IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

TIMOTHY W. REPASS and WILLIAM SCOTT McCANDLESS, Individually and On Behalf of All Others Similarly Situated, Plaintiffs vs. TNT CRANE AND RIGGING, INC., Defendant.	§ § § § § § § § § § §	NO. 7:18-CV-107-DC

DEFENDANT'S MOTION TO DECERTIFY
CONDITIONALLY CERTIFIED FLSA COLLECTIVE ACTION

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I. INTRODUCTION

More than two years ago, this Court applied a *lenient* standard and, based on now-recanted declarations from Plaintiffs and three Opt-in Plaintiffs, ordered *conditionally* certified a class of "all current and former crane operators" who worked out of Defendant TNT Crane and Rigging, Inc.'s ("TNT") Houston, Midland, or San Antonio yards. Docs. 28 - 29. *See also*, Pls' Notice Mtn., Docs. 20-1 to 20-5. That was then. The discovery evidence now reveals that Plaintiffs' claims for alleged unpaid overtime for travel and off-the-clock work cannot be tried efficiently or fairly in a single collective action.

Plaintiffs point to no evidence of a cohesive corporate policy requiring that they and the 37 Opt-in Plaintiffs[1] (collectively with Plaintiffs, the "Class") traveled and worked off-the-clock in violation of the Fair Labor Standards Act ("FLSA"). Rather, the evidence shows that all Class members deposed were paid varying amounts of overtime, which included payments for travel time and for work performed outside of customer job sites. In addition to determining whether Plaintiffs have proven by a preponderance of the evidence that the 39 Class members actually worked overtime and TNT knew about the work, the Court will be required to examine the alleged unpaid activities of each Class member to determine whether those activities were non-compensable preliminary or postliminary activities. The Court will also need to determine whether each Class member drove a company vehicle for his own convenience within the regular

[1] Though 47 individuals filed consents to join Plaintiffs' FLSA claims, six individuals have withdrawn their consent to join. *See* Docs. 85-87, 100, 142, 149 (notice of withdrawals filed for Opt-in Plaintiffs K.Wood, R. Russell, J. McDonough, D. Marciano, J. Ray, and B. Wiegel). Additionally, this Court has ordered two individuals dismissed after they failed to appear for their noticed deposition. *See* Docs. 155 (R&R) and Doc. 160 (Sept. 23, 2021 Order adopting R&R, ordering Opt-in Plaintiffs B. Spruill and G. Villa dismissed with prejudice). The Honorable Magistrate Judge has recommended granting TNT's motion to dismiss a third Opt-in Plaintiff who failed to appear (*see* Doc. 158, filed Sept. 17, 2021, recommending Opt-in Plaintiff J. Rodgers be dismissed with prejudice). TNT has also more recently moved to dismiss a fourth Opt-in Plaintiff who failed to appear. *See* Doc. 161 (moving to dismiss Opt-in Plaintiff K. Kemeha).

commuting area, and whether he voluntarily chose to drive home while other Class members on the same job assignment stayed overnight in lodging provided and paid for by TNT. These questions and many more present different answers for each Class member and will vary daily by customer and location. No common factual nexus binds the Class together and if this collective action moves forward it will require 39 separate trials.

Not one member of the Class has the same claims. Thus, fairness and procedural considerations require decertification. While some Class members assert claims under the New Mexico Minimum Wage Act ("NMMWA") extending outside the maximum statute of limitations under the FLSA, other Class members assert no claim under the NMMWA. The sample of Class members deposed confirm that their experiences greatly vary by job assignment, customer requirements, and management team at the three TNT yards. Consequently, one Class member's experiences cannot be representative of that of any other. Indeed, in their own words, the pay for travel activities outside customer jobsites was not a uniform practice, and the Class members describe numerous, material differences that affect whether the FLSA was violated. TNT must be permitted to question each Class member as the testimony of one Class member would not be representative of all other Class members. The Court should grant TNT's Motion, dismiss the Opt-in Plaintiffs without prejudice to pursue their FLSA claims in individual lawsuits, and permit Plaintiffs to proceed to trial individually.[2]

II. PROCEDURAL HISTORY

A. Plaintiffs Moved Under a Lenient Standard for an Order Conditionally Certifying a Collective Action for Travel and Off-the-Clock Claims.

In his report recommending this action be conditionally certified, the Honorable Magistrate Judge Griffin found that Plaintiffs had met the "low burden" for conditional

[2] If the Court is inclined to deny this Motion for any reason, however, TNT requests that it be denied without prejudice to renewing it.

certification of their overtime claim based on their alleged theory that TNT's policy on "drive time" and "off-the-clock" work violated the FLSA. Doc. 28, p. 6.[3] Magistrate Griffin's ruling was based on Plaintiffs' allegations "that ***all*** crane operators working for Defendant were not paid for preparatory and concluding work or for drive time." *Id.* (citing Doc. 20-1 at 3) (emphasis added). Specifically, they were "**only compensated for the time actually spent on the 'customer job site,' but not for the 'work before and after driving to the customer's job site**.'" *Id* (emphasis added). This Court noted the **class was certified for Plaintiffs' claims that TNT paid them an hourly rate plus per diem of at least $100 per day but failed to compensate them for travel time and off-the-clock work**. Doc. 29.

B. The Deposed Class Members Have Repudiated the Claims and Evidence Relied on by the Court in Granting Conditional Certification.

Following conditional certification, the Court limited discovery to deposing 15 Class members. *See* Doc. 125 (Order, Jun. 11, 2021). Approximately ***22%*** of the total initial Opt-in Plaintiffs either withdrew from this litigation, have been dismissed, or are subject to dismissal for failure to appear at their noticed deposition. Approximately ***27%*** of the initial Opt-in Plaintiffs noticed for deposition withdrew or failed to appear. *See* Docs. 85-87, 100, 142, 149, 158, 160, and 161. This is convincing evidence that Class members do not support the claims asserted in Plaintiffs' complaint and relied on by the Court in conditionally certifying a collective action. It is reasonable to expect that if called to testify at trial, a similar number (at least 27%) would not support the overtime claim being pursued by Plaintiffs.

The Class members have repudiated the statements in Plaintiffs' motion for conditional certification and supporting materials relied on by the Court in granting the motion. Strikingly,

[3] After this this action was conditionally certified as a collective, the Fifth Circuit issued its ruling in *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430 (5th Cir. 2021), in which it rejected the long-accepted lenient first step standard for court-authorized notice of a collective action under the FLSA.

the **Class members testified at their depositions that their declarations submitted in support of conditional certification are inaccurate**.[4] Opt-in Plaintiff Payne disclaimed paragraph 12 of his Declaration (Doc. 20-3) which stated he was owed overtime for driving a rigger between the yard and jobsite, stating he "**never did do none of that**." **Ex. 4,** Payne Depo. 58:13-58:19 (emphasis added). Similarly, Opt-in Plaintiff Venable recanted his prior Declaration that "neither I nor TNT's other crane operators were paid for many of the hours because we were only paid for the time spent at TNT's customer's job sites" (Doc. 20-4), explaining he "**must not have understood it very well at the time" he signed his Declaration**. **Ex. 5,** Venable Depo. 59:22-60:14 (emphasis added). When asked which was true, his deposition testimony that he <u>*was*</u> paid for time worked outside TNT's customer job sites or his Declaration submitted in support of conditional certification, Payne asserted that the "testimony today" was true. *Id.* This recanting of prior declarations is alone sufficient reason to decertify this action.[5] Even if the declarants did not intend to make misrepresentations "given the …conflicting testimony, [TNT] ha[s] a right to explore their underlying credibility and/or ability to speak for the FLSA class. Given the

[4] *See* **Ex. 3,** Deposition of Timothy W. Repass (Aug. 29, 2020) ("Repass Depo.") 98:18-100:19 (admitting that contrary to his Declaration that he was "only paid for time spent at TNT's customers' job sites," his timesheets reflect travel time, time spent working in TNT's yard, and time performing prechecks, and the only way to determine whether this time was paid is to refer to his paystubs), 102:22-103:13 (testifying that contrary to his prior Declaration asserting that Class members were governed by standardized procedures, the only common procedures of which he is aware are "JSAs, crane inspections, job tickets" and "the code of conduct that we all live by"); **Ex. 4,** Deposition of William Payne (Jul. 2, 2021) ("Payne Depo.") 58:13-58:19; **Ex. 5,** Deposition of Daniel Venable (Jun. 29, 2021) ("Venable Depo.") 59:22. *See also generally,* **Ex. 3,** Repass Depo. 84:16-84:18, 101:9-102:3 (confirming that he only worked at the Midland branch and has no knowledge of policies at the San Antonio or Houston branches).

[5] *See, e.g., White v. 14051 Manchester Inc*., 301 F.R.D. 368, 379 (E.D. Mo. 2014) (decertifying FLSA collective action where plaintiffs made assertions in their declarations in support of conditional certification identifying a common policy, but during their depositions conceded they did not have knowledge of a common class wide policy of violating the FLSA).

individualized inquiry involved in this line of credibility questioning and the distraction … to the underlying issues…this favors decertification." *White*, 301 F.R.D. at 377.[6]

Further, every Class member in the sampling has repudiated the claims of the only two violations allegedly experienced by the Class:

Alleged Violation	Deposition Testimony and Discovery Responses of Class Sampling
(1) Class members were ***paid only for work performed at a customer job site***. Doc. 28, p. 6 (Mag. J. Griffin order recommending conditional certification), Doc. 29 (Order).	**Ex. 3,** Repass Depo. 12:25-17:18, 29:17-30:4, 75:24-76:22 (his only claim is for travel time, he was paid for pre-trip inspections); **Ex. 6,** Plaintiffs' Discovery Responses, Repass RFA Nos. 13-16 (he was paid for fueling, gathering tools, purchasing supplies, and prechecks).
	Ex. 7, Deposition of William McCandless (Aug. 19, 2020) ("McCandless Depo.") 37:15-37:23 (he asserts no claim for time working at TNT's yard), 65:17-22 (operators are paid for attending meetings at TNT's yard); **Ex. 6,** McCandless RFA Nos. 14-16 (he was paid for gathering tools, purchasing supplies, and prechecks).
	Ex. 8, Deposition of Charles Baete (Jul. 23, 2020) ("Baete Depo.") 27-30, 33:19-34:22, 45:24-46:13, 47:1-47:13 (his only claim is for travel time); **Ex. 6,** Baete RFA Nos. 13-14, 16 (he was paid for fueling, gathering tools, and prechecks).
	Ex. 9, Deposition of Michael Coates (Jul. 30, 2021) ("Coates Depo.") 22:8-24:1 (he "**[a]bsolutely" recorded and was paid** up to 30 minutes for performing pre-trip inspections [emphasis added]); **Ex. 6**, Coates RFA No. 16 (he was paid for prechecks).
	Ex. 10, Deposition of Steve Costlow (Aug. 19, 2020) ("Costlow Depo.") 18:20-20, 39-40 (he was paid for time attending meetings and completing paperwork); **Ex. 6**, Costlow RFA Nos. 13-16 (he was paid for fueling, gathering tools, purchasing supplies, and prechecks).
	Ex. 11, Deposition of Andre Grimes (Aug. 11, 2021) ("Grimes Depo.") 37:5-37:16 (**he was "[a]bsolutely" paid for working at TNT's yard before a shift**, "if I'm working in the yard, you got paid for when you were working in the yard" [emphasis added]), 50:5-51:11 (paid for inspections at TNT's yard); **Ex. 6,** Grimes RFA Nos. 14-16 (he was paid for gathering tools, purchasing supplies, and prechecks).
	Ex. 12, Deposition of Terry Hardy (Jul. 17, 2020) ("Hardy Depo.") 19:1-20:5 (his only claim is for commute time between the hotel and job site); **Ex. 6,** Hardy RFA Nos. 14, 16 (he was paid for gathering tools and prechecks).
	Ex. 13, Deposition of Gary Nixon (Jul. 15, 2021) ("Nixon Depo.") 18:4-23 (sometimes he was paid for time at TNT's yard, even if it was not

