Ct. at 1430-31. This Court's approach is precisely what the First, Fifth, Seventh and Eighth Circuits have done in cases applying the ADA and FAAAA, finding preemption as a matter of law without the need for in-depth factual inquiry.

For instance, the First Circuit Court of Appeals expressly rejected a "contention that empirical evidence is necessary to warrant FAAAA preemption." *Mass. Delivery Ass'n v. Coakley,* 769 F.3d 11, 19-20 (1st Cir. 2014). Instead, that court examined "the logical effect that a particular [regulatory] scheme has on the delivery of services or the setting of rates." *Id*. at 21 (quoting *Rowe v. New Hampshire Motor Transport Ass'n,* 448 F.3d 66, 82 n. 14 (1st Cir. 2006), *aff'd*, 522 U.S. 364 (2008)). *See also Onoh v. Northwest Airlines, Inc.*, 613 F.3d 596, 600 (5th Cir. 2010)

(affirming summary adjudication that emotional distress claims were preempted by the ADA); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 611 (7th Cir.) (affirming Rule 12(b)(6) dismissal of state tort claims on preemption grounds under ADA), *cert. denied*, 531 U.S. 1036 (2000); *Data Mfg. v. UPS*, 557 F.3d 849, 852-53 (8th Cir. 2009) (affirming dismissal of state law claims against motor carrier on FAAAA preemption grounds).

These authorities make clear that state regulation of motor carriers must be scrutinized as a matter of logic and judicial common sense rather than requiring companies to quantify the effect of such laws in either temporal or dollar terms. Here, on the other hand, the trial and appellate courts insisted upon a standard of proof which would require an economist to sift through the minutiae of a motor carrier's prices, routes and services. Imposing such an evidentiary burden not only has no statutory basis, it would be cost-prohibitive for smaller trucking companies like Petitioner and likely lead to differing outcomes in factually similar cases, depending upon the relative persuasive powers of the parties' dueling experts. This is hardly a recipe for uniform national regulation, but rather for a patchwork of inconsistently applied laws from jurisdiction to jurisdiction or within a single state.[1]

[1] In any event, a far greater showing than that which *Ginsberg* (as well as the First, Fifth, Seventh and Eighth

(Continued on following page)

For the FAAAA to be effective in achieving its purpose of unifying regulation of motor carriers around the country, preemption determinations cannot be made on a carrier-by-carrier basis, but instead require a single set of rules for the entire industry. The heightened standard of proof imposed by the lower courts in this matter would make it virtually impossible to arrive at a single rule applicable to all motor carriers statewide or nationally, undermining the objective Congress had in mind when enacting the FAAAA in the first place – and affording no predictability whatsoever to the businesses affected. California motor carriers would, moreover, be at a disadvantage vis-à-vis truckers from other states, rendering the Port of Oakland more costly as a shipping destination than other locations.

Circuits) found sufficient to support a finding of preemption permeated the trial court record in this case. It was, however, dismissed both in the SOD and Court of Appeal opinion as "mere speculation." For instance, there was uncontradicted testimony from drivers regarding delays they encountered in picking up loads at the Port of Oakland. *E.g.*, RT 39-40, 88, 145, 182. Not uncommonly, they had to wait in line for four hours or more in order to pick up containers, sometimes for delivery to a customer located hours away later that same afternoon. RT 89, 210, 253. Only by ignoring this evidence could the lower court conclude that "AB has failed to sustain its burden on this appeal from the trial court's rejection of its preemption defense." App. 17-18.

C. The Impact of California's Meal and Rest Break Laws On Petitioner's Prices, Routes and Services Is Neither Tenuous, Remote Nor Peripheral

California's meal and rest break laws indisputably have a "connection with" carrier prices, routes, and services, and thus satisfy the Court's FAAAA preemption test. *E.g., Morales,* 504 U.S. at 384. The only question is whether that connection is "'too tenuous, remote, or peripheral'" to trigger preemption. *Id.* at 390 (citation omitted). The answer, under the proper standard, is no.

California's highways are extremely congested, especially in and around urban areas, and do not lend themselves to parking an 18-wheeler by the side of the road. A driver cannot simply pull a tractor-trailer weighing 80,000 lbs. to a stop on the freeway and exit the cab to take a meal or rest break by the state-mandated hour. Rather, he or she must get off the freeway (most likely deviating from their preferred route), onto a different road (i.e., a new route) and find a legal place to park. Some of those routes, moreover, prohibit trucks of the size operated by Petitioner.

In conjunction with other constraints inherent in the business (e.g., long waits at the Port, highway construction or traffic delays and narrow customer delivery windows), adhering to California's meal and rest break regulations will inevitably affect a motor carrier's ability to grapple with such real-world

conditions. Petitioner's operations are thus significantly impacted by California's meal and rest break laws in a way that other industries are not. Under *Morales, Rowe* and *Ginsberg*, such consequences are more than sufficient to trigger preemption under the FAAAA.

In addition, if drivers cannot take advantage of informal meal break opportunities during existing down-time (i.e., while waiting in line at the Port or for customers to unload containers), motor carriers will be able to provide fewer services. For example, same-day delivery service (requested by many customers when their container arrives at the Port) will be impossible to guarantee, and fewer deliveries will be possible per day. Faced with similar practical impacts, the Ninth Circuit in *Dilts* nonetheless concluded that none of them mattered because the meal and rest break laws did not *bind* carriers to *specific* routes or services. *Dilts*, 769 F.3d at 647. As previously noted, the California Court of Appeal in this case expressed its "full agreement" with the *Dilts* analysis, indicating that "[t]here is no need for us to reinvent the wheel by repeating or adding to that analysis here. . . ." App. 19.

California's meal and rest break laws also "relate to" the rates which a motor carrier can charge. By altering carriers' routes and services, those regulations have a significant impact on prices, including the cost of additional drivers, tractors and trailers that would be needed to ensure off-duty breaks while maintaining the same level of service. *Dilts* suggested

that the effects of California's meal and rest break requirements on routes and services did not give rise to preemption because Penske could have prevented them by "hir[ing] additional drivers or reallocat[ing] resources." *Id.* at 648. But this analysis ignores that such measures would in themselves impose substantial costs on carriers, thereby impacting prices – once again overlooking real-world consequences.

California's meal and rest break laws, accordingly, fall squarely within the ambit of the FAAAA's preemption clause: they have a direct and significant impact on motor carrier operations, altering the services which motor carriers can offer, the routes they can travel, and the prices at which they can provide services. Contrary to the lower court's apparent belief, these regulations do not merely affect the relationship between employer and employee; they alter fundamental aspects of the way in which Petitioner can structure its dealings with customers and respond to myriad external constraints. As such, these regulations cannot be dismissed as "tenuous, remote, or peripheral."

II. THE CALIFORNIA COURT OF APPEAL MISAPPLIED LONG-ESTABLISHED INTERSTATE COMMERCE PRINCIPLES

Believing that *Dilts*' preemption analysis with respect to intrastate drivers was equally applicable to Petitioner, the court below in effect conflated

interstate with intrastate commerce, upending decades of settled law.

A. Petitioner's Deliveries of Containers To and From an International Port Are Unarguably Part of Interstate Commerce

The long-established test for determining whether a motor carrier operates in interstate commerce is: (1) whether it transports goods across state lines, or (2) whether the goods are part of an ongoing shipment from out-of-state. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568-69 (1943); *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1469 (9th Cir. 1997). If either prong of this test is satisfied, the motor carrier is by definition engaged in interstate commerce.

Although not an issue at trial, the shipments handled by Petitioner are a classic example of the second type of interstate commerce. Containers arriving from overseas at the Port of Oakland are loaded onto Petitioner's trailers for delivery throughout northern California as part of one continuous movement from manufacturer to customer. *E.g.,* RT 212, 639, 737. Even shipments ticketed for nearby cities from the Port would be considered interstate in character under this test. Hence, the lower court's belief that deliveries to far-away locations like Shasta

or Eureka were infrequent is not only inaccurate,[2] but irrelevant: both short and long distance deliveries of containers from the Port are part of a continuous flow of interstate commerce.

Dilts dealt with purely intrastate drivers who delivered and installed Whirlpool appliances from a local warehouse to people's homes. *Dilts*, 769 F.3d at 646-47 n. 2. The Ninth Circuit opinion noted, however, that a different analysis could apply to motor carriers engaged in interstate commerce. *Dilts,* 769 F.3d at 651 (concurring opinion). Rather than undertaking such an analysis, the court below tried to sidestep it by theorizing that the *Dilts* defendants were engaged in interstate commerce, or that Petitioner was not. App. 22-23.

The former suggestion is, however, contrary to the express findings of the *Dilts* trial and appellate courts, and the latter conclusion – if allowed to stand – would overturn decades of settled precedent regarding the definition of interstate commerce. *See, e.g., Walling*, 317 U.S. at 568-69; *Klitzke,* 110 F.3d at 1469; *Lyons v. Lancer Insurance Co.*, 681 F.3d 50, 58 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 1242 (2013); and *Abel v. Southern Shuttle Services, Inc.*, 631 F.3d 1210, 1214 (11th Cir. 2011). Deliveries to or from an

[2] *See, e.g.,* RT 11 (destinations included Hopland in the north and Watsonville in the south); RT 81 (Vacaville and Merced); RT 205 (Napa); RT 267 (Lodi); RT 697 (Sacramento); RT 704-05 (Vacaville and Sacramento).

international port are the quintessence of "Commerce with foreign nations, or among the several States." Because the California Court of Appeal believed otherwise, certiorari is warranted on this additional ground.

B. As a Motor Carrier Engaged in Interstate Commerce, Petitioner Is Subject to Regulation By the FMCSA, Which Rejected Imposing Break Requirements of the Sort At Issue Here

By enacting the FAAAA, Congress sought to ensure that motor carriers would be subject to a single set of regulations nationwide with regard to their prices, routes and services. And in fact, during the period at issue here the federal agency charged with regulating interstate truckers expressly rejected imposing break requirements on interstate carriers. In the FMCSA's words, such requirements "would significantly interfere with the operational flexibility motor carriers and drivers need to manage their schedules." Hours of Service of Drivers, 70 Fed. Reg. 49,978, 50,011 (August 25, 2005), App. 83.

In light of the federal government's decision to allow motor carriers and drivers leeway to determine for themselves when and how to take rest breaks,[3]

[3] Two years ago, the FMCSA began imposing rest break requirements on interstate motor carriers, albeit ones which are far less stringent than those set forth in California's meal and

(Continued on following page)

California's decidedly less *laissez faire* approach would appear to "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress and the FMCSA. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see Hillsborough County v. Automated Med. Labs, Inc.,* 471 U.S. 707, 713 (1985). Unlike the defendants in *Dilts*, Petitioner was subject to federal regulation (or more particularly, a decision not to regulate) with respect to drivers' rest breaks. Applying California meal and rest break laws to an interstate motor carrier like Petitioner would thus create the overlapping, conflicting patchwork of regulation which the FAAAA was intended to prevent.

The lower court tried to avoid this outcome by defining Petitioner as an intrastate carrier, but that re-definition flies in the face of long-settled precepts. At a minimum, the California courts should be directed to re-consider the question of preemption with respect to a motor carrier unarguably engaged in interstate commerce, and hence well within the scope of both the FAAAA's preemption clause and the FMCSA's regulatory framework.

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rest break law. *See* 76 Fed. Reg. 81,134, 81,136 (December 27, 2011, effective July 1, 2013), App. 84. Although not in force during the period at issue in this case, the new federal rules confirm that the FMCSA considers matters concerning truck driver rest breaks to fall within its regulatory purview.

III. THE QUESTIONS PRESENTED ARE EXCEEDINGLY IMPORTANT TO MOTOR CARRIERS AND OTHER BUSINESSES NATIONWIDE, MERITING THIS COURT'S REVIEW

As previously noted, numerous class action lawsuits are currently making their way through the federal and state court systems in California, raising issues similar or identical to those presented here. Without this Court's review of the decision below, California-based interstate motor carriers will be forced to adhere to far more stringent break rules than trucking companies in other states; and as a result, California ports will be at a competitive disadvantage vis-à-vis ports in those states, whose truckers are able to deal with everyday traffic and business constraints without also having to navigate the sort of meal and rest break requirements faced by Petitioner and other motor carriers in California.

Such a re-regulation of the trucking industry by the states through a patchwork of conflicting laws is precisely what the FAAAA sought to avoid. While undoubtedly beneficial and appropriate when applied to other industries, Congress has determined that such laws result in "significant inefficiencies, increased costs [and] reduction of competition" in the motor carrier context. H.R. Conf. Rep. No. 103-677, at 86-88 (1994), quoted in *Mendonca*, 152 F.3d at 1187.

If the lower court's willingness to erase the line between interstate and intrastate commerce is allowed to stand, moreover, it could create massive uncertainty in other areas of the law where businesses previously counted on a well-settled distinction between the two realms. For instance, companies which had previously considered themselves subject to federal but not state regulation in a particular field could suddenly be faced with not knowing which authority to follow when confronted with conflicting or overlapping edicts. Certiorari should be granted to avoid costly and far-reaching dislocations stemming from this lack of clarity.

CONCLUSION

For all of these reasons, the Petition for a Writ of Certiorari should be granted.[4]

Dated: June 11, 2015

Respectfully submitted,

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[4] If certiorari is granted, Petitioner asks that the attorneys' fee and class representative enhancements awarded in the court below based upon plaintiffs' status as prevailing party be reviewed as well.

Godfrey v. Oakland Port Services Corp.

Court of Appeal of California, First Appellate District, Division Two

October 28, 2014, Opinion Filed

A139274

Counsel: Chauvel & Glatt, Ronald C. Chauvel and Kenneth M. Weinfield for Defendant and Appellant.

Weinberg, Roger & Rosenfeld, David A. Rosenfeld, Theodore Franklin, Caren P. Spencer and Lisl R. Duncan for Plaintiffs and Respondents.

