SUPERIOR COURT OF CALIFORNIA COUNTY OF TULARE	
Carson, Steve, Plaintiff/Petitioner, vs. **Knight Transportation, Inc.,** Defendant/Respondent.	Jud. Officer: **Lloyd L Hicks** Clerk: **Suzanne Glenn** Bailiff: _____ CSR: **Tammy Warren** Interpreter: Language:
Minutes: **Hearing: Other** Date: **August 30, 2012**	**Case No. VCU234186** **Department 10** Related Cases:

Appearances:

- ☐ No appearances
- ☐ Party: _____
- ☐ Party: _____
- ☐ Other _____
- ☒ Attorney: Craig Ackerman appearing by court call
- ☒ Attorney: Richard Rahm and Angela Rafoth
- ☐ Attorney: _____

Oral argument presented to the Court.

ORDER: The Tentative Ruling is adopted as the Order of the Court as follows:

Tentative Ruling: To Grant Defendant's Motion to De-Certify Class as to the issue alleged non payment for non-driving work.

The Court had asked the parties for additional briefing relating to contract formation in the circumstances of this case before ruling on Defendant's motion to de-certify the class as to the issue of alleged non-payment for all hours worked.

The class was originally certified based upon the Court's perception that Plaintiffs and Defendant had agreed that there was an employment contract to the effect that payment to Plaintiff truck drivers on a "piece rate" basis (so much per mile) was also payment for non-driving hours worked, and that it was Plaintiffs' contention that such a contract was "illegal", such that Plaintiffs would have to be paid additional sums for non driving hours worked.

Such a bright line class wide question is a classic for the class action procedure. The Court suggested that since, per the parties, this was just a question of law, it could be resolved by cross motions for summary adjudication.

In deciding these motions, it was determined that if in fact there were such an employment contract, it is not "illegal". The case since has morphed into a disagreement regarding the terms (and even the existence) of an employment contract.

In determining whether a class action procedure is appropriate for resolution of this issue, the Court is to be guided by the following principles:

Applicable Law

A certified class may be de-certified if there are changed circumstances or new evidence. The criteria are the same as for certification (below).

It is the policy of this State to encourage the use of class actions. Doubts should originally be resolved in favor of certification, subject to later modification and/or decertification as facts develop.

To obtain, and maintain, class status, a Plaintiff must demonstrate the existence of an ascertainable and sufficiently numerous class; a well defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives.

The community of interest requirement has three factors: 1) predominant questions of law or fact; 2) class representatives with claims or defenses typical of the class, and 3) class representatives who can adequately represent the class.

The ultimate question on the element of predominance is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. The answer hinges upon whether the theory of recovery advanced by the Plaintiff is, as an analytical matter, likely to prove amenable to class treatment.

It isn't so much a question of common issues, as it is the ability to generate common answers – that is, will determining the truth or falsity of an allegation resolve an issue as to the whole class.

The certification question is procedural, and does not resolve whether an action is factually or legally meritorious. The question is whether the theory of recovery is amendable to class treatment.

A Court must examine the issues framed by the pleadings, and the law applicable to them, and resolve any factual or legal questions which are necessary to a determination of whether class certification is proper. The Court must determine whether the elements necessary to establish liability are susceptible to common proof, and whether Plaintiff has provided a factual basis to establish liability as to the common issues, such that there is a reasonable likelihood of recovery.

Plaintiffs' theory of liability here, in effect, is that the terms of the employment contract were that drivers were only paid for driving, and required to perform pre and post non driving work without pay.

Plaintiffs are not saying that there was an affirmative contract where the parties agreed that Plaintiffs would not be paid for non-driving work. They say they were told, orally and in writing, that your pay is "x" cents per mile driven, without more, and that they proceeded to do the work, and that regardless of their acquiescence to this "contract", it is in violation of law, because they must be paid for all hours worked, not just driving hours.

Defendant's theory started with the contention that Plaintiffs were all told that their pay for all work, driving and non, was the amount calculated by the per-mile rate, and that they accepted this contract offer by driving and being repeatedly paid on that basis. They now refer to the "piece" as the pre-plan described load and payment, rather than the per mile rate.

The starting point thus is, what evidence do Plaintiffs present to establish a reasonable likelihood that they will prevail?

Plaintiff alleges that the "pay sheet", setting forth the mileage rates and other payment variables, proves their case. However, that sheet does not state what work is included (or not) in that pay rate. As discussed more below, the fact the scope of work for pay is not discussed explicitly in the sheet does not constitute proof that the "offer" was only to pay for driving time.

There are references in the employee manual, and power point allegedly shown to all drivers after a certain date, which could be construed as explaining that the mileage calculated pay covered all work done. Additionally, Defendant contends that Plaintiffs were all orally told that the rate calculated pay was also pay for non driving time work.

There is nothing definitive one way or the other in the written materials. Whether there were a contract, and if so, its terms, depends upon the trainers' explanation, and the drivers' understanding. Each requires a particularized inquiry.

Defendant argues that its theory is established class wide because the drivers were told they did all work for the mileage based pay, and repeatedly performed thereafter, and after receipt of payroll information, and the "pre-plan" offers, confirming this pay formula.