[6] *See also, McGee v. E. Ohio Gas Co.*, 200 F.R.D. 382, 387 (S.D. Ohio 2001) (noting "the district court may decertify a class if there is a subsequent showing that the grounds for granting certification no longer exist or never existed").

	billable to the customer), 30:23-31:11 (paid for meeting at TNT's yard) and Tr. Ex. 1 at TNT [Repass] 13940 (Nixon timesheet reporting 2.5 hours for pre-trip inspection, waiting for mechanic, and post trip refueling), 25:10-26:11 (confirming he was paid for this time at the yard).
	Ex. 14, Deposition of Jonathon Ochoa (Jul. 2, 2021) ("Ochoa Depo.") 56:7-57:5 (TNT paid him for time he worked at TNT's yard, and for work done before arriving at customer's site and after leaving customer's site); **Ex. 6,** Ochoa RFA Nos. 13-16 (he was paid for fueling, gathering tools, purchasing supplies, and prechecks).
	Ex. 4, Payne Depo. 55:5-55:13 (when asked whether TNT had a policy to only pay operators for time worked at a customer's job site, responding "**I don't remember no policy like that** in the handbook" [emphasis added]), 14:8-14:15, 16:8-16:17, 18:16-19:3 (he was paid for time worked at TNT's yard before and after shifts), 37:4-37:24 (paid for meeting and inspections at TNT's yard), 38:12-38:22, 41:11-41:17, 42:21-42:25, 43:18-44:1, 49, 57, 51:19-52:1 (he was paid for work outside of a customer's site including completing paperwork, meetings, pre and post shift time); **Ex. 6,** Payne RFA No. 16 (he was paid prechecks).
	Ex. 15, Deposition of Jorge Quintana (Jul. 30, 2021) ("Quintana Depo.") 17:2-19:19 (he was paid for safety meetings, washing the crane, maintaining the crane, pre-trip and post-trip inspections, monthly crane inspections, paperwork, and loading counterweights at TNT's yard), 22:9-24:2 (he "believe[s]" he was paid for yard time), 36:2-38:21 (he "believe[s]" his claim is limited to unpaid travel time).
	Ex. 16, Deposition of Brandon Raybion (Aug. 20, 2020) ("Raybion Depo.") 58, 66:21-67:22 (paid of yard time), 72:19-72:22, 79:3-12 (he was paid for safety meetings, time working at TNT's yard including cleaning his truck, and a variety of other tasks), 84:3-84:8 (he "would agree to a certain extent" that TNT pays wages for work performed outside of a customer's job site); **Ex. 6,** Raybion RFA Nos. 14, 16 (he was paid for gathering tools and prechecks).
	Ex. 17, Deposition of Daniel Rodriguez (Jun..29, 2021) ("Rodriguez Depo.") 23:17-25:10 (he was paid for some time working at TNT's yard), 49:21-51:23 (same, also paid for unloading equipment, attending meeting, waiting on standby).
	Ex. 5, Venable Depo. 23:11-23:18 (he was paid for a variety of tasks performed outside the customer site), 56:11-56:13 (same); **Ex. 6,** Venable RFA Nos. 13-16 (he was paid for fueling, gathering tools, purchasing supplies, and prechecks).
	Ex. 18, Deposition of Chester Ward (Jul. 16, 2021) ("Ward Depo.") 31:25-32:4 (TNT paid him for work he performed at TNT's yard).
(2) Class members were ***not paid for drive time*** (as	**Ex. 3,** Repass Depo. 12:25-17:18 (his only claim is for the commute from his home to the first place work was performed, and his claims are based on an alleged verbal pre-employment promise Levi Hastey made

required by the FLSA). *Id.*	to him); **Ex. 6,** Repass RFA Nos. 20-21 (he was paid for travel between the hotel or camp and job site).
	Ex. 7, McCandless Depo. 54:22-55:13 (he was paid for all travel time once arrived at yard), 57:18-21 (paid commute between site and lodging); **Ex. 6,** McCandless RFA Nos. 20-21 (he was paid for travel between the hotel or camp and job site).
	Ex. 8, Baete Depo. 45:24-46:13, 47:1-47:13 (his claims are limited to work at the Gate Ranch project, he ***was "absolutely" paid*** as much as four hours each way for traveling to other jobs [emphasis added]); **Ex. 6,** Baete RFA Nos. 11 (he was paid for travel from home to jobsite), 20-21 (he was paid for travel between the hotel or camp and job site).
	Ex. 9, Coates Depo. 11:8-12:2 (he was paid for travel between the Midland yard and jobsite), 16:17-19:18, 28:4-28:15 (he was paid for travel between the yard and jobsite when transferring a crane or when driving a commercial vehicle, "**TNT was very good about when we were driving a commercial vehicle for paying our time**" [emphasis added]), 11:8-12:2 (he was paid for all travel time when working a day job not requiring overnight stay).
	Ex. 10, Costlow Depo. 13:15-18:19 (he was paid for commute home when he declined to stay at lodging provided by TNT); **Ex. 6,** Costlow RFA Nos. 11-12 (he was paid travel between his home and job site), 20-21 (he was paid for travel between the hotel or camp and job site).
	Ex. 11, Grimes Depo. 13:5-13:21 (he was paid for travel time when working out of the Midland branch), 14:19-14:25 (he was paid at Midland "from the time of your commute all the way to you getting back home"), 17:5-17:18 (sometimes paid for travel time when working out of the Houston branch), 21:2-21:7 (same), 37:17-38:4 (same), 41:4-41:11 (same).
	Ex. 12, Hardy Depo. 13:20-14:3, 18:3-18:20, 19:1-20:5, 27:2-16, 29:25-30:10 (his only claim is for the commute between his home or hotel to the jobsite).
	Ex. 13, Nixon Depo. 13:7-13:24 (more often than not, he *was* paid for travel between the yard and jobsite and his home and the jobsite), 14:9-14:14 (sometimes paid for travel between hotel and jobsite), 22:7-22:13 (sometimes paid for travel), 26:16-27:11 (paid for travel between Midland and San Antonio), 29:18-29:21 (paid for travel time on timesheet), 32:1-32:4 (same), 36:17-37:1 (paid for time traveling in certain vehicles).
	Ex. 14, Ochoa Depo. 35:23-36:4 (he was paid for some travel time between the yard and the jobsite), 39:23-41:6 (same, detailing the various times he was paid), 56:7-57:5 (he was sometimes paid for travel between yard and jobsite when driving his personal vehicle); **Ex. 6,** Ochoa RFA Nos. 11-12 (he was paid travel between home and job site), 20-21 (he was paid for travel between the hotel or camp and jobsite).
	Ex. 4, Payne Depo. 38:12-38:22 (he was paid travel time between yard and site), 41:11-41:17 (same), 42:21-42:25 (same), 43:18-44:1 (same,

	confirming he was paid even if it was not billable to the customer), 49:7-50:6 (same, paid for time purchasing fuel while traveling), 57:18-21 (same), 61:4-16 (responding to questioning by Plaintiffs' attorney, explaining "The majority of my drive time in Houston I was paid for.").
	Ex. 15, Quintana Depo. 8:10-9:24 (when asked whether he was paid for travel time between the hotel and job site, responding "Honestly, sir, **I can't recall**." [emphasis added]), 27:18-28:14 ("believe[s]" he was paid for travel time between yard and site when driving a semi or haul truck), 12:7-14:4 and 35:11-35:21 (he was paid two hours of commute time daily when he chose to drive home instead of staying in provided lodging), 36:2-38:21 (his only claim is for commute time); **Ex. 6,** Quintana RFA No. 21 (he was paid for travel from job site to hotel or camp).
	Ex. 16, Raybion Depo. 58:1-3 (he is "not claiming …at all" that he was never paid travel time), 62:12-18 (he should not be paid for commute because that is "just like going to a regular job"), 79:3-12 (paid for travel time), 83:8-85:10 (he was sometimes paid for the commute between the hotel or his home and the site, he makes no claim for the commute time between TNT's yard and his home, he was paid if driving a truck or crane between TNT's yard and a site, and his only claim is for travel time to purchase fuel, ice, and supplies); **Ex. 6,** Raybion RFA Nos. 11-12 (he was paid travel between home and job site), 20-21 (he was paid for travel between the hotel or camp and jobsite).
	Ex. 17, Rodriguez Depo. 20:12-20:18 (he was paid for commute between job site and hotel), 36:14-37:2 (he was paid for travel time), 49:15-49:20 (same), 51:20-52:16 (same), 53:7-54:8 (he was paid travel time if driving the crane), 60:4-60:19 (he was sometimes paid for travel time to and from the job site).
	Ex. 5, Venable Depo. 13:12-13:17 (he was sometimes paid travel time depending on the customer), 13:18-13:24 (he was "[s]ometimes" paid for travel between the job site and yard), 35:3-35:14 (example where he was paid for travel time), 38:22-39:23 (same), 42:22-42:25 (same), 43:4-43:8 (same), 50:10-50:14 (same) 46:3-46:15 (the number of hours he got paid for traveling to the site "varied. It varied from job to job."); **Ex. 6,** Venable RFA Nos. 11-12 (he was paid travel between home and job site), 20-21 (he was paid for travel between the hotel or camp and jobsite).
	Ex. 18, Ward Depo. 31:25-32:4 (on several occasions TNT paid him for travel time).

The above establishes that there was no common practice of failing to pay wages for compensable work performed outside of a customer's job site or travel time. *See also,* **Ex. 1**.

