Department 311
Benton v. Tanintco
BC349267
MOTION TO CERTIFY CLASS

The motion is denied.

I

Assume for purposes of argument that TNS is the co-employer of all the (approximately) 760 class member putative class. Even so, this group of workers is too diverse for class treatment. The workers are diverse in two different and fundamental ways.

A

First, the governing management policies are diverse. Defendant TNS directly hired 99 of the 760 workers, and TNS had one policy before before January 7, 2010 and a different one after that. The other (approximately) 661 workers were not TNS "direct hires." Rather, TNS hired these 661 people through some 43 different "staffing companies" or "contractors": CST; Dataworkforce; InPro; Orin; Datalogix; CommsResources; MultiPoint; Protel; Global; Ritesync; Engineering Network; Keneticom; Networkers International; Carleddies; Atlas; PK; Butler; Fusion; and so forth. Nine of these have settled, so 34 staffing companies remain. CST, for instance, had a consistent rest policy during the class period. (Goodrich deposition 140:9-23 & CST-TNS-03239.) Datalogix had a break policy since at least July 1, 2003. (TNS Opposition brief 7:25 (footnote 24).) Dataworkforce had a break policy since about December 2005. (TNS Opposition brief 7:25-26 (footnote 25).) Orin began a California policy in late 2007. (TNS Opposition brief 7:26 (footnote 26).) Plaintiff Lorenzo Benton acknowledges and describes the role of the staffing companies, and to a degree admits the staffing company procedures differed. (E.g., Motion 6:7.) Benton offers no evidence showing the staffing companies had uniform policies about breaks or overtime pay.

B

Second, the physical workplace situations are diverse. Cell sites differ one from another, and all cell sites differ from switch stations. At many of these places, the putative class members effectively worked as their own bosses when it came to meal and rest breaks. In other words, no one was around to tell them when to work or when to break -- they were at liberty to do as they pleased. Whether there were break violations turns on specific details about what happened at each specific site. There are apparently dozens, or hundreds, or thousands of these sites.

At some of the sites and during some of the time, workers did not get proper breaks or overtime pay. Plaintiff Benton offers 43 declarations from putative class members. These declarations are substantively identical. Each one, for instance, includes a paragraph remarking that "it would have been grossly impractical" to clock in and clock out on the Trinity time keeping system.

All 43 plaintiff declarants use the identical and peculiar wording: "grossly impractical."

It is unbelievable that all 43 different people just happened to utter these words: "grossly impractical." These lawyer-drafted declarations, then, must be taken with a grain of salt, for the utter uniformity of experience they portray may stem both from similar workplace conditions and from the cut-and-paste function in the law firm's word processor. These 43 declarations establish that, for about 6% of the putative class, workplace conditions were similar.

Other declarations show workplace situations have varied drastically.

Matt Dillon declares he usually worked at a cell site with 3 to 4 other workers. The teams was typically at the site from two to four hours and could be done as early as 1 am or as late as 6 am. Dillon was aware of his right to take meal and rest breaks, but believes "the nature of telecommunications work leaves it entirely up to the worker to decide when and how to take these breaks since workers are not directly supervised." Dillon always felt he had the opportunity to take a break when he needed one. He could have taken more breaks than he actually did. "[H]owever, I usually just wanted to get the work done and go home to my family. . . . Again, we were all adults and I felt it was up to the worker to decide if and when they wanted to take their breaks." (Dillon declaration pages two - three.)

Jeffery Dorman declares that "[w]hether or not I wanted to take breaks during my shift was up to me. There was generally no supervision on site, therefore we could do whatever we wanted. I frequently took rest breaks. I would stop working and go out and smoke a cigarette. . . . We had plenty of freedom to do as we wished." (Dorman declaration pages two - three.)

John Fillion declares "[i]t as easy to take a break to eat or grab a power nap while the software was loading or while the system was being tested by the switch station. I am a smoker and would take 2-3 rest breaks per shift to smoke. . . . We did not always take a full 30 minute lunch break because we just wanted to get the work done. It was our choice whether or not to take a lunch break . . . ." (Fillion declaration page three.)

Vincent Gaytan declares he supervised installation projects at switch stations, which were all AT&T offices. Gaytan saw workers taking breaks. When he worked as a field project manager, the account manager told Gaytan to tell his workers about their rights to take breaks under California law. Gaytan always did so. Gaytan is very familiar with working conditions at cell sites and switch stations. Conditions are very different. Switch stations are always as the customer offices (Verizon AT&T, etc.). The switch station is in a building, with multiple floors, break rooms, restrooms, and air-conditioning. The cell sites are not in a uniform location but are all over the place. They are usually in a cage at a cell tower. They may be located in a hut or even outdoors. The team at the cell sites is one or two people, while the switch station typically has a team of two to four workers at each site. The switch workers are supervised by the

customer personnel because the work is in their office building. At the cell sites, the workers are out on their own with no one directly watching over them. The work at cell sites usually takes two to four hours at each site, while the work at the switch stations takes a few weeks. (Vincent Gaytan declaration pages two - five.)

Michael Hare declares he usually worked with a team of three others on very large cell sites that took about two days to rebuild. Hare usually started at 10 p.m. and ended at 6 a.m. No one ever talked to Hare about meal or rest breaks and no one ever told him he was not allowed to take breaks if he wanted to. No one monitored Hare's team. "[W]e took breaks if and when we felt like it." (Michael Hare declaration pages two - four.)