Judges: Opinion by Brick, J., with Kline, P. J., and Richman, J., concurring.

Opinion by: Brick, J.

Opinion

BRICK, J.* – Named plaintiffs Lavon Godfrey and Gary Gilbert initiated this class action lawsuit against Oakland Port Services Corp., doing business as AB Trucking (AB). They alleged that AB did not pay its drivers for all hours worked, misclassified some drivers as non-employee trainees and did not pay them at all, and failed to provide required meal and rest breaks. Plaintiffs sought certification of the class of drivers who performed work for AB out of its

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* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Oakland, California facility. The trial court granted the class certification motion, and the case proceeded to a bench trial. Plaintiffs prevailed on most of their causes of action and the court awarded the class a total of $964,557.08. In a post-judgment order, the court awarded attorney fees, litigation expenses, and class representative enhancements to plaintiffs.

On appeal, AB relies primarily on the argument that federal law preempts application of California's meal and rest break requirements to motor carriers. AB also argues in passing that the court order granting class certification was unsupported by substantial evidence, but without addressing the evidence presented on the motion; that the court should have reserved individual determinations of damages for the claims administration process; that AB's drivers are expressly excluded from coverage under Industrial Welfare Commission (IWC) Wage Order No. 9-2001; and that the award of attorney fees and class representative enhancements should be reversed. We find no merit in AB's preemption or other arguments and affirm.

BACKGROUND

Class members are employees of AB who drive trucks owned by AB between the Port of Oakland and AB's yard, located in the general port area. Drivers also drive loads to customer locations within the San Francisco Bay Area and elsewhere in California.

On September 20, 2010, plaintiffs filed a second amended complaint (SAC) in which they sought to represent the class of all drivers who performed work for AB out of its Oakland facility between March 28, 2004, and November 1, 2010. The SAC stated eight causes of action: (1) unfair business practices, in violation of Business and Professions Code section 17200 *et seq*. (unfair competition law or UCL); (2) failure to pay for all hours worked; (3) failure to pay for any hours worked due to misclassification of employment status; (4) failure to pay overtime; (5) violation of the living wage provision of the Oakland City Charter; (6) failure to provide all required meal and rest breaks; (7) failure to pay wages owed at termination of employment; and (8) provision of inaccurate wage statements.

When plaintiffs moved for class certification on October 29, 2010, they identified the class as those drivers who performed work for AB out of the Oakland facility between March 28, 2004, and December 3, 2010. They identified five subclasses: (1) those who had not been paid for all hours worked; (2) those who were misclassified as non-employee trainees and paid no wages; (3) those who were not paid for overtime worked; (4) those who were paid less than Oakland's living wage; and (5) those who had not been provided the required meal and rest breaks.[1] Following a

[1] Plaintiffs had previously moved for class certification, but the record of those previous motions is not before us. In granting plaintiffs' final motion for class certification, the court noted

(Continued on following page)

hearing, the trial court granted plaintiffs' motion on December 3, 2010, identifying the time period defining the class to be from March 28, 2004, "through the date of notice to the class."[2]

Immediately prior to trial, AB moved for reconsideration of the class certification order, seeking "modification or decertification of the class." The court denied AB's motion.[3]

A bench trial took place over several days in February 2012. Eight drivers testified (among other witnesses) – six class members, including Godfrey and Gilbert, for the plaintiffs and two drivers, who had chosen to opt out of the class, for AB.

The court issued a notice of intended decision on October 2, 2012. AB requested a written statement of decision on October 11, 2012. Plaintiffs filed a proposed statement of decision and AB filed objections, among which it contended that California's meal and rest break requirements, as applied to motor carriers, are preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA; Pub.L. No.

"that Plaintiffs' earlier motions for class certification fell short in various ways, as enumerated by the court in its interim orders."

[2] The time period was later specified in the trial court's statement of decision as from March 28, 2004 through March 15, 2011.

[3] The order denying the motion for reconsideration of class certification is not in the record before us and is not addressed in AB's appeal. We are aware of it because the court noted its denial in the notice of intended decision, filed on October 2, 2012.

103-305 (Aug. 23, 1994) 108 Stat. 1569). Following a hearing, the court filed a statement of decision (SOD) and judgment on May 21, 2013.

The SOD noted that plaintiffs had dismissed the fourth cause of action, for failure to pay overtime wages, during trial. For the remaining causes of action, the court found in favor of plaintiffs on causes of action Nos. 1, 2, 3, 6, 7, and 8. It found in favor of AB on the fifth cause of action, for violation of Oakland's living wage ordinance, because AB did not employ enough people to be covered by the ordinance.[4] The SOD awarded the class a total of $964,557.08.

The court's primary factual findings in the SOD were: (1) AB failed to pay for all hours worked because AB's records showed that "it deducted one hour per day from each employee. This deduction took place, even though the driver did not receive a one hour meal period"; (2) "AB misclassified drivers who were suffered or permitted to work as non-employees, or unpaid 'trainees.' . . . The evidence reflected these trainees were suffered or permitted [to] work by AB and were not paid at all"; and (3) plaintiffs had "presented substantial and persuasive evidence that class members were routinely and consistently precluded by AB from taking meal periods and rest breaks." The court then determined that these primary findings supported the derivative claims that AB had engaged in unfair competition, had failed to pay all wages

[4] Plaintiffs do not appeal from that or any other ruling.

owed on termination of employment, and had failed to provide accurate, itemized wage statements. The trial court also rejected AB's contention that the FAAAA preempts California's meal and rest break requirements.

On August 9, 2013, the trial court awarded plaintiffs $487,810.50 in attorney fees, $42,106.16 in litigation expenses, and $20,000 in class representative enhancements.

AB timely filed a notice of appeal on July 19, 2013.

DISCUSSION

I. *Preemption*

AB maintains that the FAAAA preempts California law governing meal and rest breaks as applied to motor carriers. AB's preemption argument does not apply to plaintiffs' other claims that do not involve meal and rest breaks. Also, AB does not argue that plaintiffs' UCL claim is preempted, but if AB were to prevail on its preemption argument, then AB's violation of California meal and rest break laws could not support that portion of the UCL claim. Because we conclude that AB's preemption argument fails, we need not further consider the UCL claim.

A. *Standard of Review*

To the extent that we are called upon to interpret the FAAAA's preemption provision, discussed below,

we apply a de novo standard of review. (*People v. Petrilli* (2014) 226 Cal.App.4th 814, 824 [172 Cal. Rptr. 3d 480].) To the extent that evidence is required to support AB's preemption argument, we review for substantial evidence. (*Cellphone Termination Fee Cases* (2011) 193 Cal.App.4th 298, 311 [122 Cal. Rptr. 3d 726].)

(1) We also begin with a presumption that California's meal and rest break laws are *not* preempted by the FAAAA. In preemption cases "'"'in which Congress has "legislated . . . in a field which the States have traditionally occupied," . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."'" [Citations.]' [Citation.] This is known as the presumption against preemption, and its role is to '"'provide [ ] assurance that "the federal-state balance" [citation] will not be disturbed unintentionally by Congress or unnecessarily by the courts.'" [Citation.]' [Citations.]" (*People ex rel. Harris v. PAC Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 778 [174 Cal.Rptr.3d 626, 329 P.3d 180] (*PAC Anchor*).) Regulation of wages and hours is, of course, an area of traditional state regulation. (*California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.* (1997) 519 U.S. 316, 330-334 [136 L. Ed. 2d 791, 117 S. Ct. 832].)

B. *Meal and Rest Breaks – Legal Background*

Labor Code section 226.7 provides, in relevant part: "(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the [IWC]. . . . [¶] (c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the [IWC] . . . , the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided."

The transportation industry is covered by IWC wage order No. 9-2001. (Cal. Code Regs., tit. 8, § 11090.) Meal periods are covered in subdivision 11 of the order, and rest periods are covered in subdivision 12.

(2) An employer must provide a meal period of not less than 30 minutes for a work period of more than five hours, unless a work period of not more than six hours will complete the day's work. (Cal. Code Regs., tit. 8, § 11090, subd. 11(A).) A second meal period must be provided for a work period of more than 10 hours, unless the total number of hours worked is no more than 12 hours. (*Id.,* subd. 11(B).) The second meal period may be waived by mutual

consent only if the first meal period was not waived.[5] (Cal. Code Regs., tit. 8, § 11090, subd. 11(B).)

A meal period is considered "'on duty,'" and must be counted as time worked, unless the employee is relieved of all duty. (Cal. Code Regs., tit. 8, § 11090, subd. 11(C).) An "on duty" meal period is permitted "only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to." (*Ibid.*) The employer is required to keep time records of meal periods, except those that coincide with time "during which operations cease." (Cal. Code Regs., tit. 8, § 11090, subd. 7(A)(3).)

An employer is required to "authorize and permit" rest periods of 10 minutes for each four hours worked, unless the total daily work time is less than three and one-half hours. (Cal. Code Regs., tit. 8, § 11090, subd. 12(A).) The rest periods, "insofar as practicable," are to be in the middle of each four-hour work period. (*Ibid*.) Rest periods are "counted as hours worked for which there shall be no deduction from wages." (*Ibid*.) If an employer fails to provide a rest period, then "the employer shall pay the employee one (1) hour of pay at the employee's regular rate

[5] The length and frequency of meal breaks, as provided in California Code of Regulations, title 8, section 11090, subdivision 11(A), conform to the requirements of Labor Code section 512, subdivision (a), which also provides that the meal period may be waived by mutual consent of both the employer and employee.

of compensation for each workday that the rest period is not provided." (*Id.,* subd. 12(B).)

(3) In *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 [139 Cal. Rptr. 3d 315, 273 P.3d 513] (*Brinker*), our Supreme Court clarified that the law allows some flexibility with respect to the timing and circumstances of meal breaks. Absent a waiver, the law "requires a first meal period no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." (*Id.* at p. 1041.) "[A]n employer must relieve the employee of all duty for the designated [meal] period, but need not ensure that the employee does no work." (*Id.* at p. 1034.) When "off duty" breaks are not feasible, IWC wage order No. 9-2001 provides for "'on duty'" breaks by written agreement. (*See Brinker,* at p. 1035 [discussing similar provisions in IWC wage order No. 5-2001].) "[I]n the context of an eight-hour shift, '[a]s a general matter,' one rest break should fall on either side of the meal break. [Citation.] Shorter or longer shifts and other factors that render such scheduling impracticable may alter this general rule." (53 Cal.4th at p. 1032.)

C. *The FAAAA's Preemption Clause*

The FAAAA contains an express preemption clause: "Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce

a law, regulation, or other provision having the force and effect of law *related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property*." (49 U.S.C. § 14501(c)(1), italics added.) State regulation of specified subjects, not including meal and rest break regulation, is exempted from the general preemption rule.[6] (49 U.S.C. § 14501(c)(2)-(3).)

"The FAAAA was enacted by Congress in 1994 as part of an ongoing effort to deregulate the interstate trucking industry. Pub.L. No. 103305, 108 Stat. 1569 (codified as amended in scattered sections of . . . Title 49 of the U.S. Code)." (*Villalpando v. Exel Direct Inc.* (N.D.Cal., Mar. 28, 2014, No. 12-cv-04137 JCS) 2014 WL 1338297, p. *6 (*Villalpando*).) Deregulation of the interstate trucking industry was preceded by deregulation of air carriers in the Airline Deregulation Act of 1978 (ADA; Pub.L. No. 95-504 (Oct. 24, 1978) 92 Stat. 1705). (*Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 378 [119 L. Ed. 2d 157, 112 S. Ct. 2031] (*Morales*).) The ADA also preempts state law "related to a price, route, or service of an air carrier." (49

[6] Excepted from preemption are "the safety regulatory authority of a State." (49 U.S.C. § 14501(c)(2)(A).) Plaintiffs argue that the meal and rest break laws, as applied to the transportation industry, are "'genuinely responsive to motor vehicle safety'" and even if they were otherwise preempted by the FAAAA, they would be saved from preemption by the safety exemption. The trial court did not reach this argument. Nor do we.

U.S.C. § 41713(b)(1).) In interpreting the FAAAA, the Supreme Court has followed *Morales* because of the similarity in language. (*Rowe v. New Hampshire Motor Transp. Assn.* (2008) 552 U.S. 364, 370 [169 L. Ed. 2d 933, 128 S. Ct. 989] (*Rowe*).)

(4) Turning to the preemption clause itself, the use of "related to" renders its scope "'deliberately expansive'" and "'conspicuous for its breadth.'" (*Morales, supra,* 504 U.S. at pp. 383-384.) "At the same time, the breadth of the words 'related to' does not mean the sky is the limit." (*Dan's City Used Cars, Inc. v. Pelkey* (2013) 569 U.S. ___ [185 L. Ed. 2d 909, 133 S. Ct. 1769, 1778] (*Dan's City*).) The preemption clause "does not preempt state laws affecting carrier prices, routes, and services 'in only a "tenuous, remote, or peripheral . . . manner."'" (*Ibid.*)

The United States Supreme Court has decided two cases in which the meaning of "related to a price, route or service" under the FAAAA was discussed, but none involving state regulation of employees' meal and rest breaks.[7] *Rowe* concerned a Maine statute

[7] Two other United States Supreme Court cases have decided other preemption issues under the FAAAA. In *American Trucking Assns., Inc. v. Los Angeles* (2013) 569 U.S. ___ [186 L. Ed. 2d 177, 133 S. Ct. 2096], the parties agreed that the requirements at issue relate to a motor carrier's price, route, or service with respect to transporting property; the only disputed issue was whether the requirements "'hav[e] the force and effect of law.'" (*Id.* at p. 2102.) In *Columbus v. Ours Garage & Wrecker Service, Inc.* (2002) 536 U.S. 424 [153 L. Ed. 2d 430, 122 S. Ct. 2226] (*Ours Garage*), the Supreme Court held that the FAAAA "does

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that required a licensed retailer of tobacco products to use a delivery service that provides a special kind of recipient-verification service. (*Rowe, supra,* 552 U.S. at p. 368, 128 S.Ct. 989.) The Supreme Court found that the law was preempted: "[I]t focuses on trucking and other motor-carrier services . . . , thereby creating a direct 'connection with' motor-carrier services." (*Id.* at p. 371.)