In sum, the evidence Plaintiffs submitted in support of conditional certification would not satisfy the standard for conditional certification under the Fifth Circuit's recent holding in *Swales,* 985 F.3d 430, and certainly does not satisfy the "much more stringent" standard required for final certification and a representative trial. *See infra*, at IV.A, pp. 18-19.

III. FACTUAL BACKGROUND

A. The Class Members Worked Out of Three Distinct Branches in Different Employment Settings.

TNT offers crane and rigging services, including providing fully operated and maintained cranes and other specialty lifting services to customers in the oil and gas, midstream, refining, petrochemical, power, commercial, construction and industrial markets.[7] TNT's operations vary significantly across its three Texas branches where the Class members worked: Houston, Midland, and San Antonio. These differences impact the FLSA claims of each Class member.

Unlike the Houston and San Antonio branches, Midland operates almost exclusively in oil and gas, typically requiring significant overnight stays. Indeed, the Midland branch performed, by revenue, approximately 90% of its work in the oil and gas industry in 2017, and approximately 96% of its work in the oil and gas industry in 2018.[8] By contrast, the San Antonio branch performed only 67% of its work in oil and gas in 2018, and 47% in 2017. Houston performed just *1.2*% of its work in oil and gas in 2017, and *1.6*% in 2018.[9] These differences impact Plaintiffs' overtime claims. Specifically, the Midland branch provides operators for 24-hour shifts in remote oil and gas fields, necessitating longer travel time to and from the location and overnight stays.[10] When serving industries outside oil and gas, travel time is greatly reduced

[7] Doc. 23-2, Declaration of Antoy Bell (Sept. 7, 2018) ("Bell 2018 Decl."), ¶ 3.
[8] Doc. 23-2, Bell 2018 Decl., ¶ 4.
[9] Doc. 23-2, Bell 2018 Decl., ¶ 4.
[10] Doc. 23-2, Bell 2018 Decl., ¶ 5.

and out-of-town stays are rare.[11] While operators working out of the Midland branch work an average of 12 hours per day, in San Antonio and Houston, operators work an average of 7 to 8 hours per day.[12] Thus, the shift length and number of hours worked per week greatly vary among Class members.[13] Whether class members reported to only local sites for day jobs after stopping by the yard, or whether class members drove a far distance for overnight stays will determine whether the travel time was compensable under the FLSA.[14]

Each branch has its own independent management structure which directly impacts Plaintiffs' off the clock and travel claims. For example, the Branch Manager at the Midland branch is supported by an Operations Manager and a Yard/Rigging Supervisor (in addition to business, safety, sales, and administrative management employees).[15] The San Antonio branch has its own Branch Manager and management structure, including an Operations Manager, but has no Yard/Rigging Supervisor.[16] The management structure at the Houston branch is more complex. At Houston, the Branch Manager is supported by an Operations Manager, Fleet

[11] Doc. 23-2, Bell 2018 Decl., ¶ 5.
[12] Doc. 23-2, Bell 2018 Decl., ¶ 5.
[13] **Ex. 7,** McCandless Depo. 51:19-51:24 (shift lengths varied); **Ex. 19,** Deposition of Antoy Bell (Jul. 15, 2020) ("Bell Depo.") 37:24-39:10 ("there's no such thing as a typical shift" at Midland); **Ex. 8,** Baete Depo. 10:14-12:10 (weekly hours varied from 15 to more than 40).
[14] *See* **Ex. 20,** Declaration of Alex Lelon Murray III ("Murray Decl.") ¶¶2-7 (operators working out of the Houston branch are typically expected to report to the yard, and then drive to the local customer site; and cranes are fueled at the yard, customer site, and/or by runners, thus there is no reason Class members working out of the Houston branch would need to stop and purchase supplies and fuel); **Ex. 21,** Deposition of Alex Murray (Aug. 24, 2021) ("Murray Depo.") 19:10-19, 37:1-14 (operators working out of Houston would not need to stop for fuel, TNT would instead send a runner to refuel), 38:11-23 (the Houston branch was well stocked with ice and water for the operators).
[15] **Ex. 19,** Bell Depo. 12:25-13:22, 25:8-27:20, 28:2-29:22 (branch managers are responsible for implementing travel time policies for operators working at that branch), 30:12-30:23; **Ex. 22,** Deposition of Levi Hastey (Aug. 18, 2020) ("Hastey Depo.") 9:21-12:5; **Ex. 23,** Deposition of John Kenneth Harrison (Aug. 17, 2020) ("J.Harrison Depo.") 7:20-8:10; **Ex. 24, Ex. 26,** Declaration of Antoy Bell in Support of Motion to Decertify ("Bell Decl.") **Ex. A** TNT [Repass] 009194 to 96 (Organization charts); **Ex. 25,** Deposition of John Todd Stevens (Jul. 27, 2021) 76:23-79:3 (describing continuous day jobs at the San Antonio branch).
[16] Bell Decl. **Ex. A** TNT [Repass] 009194 to 96 (Organization charts); **Ex. 4,** Payne Depo. 9:5-9:7, 10:6-10:13.

Manager, General Manager, Rigging Superintendent, and several foreman, as well as a Crane Supervisor and Dispatch Manager.[17] The administrative functions at each branch operate independently of the other branches, for example each branch has its own sales department and each branch has its own Human Resources ("HR") and payroll personnel and procedures.[18] These differences are central to Plaintiffs' claims, as the different management personnel at each branch were responsible for implementing recordkeeping and pay policies, and for reviewing and making any adjustments to the Class members' timesheets.[19] Because of the disparate management structure, there could not be one directive to either work off the clock or deny Plaintiffs compensable travel time.

B. Class Members Worked Under a Variety of Different Lawful Timekeeping, Scheduling, Overtime, And Pay Polices.

TNT's baseline corporate policies are lawful and compensate employees more generously than required by the FLSA.[20] There is no dispute that TNT's policy is to pay Class members for

[17] **Ex. 24,** Bell Decl. **Ex. A** TNT [Repass] 009194 to 96 (Organization charts); **Ex. 18,** Ward Depo. 9:20-10:10, 32:13-32:15; **Ex. 14,** Ochoa Depo. 8:22-9:7; **Ex. 12,** Hardy Depo. 6:19-7:23.

[18] **Ex. 19,** Bell Depo. 12:25-13:22, 40:18-41 (the HR personnel at each branch is responsible for training Class members on reporting time to payroll, and that Carol Harrison is the office manager for only the Midland branch), 42:13-42:18; **Ex. 7,** McCandless Depo. 20:25-21:23 (at the Midland branch, Carol Harrison reviewed the Class members' timesheets); **Ex. 26,** Deposition of Carol Lynelle Harrison (Aug. 8, 2020) ("C.Harrison Depo.") 15:2-16:16, 41:9-43:4; **Ex. 24,** Bell Decl. **Ex. A** TNT [Repass] 009194 to 96 (Organization charts).

[19] **Ex. 27,** Deposition of Gary Eldon Harvey, Jr. ("Harvey Depo.") 12:19-14:1 (he decided any issues with timesheets at San Antonio); **Ex. 23,** J. Harrison Depo. 12:10-14:9 (he decided any issues with timesheets in Midland); **Ex. 26,** C. Harrison Depo. 41:9-43:4 (she did not review or mark on the timesheets turned in by San Antonio employees, even if those employees were working at Midland, as her review only concern Midland employees); **Ex. 19,** Bell Depo. 34:21-37:17; **Ex. 21,** Murray Depo. 52:3-53:10.

[20] Doc. 23-1, Bell 2018 Dec., ¶ 6; **Ex. 19,** Bell Depo. 69:6-69:11 (TNT paid travel occurring during the workday and TNT also paid [noncompensable] commute time when the customer paid TNT for it); **Ex. 21,** Murray Depo. 39:24-41:3 (TNT paid Class members "ticket time" which was time that it billed to a customer though the actual work day was shorter than the billed time, for example when the customer is billed a minimum of eight hours for the crane, but the operator is only on site for four hours); **Ex. 19,** Bell Depo. 34:7-14 (holidays and weekends were paid at 1.5 the regular rate).

all time stated on their timesheets as submitted to payroll.[21] The evidence consisting of timesheets showing Class members recorded travel time and other time outside a customer's jobsite, pay records showing pay for these activities, and the Class members' own deposition testimony, conclusively disprove the two conditionally certified theories of common violations of the FLSA. *See* **Ex. 1**, attached.[22]

1. TNT's Policies Direct Class Members to Report All Time Worked.

TNT uses a timekeeping system for tracking employee time worked for payment of wages (payroll).[23] Once operators report to work (which could be at the TNT yard or a customer's job site if they travel directly from their homes to the job sites) and perform any work, they are directed to report their start time and they are compensated continuously throughout the workday, with the exception of any off-duty breaks lasting 30 minutes or longer.[24]

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[21] **Ex. 28,** Declaration of Sandra Thornton (Sept. 24, 2021), ¶¶ 3-4 (the payroll procedure is to generate paychecks according to the time stated on timesheets). No deposed Class members was able to identify any occasion on which they were not paid according to the time stated on their timesheets as submitted to payroll.

[22] *See also,* Doc. 23-5 (Plaintiff McCandless' timesheets and payroll records showing he reported and was paid for, time for "driv[ing] to yard to turn in paperwork and ticket," washing a crane in the yard, "travel to job from Midland," "travel to hotel," crane maintenance and assisting a mechanic); Doc. 23-6; (Plaintiff Emmert reporting, and being paid for, yard time, driving to a meeting, changing oil and washing his pickup, checking in with dispatch, "help[ing] out around the yard", and "safety meeting [in] yard"); Doc. 23-7 (Opt-in Plaintiff Venable's timesheets and payroll records showing he reported and was paid for travel time); **Ex. 3,** Repass Depo. 12:25-17:18, 29:17-30:4 (his claim is limited to travel time which is based on Levi Hastey's alleged promise the time would be paid, including the regular commute time before any work was performed).

[23] TNT uses a field ticket system which is separate and apart from timekeeping to track billable time to customers. *See, e.g.,* **Ex. 25,** Stevens Depo. 90:14-92:20 (explaining that field tickets for customer charges is separate from payroll); **Ex. 21,** Murray Depo. 39:24-40:18. During some of the relevant period, TNT required operators to complete written timesheets, in which operators were directed to record all hours worked, but to distinguish between the time that is "Billable" and "Non-Billable" work. *See* **Ex. 24,** Bell Decl. ¶5. "Billable" refers to time which hours may be billed to TNT"s customer, while "Non-Billable" refers to time that is not billed to a customer. *See id*.

[24] *See* **Ex. 26,** C. Harrison Depo. 39:10-39:20 ("I don't believe there would be a circumstance, to my knowledge, that they wouldn't be paid for it once they got to the yard and picked up the rigger" at Midland); **Ex. 21,** Murray Depo. 16:5-19:5, 19:24-20:11, 28:18-25.