Dennis Holt Jr. declares he typically worked with one other person. Holt always felt there was time for him to take breaks when needed and no one ever prevented him from taking one. "It was ultimately up to us to decide when and how we wanted to take our breaks since no one watched over us at the cell sites." Holt had very little contact with TNS. No one from TNS ever came to the sites where Holt was working. "It was usually just me and my co-worker." (Dennis Holt Jr. declaration pages two - three.)

Lon Irwin declares he has done many kinds of work in telecommunications. Irwin has done "rip and replace" work at cell sites. This work could run four to eight hours per site. Irwin typically worked with one other person. It was hard to know ahead of time how long the work would take at each site. Irwin always got paid for at least eight hours per night, even though he generally worked for more like six hours. Irwin also did "radio adds," which involved gear the size of a laptop and typically took 15-20 minutes per job. Irwin also installed new 3g equipment, which was the size of a refrigerator and weighted about 800 pounds. This latter process generally took six hours, but Irwin always got paid for eight hours. Irwin also installed and integrated indoor 3g equipment, which weighed about 250 pounds. Irwin also installed new 4g equipment, which involved two different kinds of cabinets. The outdoor cabinets weighed 200 pounds and took about two to three hours to install. The indoor cabinets were the size of a toaster and weighed 15 pounds. They took about five to eight hours to install. Irwin typically did this work with one other person. Irwin also did 4g integration work. This work he did alone. Many days he worked for three to four hours but got paid for eight hours. Irwin also did "card add" jobs. This was a 30 minute job, but Irwin got paid for two hours per site. TNS would give Irwin a list of 20 sites to do. He would pick up the cards and plot out which sites to go to depending on location. Irwin generally feels like his own supervisor and did not communicate much with TNS when out on a site unless there was a problem. It was Irwin's choice whether to take his 30 minute lunch break. Sometimes Irwin chose not to take the lunch break, particularly if he was going to be done early. Irwin was able to take to take 10 breaks if he wanted. (Lon Irwin declaration pages two - six.)

There are many more individualized declarations from putative class members that show a diversity of workplace conditions.

II

"The party advocating class treatment 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. . . . In turn, the community of interest requirement embodies three factors: (1) predominant common 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." (*Brinker Restaurant Corp. v. Superior Court* (2012) 2012 Cal.LEXIS 3149, **17-18 (citations and quotation marks omitted).)

On the issue of whether individual questions or questions of common or general interest predominate, the "ultimate question the element of predominance presents 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 on whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. . . . A court must examine the allegations of the complaint and supporting declarations . . . and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. . . . [W]hat really matters to class certification is not similarity at some unspecified level of generality but, rather, dissimilarity that has the capacity to undercut the prospects for joint resolution of class members' claims through a unified proceeding. . . . As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Brinker Restaurant Corp. v. Superior Court*, *supra*, 2012 Cal.LEXIS 3149, **18-19 & footnote 5 (citations and quotation marks omitted).)

A class definition is overinclusive when it "embraces individuals who now have no claim against" the employer. (*Brinker Restaurant Corp. v. Superior Court*, *supra*, 2012 Cal.LEXIS 3149, *90.)

III

Class treatment for meal and rest breaks is inappropriate. The evidence in this record shows no uniformity of policy or circumstance. There is no single way to determine whether TNS is liable to the class for failure to provide breaks. Some workers did not get breaks. Other workers were on their own and at complete liberty to take breaks as they pleased, with no time or management pressure.

Focus on this question of liability for meal and rest breaks for someone like Lon Irwin, for instance. Irwin often got paid eight hours for six hours of work. He was at a remote job site with no supervision. He could take his time and do as he pleased. What breaks he took, and when, were strictly his decision. Under *Brinker*, TNS gave Irwin all California law requires: the chance to take proper meal and rest breaks. On the uncontested facts about Irwin, TNS bears no liability about meal and rest breaks. Irwin is a member of the putative class but has no claim against TNS.

The situation is different for the 43 declarants with the functionally identical declarations, if we naively accept them at face value (which we do here for purposes of analysis).

So, 44 down, and (760-44 =) 716 left to go on the issue of liability.

A civil defendant like TNS enjoys the right to due process on the issue of civil liability. (See, e.g., *Duran v. United States Bank National Assn.* (2011) 203 Cal.App.4th 212, 248-254.)

How can we sort this out? Even assuming TNS were a co-employer, it would take hundreds of witnesses to determine whether there was or was not liability for improper breaks.

This is not a practical trial. It is unworkable. The proposal to analyze these disputes as a class matter does not make common sense. The problem is the factual dissimilarity, which undercuts "the prospects for joint resolution of class members' claims through a unified proceeding." (*Brinker Restaurant Corp. v. Superior Court*, *supra*, 2012 Cal.LEXIS 3149, **19 footnote 5 (citation and quotation marks omitted).)

The same holds true for the proposed overtime class.

The proposed injunction class superficially seems more tractable because one might more easily say that a co-employer (assuming after class certification TNS were indeed found to be a co-employer) has a duty to ensure those employees under its control receive lawful workplace treatment going forward. The past would matter less when the focus is on guaranteeing lawful treatment in the future. Yet this matter is more complex than it first appears, because an injunction will issue only upon a proper showing that equitable relief is appropriate at all. Here that question is, again, highly diverse.

TNS changed its policy for 99 of the workers in 2010. For the remaining 34 staffing company practices still at issue, the evidence does not establish -- or even suggest -- that these 34 policies are uniform in any way. Indeed, as to most of these staffing companies there is no evidence at all. Benton's failure of proof dooms his proposal for an injunction class.

Benton repeatedly cites the *Brinker* concurrence. The concurrence commanded only two votes. It is not the law.