In contrast, *Dan's City* concerned a New Hampshire law regulating the disposal of stored vehicles in which defendant towing company had disposed of plaintiff's car after towing it rather than allowing plaintiff to pay towing and storage charges. (*Dan's City, supra,* 569 U.S. at p. ___ [133 S.Ct. at p. 1777].) The United States Supreme Court, noting the FAAAA preemption clause is limited to laws that relate to price, route, or service concerning the *transportation of property,* held that the law was not preempted because it regulated "the disposal of vehicles once their transportation – here, by towing – has ended." (569 U.S. at p. ___ [133 S.Ct. at p. 1779].)

D. *The FAAAA Does Not Preempt California Meal and Rest Break Laws*

Whether the FAAAA preempts California meal and rest break requirements as applied to motor

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not bar a State from delegating to municipalities and other local units the State's authority to establish safety regulations governing motor carriers of property." (*Id.* at p. 428.)

carriers is a question of first impression in California courts.[8] However, while this case has been pending, two important decisions, *Pac Anchor* and *Dilts v. Penske Logistics, LLC* (9th Cir. 2014) 769 F.3d 637, superseding opinion at *Dilts v. Penske Logistics, LLC* (2014) 757 F.3d 1078, amended after denial of rehearing en banc (*Dilts*), were made which are instructive, if not wholly determinative, of the outcome here.[9] Initially, our Supreme Court held in *Pac Anchor* that claims under the UCL based upon wage and hour regulations – not including meal and rest break rules – are not preempted by the FAAAA. In that case, the

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[8] *Fitz-Gerald v. SkyWest, Inc.* (2007) 155 Cal.App.4th 411 [65 Cal. Rptr. 3d 913] dealt with labor issues under IWC wage order No. 9-2001, including meal and rest breaks, and a UCL claim predicated on the labor violations. (*Fitz-Gerald* at p. 415.) The court determined that the labor claims were preempted by the Railway Labor Act (RLA) (45 U.S.C. § 181), which regulates labor relations between common interstate air carriers and their employees. (*Fitz-Gerald,* at pp. 418-422.) The court was unconvinced that the labor claims were also preempted by the ADA. (155 Cal.App.4th at p. 423.) Because the court had already found the labor issues to be preempted under the RLA, the court's rejection of preemption under the ADA was perhaps dictum, but we note that the court said: "Although the ADA has been broadly interpreted as preempting state 'enforcement actions having a connection with, or reference to, airline "rates, routes, or services" ' it has its limits. [Citation.] If the rule was otherwise, 'any string of contingencies is sufficient to establish a connection with price, route or service [and] there will be no end to ADA preemption. [Citations.]' " (155 Cal.App.4th at p. 423, fn. omitted.)

[9] We issued a focus letter, asking that the parties be prepared to address these two cases at oral argument. They were.

People filed a complaint alleging that the defendants had violated the UCL by committing various labor violations, including violations under IWC wage order No. 9-2001 sections 4 and 7. (*PAC Anchor, supra,* 59 Cal.4th at p. 776.) In rejecting defendant's preemption argument, the court held: "Although IWC Wage Order No. 9 regulates wages, hours, and working conditions 'in the transportation industry,' the sections on which the People rely do not refer to prices, routes, or services. Section 4 of the wage order governs minimum wage requirements, and section 7 governs employer recordkeeping. If sections 4 and 7 have an effect on defendants' prices, routes, or services, that effect is indirect, and thus falls outside the scope of the test set forth in *Morales*. For this reason, we also reject defendants' argument that the FAAAA facially preempts sections 4 and 7 of IWC Wage Order No. 9." (*PAC Anchor,* at p. 785.)

In addition, while this case has been pending, the Ninth Circuit has specifically addressed the question of FAAAA preemption of California meal and rest break rules and concluded that the "FAAAA does not preempt" them.[10] (*Dilts, supra,* 769 F.3d at p. 650.) *Dilts* resolved a split among California federal district courts, nine of which had determined that the FAAAA

[10] Federal circuit court opinions do not bind California courts, but they "may serve as persuasive authority." (*People v. Memro* (1995) 11 Cal.4th 786, 882 [47 Cal. Rptr. 2d 219, 905 P.2d 1305].)

preempts California meal and rest break laws[11] while four had found no preemption.[12]

AB contends that the meal and rest break laws have a significant impact on prices, routes and services in the following ways:

> (1) Drivers must deviate from their routes in order to find a legal place to pull over and park, changing the driver's route and adding to the break time itself. This acts to "deprive motor carriers of the ability to follow any route that does not offer adequate locations for stopping, or force them to take different or fewer routes." "In essence, the laws bind

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[11] *Dilts v. Penske Logistics LLC* (S.D.Cal., 2011) 819 F.Supp.2d 1109; *Rodriguez v. Old Dominion Freight Line, Inc.* (C.D.Cal., Nov. 27, 2013, No. CV 13-891 DSF (RZx)) 2013 WL 6184432; *Parker v. Dean Transportation, Inc.* (C.D.Cal., Oct. 15, 2013, No. CV 13-02621 BRO (VBKx)) 2013 WL 7083269; *Ortega v. J.B. Hunt Transportation, Inc.* (C.D.Cal., Oct. 2, 2013, No. CV 07-08336 (BRO) (FMOx)) 2013 WL 5933889; *Burnham v. Ruan Transportation* (C.D.Cal., Aug. 16, 2013, No. SACV 12-0688 AG (ANx)) 2013 WL 4564496; *Cole v. CRST, Inc.* (C.D.Cal., Sept. 27, 2012, No. EDCV 08-1570-VAP (OPx)) 2012 WL 4479237; *Campbell v. Vitran Express, Inc.* (C.D.Cal., June 8, 2012, No. CV 11-05029-RGK (SHx)) 2012 WL 2317233; *Aguiar v. California Sierra Express, Inc.* (E.D.Cal., May 4, 2012, No. 2:11-cv-02827-JAM-GGH) 2012 WL 1593202; and *Esquivel v. Vistar Corp.* (C.D.Cal., Feb. 8, 2012, No. 2:11-cv-07284-JHN-PJWx) 2012 WL 516094.

[12] *Villapando, supra,* 2014 WL 1338297; *Brown v. Wal-Mart Stores, Inc.* (N.D.Cal., Apr. 18, 2013, No. C 08-5221 SI) 2013 WL 1701581; *Mendez v. R+L Carriers, Inc.* (N.D.Cal., Nov. 19, 2012, No. C 11-2478 CW) 2012 WL 5868973; and *Reinhardt v. Gemini Motor Transport* (E.D.Cal. 2012) 869 F.Supp.2d 1158.

> motor carriers to a subset of all possible routes, in plain violation of the preemptive language. . . ."
>
> (2) The "impact on routes . . . affects the number of deliveries a driver can make in a day." This results in a lower level of service.
>
> (3) "[R]educing a driver's work time by at least 15% per day to account for state-mandated break periods will inevitably affect the prices a motor carrier can charge, driving up the cost of a given set of deliveries because it requires more employee time and fuel to accomplish."

AB's arguments here are essentially the same as the arguments made by the defendant in *Dilts* – arguments that the *Dilts* court rejected. (*Dilts, supra,* 769 F.3d at p. 647.) In addition, the trial court here found that "AB presented no evidence of any imposed conditions or costs, let alone rising to the level of creating 'a significant impact' upon its prices. No showing was made regarding the number of routes, costs of additional drivers, tractors, trailers, or other such factors that AB could have claimed it would face should it have to comply with state law. To the contrary, AB has made no showing of interference with competitive market forces within the industry." AB does not dispute this assessment or cite to us any evidence in the record supporting its factual contentions as to the impact on its rates, routes or services. For this reason alone, AB has failed to sustain its burden on this appeal from the trial court's rejection

of its preemption defense.[13] (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088 [72 Cal. Rptr. 3d 112, 175 P.3d 1170] ["It is well established that the party who asserts that a state law is preempted bears the burden of so demonstrating."].)

Further, AB's arguments are premised on a misreading of the regulations as requiring breaks at set times,[14] ignoring the flexibility, emphasized by *Brinker,* that employers have in scheduling breaks. AB's mischaracterization of the break requirements extends to statements such as "[s]tate meal and rest break laws . . . require . . . that motor carrier services cease at certain times of the day. . . ." This improperly applies what is a mandate affecting *individual workers* to the operation of the business *as a whole.* Nothing in the meal and rest break laws suggests that all workers must take their breaks at the same time, causing a business to cease providing services or that

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[13] AB noted at oral argument that there is evidence in the record to support its preemption defense, but the evidence to which counsel cited shows only that AB's routes vary daily and that "[a] driver's geographic location at the time one of these breaks must occur is contingent upon a whole host of variables." However, the trial court found that any impact of such variables on rates, routes, and service is "mere speculation." AB points to no evidence in the record casting doubt on the trial court's finding.

[14] AB states in its opening brief: "At a macro-level, application of [the meal and rest break] regulations to the trucking industry has the effect of superimposing a rigid daily break regimen onto the natural ebb and flow of daily drayage deliveries. . . ."

individual workers must take their breaks at any specific time. *Brinker* makes clear that is not the case.

Returning to the recent *Dilts* decision of the Ninth Circuit, after considering essentially the same arguments made by AB here, the court concluded that California meal and rest break laws are not preempted by the FAAAA. That conclusion was reached after careful, thorough, and, we believe, correct analysis. There is no need for us to reinvent the wheel by repeating or adding to that analysis here, except to note that the meal and rest break requirements are quite different from any laws the United States Supreme Court has found preempted under the FAAAA and "the scope of the pre-emption must be tempered by the 'presumption against the pre-emption of state police power regulations.'" (*Tillison v. Gregoire* (9th Cir. 2005) 424 F.3d 1093, 1098.)

(5) Accordingly, we are in full agreement with the *Dilts* summation: "Although we have in the past confronted close cases that have required us to struggle with the 'related to' test, and refine our principles of FAAAA preemption, we do not think that this is one of them. In light of the FAAAA preemption principles outlined above, California's meal and rest break laws plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt. They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not provide, either directly or indirectly. They are 'broad law[s] applying to hundreds of

different industries' with no other 'forbidden connection with prices[, routes,] and services.' [Citation.] They are normal background rules for almost *all* employers doing business in the state of California. And while motor carriers may have to take into account the meal and rest break requirements when allocating resources and scheduling routes – just as they must take into account state wage laws, [citation,] or speed limits and weight restrictions, [citation] – the laws do not 'bind' motor carriers to specific prices, routes, or services, [citation]. Nor do they 'freeze into place' prices, routes, or services or 'determin[e] (to a significant degree) the [prices, routes, or] services that motor carriers will provide,' [citation]." (*Dilts, supra,* 769 F.3d at p. 647, italics added.)

At oral argument, AB also invited us not to follow *Dilts* by arguing that its case was distinguishable, relying on footnote 2 of that opinion as well as a concurring opinion. AB's reliance on these passages is of no avail.

In footnote 2, the *Dilts* majority wrote: "We recently noted that it was an 'open issue' 'whether a federal law can ever preempt state law on an "as applied" basis, that is, whether it is proper to find that federal law preempts a state regulatory scheme sometimes but not at other times, or that a federal law can preempt state law when applied to certain parties, but not to others.' [Citation.] We need not resolve that issue here. For the reasons discussed in this section, we hold that California's meal and rest

break laws, as generally applied to motor carriers, are not preempted. [¶] Were we to construe Defendant's argument as an 'as applied' challenge, we would reach the same conclusion and, if anything, find the argument against preemption even stronger. Plaintiff drivers work on short-haul routes and work exclusively within the state of California. They therefore are not covered by other state laws or federal hours-of-service regulations, 49 C.F.R. § 395.3, and would be without *any* hours-of-service limits if California laws did not apply to them. *See Hours of Service of Drivers*, 78 Fed.Reg. 64,179-01, 64,181 (Oct. 28, 2013) (amending 49 C.F.R. § 395.3 to exclude short-haul drivers, in compliance with *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.,* 406 U.S. App. D.C. 312 [724 F.3d 243] (D.C.Cir.2013), cert. denied, ___ U.S. ___ [187 L.Ed.2d 781, 134 S.Ct. 914] (2014)). Consequently, Defendants in particular are not confronted with a 'patchwork' of hour and break laws, even a 'patchwork' permissible under the FAAAA." (*Dilts, supra,* 769 F.3d at p. 648, fn. 2, italics added.)

In a concurring opinion, Judge Zouhary wrote: "[This case is not] about FAAAA preemption in the context of interstate trucking. . . . On this record, and in the intrastate context, California's meal and rest break requirements are not preempted." (*Dilts, supra,* 769 F.3d at 651 (conc. opn. of Zouhary, J.).)

AB maintains that, unlike the *Dilts* defendants, it is involved in interstate commerce because it transports goods from the Port of Oakland. Even if we

were willing to analyze AB's preemption challenge on an "as applied" basis,[15] AB has failed to differentiate its case from *Dilts* in a meaningful way. It is clear from the context of *Dilts* that the terms "interstate" and "intrastate" are used in the footnote and concurring opinion in their purely geographical sense. The *Dilts* defendants did not send their drivers across state lines, and neither does AB. Nothing in *Dilts* suggests that the *Dilts* defendants *did not* participate in interstate commerce, despite their operations being confined geographically to California.[16] Like the *Dilts* defendants, AB is subject to the laws of no other state with respect to the drivers in the class before us.