TNT's written Employee Handbook sets out its timekeeping policies and notifies employees that "[a]ccurately recording time worked is the responsibility of every nonexempt employee," that nonexempt employees must accurately record the time they begin and end work, and that falsifying time records is strictly prohibited.[25] TNT's Employee Handbook also explains that the normal work schedule is 8 hours per day, 5 days per week, but schedules vary "depending on customer needs," and supervisors will advise employees of their schedules.[26] The Handbook provides that TNT's:

> overtime policy conforms to…provisions of the…FLSA…All non-exempt employees will report their hours worked on a timesheet. Employees are responsible for assuring that their timesheets are turned in to the payroll department on time. …Overtime hours are hours worked by nonexempt employees in excess of forty…hour week. …All overtime hours …will be paid at time and a half.[27]

TNT also posted FLSA minimum wage and overtime notices at each branch.[28] The daily and weekly time reports Class members completed and submitted to TNT's payroll expressly reminded them to report all time they spent traveling and performing any pre or post-trip activities and fueling.[29] Operators self-report their time, and are instructed to round up to the nearest quarter hour in favor of the employee.[30]

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[25] **Ex. 24,** Bell Decl. **Ex. B** TNT [Repass] 005593; *see also*, **Ex. 24,** Bell Decl. **Ex. B** TNT [Repass] 005593-95; **Ex. 6,** Pls' Response to RFA No. 26 (36 of the 39 original Class members admit they received a copy of the Employee Handbook); **Ex. 26,** C. Harrison Depo. 39:10-20 (policy was that if an operator was required to drive to the yard all time after arriving at the yard was paid); **Ex. 22,** Hastey Depo. 26:5-29:3 (same); **Ex. 29,** Deposition of William John Johnson ("Johnson Depo.") 29 (same).

[26] **Ex. 24,** Bell Decl. **Ex. B** TNT [Repass] 005594.

[27] **Ex. 24,** Bell Decl. **Ex. B** TNT [Repass] 005594-95.

[28] **Ex. 19,** Bell Depo. 121:20-122:2.

[29] A portion of the Class members' timesheets reflected this instruction: "Daily time must be broken down, 15 min pre/post trip, fuel, travel, ticket hours, etc." *See e.g.* **Ex. 24,** Bell Decl. **Ex. L, M,** TNT 1227-30 (Timesheets of Khalid Kemeha); TNT 001428-59 (Timesheets of Layne Matthews); *see also* Doc. 23-2 pp. 4, 6, 8; Doc. 23-3 pp. 2, 4, 6, 8, 10, 12; Doc. 23-4 pp. 2-10, Doc. 23-5 pp. 2, 4, 6; Doc. 23-6 pp. 2, 4; Doc. 23-7 p. 2; **Ex. 6,** Pls' Response to RFA No. 28 (admitting the weekly time reports and daily timesheets speak for themselves).

[30] *See* **Ex. 24,** Bell Decl. ¶ 6.

2. TNT's Policy is to Pay Class Members for All Time Worked.

TNT pay operators for all time worked.[31] TNT's written policies are to pay employees for compensable travel time, pre-trip and post-trip work, yard work, fueling, maintenance, safety meetings, and paperwork.[32] While TNT may not bill customers for all of the time worked by operators, whether or not the customer is billed does not determine whether the employee is paid wages required by the FLSA. *See, e.g.,* **Ex. 2** (illustrating TNT's payment of total hours worked to Plaintiffs Repass and McCandless irrespective of hours billed to customers); Nixon Depo. Tr. Ex. 1 at TNT [Repass] 13940 (Opt-in Plaintiff Nixon Apr. 23, 2016 timesheet reporting 12.50 hours to payroll and only 10.5 hours billable to the customer).

3. Variations in Pay Policies Exist Between the Midland, Houston, and San Antonio Branches.

TNT issued several written memos describing nuances in customer billing and timekeeping/payroll practices related to commuting and work travel.[33] For the Midland and San Antonio branches only, memos were issued in March 2015 directing operators to charge actual hours worked, and that they had the option when traveling overnight to either stay in provided lodging and receive $35-$60 per diem *plus* travel time between lodging and job site, or to obtain a $100 per diem and no travel between home and job site beyond that agreed to be paid by the

[31] Doc. 23-1 Bell 2018 Decl. ¶¶ 6, 7; **Ex. 28,** Thornton Decl., ¶¶ 3-4; **Ex. 25,** Stevens Depo 45:16-46:3, 68:1-11 (regardless of the "rule," if time was on the timesheets it was paid), 68:22-69:5, 84:22-85:6 and 93:18-97:14 (at San Antonio, at one time the pretrip was defaulted at 15 minutes paid time but later increased to 30 minutes paid time, however if it took longer the operator was to record the additional time and the reason for the extra time on his timesheet); **Ex. 21,** Murray Depo. 30:5-31:15, 33:1-7, and 44:11-48:9 (no adjustments are made to timesheets unless the manager first talks to the employee), 48:10-51:10 (while a default was set for pretrip, an entry of more than 15 minutes was simply confirmed with the employee that it in fact took longer).

[32] *See* Doc. 23-2 (timesheets and pay records for Midland operators); Doc. 23-3 (timesheets and pay records for Houston operators); and Doc. 23-4 (timesheets for San Antonio employees). *See also,* Bell Depo. 90:21-96:23 (explaining that TNT's written policies provide that if compensable time is recorded on the timesheet, the time is paid, and though the commute from lodging to the job site is not required to be paid under the FLSA, TNT may pay the travel time to encourage employees to stay in the lodging and thus have their entire commute paid).

[33] **Ex. 24,** Bell Decl. **Exs. D-I,** TNT [Repass] 008450, 005601, 005598, 005954, 005599, 005596-97.

customer (typically, an amount equal to the distance between the provided lodging and the job site).[34] No similar policy exists in Houston, rather "per diem" is "completely separate" from travel time in Houston.[35] However, in Houston, a hotel was provided if the job site was more than 60 miles from Houston (which was rare) and any time worked on weekends or holidays was paid at an overtime rate regardless of the number of hours worked that week.[36] Some of the policies were reactive to various issues arising at a branch, for example in San Antonio a policy was implemented requiring pre-approval to work "yard time" after certain operators were falsifying their time, turning in time they claimed they worked in the yard and video revealed they were merely arriving and hanging out, not performing work.[37]

The San Antonio yard guaranteed operators a minimum of 40 hours per week.[38] Indeed, a prior 2014 memo to only San Antonio operators contains the policy guaranteeing certain

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[34] *See* **Ex. 24,** Bell Decl. **Exs. E and F,** TNT [Repass] 005598, 005601; **Ex. 26,** C. Harrison Depo. 18:16-20:14, 22-23, 3842, 43:5-44:25 (explaining the time she cut for Midland operators was time that exceeded the travel that was billed to the customer "which would have been the travel to the closest place of lodging to the job site"), 45, 46:18-47:9 (explaining Midland operator "would not receive any extra travel from the job site to his lodging" if he chose to lodge at a location farther from the site than the provided-lodging), 48-49; **Ex. 19,** Bell Depo. 105-110. This written memo was provided to Repass at least twice. **Ex. 22,** Hastey Depo. 42-46, 49-50; **Ex. 16,** Raybion Depo. 49:17-50:11, 51:12-52:3 (explaining that only the Midland yard provided "man camps," *i.e.* lodging and therefore Midland's per diem policy was different than the other two branches, and for Class members working out of the Midland branch, it was a "personal choice" as to whether or not they stayed in the provided lodging). The amount paid by a customer to TNT covering the commute time for TNT's employees is based on verbal agreements or understandings and does not appear in the rate sheets. *See* **Ex. 24,** Bell Decl. ¶8. *See also,* **Ex. 25,** Stevens Depo. 76:23-79:3 (whether a customer paid for travel time did not impact whether TNT paid for travel time for operators working out of the San Antonio yard).

[35] **Ex. 21,** Murray Depo. 41:4-13; *see also*, **Ex. 19,** Bell Depo. 105:25-110:18.

[36] **Ex. 24,** Bell Decl. ¶¶7-9

[37] **Ex. 27,** Harvey Depo. 28:4-29:17, 47:5-48:2; *see also*, **Ex. 21,** Murray Depo. 29:1-10; **Ex. 25,** Stevens Depo. 102:9-105:11 (explaining the policies are not the same at San Antonio, "our branch was different").

[38] *See* **Ex. 24,** Bell Decl. **Exs. E, F, J,** TNT [Repass] 005598 (Mar. 13, 2015 memo), TNT [Repass] 005601 (Mar. 5, 2015 memo), and TNT [Repass] 008451 (Jan. 11, 2018 Hastey email sending March 13, 2015 memo); **Ex. 22,** Hastey Depo. 21:4-21:24; **Ex. 19,** Bell Depo. 50:22-52:3 (explaining TNT 6165 is a 2015 policy memo applicable to San Antonio); **Ex. 26,** C. Harrison Depo. 26:14-28:17 (though she reviewed timesheets and implemented policies at Midland, she is unfamiliar with the policies at San Antonio).

minimum pay regardless of whether the time was worked.[39] The 40-hour guarantee was omitted in an April 2018 memo to only Midland operators, which re-stated TNT's lawful policy at Midland that for overnight travel, if an operator chose not to stay in the provided lodging, they would only be paid for commute time to and from the job site at an amount equivalent to the time it took to travel between the provided lodging and job site.[40] Houston had no similar policy. **Ex. 21,** Murray Depo. 16:10-16, 38:24-39:8. Instead, at Houston where work was primarily local, the regular commute was not paid but the actual time driving from the yard to the job site was paid.[41]

C. The Class Members Experienced Different, Limited and Individual Variances in Timekeeping and Pay Practices.

The vast majority of Class members have confirmed they were paid for pre- and post-shift work and travel time, and in any event, whether this time is required to be paid under the FLSA varies for each Class member, as summarized in the attached **Exhibit 1**, which shows:

- Many Class members, typically those working out of the Midland yard, admit they were sometimes paid for their commute between their homes and the first site where work was performed (though not required by the FLSA).
- Most Class members admit they always were paid for working at TNT's yards, though a few claimed they were paid only sometimes.
- Most Class members admit they were paid for all travel once they arrived at the yard, though a few reported varied experiences where they were not paid.
- Class members were paid overtime at 1.5 times their regular rate.[42]

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[39] *See* **Ex. 24,** Bell Decl. **Ex. D,** TNT [Repass] 008450; **Ex. 26,** C. Harrison Depo. 26-28; **Ex. 22,** Hastey Depo. 20-21.
[40] *See* **Ex. 24,** Bell Decl. **Exs. G, H,** TNT [Repass] 005599 (Apr. 5, 2016 memo), TNT [Repass] 005596-97 (Apr. 1, 2018 memo); **Ex. 26,** C. Harrison Depo 22-23, 38-49; **Ex. 23,** J. Harrison Depo. 42:10-44:4, 63:13-66:8 (explaining this policy and that Class members working out of Midland would be paid for the travel time between provided lodging and the jobsite [though such commute time is not required to be paid by the FLSA]). *See also, e.g.*, **Ex. 24,** Bell Decl. **Ex. K** TNT [Repass] 005602-03 (Apr. 4, 2018 email regarding requirement to stay at closer lodging).
[41] **Ex. 21,** Murray Depo. 17:5-19:5, 19:24-20:11, 28:18-25.
[42] **Ex. 3,** Repass Depo. 84:10-84:15.