The problem with this contention is that the number of hours worked does not appear anywhere on the payroll material the drivers received from Defendant.

Furthermore, the payroll records, and even the pre-plan, do not resolve the question of whether the drivers just accepted on a "take it or leave it" basis, unaware of the right to be paid for all hours worked.

Plaintiffs point out the consistent declarations, even from Defendant, to the effect that drivers were told that they were, in essence, "paid by the mile'. Plaintiff says that, by definition, if the only pay is for miles driven, then they are not being paid for non driving work.

Plaintiff argues that Gattuso v. Harter-Hanks Shoppers, Inc (2007) 42 Cal 4th 554, holding that an employer paying commissions and expense reimbursement in one check must specify how much is for which, applies here on the theory that what we have here is a failure to communicate – and that even if drivers were told "the per mile rate covers everything", that such is not sufficiently clear to create a contract offer accepted by performance.

With regard to the "paid by the mile" issue, Defendant states, in essence, that this is a semantic quibble, because the agreement is that mileage driven and the scale rate fix the amount of total compensation which, per company policy and practice, explained to the drivers, and known by them, and consistent with industry wide custom and practice, is the pay for all work performed, driving and non-driving.

So, what is the contract if the drivers are just told they are paid by the mile, or some variation thereof. This is a semantic issue that lawyers and judges can accurately parse only if they know exactly what was said to each driver.

The problem is, we do not know exactly what was said to each driver (or even less than exactly) before they started driving, let alone what they understood what they were told to mean. To be amenable to class treatment, each driver would have to have been told they same thing.

As Plaintiffs' brief states, the "...finder of fact will determine what the drivers were told at the time of contract formation".

In short, there is no way to determine whether there even was an agreement, let alone what the terms were, without an individual inquiry, not only of each driver, but of each of the numerous presenters at the orientation sessions.

Plaintiffs argue that Defendant's statements to the effect that the piece rate covers everything, even if made, are not sufficiently clear communication to create a contract, so there is no class defense based on a contract on Defendant's terms.

Thus, the next inquiry must be what is the legal effect if there were no mutually agreed upon employment contact?

Plaintiffs appear to take the position that if such is the case, then there is no contract that the piece rate pay covers non driving work, and therefore it doesn't, and Plaintiffs must be paid for it.

The defect in this position is that it assumes either that if there is no contract that the piece rate covers all work, then there was a contract that it did not, or, as a matter of law, because the pay was expressed in terms of miles driven, it only covered miles driven and not non-driving work. Neither result follows.

As to the first, the lack of mutual agreement means that there is no contract at all - - not only no contract that the rate covered all, but no contract that it did not.

As to the second, this is the same semantic issue regarding what was meant by "paid by the mile". The fact pay is based on the number of miles driven does not necessarily mean that it is pay only for the miles driven.

It should also be noted that the pay in fact was not based on the actual miles driven. Defendant, per some computer data base, assigned mileage to each trip and the pay was determined by that number. With certain exceptions, drivers do not keep track of their miles and submit for payment.

So what is the effect if Plaintiff drivers come out of orientation and start driving with no agreed upon compensation contract?

There are a couple of possibilities. One is, to revert to the state written employment contract - - minimum wage. Another is that when a driver, having the right to decline, accepts an offer for a load by the "pre-plan" procedure, which tells what, when, where, and total pay, a contract is formed as to that load.

Plaintiffs argue that the pre-plan is not a contract, but only a job assignment. This is wrong, because it was not a direction to take a stated load, but an offer to allow a driver to take it, or decline it, and which had to be affirmatively accepted if they wanted it.

Either way, there is not a basis for proceeding as a class action. So long as a driver is paid an amount of at least minimum wage for all hours worked, there is no apparent violation of wage and hour laws (assuming, of course, no contrary agreement).

There is no way to determine whether any driver was not paid at least minimum wage without an individual inquiry into each trip and/or day.

Conclusion

Neither Plaintiffs nor Defendant has met the threshold requirement of presenting sufficient evidence to show a reasonable likelihood of recovery or defense on a class basis.

The Court finds that there are not predominant questions of law and fact enabling the Court to resolve the issue on a class basis. The issue here requires a case-by-case inquiry. Thus, this is not a case where the class action procedure is advantageous to either the Court or the litigants.

The motion to de-certify the class as to the issue of alleged non payment for non-driving work is granted.

If no one requests oral argument, under Code of Civil Procedure section 1019.5(a) and California Rules of Court, rule 3.1312(a), no further written order is necessary. The minute order adopting this tentative ruling will become the order of the court and service by the clerk will constitute notice of the order.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF TULARE
Visalia Division
County Civic Center, Room 201
Visalia, CA 93291-4593

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CLERK'S CERTIFICATE OF SERVICE BY MAIL

I certify that I am not a party to this cause.

I certify that I placed the Ruling on Defendant's Motion to De-certify class for collection and mailing on the date shown, so as to cause it to be mailed in a sealed envelope with postage fully prepaid on that date following standard court practices to the persons and addresses shown. The mailing and this certification occurred at Visalia, California on August 30, 2012.

LARAYNE CLEEK, CLERK OF THE SUPERIOR COURT, COUNTY OF TULARE

By _____
Deputy Clerk

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