The *Dilts* defendants and AB may differ in being subject to federal hours-of-service regulations. The Federal Motor Carrier Safety Administration

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[15] In its opening brief, AB explicitly eschewed an "as applied" challenge, maintaining that the question of federal preemption is not subject to a case-by-case factual inquiry.

[16] Despite operating solely within California, the *Dilts* defendants and AB are equally subject to regulation under the Commerce Clause. (U.S. Const., art. I, § 8, cl. 3.) "This court has previously recognized that [motor vehicles] are instrumentalities of commerce even when used solely for intrastate purposes. [Citation.] That view seems to be shared universally among federal courts. [Citation.] Because a motor carrier is defined under the [FAAAA] as 'a person providing *motor vehicle* transportation for compensation,' [citation], [49 U.S.C.] section 14501 is within Congress' Commerce power because it regulates an instrumentality of commerce." (*Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040, 1052, fn. omitted, overruled on other grounds by *Ours Garage, supra,* 536 U.S. at p. 432.)

(FMCSA) has promulgated safety regulations governing motor carriers, including hours-of-service regulation. (49 C.F.R. § 395.3 (2014).) These regulations require no specific meal break and require that a driver be permitted to drive no more than eight hours before having a break of at least 30 minutes. (49 C.F.R. § 395.3(a)(3)(ii) (2014).) The *Dilts* drivers were not subject to the federal hours-of-service regulations because they were "short-haul" drivers, who operated "within a 100 air-mile radius of the normal work reporting location." (49 C.F.R. § 395.1(e)(1)(i) (2014); *see Dilts, supra.* 769 F.3d at p. 658, fn. 2.)

At trial, AB did not attempt to prove that its drivers were not also short-haul drivers – that was not an issue – nor has it attempted to demonstrate that the record supports that proposition on appeal. The SOD described AB's operations as including deliveries "in the greater San Francisco Bay Area, and, on occasion, to locations throughout California." In its opening brief, in support of its own description of operations taking place outside of the Bay Area, AB cites the testimony of one driver who made three trips to Eureka and a trip to "someplace up in Shasta." Evidence that one driver made infrequent trips outside the Bay Area does not establish that, to a more than de minimis degree, AB's drivers are *not* short-haul drivers and that they differ from the *Dilts* drivers in this respect.

Even if AB's drivers in the class were subject to federal hours-of-service regulation, compliance with California meal and rest break laws will not conflict

with the federal requirements. As with the *Dilts* drivers, AB would not be confronted with an unworkable "patchwork" of regulation.[17] We conclude that AB has not differentiated its case from *Dilts*. In any case,

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[17] In its opening brief, AB argued that "[i]f California can 'insist exactly when and for how long' carriers must provide breaks for drivers, other states could 'do the same, and . . . do so differently,'" leading to "'a patchwork of state service-determining laws, rules and regulations,' in direct contravention of Congressional intent." In support of this proposition, AB asserted that "when the FMCSA revised its hours of service rules in 2005, it considered and rejected imposing meal and rest break requirements akin to the state regulations at issue here, concluding that requirements of that type 'would significantly interfere with the operational flexibility motor carriers and drivers need to manage their schedules.'" (Quoting Hours of Service of Drivers, 70 Fed.Reg. 49978, 50011 (Aug. 25, 2005).) We have consulted the Federal Register and find that the FMCSA was commenting specifically on "a mandatory rest period (break) to mitigate any possible fatigue related to the 11th hour of driving," not on meal and rest breaks in general. (*Ibid.*) The Hours of Service of Drivers document in the Federal Register is a 95-page document and AB provides no citation within the document to a specification of what the FMCSA considered in 2005 and the specific findings it made, in violation of California Rules of Court, rule 8.204(a)(1)(C).

Moreover, plaintiffs requested and we granted judicial notice of an amicus brief filed by the United States in *Dilts*. This brief notes that in 2008, the FMCSA determined that California meal and break laws were not regulations on motor vehicle safety and, thus, the California laws are not within the scope of the power of the Secretary of Transportation to declare them preempted. (Department of Transportation Notices, 73 Fed.Reg. 79204-79206 (Dec. 24, 2008); *see* 49 U.S.C. § 31141.) The United States took the position in its brief that, at least in the intra-state context, California meal and break laws were preempted neither by the FAAAA nor by federal safety regulations.

the *Dilts* majority made clear in footnote 2 that its decision did *not* rely in the intrastate nature of defendants' operations or on the fact that the routes were short-haul.

Our conclusion, in agreement with *Dilts,* that the FAAAA does not preempt California state law regarding meal and rest breaks is reinforced by our Supreme Court's recent decision in *PAC Anchor*. Although the meal and rest break claims at issue here are in different sections of IWC Wage Order No. 9 than the provisions at issue in *PAC Anchor,* we believe that the court's conclusion applies to them equally. We also note that although the *PAC Anchor* court did not rely on *Dilts* (and did not need to reach its holding), both the *PAC Anchor* and *Dilts* courts relied extensively on *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca* (9th Cir. 1998) 152 F.3d 1184) (holding that the FAAAA does not preempt California's prevailing wage law when enforced against transportation companies). (*PAC Anchor, supra,* 59 Cal.4th at pp. 783-786; *Dilts, supra,* 769 F.3d at pp. 644-648.)

Hence, while the district court decision in *Dilts* and the federal trial courts which followed it reached a different conclusion, our holding that the FAAAA does not preempt California wage and hour regulations is entirely consistent with the jurisprudence of

the United States Supreme Court, the California Supreme Court, and the Ninth Circuit.[18]

II. *Class Certification*

AB contends that the trial court erred when it certified the class because plaintiffs failed to fulfill their burden of showing that the claims of the putative class representatives were typical of those of the class as a whole, that individual issues predominated over common questions, and that it was probable that class members would come forward to prove their separate claims. In its order granting class certification, much of the evidence upon which the court relied came from AB's records and the deposition testimony of AB witnesses. The trial court specifically found that the proposed class was sufficiently numerous and ascertainable, that commonality was "adequately supported," that plaintiffs' claims were typical and that plaintiffs' counsel could adequately represent the interests of the proposed class. The court noted that AB "does not identify any individual issues, much less argue that individual issues will predominate over common ones."

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[18] The court has also considered *Massachusetts Delivery Assn. v. Coakley* (1st Cir., Sept. 30, 2014, No. 13-2307) 769 F.3d 11 [2014 WL 4824976], which was decided after this case was submitted. *Massachusetts Delivery* is neither binding on this court nor, to the extent that it may differ in its analysis from that of the Ninth Circuit in *Dilts* and from our analysis, persuasive.

"'A judgment or order of the lower court is *presumed correct*.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [86 Cal. Rptr. 65, 468 P.2d 193].) AB bears the burden on appeal of affirmatively showing error. (*Lennane v. Franchise Tax Bd.* (1996) 51 Cal.App.4th 1180, 1189 [59 Cal.Rptr.2d 602].) Despite this burden, AB, in its briefing, discusses *none* of the evidence presented in support of plaintiffs' motion for certification (no evidence was submitted in opposition to the motion). Instead, AB briefly provides its own assessment of evidence presented at trial – evidence that is irrelevant to a determination of whether the trial court erred at the time of class certification.

Additionally, AB cannot show error without providing us with an adequate record. (*Parker v. Harbert* (2012) 212 Cal.App.4th 1172, 1178 [151 Cal. Rptr. 3d 642].) AB has presented a record that is inadequate for review of evidence presented in support of class certification. Plaintiffs submitted numerous exhibits with their motion for class certification, including excerpts from the reporter's transcript (RT) of the deposition of William Aboudi, AB's president; excerpts from the RT of the deposition of Jovi Aboudi (the individual identified by AB as its person most knowledgeable regarding its payroll system and payment of wages); documents produced by AB during discovery, as well as AB's responses to interrogatories and requests for production; and excerpts from the RT's of the depositions of Godfrey and Gilbert. This evidence is included in the record on appeal.

However, plaintiffs' motion was also based on the declarations of Godfrey and Gilbert, which they had previously filed with the trial court. The memorandum of points and authorities in support of the motion relied on these declarations extensively.[19] AB failed to include these declarations when designating the clerk's transcript on appeal.

Accordingly, we reject AB's attack on the trial court's order certifying the class because AB has manifestly failed to affirmatively show error by accounting for all of the evidence presented in support of class certification and because the record provided by AB is inadequate for review of that evidence.

III. *The Damages Award*

AB contends that the evidence at trial "showed that some AB trucking drivers took meal and rest breaks which complied with California regulations, while others did not. It also showed that some were encouraged to take the requisite breaks under state law, while others were not." AB notes the court's

[19] AB objected to the plaintiffs' reliance on the declarations, arguing that plaintiffs had not requested that the court take judicial notice of them. In reply, plaintiffs noted that a prior case management order allowed incorporation by reference of materials previously filed in the case. In its order granting class certification, the court overruled AB's objection, stating that the "objection to the Godfrey and Gilbert declarations on the basis of the date of filing is not well taken."

finding that "'class members were routinely and consistently precluded by AB Trucking from taking meal periods and rest breaks,'" but finds it significant that "this does not say that 'all' class members were so precluded, or that it happened most of the time." AB asserts that the court should have reserved individual determinations of damages for a claims administration process[20] rather than granting "a maximum damage award to each and every member of the plaintiff class, based upon an assumption that all of them had the same experience as the handful of drivers who testified on plaintiffs' behalf at trial (and unlike those who testified on behalf of AB Trucking.)" AB claims that as a result of this error, "many if not most of the plaintiffs received a windfall damage award."

We review the trial court's damages award for substantial evidence. (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 43 [171 Cal. Rptr. 3d 714].) In order to evaluate the evidence with respect to damages, we must first understand the evidence with respect to liability.

At trial, the court heard testimony from six drivers who testified for plaintiffs and two drivers, James Francis and Erik Gaines, who testified for AB. We quote the trial court's findings in the SOD

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[20] AB does not contend that it sought a claims administration process for determining damages, nor can we find that it did so in the record.

concerning meal and rest periods, which AB does not dispute were supported by substantial evidence:

(6) "The Class presented substantial and persuasive evidence that class members were routinely and consistently precluded by AB from taking meal periods and rest breaks. Under the California Supreme Court's decision in [*Brinker, supra,*] 53 Cal.4th 1004, AB failed to comply with its obligation to afford drivers meal periods because *Brinker* holds an employer's duty 'is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.' (*See Id.* at p. 1040.) An employer does not satisfy its obligation if it 'impedes' or 'discourages' employees from taking an 'uninterrupted 30-minute break.' (*Id.*) An employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks. (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963 [35 Cal. Rptr. 3d 243]. . . .)

"The recent *Brinker* decision provides two examples of unlawful discouragement – a scheduling policy that makes taking breaks 'extremely difficult' and creating an anti-meal-break policy enforced through ridicule or reprimand. The Class established both unlawful scenarios exist here. . . .

"In addition, the evidence shows AB neither maintained, nor provided drivers, any 'formal' meal period policy. The first example of unlawful discouragement provided in *Brinker* presumes the existence of a formal meal period policy. AB does not meet the 'provide' standard because it provided no evidence showing drivers were, at a minimum, informed in any meaningful or consistent way that they could take a meal period, or the definition of any such meal period. As AB had no meal period policy to 'undermine,' and the evidence presented shows that, beyond that, AB regularly discouraged the taking of legally protected breaks, AB has not shown it provided meal periods to the Class.

"The evidence reflects AB knew drivers were stuck in line to enter the Port, once inside the Port, and in order to exit the Port, every single day. Yet it did not provide for the relief of its employees' duties during this 'waiting' time. Waiting, even in a comfortable location, is 'on-duty' by definition: here, drivers were waiting to complete a task assigned by their employer. (*See* [*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582 [94 Cal. Rptr. 2d 3, 995 P.2d 139]].) While waiting to complete an assigned task, drivers were not free to leave to engage in personal activities. [Citation.] Instead, AB discouraged off-duty meal periods, and instructed drivers to eat while in line and 'on-duty.'

"Despite evidence drivers did not receive meal periods as required by law, AB presented no evidence that it created or entered into written agreements

between AB and drivers for on-the-job paid meal periods. AB's [person most qualified] on payroll and payroll processing admitted that AB automatically deducted one hour's pay from each driver per each shift worked based on a presumption that one hour meal periods were taken."

As for rest breaks, the Court found: "Drivers testified that AB did not authorize and permit ten minute rest breaks. Moreover, the evidence reflected AB typically encouraged drivers not to take, or prevented drivers from taking, rest breaks. AB provided no evidence of any formal policy on rest breaks. As with meal periods, there is no indication drivers were, at a minimum, informed in any meaningful or consistent way that they could take rest breaks, or the definition of any such rest breaks."

AB's contention that the SOD did not apply to "all" class members and that it did not say that deprivation of meal and rest breaks happened "most of the time" is not well taken. A fair reading of the court's factual findings shows that with respect to the class as a whole, the court determined that AB had no policy of providing rest and meal breaks, that breaks the drivers were able to take were usually on-duty breaks, and that AB consistently discouraged or prevented the taking of off-duty breaks. The court's finding of liability applied to the class as a whole, and to its members individually.

As to damages, the court heard extensive testimony from Andrea Don, who presented the damages

model that the court adopted in its damage award. Don prepared her model from AB's payroll and employment records that were produced during discovery. The model presents a damage calculation for each individual class member and Don's testimony detailed the assumptions and calculations that contributed to the individual damages presented to the court. AB identifies no evidence in its brief that would undermine the validity of these calculations.[21] AB identifies no individual factor affecting damages that was supported by evidence at trial and was not accounted for in Don's calculations. We reject AB's characterization of the damages as based on "speculation."