See **Ex. 1.** A lone Class member, Costlow, asserts he was paid under a "zip code to zip code" policy meaning that once he reached the zip code of his destination, he was no longer paid for the travel time.[43] Another Class member describes a policy where his daily hours were capped at 11.5.[44] Yet another asserts there is a policy in Houston that operators are paid if driving a haul truck or crane, but are not paid for time driving between the yard and job site in their personal vehicle or a TNT truck if they were being paid a per diem.[45] Yet another Class member testified he was told commute time from home to a job site was paid, but the return home was not paid.[46] Plaintiff Repass testified that he generally was unaware of TNT's written timekeeping policies, but instead understood TNT's pay practices based on conversations with Levi Hastey and his trainer.[47] Similarly, a few of the deposed Class members assert they *individually* experienced violations of the FLSA because they were directed by co-workers, specific managers, and/or at specific sites not to record time.[48]

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[43] **Ex. 10,** Costlow Depo. 9:9-11:18, 12:6-13:8, 20:21-26:21.
[44] **Ex. 18,** Ward Depo. 42:5-46:13.
[45] **Ex. 11,** Grimes Depo. 16:18-17:4. *See also*, **Ex. 9,** Coates Depo. 16:17-19:18 (he claims to have worked under a policy whereby travel between the jobsite and yard was paid only if driving a commercial vehicle or the customer paid for the time, and he never worked for a customer who paid for the time).
[46] **Ex. 12,** Hardy Depo. 25:1-29:6.
[47] **Ex. 3,** Repass Depo. 11:15-12:14, 17:19-18:12 ("I didn't know there was a policy except for what I was told"), 18:13-20:1, 26:5-27:15 (he did not speak to anyone other than Levi Hastey regarding his alleged individual arrangement to be paid for all commute time), 49:8-50:18, 72:22-75:6.
[48] *See, e.g.,* **Ex. 15,** Quintana Depo. 12:7-14:4 ("When I would do my timesheets, sir, we were only allowed to charge 14 hours per day, that's what the other operator had mentioned to me, so we would only charge 14 hours," confirming he "never did" ask a branch manager whether he was supposed to omit time from his timesheet and stating "that's mainly what everybody went by"); **Ex. 17,** Rodriguez Depo. 24:2-26:3, 42:5-42:25, 43:14-44:6. By contrast, Opt-in Plaintiff Ward does not recall ever being told not to record time performing tasks such as getting fuel, ice or water. **Ex. 18,** Ward Depo. 20:14-20:16. *See also*, **Ex. 11,** Grimes Depo. 8:25-9:20, 10:18-11:22 (dispatch told him which jobs to record on his timesheets, but directed him to bring his questions to his manager, though he understood TNT policy required that he accurately report all time worked on his timesheets); **Ex. 14,** Ochoa Depo. 14:1-15:1 (sometimes dispatch told him he was only being paid 15 minutes and then he had "a guy, Big O tell me I wouldn't get anything. And I had one say that you get 30 minutes" paid for pre-trip inspections); **Ex. 5,** Venable Depo. 13:18-13:24 (if he did not put time on his timesheet, he was not paid for it), 35:3-35:14 (he was told by his supervisor to record a certain number of hours for travel time), 68:16-69:1 (John Harrison told him

Several of the representative Class members cannot say when or about how many hours they allegedly worked off-the-clock. For example, Opt-in Plaintiff Ward testified:

> Q So sitting here today, you can't say what dates you worked and weren't paid?
> A No, sir.
> Q And would you be able to say what workweeks there were times you weren't paid overtime?
> A No, sir. I can't recall. I mean, it's a daily thing or a weekly thing. I'm not sure.

Ex. 18, Ward Depo. 34:18-34:24; *see also*, **Ex. 3,** Repass Depo. 29:17-30:4; **Ex. 15,** Quintana Depo. 8:10-9:24 ("can't recall" if paid drive time), 22:9-24:2 ("believe[s]" he recorded his yard time on his timesheet, but he is "not sure"). As demonstrated in **Exhibit 1**, many representative Class members were paid for time that other Class members claim was unpaid.[49] There is simply no representative proof of unpaid overtime worked or damages.

IV. LAW AND ARGUMENT

A. Legal Standard for Decertification.

To proceed to trial as a collective action under the FLSA, 29 U.S.C. § 216(b), Plaintiffs bear the burden of demonstrating the Class members are "similarly situated." *Proctor v. Allsups Convenience Stores, Inc.*, 250 F.R.D. 278, 280 (N.D. Tex. 2008) (citations omitted). "[T]he similarly situated inquiry at the second stage is much more stringent." *Id.* At the decertification stage, "the court makes a second and final 'determination, utilizing a stricter standard,' about whether the named plaintiffs and opt-ins are 'similarly situated' and may therefore proceed to trial as a collective…. If the court finds that the opt-ins are not sufficiently similar to the named plaintiffs, it 'must dismiss the opt-in employees, leaving only the named plaintiff's original

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some of the time driving in a TNT truck would not be paid), **Ex. 10,** Costlow Depo. 9:9-11:18 (dispatcher Todd Stevens told him that TNT's policy was to pay all time traveling "zip code to zip code"); **Ex. 16,** Raybion Depo. 30:13-18 (there was no uniform practice regarding travel time); **Ex. 9,** Coates Depo. 22:8-24:1 (believed he could record 30 minutes for pre-trip inspections though he does not recall whether anyone told him that was TNT's policy).

[49] *See also*, Docs. 23-1 to 23-7.

claims.'" *Swales*, 985 F.3d at 437 (citations omitted). *See also generally,* 3 Newberg on Class Actions 7:37 ("Once a court certifies a class, its authority over the subsequent litigation requires it to ensure that these indicia continue to be met… thereby creating a duty of monitoring … class decisions in light of the evidentiary development of the case." [citations omitted]).

Courts in the Fifth Circuit consider several factors when determining a motion to decertify an FLSA collective action, including:

> (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to [the defendant] which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations ...

Proctor, 250 F.R.D. at 280 (*citing Mooney v. Aramco Servs. Co*., 54 F.3d 1207, 1216 (5th Cir.1995), *overruled on other grounds by Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003)). In looking at the factual disparities among the Class members, the Court must also consider if it can "coherently manage the class in a manner that will not prejudice any party." *Proctor*, 250 F.R.D. at 281 (citations omitted). If there is "no single decision, policy, or plan" that affects the plaintiffs, as is the case here, the case will have "enormous manageability problems." *Id.* (citation omitted).

Here, discovery is completed, and the Plaintiffs' claims are ripe for decertification. The now repudiated allegations of Plaintiffs at the conditional certification stage will not suffice to proceed to trial collectively. Discovery has proven the Class members are not similarly situated regarding the asserted claims and defenses. The Court should grant TNT's motion and dismiss the Opt-in Plaintiffs without prejudice and proceed on Plaintiffs' claims only.

B. The Discovery Demonstrates There is No Common Unlawful Policy.

The linchpin of Plaintiffs' dubious legal theory is that TNT had a common policy of refusing to pay all time required by the FLSA to be compensated, including time spent traveling and performing other work tasks outside a customer's site. To proceed as a collective action,

Plaintiffs must show that the testimony of a representative few could establish liability against TNT for the entire Class. But the only common policy TNT has is to comply with the FLSA and pay all time worked, including overtime. Indeed, TNT's policies provide for pay beyond that required by the FLSA. Plaintiffs have not shown a common policy or practice to violate the law. To the contrary, the discovery evidence shows Class members either experienced no violation or claim to have suffered a violation in some highly individualized manner.[50]

1. Plaintiffs Identify No Common Policy.

The variety of travel and pay practices will preclude the parties from using representative evidence. Variances in customers and job sites interrupt any continuity in the evidence.[51] Variations in Plaintiffs' travel time claims also are individualized depending on the nature of the travel (including but not limited to travel home to yard; home to job site; yard to job site; job site to yard; company-paid lodging to job site and back). Operators in Houston rarely traveled

[50] *See* **Ex. 1**. *See also, e.g.,* **Ex. 11,** Grimes Depo. 10:18-11:22 (he understood he was required to accurately report all time worked); **Ex. 19,** Bell Depo. 46:25-48:5 (when an operator reports travel time that is not compensable under the FLSA and TNT is not paying the time, management at that branch must contact the operator and explain that the particular travel time was not compensable), 56:8-62:12 (if an operator performed work before traveling and was not paid, the reason he was not paid would have been because the operator did not report performing the work on his timesheet contrary to TNT's policies which required reporting all time worked).

[51] *See* **Ex. 11,** Grimes Depo. 17:5-17:18, 19:13-19:21 (claiming whether travel time is paid in Houston depended on factors such as what type of vehicle was being driven and varied by customer and job), 23:25-24:5 (he was aware that some operators in Midland are paid commute time and others are not); **Ex. 17,** Rodriguez Depo. 53:7-55:2 (to determine whether travel time was paid, one would have to look at the customer for that day, the directions from dispatch or the branch manager to determine whether they gave directions as to whether any particular travel time or task would be paid); **Ex. 5,** Venable Depo. 46:3-46:15 (the number of hours he got paid for traveling to the yard "varied. It varied from job to job. Like I said, if it was -- if they said you have 13 hours a day with this job, this Chevron job, you get 13 hours a day, … you get 15 hours a day, well, we're on the job site for 12 and a half to 13 hours and then…if it's 15, then we get 2 hours" and there may have been times he got 18.5 or 19 hours paid for a day); **Ex. 14,** Ochoa Depo. 22:18-23:6 (whether time was worked off the clock is "circumstantial, different situational").

overnight, thus they will not have claims related to overnight travel.[52] During their depositions and in their discovery questionnaires, several Class members confirmed that they actually have no claim for time working at TNT's yard, time spent stopping by the yard, time after they arrived at the yard, and many confirmed they received pay for commute time.[53] Opt-in Plaintiff Grimes described the differences he experienced when he worked at Midland where some of the commute time is paid, and later at Houston where he later worked and where regular commute time is not typically paid:

> I basically worked those -- well, I drove those hours. And they said, well, you don't get paid for driving those hours. You get paid when you actually get on the job. I was like, well, I just came from Midland where they paid me for those hours. I don't understand why it's any **different here at this yard than it is at the other yard**. **They said, well, this is not Midland**. I said, but it's still TNT. He's like, well, you'll learn when you get here. **Basically, what they paid you for at Midland, we're not going to be paying you for here in Houston, because it's -- it's a different setup**. I was like, okay, well –

Ex. 11, Grimes Depo. 13:5-13:21 (emphasis added). In their own words, the representative Class members confirm there is no common policy at issue in this case.