It was the court's finding that AB did not provide for conforming breaks and actively and consistently impeded or discouraged drivers from taking them. AB points to no substantial evidence that, despite AB's actions, drivers still managed to take off-duty breaks, in conformance with the requirements of IWC wage order No. 9-2001, and thus has failed to undermine

[21] AB does argue that "some AB Trucking drivers took meal and rest breaks which complied with California regulations," but the record does not bear this out. Francis stated that he "always" took his lunch break, but we find no testimony that these were off-duty breaks, in conformance with IWC wage order No. 9-2001. Indeed, Francis testified that he would "put [his] lunch off" if he was dispatched on a "hot" job. This implies that when he took a meal break he was not relieved of all duties, and was expected to, and did, respond to dispatch calls.

Gaines said that he took rest breaks, but it appears that he counted time in his truck, waiting in line at the Port – time that was not off duty – as break time.

the damages model upon which the court based its award. The damages model was supported by ample evidence and we conclude that substantial evidence supported the court's damage award.[22]

IV. *The IWC Wage Order No. 9-2001 Exclusion does not Apply*

AB contends that IWC wage order No. 9-2001 does not apply to them because its drivers are expressly excluded from coverage. In support of this contention, AB cites section 3(L) of the Order, which provides, in relevant part: "The provisions of this section are not applicable to employees whose hours of service are regulated by: [¶] (1) The United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers. . . ." (Cal. Code Regs., tit. 8, § 11090, subd. 3(L).) Assuming that AB's drivers are governed by the applicable federal regulations,[23] AB

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[22] In the final paragraph of its brief in the section attacking the damage award, AB states that the damage calculation was "based upon little more than guesswork as to causation" and "must be reversed for this reason alone." This is a wholly frivolous argument. The court clearly concluded that class members were deprived of conforming meal and rest breaks because of AB's lack of a policy authorizing and providing such breaks, and AB's acts impeding or discouraging the taking of breaks.

[23] AB asserts that its drivers are subject to the federal regulations "[a]s holders of commercial vehicle licenses for trucks in excess of 33,000 pounds," citing 49 United States Code

(Continued on following page)

can prevail in its argument only if "this section" refers to the entire order and not just to section 3, which covers "Hours and days of work."

"When [IWC wage order] No. 9[-2001] refers to itself in its entirety, the phrase 'this order' or 'this wage order' is used." (*Cicairos v. Summit Logistics, Inc., supra,* 133 Cal.App.4th at p. 958 (*Cicairos*).) "The 'order' is . . . broken down into 22 'sections.' The difference between the entire 'order' and its individual 'sections' is clear." (*Ibid.*) "Basic rules of statutory construction . . . require that the phrase 'this section' in [California Code of Regulations, title 8, section 11090, subdivision 3(L)] be read to encompass only the provisions of section 3 'Hours and Days of Work' of which it is a part. Therefore, truck drivers are not exempted from the other requirements of wage order No. 9." (*Id.* at p. 959.)

We agree with *Cicairos* and reject AB's argument.[24]

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sections 31502, 31136, and 49 Code of Federal Regulations parts 395.1-395.13 (2014). We need not decide whether AB is correct.

[24] In its reply brief, AB relies on *Collins v. Overnite Transportation Co.* (2003) 105 Cal.App.4th 171 [129 Cal. Rptr. 2d 254], in which the court considered only overtime claims. *Cicairos* explicitly rejected an expansive reading of *Collins* that would apply to meal and rest break claims. (*Cicairos, supra,* 133 Cal.App.4th at pp. 956-957.)

V. *Attorney Fees and Class Representative Enhancements*

AB contends that we must set aside the award of attorney fees and class representative enhancements, but this contention is predicated entirely on our having found that the court erred, as asserted in AB's other arguments. Because we have found no error, we affirm the award of attorney fees and class representative enhancements.

DISPOSITION

The judgment of the trial court and its post-judgment order awarding attorney fees, litigation expenses, and class representative enhancements are affirmed. Plaintiffs are awarded their costs on appeal. The matter is returned to the trial court for an award of attorney fees on appeal.

Kline, P.J., and Richman, J., concurred.

A petition for a rehearing was denied December 1, 2014, and appellant's petition for review by the Supreme Court was denied February 11, 2015, S222999.

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 2

LAVON GODFREY et al.,
Plaintiffs and Respondents,
v.
OAKLAND PORT SERVICES CORP.,
Defendant and Appellant.

A139274
Alameda County No. RG08379099

BY THE COURT:

The petition for rehearing is denied.

Date: DEC 1, 2014 KLINE, P.J. P.J.

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SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated, Plaintiffs, v. OAKLAND PORT SERVICES CORP d/b/a AB Trucking, and DOES 1 through 20, inclusive, Defendants.	Case No. RG08379099 ~~[PROPOSED]~~ **STATEMENT OF DECISION AND ORDER RE: JUDGMENT** (Filed May 21, 2013) Trial Dates: February 14-22, 2012 March 12, 2012 Dept.: 20 Judge: Hon. Robert B. Freedman

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural posture

Plaintiffs Lavon Godfrey and Gary Gilbert, on behalf of themselves and the Class ("Plaintiffs") against AB Trucking ("AB")[1] filed Complaint in this wage and hour class action suit in March 2008. The operative Second Amended Complaint was filed on September 20, 2010 ("SAC"). The suit alleged violations of the California Labor Code ("Labor Code") and Unfair Business Practices (Business & Professions Code §§17200, et seq., "UCL") containing eight causes of action: 1) Unfair Business Practices (Business & Professions Code §§17200, et seq., "UCL"); 2) Failure to Pay for All Hours Worked (Labor Code §§510, 1182.12, and 1194; IWC[2] Wage Order No. 9, §4); 3) Failure to Pay for Any Hours Worked Due to Misclassification of Employment Status (Labor Code §§510, 1182.12 and 1194; IWC Wage Order No. 9, §4; 4) Failure to Pay Overtime (Labor Code §§510 and 1194; IWC Wage Order No. 9, §3); 5) Failure to Pay Living Wage (Oakland City Charter §728) ("OLW"); 6) Failure to Provide Meal and/or Rest Periods (Labor Code §§226.7 and 512; IWC Wage Order No. 9); 7) Failure to Pay Wages Owing at Discharge or Quitting (Labor Code §§201, 202 and 203); and 8) Failure

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[1] Reference herein to AB encompasses Oakland Port Services ("OPS") and Baymodal.

[2] "IWC" refers to the California Industrial Welfare Commission.

to Provide Accurate Itemized Wage Statements (Labor Code §226). The fourth cause of action for failure to pay overtime was dismissed by Plaintiffs during trial, leaving seven causes of action and eliminating the need for the Overtime Subclass.

Plaintiffs are truck driver employees of AB who primarily drove trucks owed by their employer back and forth to the Port of Oakland from AB's yard located in the general Port Area. Drivers also drove loads to customer locations in the greater San Francisco Bay Area, and, on occasion, to locations throughout California.

The Court certified the following Class in December 2010 of drivers ("Drivers" or "Class"):

> All drivers who performed work for Defendant out of its Oakland, California facility from the period of March 28, 2004 through the date of notice to the class [March 15, 2011] ("statutory period").

After completion of discovery and mediation that proved unsuccessful, the action was tried to the Court over several days in February 2012. On October 2, 2012, this Court issued its Notice of Intended Decision and Order ("NOID"). On October 12, 2012, AB filed a request for Statement of Decision. On November 2, 2012, Plaintiffs filed the first Proposed Statement of Decision.

On November 13, 2012, AB filed Objections to the Proposed Statement of Decision. On April 8, 2013, this Court issued its Order regarding Statement of

Decision, Proposed Judgment and Claims Administration Issues. The parties appeared before the Court on May 10, 2013.

B. FACTS IN EVIDENCE

The Court will discuss the facts in evidence pertaining to causes of action two through three, and five. The other causes of action were either dismissed by Plaintiffs (fourth cause of action), or will be discussed later herein as the claims are derivative of other violations (first, seventh and eighth causes of action).

1. Failure to pay for all hours worked

Drivers testified they worked more than eight hours in a day, and at times AB management required drivers to clean AB's yard on weekends, holidays, or at other times when business was slow.[3] Drivers testified they typically worked more than eight hours each day, but that they were typically only paid for eight hours each day.

AB automatically deducted one hour's pay from each driver per each shift worked according to AB's designated person most qualified ("PMQ") on payroll and payroll processing, Maria Jovita (Jovi) Aboudi.

[3] At trial, eight drivers provided testimony: six Class members, including Plaintiffs Godfrey and Gilbert, as well as two drivers who had chosen to opt-out of the Class.

Any time a driver worked over five hours in a day, there was always a deduction of one hour applied. The documentary evidence presented also reflected, on its face, deductions of one hour per each driver, per each shift of five hours or more worked, each day. No documentary evidence produced by AB reflected that the automatic one-hour deduction ever ceased.

AB alleged that the one-hour automatic deduction, and thus failure to pay at least minimum wage, was made because drivers received a one-hour, off-duty meal period. However, AB did not produce records of meal periods, pursuant to the applicable wage order, Industrial Welfare Commission Wage Order No. 9-2001 ("Wage Order 9"), subsection 7, that would have supported its position. AB offered no documentary evidence at trial showing meal periods received by drivers at any time during the statutory period.

Though there was no showing at trial that the automatic deduction of one hour ceased or changed in any way, there was some indication that AB made a change to its record-keeping policies after the filing of the lawsuit. But again, notwithstanding some indication of this in testimony, AB did not produce records of meal periods recorded (or received) by drivers for any time during the statutory period.

The evidence reflects that prior to May 2009, drivers did not receive one-hour, uninterrupted, off-duty meal period after every five hours worked (or at all). Post-May 2009, there is some evidence that

drivers received at least 30-minute meal periods (if not one hour meal periods) when it was not "busy." However, despite these described changes to instruction or general awareness regarding meal periods, no evidence reflected AB ceased its automatic deduction policy and practice, nor that AB ceased discouraging or preventing drivers from receiving meal periods. Drivers were regularly paid for eight hours, though they had worked more than eight hours.

2. Failure to pay for any hours worked due to misclassification

AB misclassified drivers who were suffered or permitted to work as non-employees, or unpaid "trainees." Both AB's President, Bill Aboudi, and AB's PMQ admitted there was a subclass of drivers classified as non-employee trainees who were not paid at all for any hours worked. The payroll and timekeeping records confirmed AB had trainees who were not paid at all for any hours worked. Misclassified trainees were both those with Class A licenses at the time they worked for AB, but were not paid, and those without Class A licenses.

3. OLW

Evidence was presented as to the number of drivers employed by AB during the statutory period. Evidence was also presented as to the wage rates earned by drivers during the statutory period. While many of the drivers received wages at a rate lower

than that required by the OLW, as is discussed below, the record reflects insufficient evidence to support a finding that AB employed the requisite number of employees to be covered by OLW requirements.

4. Meal periods and rest breaks

Class member witnesses testified that no one at AB told them to take a half hour, uninterrupted, off-duty meal period, at least not until in mid-2009 when the dispatcher first indicated to them on single, isolated occasions that they should take a one hour lunch break.[4] Drivers testified that before 2009, though they were able to stop briefly (5-20 minutes at a time) to "grab" food, they were not allowed to take a lunch break and had to eat in the truck in line at the Port while turning the motor of their assigned vehicle on and off. After 2009, drivers were told to take a lunch break when it was not busy, but were often told it was "too late" in the shift to take a lunch. Both prior to 2009 and after, drivers presented evidence they were prevented from taking meal period because they were continuously dispatched.

Drivers were also prevented from taking meal periods because they could not leave their trucks when the line into the Port was not moving. Drivers were prevented from getting out of the line to pull over and eat because this would cause them to lose

[4] The year 2009 is post-filing of the instant action, which was brought in March 2008.

their place in line, in addition to the fact that there was no legal or safe area in which to to pull over.

Drivers were not told by AB to take rest breaks. Instead, drivers provided examples of when they had been interrupted when attempting to take a break. Some drivers were encouraged by AB to relieve themselves in a bottle, via a funnel in the case of one female driver, or a bucket, in the case of another female driver, rather than take the time to stop to use the restroom. Another driver testified she was chastised for taking a break to warm her food in the microwave kept in AB's office area.

In addition, when drivers arrived at a customer location, they would often have to wait until their truck could be unloaded, and while the truck was being unloaded. This waiting requirement affected both their ability to take meal and rest periods.

Drivers never recorded taking a meal period, nor were they asked to do so. No evidence of recorded meal periods was provided. Drivers testified that they were never paid an hour of pay at their regular wage rate for having missed a meal period or a rest break. AB produced no evidence to the contrary.

II. DISCUSSION

A. FAILURE TO PAY FOR ALL HOURS WORKED

Wage Order 9, subsection (4)(B) provides: "Every employer shall pay to each employee, on the established

payday for the period involved, not less than the applicable minimum wage *for all hours worked* in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise [emphasis added]." (See *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323-4.) Wage Order 9, subsection (2)(H) defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (See *Morillion v. Royal Packing* (2000) 22 Cal.4th 575, 582.) "The "suffered or permitted to work" language does not limit whether time spent "subject to the control of an employer" is compensable." (*Id.*; see e.g., *Martinez v. Combs* ("*Martinez*") (2010) 49 Cal.4th 35, 69.)

Based on the testimony of AB's PMQ, the documentary evidence and testimony of drivers, AB consistently failed to pay for all hours worked because it deducted one hour per day from each employee. This deduction took place, even though the driver did not receive a one hour meal period. As a result of AB's default practice and policy of automatically deducting one hour's pay from each driver per each shift worked, drivers worked an hour each day for which they were not paid.

B. FAILURE TO PAY EMPLOYEES CLASSIFIED AS TRAINEES

Wage Order 9, subsection (4)(B) applies to this claim as well as the all hours worked claim. (See also *Morillion,* 22 Cal.4th at p. 582; *Martinez,* 49 Cal.4th at p. 69.) In addition, several sections of the Labor Code prohibit the waiver of wage claims or payment at any rate less than the minimum wage. (See e.g., Labor Code §§ 206.5, 219, 1194, 2802, 2804.)

The Class presented compelling evidence as to this claim. The evidence reflected that AB misclassified drivers who were suffered or permitted to work as non-employees, or unpaid "trainees." AB's witnesses admitted there were drivers classified as non-employee trainees who were not paid at all for any hours worked. AB did not dispute its use of "trainees" during the statutory period, nor that it utilized trainees who were unpaid. The evidence reflected these trainees were suffered or permitted work by AB and were not paid at all. Thirteen identifiable individuals were classified as "trainees" and were not paid. These individuals were identified from the record and documents produced by AB.

C. CLAIMS UNDER THE OLW LAW

Although AB meets some of the criteria for a Port Assisted Business within the meaning of the OLW (Section 728 of the Oakland City Charter), the Court concludes that AB did not employ the requisite number of employees during the applicable period of

January 28, 2005 through February 10, 2006, and thus the OLW is not applicable to quantifying the recovery to which the Class is otherwise entitled.

D. MEAL PERIODS AND REST BREAKS

1. Meal periods

Labor Code section 512 requires an employee be provided one thirty-minute meal period in the first 5 hours of work and a second thirty-minute meal period if the employee works more than 10 hours in a shift. Under the terms of Section 512, an employee may consent to waiver of the second meal period but may not consent to waive his second meal period if he waived the first meal period.

Labor Code section 226.7(b) states, "If an employer fails to provide an employee a meal 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 . . . period is not provided." Wage Order 9 states, "No 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. . . ." (Cal. Code Regs., tit. 8, § 11090, subd. 11(A).) "Employ," under the wage order, means "to engage, suffer, or permit to work." (*Id.,* subd. 2(E).) An employer who suffers or permits an employee to work over 5 hours without a meal period (or valid waiver thereof) may be liable under the statute for an additional hour of

pay at the employee's regular rate of compensation. The California Supreme Court has "repeatedly enforced definitional provisions the IWC has deemed necessary . . . to make its wage orders effective, to ensure that wages are actually received, and to prevent evasion and subterfuge. [Citation.]" (*Martinez, supra,* 49 Cal.4th at pp. 61-62.)

The Class presented substantial and persuasive evidence that class members were routinely and consistently precluded by AB from taking meal periods and rest breaks. Under the California Supreme Court's decision in *Brinker v. Superior Court* ("*Brinker*") (2012) 53 Cal.4th 1004, AB failed to comply with its obligation to afford drivers meal periods because *Brinker* holds an employer's duty "is an obligation to provide a meal period to its employees.[5] The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (See *Id.* at p. 1040.) An employer does not satisfy its obligation if it "impedes" or "discourages" employees from taking an "uninterrupted 30-minute break." (*Id.*) An employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks. (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963;

[5] (See also *Faulkinbury v. Boyd and Associates, Inc.* (May 10, 2013), No. G041702, Slip Op.)

see also *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1304-1305 [proof of common scheduling policy that made taking breaks extremely difficult would show violation].)

The recent *Brinker* decision provides two examples of unlawful discouragement – a scheduling policy that makes taking breaks "extremely difficult" and creating an anti-meal-break policy enforced through ridicule or reprimand. The Class established both unlawful scenarios exist here. (See *Brinker, supra,* at p. 1040; concurrence at p. 1053 and ft. 1.)

> An employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks. ([Citation].) The wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks.

(*Brinker,* 53 Cal.4th at p. 1040.)

In addition, the evidence shows AB neither maintained, nor provided drivers, any "formal" meal period policy. The first example of unlawful discouragement provided in *Brinker* presumes the existence of a formal meal period policy. AB does not meet the "provide" standard because it provided no evidence showing drivers were, at a minimum, informed in any meaningful or consistent way that they could take a meal period, or the definition of any such meal period.

As AB had no meal period policy to "undermine," and the evidence presented shows that, beyond that, AB regularly discouraged the taking of legally protected breaks, AB has not shown it provided meal periods to the Class.

The evidence reflects AB knew drivers were stuck in line to enter the Port, once inside the Port, and in order to exit the Port, every single day. Yet it did not provide for the relief of its employees' duties during this "waiting" time. Waiting, even in a comfortable location, is "on-duty" by definition: here, drivers were waiting to complete a task assigned by their employer. (See *Morillion, supra,* 22 Cal.4th at p. 582.) While waiting to complete an assigned task, drivers were not free to leave to engage in personal activities. (See *Brinker,* at p. 1040; concurrence at p. 1053 and ft. 1.) Instead, AB discouraged off-duty meal periods, and instructed drivers to eat while in line and "on duty."

Despite evidence drivers did not receive meal periods as required by law, AB presented no evidence that it created or entered into written agreements between AB and drivers for on-the-job paid meal periods. AB's PMQ on payroll and payroll processing admitted that AB automatically deducted one hour's pay from each driver per each shift worked based on a presumption that one hour meal periods were taken.

a. AB's argument that an employer need not record meal periods after *Brinker* is not supported by legal authority

AB argued that the holding in *Brinker* places the responsibility of accurately recording meal periods on the "employee," challenging the Court's reliance on Wage Order 9, subsection 7, which requires "every employer" to keep "[t]ime records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded." Nothing in Brinker, however, overrules the obligation imposed by Wage Order 9, subsection 7.[6]

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[6] Indeed, the concurrence in *Brinker* arrives at the fully opposite conclusion:

> Employers . . . have an obligation both to relieve their employees for at least one meal period for shifts over five hours . . . *and* to record having done so . . . (Citations.). If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. This is consistent with the policy underlying the meal period recording requirement, which was inserted in the IWC's various wage orders to permit enforcement. (See, e.g., IWC board for wage order No. 7-63 meeting mins. (Dec. 14-15, 1966) pp. 4-5 [rejecting proposal to eliminate the meal period recording requirement because "without the recording of all in-and-out time, including meal periods, the enforcement staff would be unable to adequately investigate and enforce" a wage order's meal period provisions].)

(Continued on following page)

Where an employer fails to keep records of hours worked, employees may establish the hours worked solely by their testimony, and the burden of overcoming such testimony shifts to the employer. (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727; see also Wage Order 9(7).) AB's argument that employees are foreclosed from recovering on a claim for a meal period not provided because the employee failed to accurately record the time they began and ended each meal period each day – when the employer provides no place to record a meal period nor asks the employee to do so – is not supported by legal authority.

2. Rest breaks

The evidence further reflected that drivers were not provided with paid rest breaks as required under Wage Order 9. (See Cal. Code Regs., tit. 8, § 11090, subd. 12(A).) Wage Order 9 entitles each employee who works four hours, or each major fraction thereof, with a 10 minute on the clock break. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104 ["Pursuant to IWC wage orders, employees are entitled to . . . a paid 10-minute rest period per four hours of work."]). Drivers testified that AB

(*Brinker,* 53 Cal.4th at p. 1053.) The *Brinker* concurrence goes further to explain that "[a]n employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is . . . an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it." (*Id.*)

did not authorize and permit ten minute rest breaks. Moreover, the evidence reflected AB typically encouraged drivers not to take, or prevented drivers from taking, rest breaks. AB provided no evidence of any formal policy on rest breaks. As with meal periods, there is no indication drivers were, at a minimum, informed in any meaningful or consistent way that they could take rest breaks, or the definition of any such rest breaks.

Under the authority of *Brinker,* AB did not relieve class members of all duties during the periods that rest or meal breaks could be taken.

E. DERIVATIVE CLAIMS

1. Unfair Competition Law

California Business & Professions Code section 17203, also known as the Unfair Competition Law, provides that the Court may restore to any person in interest any money or property which may have been acquired by means of such unfair competition and to which that person or persons have an ownership interest. AB violated the UCL based on its violations of the Labor Code discussed herein.[7]

[7] The UCL extends the liability period back for years from the date the Complaint was filed, or until March 28, 2004. (See page 20, *infra.*)

2. Labor Code sections 201, 201, 203, and 226

Labor Code sections 201, 202 and 203 require an employer to pay all wages owed to an employee at the time of separation of employment. The evidence reflects monies AB owed but never paid for its failure to pay for all hours worked, any hours worked, meal and rest period violations, and Labor Code section 226 violations.

Labor Code section 226 and Wage Order 9 require AB to provide accurate itemized wage statements showing the correct number of hours worked, the applicable hourly rate for each hour worked, and each category of compensation received, among other details. Plaintiffs proved they suffered injury as a result of this violation because the incorrect number of hours worked set forth on wage statements made it impossible for employees to calculate the wages to which they were entitled. (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1143.)

AB had knowledge that drivers did not receive one hour, off-duty, uninterrupted meal periods each day worked, yet AB deducted one hour each day from their pay. AB willfully paid drivers less than they were owed and willfully provided wage statements reflecting false "hours worked" as a result. AB knew it suffered and permitted trainees to work without paying these trainee drivers (or providing them with wage statements) at all. Finally, AB also failed to provide payment for missed meal and rest breaks on

wage statements. The Class is entitled to recovery as to this claim.

F. AB'S AFFIRMATIVE DEFENSES

The Court now addresses affirmative defenses raised by AB in its objections to the Court's PSOD.

1. AB holds the burden to overcome the presumption against preemption of California's meal and rest break laws by FAAAA

Congress enacted the Federal Aviation Administration Authorization Act ("FAAAA") in 1994 to prevent states from undermining federal deregulation of interstate trucking. (See *American Trucking Ass'ns, Inc. v. City of Los Angeles* ("*ATA*") (2011) 660 F.3d 384, 395; see also *Rowe v. N.H. Motor Transp. Ass'n* ("*Rowe*") (2008) 552 U.S. 364.) FAAAA provides in pertinent part:

> (c) Motor carriers of property.
>
> (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

(49 U.S.C. § 14501(c)(1).)

Preemption questions are approached with a presumption that "Congress did not intend to pre-empt areas of traditional state regulation." (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 740.) States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state. It is a traditional exercise of the States' "police powers to protect the health and safety of their citizens," including child labor laws, minimum wage laws, and laws affecting occupational health and safety. (*Hill v. Cola* (2000) 530 U.S. 703, 715 citing *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 475; *Day-Brite Lighting, Inc. v. Missouri* (1952) 342 U.S. 421.) Because of this presumption against preemption, courts may not interpret the FAAAA to preempt every traditional state regulation that might have some indirect connection with, or relationship to, rates, routes, or services unless there is some indication Congress intended that result. The Court finds, for reasons discussed herein, and based on the facts presented at trial regarding the duties of the Class and AB's operations, in particular that Congress did not intend preemption of California's meal and rest break laws.

The initial question in determining whether Section 14501(c)(1) of the FAAAA preempts state action is whether the provision "relate[s] to a price, route or service of a motor carrier;" if the answer is no, the provision does not fall within the preemptive scope of Section 14501(c)(1). (*ATA,* 660 F.3d at p. 395.) In *Morales v. Trans. World Airlines. Inc.* ("*Morales*")

(1992) 504 U.S. 374, in also interpreting "relates to" language, the U.S. Supreme Court held the state law in question was preempted by the Airline Deregulation Act ("ADA") because the law would have a "significant impact" on the airlines' fares.[8] (*Ibid.* at p. 389 [finding state promulgated guidelines regarding airline fare advertising expressly preempted by ADA].)

In *Californians for Safe & Competitive Dump Truck Transportation v. Mendonca* ("*Mendonca*") (9th Cir. 1998) 152 F.3d 1184, 1185, the Ninth Circuit found certain wage laws in California qualified as state laws that had "no more than an indirect, remote, and tenuous effect on motor carriers" and, as such, were not preempted by the FAAAA (in original.) Thus, the state wage laws did not meet the "relate to" standard. *Rowe* reaffirmed this principle that state laws with only a tenuous, remote, or peripheral effect on prices, services, or routes are not preempted by FAAAA. (*Rowe,* 552 U.S. at p. 995.)

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[8] The preemption language used in the ADA and the FAAA Act is essentially identical. The ADA was passed in 1978 and prohibits states from enforcing any law "relating to [air carriers] rates, routes, or services." 49 U.S.C.App. § 1305(a)(1). The U.S. Supreme Court, comparing the identical "relating to" language to the language found in ERISA, set forth the standard to identify "relating to" under the ADA: "State enforcement actions having a connection with or reference to airline "rates, routes, or services" are pre-empted under 49 U.S.C.App. § 1305(a)(1)." (*Morales,* 504 U.S. at p. 384.) The test under the ADA is, thus, whether California's meal and rest break laws either (1) have a connection to or (2) reference to rates, routes or services.

If the provision at issue does not fall within the market participant doctrine[9] and relates to rates, routes, or services, then the court considers whether any of the FAAAA's express exemptions save the regulation from preemption. (*Id.* at pp. 395-6.)

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[9] This doctrine is not applicable here as the state was not acting as a market participant in passing meal and rest break laws.

The Court, likewise, need not address the "safety exemption" to preemption by FAAAA on the facts of this case. However, the Court notes it appears that California's meal and rest break laws are regulations aimed at protecting and benefitting workers and are part of a "remedial worker protection framework," which would tend to place them under the "safety exemption." "[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." (See *Brinker, supra,* 53 Cal.4th at pp. 1026-27 citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702; *Murphy, supra,* 40 Cal.4th at pp. 1103, 1105, 1113 ["Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor. Indeed health and safety considerations (rather than purely economic injuries) are what motivated the IWC to adopt mandatory meal and rest periods in the first place."].) Particularly in the case of truck drivers, these laws protect not only workers, but the public. (See e.g., *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456.)