2. Plaintiffs Identify No Common Violation of the FLSA.

Plaintiffs rely on varied and individualized evidence to support their claims, and assert claims for activities that are not compensable under the FLSA.[54] Given the complex law

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[52] *See* **Ex. 24,** Bell Decl. ¶3 (most jobs in Houston are local day jobs or continuous jobs); **Ex. 16,** Raybion Depo. 14:8-14:15 (testifying that when he worked out of the Houston branch, he did not stop by the yard but instead drove straight from his home to the ongoing refinery site where he worked).

[53] *See* **Ex. 1**.

[54] *See* 29 U.S.C.A. § 254 (providing "activities which are preliminary to or postliminary to said principal activity or activities" are not compensable under the FLSA); 29 C.F.R. § 785.35 (providing the regular commute between home and work, even if the work is at different job sites, is not compensable under the FLSA); 29 C.F.R. § 785.39 (providing that travel for work requiring an overnight stay is compensable "when it cuts across" the employee's regular work time); WHD Opinion Letter, 1997 WL 998025, at *1. 29 C.F.R. § 785.39; *see also, e.g., Moore v. Performance Pressure Pumping Servs., LLC*, 2017 WL 1501436, *10 (W.D. Tex. Apr. 26, 2017) (noting that the FLSA provisions providing that normal commute time is not compensable apply regardless of whether the commute is from the plaintiff's home or for "travel to and from lodgings, such as a hotel"); U.S. DOL Wage and Hour Div., FLSA2020-16, at p. 6 (confirming principal that employers are not to be punished for flexibility in allowing employees to

regarding the compensability of travel time, individualized determinations would be required to ascertain whether time is compensable, including: (1) whether the Class member drove a company vehicle, (2) the regular commute area[55], and for overnight travel, additionally: (3) when overnight travel occurred[56], (4) whether the operator was a passenger, (5) the duration of the travel, (6) what the operator's regular working hours were, (7) whether any of the travel time cut across the employee's regular working hours, (8) if lodging was provided, the distance between the lodging and the site[57], and (9) whether the class member stayed at the provided lodging. Such variances are demonstrated by Plaintiff Repass who testified that he chose not to stay in provided lodging and instead drove home or to his own hotel of choice because he had no one to take care of his two dogs and they could not be kept at the provided lodging.[58] Further, as another Class member explained, to determine whether he is owed additional compensation for unpaid travel from site to site, one would have to look at "where I was going" on each entry of his timesheet

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choose personal travel arrangements, thus employer must compensate only the time equivalent that required for the employer-provided option).

[55] For example, Opt-in Plaintiff Daniel Rodriguez testified he was assigned out of only the San Antonio branch but he lived 2.5 miles from San Antonio. **Ex. 17,** Rodriguez Depo. 7:3-7:16, 8:19-9:5. Opt-in Plaintiff Raybion and his family brought a traveling trailer with him to various campsites so that his commute was anywhere from 15 minutes to two hours, depending on where he parked his camper. **Ex. 16,** Raybion Depo. 7:18-11:20. Plaintiff McCandless testified that he lived in a camper approximately 15 to 20 minutes away from the Midland yard where he worked. **Ex. 7,** McCandless Depo. 19:9-19:23. By contrast, Opt-in Plaintiff Hardy never stayed in a travel trailer. **Ex. 12,** Hardy Depo. 8:3-10:22. *See also*, **Ex. 22,** Hastey Depo. 62:10-63:11 (explaining that the practice at the Midland branch was for management to attempt to assign Class members living around Midland to work near Midland, and those coming in from out of town to work at sites farthest from Midland). In Houston, management established a regular commute area of a 60-mile radius. **Ex. 24,** Bell Decl. ¶8.

[56] For example, Opt-in Plaintiff Coates believes he should have been paid for an hour travel time occurring sometime between 2:30 and 5:00 a.m. on a Saturday morning, which time is based on where he parked his camper in relation to the jobsite. **Ex. 9,** Coates Depo. 35:3-37:19.

[57] *See* **Ex. 8,** Baete Depo. 13:19-16:17 (hotel provided approximately 10 miles from jobsite).

[58] **Ex. 3,** Repass Depo. 22:9-25:20, 38:11-40:12, 41:2-46:10. *See also* **Ex. 23,** J. Harrison Depo. 29:14-31:4 (Class members who traveled with guests or pets did not stay at the provided lodging); **Ex. 10,** Costlow Depo. 13:15-18:19 (was reimbursed for commute when drove home due to personal choice instead of staying in provided lodging, though he was reprimanded and ultimately removed from the job); **Ex. 15,** Quintana Depo. 11:20-14:4 and 35:11-35:21 (declined providing lodging in Texas and drove home each day because he wanted to spend time with his family, and nonetheless was paid for some commute time).

listing site to site travel because it depended "what job it was" and "where I was coming from" as to whether the time reported on his timesheet accurately reflected the actual travel time.[59] Due to unique variances in this case, there was no common violation of the FLSA experienced by all Class members.

3. Determining Whether Compensable Time was Unpaid Will Require Individual Testimony and Evidence.

Plaintiffs contend that some non-compensable travel time became compensable depending on the nature of their stops while driving from their homes to either the yard or a jobsite. The reason why any Class member stopped his vehicle or performed any task before arriving at the yard or jobsite would fall into a splintered decision tree, including not only the questions from the previous section above but also questions such as whether a runner was available to run supplies and fuel out to the Class member and if so, why the Class member did not use the runner; whether the Class member was ordered by dispatch to drive to the yard to give a rigger a ride to the site or went to the yard to pick-up fuel or supplies; where did the Class member stop, how long was the stop and how long was the drive from there to the yard or jobsite.[60] The credit card purchases on TNT's corporate credit card made by each Class member will need to be examined to determine whether they stopped, used the card for personal items such as beverages, breakfast, or cigarettes; whether they stopped for fuel to fill their vehicle or a drag tank for the crane; and the size of the TNT vehicle they drove and whether it had a drag

[59] **Ex. 17,** Rodriguez Depo. 15:25-16:16, 33:20-34:7, 36:23-37:2 ("we can't tell" from looking at the records what, if any, time was not reported).

[60] **Ex. 19,** Bell Depo. 52:4-52:15; **Ex. 3,** Repass Depo. 58:19-59:9 (whether he had to stop by the yard before driving to the job site depended on whether dispatch told him to first drive to the yard); **Ex. 27,** Harvey Depo. 42:11-43:8 (while Class members in San Antonio were not typically required to drive to the yard if they did, they were paid); **Ex. 29,** "Johnson Depo." 59:1-59 (Class members in San Antonio were not required to go to the yard for meetings because management emailed out the safety minutes); **Ex. 20** Murray Decl. ¶3 (in Houston, runners provided by TNT take fuel to the jobsites as needed); **Ex. 21,** Murray Depo. 19:10-19, 37:1-14.

tank that could transport diesel fuel for the cranes.[61] For each stop that was made during travel, the Court will need to examine whether the stop caused the remaining travel time to become compensable.[62] TNT must be permitted to question each Class member as to each entry for travel time, each time they were paid travel time, each stop made while traveling, and as to any credit card purchases made during any stop.

Further, to show time was compensable, Plaintiffs must prove that TNT had knowledge that they were performing unpaid work. *Newton v. City of Henderson*, 47 F.3d 746, 748 (5th Cir. 1995); *accord*, Fifth Cir. Pattern Jury Instr. 11.24(A)(2)(c).[63] To do so, extensive individualized evidence of each stop by each Class member would be required. This demonstrates yet another layer of individualized evidence that will be required if this case proceeds to collective trial.

4. Class Members Asserting Claims Under the NMMWA Are Not Representative of Class Members Asserting Only FLSA Claims.

While Plaintiffs have acquiesced that there are no grounds for pursing class certification for their state law claim under the NMMWA, they insist on pursuing the claim on an individual

[61] **Ex. 20,** Murray Decl. ¶¶ 2,4 (most trucks issued to crane operators out of the Houston branch do not have drag tanks, and for those with drag tanks, the size of the tank can vary and corresponding time to fill the tank varies). *See also*, **Ex. 24** Bell Decl. ¶ 11 (describing the variances in credit card charges) and **Ex. Q,** Bell's Decl. TNT [Repass] 012349-50 (charges by Opt-in Plaintiff Ochoa showing charges in small amounts such as $4.39, $7.77, and $11.98 in January and February 2017) and **Ex. R**, Bell's Decl. TNT [Repass] 012380-86 (charges by Opt-in Plaintiff Quintana showing regular daily charges in the amount of $2-$10 at various gas stations).

[62] *See* **Ex. 20,** Murray Decl. ¶ 4 (drag tanks range from 40 to 100 gallons, and not all trucks that Class members drove home had drag tanks, and the time it would take to fill a tank with fuel varies not only based on the size of the tank, but also whether the fuel was obtained from a regular gas station pump or from a diesel truck pump in which case the fuel pumps much quicker), ¶¶ 6-7 (operators have stopped during their commute and other travel time and used TNT's corporate credit card for personal purchases), ¶ 6 (management at Houston would have been very concerned if fuel purchases appeared on TNT's corporate card because runners brought fuel out and fuel was available in the yard, there was typically no reason a Class member should be stopping for fuel and there had been instances where employees filled drag tanks with fuel and brought it home to syphon out of the tank and re-sell it which is why management would have been alert to fuel purchases); **Ex. 25,** Stevens Depo. 70:7-71:12 (while all travel after arriving at the first location is paid, discussing the possibility that operators are independent and may stope for personal business after leaving the customer site and before returning to TNT's yard).

[63] *See also*, **Ex. 3,** Repass Depo. 53:15-54:7, 55:7-56:1 (he allegedly performed pre-trip checks completed paperwork in his RV or hotel but did not report this time).

basis. Significantly, while Plaintiffs' FLSA claim is limited to two or three years, they assert the NMMWA claim on a "continuing course of conduct" theory and seek damages for alleged violations under the NMMWA "regardless of the date on which they occurred." Second Am. Compl., Doc. 70-1, pp. 16-18 ¶ 69 and Prayer for Relief at ¶ e. While only certain Class members worked in New Mexico,[64] their testimony regarding their alleged experiences beyond the statute of limitations for FLSA claims is not representative of Class members who assert no NMMWA claim.[65]

5. Federal Courts Regularly Decertify Collective Actions Like This One.

District courts have regularly granted motions to decertify in cases involving claims for off-the-clock work similar to the claims asserted by Plaintiffs here.[66] For example, in *Johnson*,

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[64] *See* **Ex. 6,** Pls' Response to ROG 20 (Class members Beate and Freas assert they never worked in New Mexico; Class members Coates, Emmert, and Franklin assert they performed 70% of their work in New Mexico; Class member Hill asserts 50% of his work was in New Mexico; Class members Golden and Grimes assert 40% of their work was in New Mexico; and Class members Garduno, Grossnickle, Hardy, and Jones assert 10% of their work was in New Mexico).