2. Background and legal standard

a. Federal precedent: pre-*Dilts*

In 1992, as discussed above, the U.S. Supreme Court decided *Morales* holding a state law regarding advertising guidelines for airline fares preempted by the ADA because it would have a "significant impact" on the airlines' fares. In 1995, the U.S. Supreme Court held in *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219, that claims for breach of contract and violations of state consumer protection laws arising out of changes to a frequent flyer program were preempted by the ADA as to the consumer protection law – but not as to common law remedies for breach of contract. (*Ibid.* at 228-9.) In *Mendonca, supra,* the Ninth Circuit squarely held that the language and structure of the FAAA Act does not evidence a clear and manifest intent on the part of Congress to preempt California's Prevailing Wage Law (Labor Code §§ 1770-80) ("CPWL"). *Mendonca* held that, while CPWL "in a certain sense" is "related to" the employer's "prices, routes and services, we hold that the effect is no more than indirect, remote, and tenuous . . . We do not believe that CPWL frustrates the purpose of deregulation by acutely interfering with the forces of competition." (*Mendonca,* 152 F.3d at pp. 1185, 1189.) The Court recognizes that prevailing wage laws are not identical to meal and rest break laws. However, the reasons offered by the employer (also of drivers) in *Mendonca* in support of preemption under the FAAA Act were nearly identical to the concerns raised by *Dilts, infra,* yet, the Ninth Circuit

came to the opposite conclusion from the district court in *Dilts*.[10] Also in 1998, the Ninth Circuit held in *Charas v. Trans World Airlines, Inc.* (9th Cir. 1998) 160 F.3d 1259, that the ADA evidenced congressional intent to "prohibit states from regulating airlines while preserving state tort remedies that already existed at common law, providing that such remedies do not significantly impact federal deregulation." (*Ibid.* at p. 1265.)

In 2001 in *Air Transport Ass'n of Am. v. City & County of San Francisco,* the Ninth Circuit held that a city Ordinance conditioning city contracts, including airport property lease agreements, on the contractor's promise not to discriminate on the basis of several protected grounds including domestic partner status, was not preempted by the ADA. The court found the promise not to discriminate extended to the provision of employment benefits to the domestic partners of employees. (*Air Transport Ass'n of Am. v. City & County of San Francisco* ("*Air Transport*") (9th Cir.

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[10] The employer in *Mendonca* argued that CPWL "increases its prices by 25%, causes it to utilize independent owner-operators, and compels it to re-direct and re-route equipment to compensate for lost revenue. As proof of these assertions, [employer] alleges that its rates for "services" are based on: (1) costs, including costs of labor, permits, insurance, tax and license; (2) performance factors; and (3) conditions, including prevailing wage requirements." (*Mendonca, supra*, at p. 1189.) AB has not raised specific examples, as is discussed further below, of how it might be compelled to re-direct or re-route, but the concerns raised – and dismissed – by the defendant in *Mendonca,* including "cost of labor," would likely be among the examples cited.

2001) 266 F.3d 1064, 1068.) The airlines complained they would face an increase in the cost of providing benefits to their employees' domestic partners, and that would in turn force the airlines to change their "routes" and "services." (*Ibid.* at 1073.) The Ninth Circuit reasoned that because "[t]he Airlines [conceded] that they will use airport property in San Francisco regardless of the Ordinance . . . the Ordinance cannot be said to compel or bind the Airlines to a particular route or service and there is no preemption under the connection-with test." (*ATA,* 660 F.3d at p. 397 citing *Air Transport,* 266 F.3d at pp. 1071-2.) The Ninth Circuit noted there might be some imaginable contract term the city could demand whose costs would be so high that it would compel the airlines to change their "prices, routes, or services," but it found the Ordinance at issue did not approach that level even though providing additional employee benefits would raise operating costs. (*Air Transport,* 266 F.3d at p. 1075.)

In 2011, in *ATA, supra,* the Ninth Circuit held that a state may condition access to state property without preemption by FAAAA, so long as the conditions do not impose costs that compel the carrier to change rates, routes, or services. The laws in question in *ATA* were concession agreements imposed by the Port of Los Angeles. Under *ATA,* state laws do not per se affect rates, routes, or services simply because they "impose conditions" on those operating in the state. (See e.g., *ATA,* 660 F.3d at p. 398.) Imposing conditions does not amount to per se "significant impact."

Federal precedent interpreting FAAAA (or ADA) thus finds that common law contract and tort claims are not preempted by the "relates to" language, though such claims would have an indirect financial impact on motor carriers. Laws that make a direct substitution for competitive market forces also do not withstand scrutiny. But, an imposition of conditions, such as a cost, on the motor carrier – without "compelling" a change in rates, routes, or services – is insufficient to constitute a "significant impact." A state's desire to implement prevailing wage laws was too indirect, remote, or tenuous to be preempted.

b. Federal precedent: *Dilts*

In *Dilts v. Penske Logistics LLC* ("*Dilts*") (S.D. Cal. 2011) 819 F.Supp.2d 1109, a federal district court found on the facts presented that while California's meal and rest break laws did not directly target the motor carrier industry, California's "fairly rigid" meal and break requirements impacted the types and lengths of routes that were feasible and reduced the amount of on-duty work time allowable to drivers, thus reducing the amount and level of service the employer could offer its customers without increasing its workforce and investment in equipment. (*Ibid.* at pp. 1117-1122.) *Dilts* is limited to its facts.[11] Under

[11] AB also cites *Esquivel v. Vistar Corp.* (C.D. Cal., Feb. 8, 2012, 2:11-CV-07284-JHN) 2012 WL 516094 in which a federal district court, relying entirely on *Dilts*, granted a Motion to Dismiss the Plaintiff's Second Amended Complaint because the

(Continued on following page)

existing federal precedent, causing an increase in workforce or investment may constitute an imposition of conditions on AB, but as in *Air Transport* and *Mendonca,* such an increase would not necessarily rise to the level of "significant impact." This Court is not inclined to follow the limited ruling in *Dilts.*

The court in *Dilts* found "[b]oth parties agree that the [California meal and rest break] laws impact the number of routes each driver/installer may go on each day, and Plaintiffs do not oppose Penske's argument that the laws impact the types of roads their drivers/installers may take and the amount of time it takes them to reach their destination from the warehouse." (*Dilts* at p. 1119.) The court in *Dilts,* thus, reached a conclusion of preemption under the facts it considered: " . . . these ramifications of California's [meal and rest break] laws upon Penske's routes and services all contribute to create a significant impact upon prices. Penske produces facts regarding the cost of additional drivers, helpers, tractors, and trailers that would have been needed to ensure off-duty breaks under California's rules and maintain the same level of service. [Citation]." (*Id.*) The court determined that while Penske did not show that the

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meal and rest period claims were "preempted" by the FAAAA. The district court in *Esquivel* did not have any "facts" before it other than those plead in the complaint, yet it determined it could conclude that the presumption against preemption was overcome and that the safety exemption to FAAAA did not apply. This Court need not adopt this approach.

meal and rest break laws would prevent them from serving certain markets, "the laws bind Penske to a schedule and frequency of routes that ensures many off-duty breaks at specific times throughout the work-day in such a way that would interfere with 'competitive market forces within the . . . industry.'" (*Id.*) *Cardenas, infra,* decided by a different federal district court in 2011, arrives at a different conclusion as discussed below.

Here, AB presented no evidence of any imposed conditions or costs, let alone rising to the level of creating a "significant impact" upon its prices. No showing was made regarding the number of routes, cost of additional drivers, tractors, trailers, or other such factors that AB could have claimed it would face should it have to comply with state law.[12] To the contrary, AB has made no showing of interference with competitive market forces within the industry.

c. California precedent

The trend in California law is against preemption by FAAAA of state meal and rest break laws for employees governed by Wage Order 9. In *Fitz-Gerald v. Skywest, Inc.* ("*Fitz-Gerald*") (2007) 155 Cal.App.4th 411, the California appellate court found that actions

[12] AB does not address how numerous other trucking companies continue to operate in California, as well as in and out of the Port of Oakland, every day seemingly without any problem of competitive advantage in the market.

to enforce California's minimum wage laws and labor laws governing meal and rest breaks are *not* preempted by the ADA. The court rejected the defendant's argument that the state's laws resulted in "higher fares, fewer routes, and less service" as too "tenuous." *Fitz-Gerald,* 155 Cal.App.4th at p. 423 n. 7.)[13]

Likewise, since 2000 when the most recent manifestations of California meal and rest break laws took effect, numerous California courts have decided issues in meal and rest break cases involving Wage Order 9 governing workers in the transportation industry – whether class certification, summary judgment, or otherwise – yet, none have found preemption of those claims by the FAAAA. (See e.g., *United Parcel Service, Inc. v. Superior Court* (2011) 196 Cal.App.4th 57 [holding that, as a matter of first impression, statute authorized separate premium payments for failure to provide both meal periods and rest periods]; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112 [trial court properly declined to award maximum amount under PAGA, but no FAAAA preemption discussion]; *Jaimez, supra,* 181 Cal.App.4th at p. 1299 [certifying class where Wage Order 9 applicable]; *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277 [Court of Appeal held class arbitration waiver was invalid with respect to alleged meal and rest period violations

[13] Preemption was found under the separate and distinct analysis of the Railway Labor Act.

in putative class action brought by trash truck driver against former employer for meal and rest period violations]; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524 [proposed class of all drivers employed by company was ascertainable; sufficient community of interest existed for class certification; and class action was the superior method for resolving the dispute.]; *Cicairos v. Summit Logistics, Inc., supra,* 133 Cal.App.4th 949 [Employer's obligation under Labor Code and Wage Order 9 to provide truck drivers with an adequate meal period was not satisfied by assuming that the meal periods were taken, because employers have an affirmative obligation to ensure that workers are actually relieved of all duty at such times, and employers also have a duty to record their employees' meal periods.]; *Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1329 [reversing trial court's order sustaining defendant's demurrer to class allegations in complaint as premature, court observed that plaintiff had alleged "institutional practices by CLS that affected all of the members of the potential class in the same manner, and it appears from the complaint that all liability issues can be determined on a class-wide basis."].)

As the preemption argument is jurisdictional, California courts have possessed the authority to raise the issue independent of any argument made by the involved parties. (See, e.g., *Porter v. United Services Automobile Assn.* (2001) 90 Cal.App.4th 837, 838, ("We have the duty to raise issues concerning our jurisdiction on our own motion"]; see also *Thomas v.*

Basham, 931 F.2d 521, 523 (8th Cir.1991) [stating that federal courts shall raise jurisdictional issues *sua sponte* when there is an indication that jurisdiction is lacking, even if the parties concede the issue].) Yet, no California court has raised the issue, nor held California's meal and rest break laws preempted by FAAAA.[14]

Indeed, the California legislature, aware of federal law governing motor carriers, chose to create an exemption in 2002 to Wage Order 9 with regard to overtime.[15] When the defendant in *Cicairos* argued this 2002 amendment exempted it from the entirety of the Wage Order, the Court of Appeals in 2005 found the defendant's "strained argument" failed. (See *Cicairos,* 133 Cal. App. 4th at p. 959.) Thus, throughout the entirety of the period in which the California legislature considered federal law and accordingly amended Wage Order 9, and the Court of

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[14] The California Supreme Court granted review of *People ex rel. Harris v. Pac Anchor Transp., Inc.* ("*Pac Anchor*") (2011) 195 Cal.App.4th 765 on August 10, 2011 to determine the question of whether California's UCL law is preempted by FAAAA. There are no meal and rest break claims at issue in *Pac Anchor*.

[15] Wage Order 9 subsection (3)(L), regarding overtime, was amended by the legislature in 2002 to provide: "The provisions of this section are not applicable to employees whose hours of service are regulated by: (1) The United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers; or (2) Title 13 of the California Code of Regulations, subchapter 6.5, Section 1200 and the following sections, regulating hours of drivers." (Cal. Code Regs. tit. 8, § 11090.)

Appeals considered Wage Order 9 in *Cicairos,* the FAAAA had existed for years – since 1994. If the California legislature believed it was necessary to provide an exemption in the Wage Order in response to FAAAA, as it did in 2002 with regard to an overtime exemption for motor carriers, it would have done so. (*Id.*)

3. AB made no showing of "significant impact" on its rates, routes, or services

In determining whether a provision has a connection to rates, routes, or services, the Court examines the actual or likely effect of a state's action. (See *ATA,* 660 F.3d at p. 396.) In *Cardenas v. McLane Food-Services, Inc.* ("*Cardenas*") (2011) 796 F.Supp.2d 1246, 1255-56, a federal district court, without reaching a conclusion on the ultimate question of preemption, summarized the law in the area finding that the relevant cases clearly suggest a conclusion that, like other California wage laws, California's rest and meal break laws are not preempted under the FAAAA.[16]

In *Cardenas*, as is the case here, the defendant proffered a "great deal of speculative evidence suggesting the impact that compliance with California's

[16] *Cardenas,* out of the Central District of California, decided counter motions for summary judgment in July 2011. *Dilts* was decided in the Southern District of California in October 2011.

rest and meal break laws would have on its prices, service, and routes [footnote omitted]." (*Ibid.*) The court found the evidence presented highly speculative, and that it failed to persuade the court that such an impact would necessarily result, or, alternatively, that it would be more than attenuated. The court explained:

> To be sure, to comply with California break laws, [defendant] may choose to adjust its routes, or slightly modify its services in the ways it has suggested. But just because [defendant] may make changes to its routes does not necessarily mean that California's break laws have more than an "indirect, remote, or tenuous effect" on these decisions. The Court has concerns that MFI's evidence stretches plausibility – and the FAAAA – to suggest that nearly every state law would be preempted.

(*Id.*)

AB provided no evidence at trial beyond mere speculation with regard to any impact on its rates, routes or services. AB's unsubstantiated arguments do not persuade the Court that California's meal and rest break laws have had, or will have, a more than tenuous effect upon the price of AB's rates, routes or services. The evidence reflects instead an employer that claimed to provide drivers with one hour per day for a "meal period." Notwithstanding the fact that Plaintiffs established this employer did nothing to make that a reality, AB presented no evidence at trial

that the provision of this "one hour meal period" acutely interfered with its prices, routes or services. To the contrary, AB instead claimed throughout the life of this case to have operated its business with each driver taking a one hour meal period each day. AB has not sustained its burden of proving that compliance with these state laws would have a "significant" effect on its ability to market its services or rates.

4. FAAAA does not preempt Plaintiffs' UCL claim

The purpose of the UCL is "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.) The UCL does not regulate market "competition," rather it is used to provide additional remedies for plaintiffs bringing claims arising under other statutes or at common law. The only reference in the UCL to competition is its definition of "unfair competition" as "any unlawful . . . act or practice . . . " (Bus. & Prof. Code § 17200.) In other words, the type of competition the UCL addresses is the unfair competitive advantage gained by an actor because it does not follow underlying laws.[17] Indeed, after a 2004

[17] The California Supreme Court concluded in *Cortez v. Purolator Air Filtration Products Co.* ("*Cortez*") (2000) 23 Cal.4th 163, 177-78 that orders for payment of wages unlawfully withheld from an employee are also a restitutionary remedy authorized

(Continued on following page)

ruling in *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 947, plaintiffs' counsel generally must plead a claim for UCL in a lawsuit with underlying Labor Code claims or be potentially subject to a malpractice suit.

The equitable relief provided by the UCL is not more onerous than the remedies provided in the underlying statutes at issue in this case. At most, the UCL law extends AB's liability one additional year. (See *Cortez,* 23 Cal.4th at p. 179 finding "[a]ny action on any UCL cause of action is subject to the four-year period of limitations created by that section [emphasis in original].")

The California court of appeal in *Pac-Anchor* determined that "[w]here a cause of action is based on allegations of unlawful violations of the State's labor and unemployment insurance laws, we see no reason

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by section 17203: "The employer has acquired the money to be paid by means of an unlawful practice that constitutes unfair competition as defined by section 17200 . . . The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person. The commonly understood meaning of "restore", includes a return of property to a person from whom it was acquired, (citation), but earned wages that are due and payable pursuant to section 200 et seq. of the Labor Code are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice. An order that earned wages be paid is therefore a restitutionary remedy authorized by the UCL. The order is not one for payment of damages."

to find preemption merely because the pleadings raised these issues under the UCL . . . " (*Pac-Anchor,* 195 Cal.App.4th at p. 771, review granted.)

This Court agrees that the UCL does not seek to regulate motor carriers, nor does its use here relate to AB's routes, rates or services in a way that is more than remote, indirect or tenuous. Plaintiffs' underlying claims, giving rise to their ability to seek relief under the UCL, are not preempted, thus, Plaintiffs' claim under the UCL are similarly not preempted.

III. CONCLUSION

Having considered the points, evidence, and arguments submitted by both AB and the Plaintiffs, the Court hereby determines that Plaintiffs prevail as to the failure to pay all hours worked claim, failure to pay employees classified as trainees claim, meal period and rest break claim and UCL and labor code claims (causes of action one through three and six through eight). Plaintiffs do not prevail as to the overtime claim, which was dismissed (cause of action four), or the OWL claim (cause of action five). Plaintiffs' supplemental damages and restitution computation is approved. The Court rejects AB's preemption claim under the FAAAct filed on Octobr 12, 2012.[18]

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[18] For information purposes only, the Court recognizes, *Mendez v. RL Carriers, Inc.,* C 11-2478 CW, 2012 WL 5868973 (N.D. Cal. Nov. 19, 2012) certificate of appealability denied, C 11-2478 CW, 2013 WL 1004293 (N.D. Cal. Mar. 13, 2013), in

(Continued on following page)

Class counsel may file a motion for attorney fees and costs subsequent to the issuance of this Judgment.

After full consideration of the evidence, and the written and oral submissions by the parties, and, upon good cause showing,

IT IS HEREBY ORDERED:

1. The Class prevails as to causes of action one, two, three, six, seven and eight;

2. The Class is, therefore, entitled to recover from defendant OAKLAND PORT SERVICES CORP. d/b/a AB Trucking the amounts as specifically set forth in Appendix A to this Order (Appendix A was originally filed with the Court on October 12, 2012, attached to the Declaration of Andrea Don, in compliance with the NOID);

3. In total, the Class is entitled to recover from defendant OAKLAND PORT SERVICES CORP. d/b/a AB Trucking the sum of $964,557.08 (as set forth specifically in Appendix A) with interest thereon at the rate of 10% per annum from the date of the entry of ~~this~~ [the] judgment until paid in full.

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which the District Judge held that in light of the flexibility provided by California's meal and rest break provisions, it is unlikely that those provisions would rigidly "bind" motor carriers to particular rates, routes, or services, and that, accordingly, those provisions do not "relate to" motor carrier rates, routes, or services and are not preempted by the FAAA Act.

IT IS SO ORDERED.

Dated: May 21, 2013 /s/ Robert Freedman
HONORABLE
ROBERT B. FREEDMAN
JUDGE OF THE
SUPERIOR COURT

Evidentiary exhibit attached to Order (which is not relevant to issues raised by Petition) will be submitted, if necessary, in accordance with Rule 32.

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SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

OAKLAND PORT SERVICES CORP. d/b/a AB Trucking, and DOES 1 through 20, inclusive,

Defendants.

Case No. RG08379099

~~[PROPOSED]~~ ORDER RE: PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS; CLASS REPRESENTATIVE ENHANCEMENTS

(Filed Aug. 9, 2013)

Date: August 9, 2013
Time: 10:00 a.m.
Dept. 20
Judge:
Hon. Robert B. Freedman

Action Filed: March 28, 2008
Trial Date:
February 14, 2012

Plaintiffs filed and served a motion for attorney fees and costs and class representative enhancements. Plaintiffs appeared through counsel, Lisl Duncan of Weinberg, Roger & Rosenfeld ("Class Counsel"). Defendant Oakland Port Services d/b/a AB Trucking ("AB") was not represented. After considering the papers filed and the argument of counsel, the Court grants Plaintiffs' Motion for Attorneys' Fees and Costs and class representative enhancement, upon good cause showing,

IT IS HEREBY ORDERED:

1. AB must pay the reasonable fees associated with litigation of this matter to Class Counsel, after application of a reasonable multiplier of 1.41, in the amount of $487,810.50, as determined below:

PROFESSIONAL	HOURS WORKED	RATE	LODESTAR
David Rosenfeld	101.75	675.00	$ 68,681.25
Caren Sencer	118.80	450.00	53,460.00
Roberta Perkins	0.25	575.00	143.75
Conchita Lozano-Batista	10.25	450.00	4,612.50
Kristina Hillman	1.50	495.00	742.50
Jannah Manansala	1.00	395.00	395.00
Lisl Duncan	976.95	325.00	317,508.75
Sharon Seidenstein	31.65	425.00	13,451.25
Yuri Gottesman	0.75	300.00	225.00
Andrea Don	60.17	300.00	18,051.00
Judy Castillo	24.50	195.00	4,777.50

Eleanor Natwick	15.00	195.00	2,925.00
Teresa Rojas Alou	11.30	195.00	2,203.50

2. AB must pay litigation expenses to Class Counsel in the amount of $42,106.16;

3. AB must provide an enhancement for class representatives Godfrey and Gilbert in the amount of $10,000.00 each.

IT IS SO ORDERED.

Date: Aug. 9, 2013 /s/ Robert Freedman
Honorable
Robert B. Freedman

Court of Appeal, First Appellate District,
Division Two – No. A139274

S222999

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LAVON GODFREY et al., Plaintiffs and Respondents,

v.

OAKLAND PORT SERVICES CORP.,
Defendant and Appellant.

(Filed Feb. 11, 2015)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

49 U.S.C. App. § 1305 (1988)

§ 1305. Federal preemption

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

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49 U.S.C. § 14501

§ 14501. Federal authority over intrastate transportation

* * *

(c) MOTOR CARRIERS OF PROPERTY. –

(1) GENERAL RULE. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private

carrier, broker, or freight forwarder with respect to the transportation of property.

(2) MATTERS NOT COVERED. – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

* * *

49978 **Federal Register**/Vol. 70, No. 164/
Thursday, August 25, 2005/Rules and Regulations

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 390 and 395

[Docket No. FMCSA-2004-19608; formerly FMCSA-1997-2350]

RIN-2126-AA90

Hours of Service of Drivers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA is publishing today its final rule governing hours of service for commercial motor vehicle drivers, following its Notice of Proposed Rulemaking published January 24, 2005. The rule addresses requirements for driving, duty, and off-duty time; a recovery period, sleeper berth, and new requirements for short-haul drivers. The hours-of-service regulations published on April 28, 2003, were vacated by the U.S. Court of Appeals for the District of Columbia Circuit on July 16, 2004. Congress subsequently provided, through the Surface Transportation Extension Act of 2004, that the 2003 regulations will remain in effect until the effective date of a new final rule addressing the issues raised by the court or September 30, 2005, whichever occurs first. Today's rule meets that requirement.

DATES: This rule is effective October 1, 2005.

* * *

Breaks, Naps and Driver Fatigue

The Agency considered a mandatory rest period (break) to mitigate any possible fatigue related to the 11th hour of driving. Scientific research suggests that rest breaks, including naps, while not reducing accumulated fatigue, refresh drivers and enhance their level of performance and alertness on a short-term basis [Belenky. G. L., *et al*. (1987), p. 1-13; Wylie, D. (1998), p. 13]. The Agency 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.

Still, FMCSA encourages carriers to establish a break or napping policy as part of an overall fatigue management program. Several studies have shown that a nap during a night shift can lessen the fatigue felt overnight [Matsumoto, K., & Harada, M. (1994), p. 899; Rogers, A.S., *et al.* (1989), pp. 1202-1203]. A study found that a 20-minute "maintenance" nap helped to improve daytime self-rated sleepiness and performance levels on a variety of tasks, including logical reasoning, mathematical calculations, and auditory vigilance [Hayashi, M., *et al.* (1999), p. 272].

Research suggests that a short nap of 10 to 20 minutes (but generally for less than 45 minutes) can provide a beneficial boost in driver alertness.

* * *

81134 **Federal Register**/Vol. 76, No. 248/
Tuesday, December 27, 2011/Rules and Regulations

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 386, 390, and 395

[Docket No. FMCSA-2004-19608]

RIN 2126-AB26

Hours of Service of Drivers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: FMCSA revises the hours of service (HOS) regulations to limit the use of the 34-hour restart provision to once every 168 hours and to require that anyone using the 34-hour restart provision have as part of the restart two periods that include 1 a.m. to 5 a.m. It also includes a provision that allows truckers to drive if they have had a break of at least 30 minutes, at a time of their choosing, sometime within the previous 8 hours. This rule does not include a change to the daily driving limit

because the Agency is unable to definitively demonstrate that a 10-hour limit – which it favored in the notice of proposed rulemaking (NPRM) – would have higher net benefits than an 11-hour limit. The current 11-hour limit is therefore unchanged at this time. The 60- and 70-hour limits are also unchanged. The purpose of the rule is to limit the ability of drivers to work the maximum number of hours currently allowed, or close to the maximum, on a continuing basis to reduce the possibility of driver fatigue. Long daily and weekly hours are associated with an increased risk of crashes and with the chronic health conditions associated with lack of sleep. These changes will affect only the small minority of drivers who regularly work the longer hours.

DATES: *Effective date:* February 27, 2013.

Compliance date: The rule changes that affect Appendix B to Part 386 – Penalty Schedule; Violations and Monetary Penalties; the oilfield exemption in § 395.1(d)(2); and the definition of on-duty time in §395.2 must be complied with on the effective date. Compliance for all the other rule changes is not required until July 1, 2013.

* * *

3. *Thirty-Minute Break.* In response to commenters' concerns, FMCSA adopts a slightly modified form of the break proposed in the NPRM. Research with drivers and in other industrial sectors indicates that the risk of accidents falls substantially after a break, with off-duty breaks providing the greatest

reduction in risk. The final rule requires that if more than 8 consecutive hours on duty – compared to 7 hours in the NPRM – have passed since the last off-duty (or sleeper-berth) period of at least half an hour, a driver must take a break of at least 30 minutes before driving. For example, if the driver started driving immediately after coming on duty, he or she could drive for 8 consecutive hours, take a half-hour break, and then drive another 3 hours, for a total of 11 hours. Alternatively, this driver could drive for 3 hours, take a half-hour break, and then drive another 8 hours, for a total of 11 hours. In other words, this, driver could take the required break anywhere between the 3rd and 8th hour after coming on duty. A driver who plans to drive until the end of the 14th hour and wants to take only one break will need to take a break between the 6th and 8th hour after coming on duty. Drivers will have great flexibility in deciding when to take the break. By postponing, the latest point at which the break can be taken from the 7th to the 8th hour, the rule will make it significantly easier for team drivers to fit the break into their schedules. To address an issue raised by commenters, FMCSA has also added an exception for drivers of CMVs carrying Division 1.1, 1.2, or 1.3 explosives to allow them to count on-duty time spent attending the CMV, but doing no other on-duty work, toward the break.

* * *

Cal. Lab. Code § 226.7

226.7. (a) As used in this section, "recovery period" means a cooldown period afforded an employee to prevent heat illness.

(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

(c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

(d) This section shall not apply to an employee who is exempt from meal or rest or recovery period requirements pursuant to other state laws, including, but not limited to, a statute or regulation, standard, or order of the Industrial Welfare Commission.

Cal. Lab. Code § 512

512. (a) An 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, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

* * *

Cal. Code Regs. tit. 8, § 11090(12)(A)

§ 11090. Order Regulating Wages, Hours, and Working Conditions in the Transportation Industry.

* * *

12. Rest Periods

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total

hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

* * *