[65] A similar problem with representative testimony exists given the fact that at least one Class member never worked out of the Midland, Houston, or San Antonio branch. *See* **Ex. 18,** Ward Depo. 9:20-23, 32:13-18 (he worked out of the Freeport branch only). *Compare id. with* Docs. 28, 29 (Recommendation and Order conditionally certifying an FLSA action comprising operators working out of the Midland, Houston or San Antonio branches).

[66] *See, e.g., Proctor,* 250 F.R.D. at 280; *Johnson v. TGF Precision Haircutters, Inc*., 2005 WL 1994286 (Aug. 17, 2005 S.D. Tex.); *Basco v. Wal-Mart Stores, Inc.,* No. CIV.A. 00-3184, 2004 WL 1497709, at *5 (E.D. La. Jul. 2, 2004) (denying plaintiffs' motion for final certification of FLSA collective action); *Reyes v. Texas Ezpawn, L.P*., 2007 WL 3143315, *1 (S.D. Tex. Oct. 24, 2007) (granting decertification of FLSA collective action in misclassification case due to array of differences in plaintiffs' individual experiences depending on the management practices of individual store managers); *Espenscheid v. DirectSat USA, LLC,* 705 F.3d 770, 773 (7th Cir. 2013) (affirming decertification of FLSA collective where each collective member claimed a different number of unreported hours); *Haugen v. Roundy's Illinois, LLC*, 2021 WL 3418848, at *1 (N.D. Ill. Aug. 5, 2021) (U.S. District Judge Elaine Bucklo decertifying FLSA collective comprising 28 opt in plaintiffs because determining what sort of unpaid work each worker performed would be too individual of an inquiry); *Cornell v. World Wide Bus. Servs. Corp*., 2015 WL 6662919, at *3 (S.D. Ohio Nov. 2, 2015) (granting decertification, noting plaintiffs failed to show "substantial evidence of a single decision, policy or plan"); *Zivali v. AT & T Mobility, LLC*, 784 F. Supp. 2d 456, 459 (S.D.N.Y. 2011) (granting decertification where plaintiffs "failed to show that [the employers'] lawful policies are consistently violated in practice such that it would be possible to generalize" across the opt-in plaintiffs); *Douglas v. First Student, Inc*., 888 F. Supp. 2d 929, 934 (E.D. Ark. 2012) (collective treatment is inappropriate where "individualized inquiries would[] have to be conducted to determine whether any of the class members worked off-the-clock during any given week,

the plaintiffs alleged that hourly employees were working off the clock and owed overtime. 2005 WL 1994286, at *1. After the Southern District of Texas court conditionally certified the FLSA claims, defendant moved for decertification which the court granted, finding the evidence showed "a substantial variance of experiences by different Plaintiffs under different managers and at different shops around Texas." *Id.* at *3. The court noted that at some locations the class members claimed they were not allowed to clock in when they worked for 15 minutes before the store opened. *Id.* Yet, other class members did clock in for that time. *Id.* Additionally, the class members had varied experiences regarding whether they were required to clock out when waiting for customers. *Id.* While the plaintiffs alleged an overarching policy to deny them overtime, the company's actual policy in the manual instructed employees to make sure their timesheets accurately reflected the hours worked. *Id.* at *3. The court concluded that though the evidence established "some Plaintiffs may have prima facie claims for FLSA violations at different times, in different places, in different ways, and to differing degrees"; the overall "evidence of varied particular violations" was not enough to prove a "uniform, systematically applied policy of wrongfully denying overtime pay to Plaintiffs." *Id.* at *4. The "highly variable" nature of the alleged violations that differed by manager meant that the class should be decertified. *Id.*

In another Texas case involving claims similar to those asserted by Plaintiffs here, the court noted that the company's "official policy" was to prohibit working off the clock, and there was no official policy allowing employees to work off the clock. *Proctor,* 250 F.R.D. at 282.[67] In

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and if so, how many hours were worked"); *Saleen v. Waste Mgmt., Inc.*, 649 F. Supp. 2d 937, 942 (D. Minn. 2009) (affirming magistrate's denial of collective certification where plaintiffs gave "very different explanations for being shortchanged").

[67] *See also, generally, Garcia v. Sun Pac. Farming Coop.*, Inc., 359 F. App'x 724, 725 (9th Cir. 2009) (affirming district court's denial of class certification under Rule 23 where "the record evidence--in particular, the conflicting employee declarations submitted by each party--does not establish common

addition, the class presented "claims that are factually disparate" in that some claimed they never worked off the clock, while others claimed they remained clocked in but their paychecks were incorrect, some alleged "minimal" amounts of time worked off the clock, and yet others alleged they "spent a large portion" of time working off the clock. *Proctor,* 250 F.R.D. at 282. The court concluded these differences in the "quantity of time and the pattern of incidents" evidenced: "a large factual variety among the individual [] claims … [and] mean that the Defendant's defenses would also vary." *Id.,* at 283.

In yet another case, *Cornell*, 2015 WL 6662919, the court decertified claims very similar to Plaintiffs' claims in this case. There, the plaintiffs, similar to Plaintiffs here, asserted they were not paid for time performing work in the defendants' shop and traveling between job sites. *Id.* Also, as in this case, some of the class members testified during their depositions that they were sometimes paid for time working in the shop and for travel. *Id*., at *4. The court reasoned:

> Although Plaintiffs offer substantial evidence that some workers did perform at least occasional off-the-clock work, the evidence indicates that the decisions of individual workers and supervisors, not a company-wide policy, were the causal factor. Furthermore, Plaintiffs' own testimony suggests that a rather large amount of shop time and travel time was in fact compensated, contradicting their claim that Defendants operated under a *de facto* policy of violating FLSA's wage and hours provisions.

Id. For this reason, the court found that there was no common policy of violating the FLSA and fairness and procedural considerations required it to grant defendants' motion to decertify the collective action. *Id*., at *5-6.

Here, as in numerous cases where the collective action was decertified, the evidence shows only "anecdotal" and "particularized" purported violations of the FLSA. *Proctor,* 250 F.R.D. at 282 (internal citation omitted). Here, there is no consistency among the testimony,

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wage and hour practices … but rather the "[in]consistent application of the wage and hour laws between and among the various [work] Crews.").

there is no consistently applied policy resulting in overtime due for compensable time. The allegedly compensable time spent traveling or performing other work tasks is not alleged to be uniform in nature, frequency, or duration. The action should be decertified.

C. Individual Damages Claims and Analyses Preclude Collective Treatment.

Here, presuming *arguendo* that Plaintiffs could establish liability with representative evidence (they cannot), it is irrefutable that there is no common evidence of alleged off-the-clock work time and the testimony shows significant, person-by-person variation. *See* **Ex. 1**. Because there is no common evidence but instead drastic differences regarding the amount of and reasons for alleged unpaid time, trying the case collectively would inevitably result in a windfall for either TNT or individual Opt-in Plaintiffs who would have to rely on representative testimony.

The representative Class members allege that they worked varying amounts of overtime; however, many of the deposed Class members could not recall when or for what reason that overtime was performed, nor the amount of overtime.[68] The inability to even estimate damages underscores that the Class members' damages are not capable of calculation beyond a speculative level and certainly not to a "just" and "reasonable" level. *Anderson v. Mt. Clemons*

[68] *See* **Ex. 3,** Repass Depo. 29:17-30:4 (he has not attempted to estimate the hours he alleges in this lawsuit that he worked off the clock); **Ex. 11,** Grimes Depo. 60:22-61:2; **Ex. 16,** Raybion Depo. 59:12-59:14 (unable to identify any dates for which he was not paid for travel time); **Ex. 13,** Nixon Depo. 9:13-9:23, 11:7-11:12, 13:7-13:24 (testifying that though "[s]ometimes we were, and sometimes we weren't" paid for time traveling between the yard and job site and time spent at the yard "I cannot recall" those jobs for which he was not paid); **Ex. 5,** Venable Depo. 13:12-13:17, 13:18-13:24 ("Sometimes" paid for travel between the job site and yard, though he cannot recall on which jobs he was paid or not paid). For example, when Plaintiff McCandless was asked to estimate how far the job site was to the Midland yard to estimate alleged unpaid time, McCandless testified he "couldn't recall the time, because it was always -- I mean, it varied just depending on when the job was there." **Ex. 7,** McCandless Depo. 8:14-9:7. *See also*, McCandless Depo. 42:7-42:14 (he did not stop to buy supplies every day); **Ex. 13,** Nixon Depo. 39:21-40:4 ("every job was different"); **Ex. 14,** Ochoa Depo. 15:23-17:11 (TNT's policy in its handbook is to pay "portal to portal" meaning that all travel including commute from home to the yard would be paid, but whether travel time was actually paid depended on "different circumstances for different things"); **Ex. 17,** Rodriguez Depo. 15:25-16:16 (was told by Todd Stephens or dispatcher when travel from job site to site would be paid because "[e]very job was different"), 36:23-37:2 ("we can't tell" from looking at the records what, if any, time was not reported).

Pottery Co., 328 U.S. 680, 687 (1946). There is no consistent testimony that could fairly represent the experience of all Class members. Given the inability to estimate and the fact that the number of hours worked by Class members during the relevant period greatly varied, Class members' damages are not susceptible to mechanical calculation.[69] "Representative proof" of damages does not exist. Indeed, **Plaintiffs have agreed that should this case proceed to trial, it must proceed "on the issue of damages for the *individual* class members**" as there is no representative evidence of damages. *See* **Ex. 6,** Pls' Response to ROG No. 19 (emphasis added).

Several courts have ordered collective actions decertified where there was no representative evidence as to damages. In *Espenscheid v. Directsat USA, LLC*, *et al.*, the Seventh Circuit affirmed the district court's decision to decertify an FLSA collective action for unpaid overtime. 705 F.3d. at 771. The court determined that variances in the number of unpaid overtime hours claimed by plaintiffs rendered the claims infeasible to try together. *Id.,* at 773. The court rejected the plaintiffs' proposal to offer "representative" proof at trial because even if plaintiffs were sampled at random, "this would not enable the damages of any members of the class other than the [random sample] to be calculated." *Id.,* at 774. The court further noted that "[t]o extrapolate from the experience of the [random sample] to that of the [collective] would require that all [all collective members] have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage . . . No one thinks there was such uniformity." *Id.* Instead, the result of such an approach would provide windfalls to

[69] *Compare* **Ex. 6,** Pls' Response to ROG No. 3, 13 (Repass estimating he worked 42-43 hours weekly unpaid, Grimes estimating he worked 15 hours weekly unpaid, Raybion estimating he worked 10-15 hours weekly unpaid, Venable estimating he worked 20-30 hours weekly unpaid, McCandless estimating he worked 14 hours per week unpaid) *with* **Ex. 3,** Repass Depo. 29:17-30:4 (he has not attempted to estimate the hours he allegedly worked unpaid); **Ex. 11,** Grimes Depo. 60:22-61:2 (the only way to know whether he was paid for all time on his timesheets is to compare them against his pay records); **Ex. 16,** Raybion Depo. 59:12-59:14 (unable to identify any dates for which he was not paid for travel time); **Ex. 5,** Venable Depo. 13:12-13:17, 13:18-13:24 (he cannot recall on which jobs he was paid or not paid; **Ex. 7,** McCandless Depo. 8:14-9:7 (unable to state the amount of time unpaid because it "varied").

some plaintiffs while undercompensating others. *Id.* Representative proof cannot hope to separate "benign underreporting" from an unlawful requirement. *Id. See also,* 4 Newberg on Class Actions § 11:21 (5th ed.) ("[C]ourts have generally rejected [trial by extrapolation] as a binding litigation solution to establishing damages[.]"). Additionally, representative proof is infeasible where plaintiffs "have no records of the amount of time they worked but didn't report on their timesheets." *Espenscheid*. 705 F.3d. at 774-75. The *Espenscheid* court noted that while the plaintiffs claimed that their records were incomplete because the employer told them not to report all their time, that did "not excuse them from having to establish the amount of the unreported time," and thus they could not adjudicate their FLSA claims collectively. *Id.* Here, individualized damages inquiries are necessary, making the claims unfit for collective adjudication.

D. Individualized Defenses Will Predominate Litigation.

In considering decertification, the Court must consider the various defenses available to TNT that appear to be individual to each plaintiff. *Proctor*, 250 F.R.D. at 280. TNT is entitled to due process including individually examining each Class member's claims. Thus, consideration of TNT's defenses weighs heavily for decertification. *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 954 n.8 (11th Cir. 2007) (affirming order decertifying collective action, noting significant case management concerns where there were defenses that applied to some but not all putative class members).[70] Here, TNT has numerous defenses to the claims of individual Class members which

[70] *See also, Wright v. Pulaski Cty.,* 2010 WL 3328015, at *10 (E.D. Ark. Aug. 24, 2010) (ordering collective action decertification where there were individual defenses because resolution would involve consideration of personalized evidence and so the interests of fairness and justice would not be served by attempting to adjudicate claims collectively); *Blair v. TransAm Trucking, Inc.*, 309 F. Supp. 3d 977, 1009 (D. Kan. 2018) (decertifying collective in which "Defendants' defenses as to each Plaintiff [were] ... highly individualized").

it is entitled to litigate, including estoppel, defenses under the NMMWA, application of the ECFA, the Portal-to-Portal Act, and the *de minimis* defense.[71]

1. Judicial Estoppel.

At least one Class member has filed an intervening bankruptcy in which he failed to disclose his claims in this lawsuit. *See* **Ex. 30** (Schedule A/B filed by Opt-in Plaintiff Hardy on January 13, 2020, at p. 5 items 30 and 33 responding "No" to the question of whether he is owed "Unpaid wages" and responding "No" when responding to the question of whether he has claims against a third party or has filed a lawsuit, making no mention of claims against TNT); **Ex. 31** (Docket); **Ex. 32** (Order of Discharge, filed Feb. 24, 2020).[72] TNT is entitled to dismissal of Opt-in Plaintiff Hardy's claims, and those of other Class members who are likewise estopped from pursing claims against TNT. *See*, *e.g.*, *In re Superior Crewboats, Inc.*, 374 F.3d 330, 335-37 (5th Cir. 2004) (plaintiffs judicially estopped from pursuing a personal injury claim where they had failed to disclose the claim and the bankruptcy court subsequently discharged the debtors); *In re Walker*, 323 B.R. 188, 195-98 (Bankr. S.D. Tex. 2005) (same); *see also Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261-63 (5th. Cir. 2012) (plaintiff judicially estopped from pursuing employment discrimination claim because he failed to disclose the claim to the bankruptcy court before it confirmed his Chapter 13 reorganization plan).

2. New Mexico Minimum Wage Act Claims.

There is no dispute that TNT must be permitted to individually question each Class member who has or will purport to assert a claim under the NMMWA. As no class action is

[71] Other defenses include the statute of limitations which bars the claims of some Class members, the doctrine of unclean hands as to Class members who intentionally underreported their time, whether TNT is entitled to offset against any overtime the amount of extra pay provided to Class members above what is required by the FLSA such as extra pay provided for noncompensable commute time. Some of these defenses are discussed in TNT's motion for summary judgment, filed contemporaneously herewith.

[72] Courts may take judicial notice of other court filings. *U.S. ex rel. Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 673, 680-81 (W.D. Tex. 2006).

being pursued for the NMMWA claim, the claims can only be heard and defended based on individual evidence.

3. Employee Commuting Flexibility Act (EFCA).

Under the ECFA, 29 U.S.C. § 254(a), time spent by employees that are incidental to the use of an employer's vehicle for commuting are not compensable if the use of the vehicle is the subject of an agreement between the employer and the employee and the vehicle is used for travel that is within the normal commuting area for the employer's business. *Chambers v. Sears Roebuck and Co.*, 428 Fed. Appx. 400, 410-21 (5th Cir. 2011) (holding time spent logging into handheld device to view assignments, commuting to the first job and home from the last job, loading parts and supplies, and calling customers to confirm was not compensable under ECFA).

Class members testified or stated in their discovery questionnaires that they were not paid for time spent on some tasks such as (1) routine maintenance on their company-provided trucks and (2) fueling their trucks (rather than fueling "drag tanks"). Class members are not entitled to compensation for this time under the ECFA if they had an agreement with TNT about the use of a company vehicle and they used that vehicle to drive home at night.[73]

The evidence shows that many Class members used company-provided vehicles during their employment and drove the vehicles home. The agreement between TNT and Class members who drove vehicles home varied by branch and by employee.[74] Thus, this defense is applicable to some Class members and possibly not others and must be considered on an individualized basis.

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[73] *See Chambers,* 428 F. App'x 400; *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 1057 (9th Cir. 2010) (holding that the technician's morning activities of "receiving, mapping and prioritizing jobs and routes for assignments" are related to his commute and not compensable under ECFA); *Buzek v. Pepsi Bottling Group, Inc.*, 501 F. Supp. 2d 876, 886 (S.D. Tex. 2007) (home-based technicians' transportation of tools in company car and completion of end of day reports at home were incidental to commute and therefore not compensable under ECFA).

[74] *See* **Ex. 19,** Bell Depo. 112:15-115:3.

4. The Portal-to-Portal Act.

Under the Portal-to-Portal Act, Plaintiffs' claims are barred to the extent they seek pay regarding any hours during which the Class members were engaged in activities that were preliminary or postliminary to their principal activities. 29 U.S.C. § 254. Specifically, certain activities, including but not limited to checking the schedule, acknowledging jobs in the morning, and calling dispatch, are not compensable, in that those activities were performed before or after the principal activities of operating, inspecting, and servicing TNT's cranes. An individualized inquiry will be required to determine this defense with respect to each Class member.

5. *De Minimis* Time.

Courts in the Fifth Circuit consistently find that employers are not liable for off the clock work time lasting 10 minutes or less per day. *See, e.g., Prince v. MND Hosp., Inc.*, 2009 WL 2170042, at *1 (S.D. Tex. Jul. 20, 2009). Here, the discovery from a sampling of Class members shows that much of the claimed unpaid time (such as alleged time spent fueling, purchasing beverages) may be *de minimis* and thus not compensable under the FLSA.[75] TNT is entitled to an opportunity to establish a *de minimis* defense against each Class member.

E. Fairness and Procedural Considerations Weigh for Decertification.

The Court has the authority to control class or other representative actions in circumstances where liability determinations cannot be effectively managed on a group-wide basis without implicating the defendant's Due Process rights.[76] Here, a collective action is not

[75] *See* **Ex. 3,** Repass Depo. 55:12-56:5 (pre-trip inspection and sometimes stopping to get oil and water would take "[f]ive, ten minutes at the most").

[76] *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (holding class could not be certified due to lack of common proof because Due Process "entitled [Wal-Mart] to individualized determinations of each employee's eligibility for backpay"); *Hofmann-LaRoche v. Sperling*, 493 U.S. 165 , 170-71 (1989) (Justice Kennedy noting the importance of "efficient resolution" of common issues of law and fact arising

the most efficient way for Plaintiffs to pursue their claims because the evidence demonstrates the Class members' claims are individualized and dependent upon factors that preclude a single trial. These factors include the site location and customer, supervisor, individual Class member's practice with respect to recording commute and travel time, whether they had an agreement with TNT regarding travel or pay, whether their work required overnight travel and whether they voluntarily drove home, whether they drove a TNT vehicle home and so forth. *See 14051 Manchester, Inc.*, 301 F.R.D. at 377 (decertifying a conditionally certified FLSA collective action where attempting to collectively try the case would be inefficient and violate Defendant's procedural and constitutional rights); *Hamilton v. Diversicare Leasing Corp.,* 2014 WL 4955799, at *5 (W.D. Ark. Oct. 1, 2014) (decertifying collective action where "it would be very difficult to adjudicate the claims" of the opt in plaintiffs properly, finding "the judicial inefficiency that would stem from a collective action outweighs any reduction in cost to potential plaintiffs").

Decertification is particularly just in a case like this with a modest class size, such that each Opt-in Plaintiff could pursue resolution of his own claims. Here, given the individualized factual issues that would predominate, the interests of judicial economy would not be served by

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from the same activity and the court's "managerial responsibility" in overseeing the efficient and proper adjudication of collective action under 29 U.S.C 216(b)); *In re Chevron U.S.A.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (finding trial court erred in approving trial plan that while "designed to resolve the issue of liability on the part of Chevron to all the plaintiffs by referring to a unitary trial on the issues of general liability or causation, does not identify any common issues or explain how the verdicts in the thirty (30) selected cases are supposed to resolve liability for the remaining 2970 plaintiffs"); *see also, e.g., McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 232 (2d Cir. 2008) ("[T]o mask the prevalence of individual issues … is an impermissible affront to defendants' due process rights."); *Duran v. U.S. Bank Nat'l Assn.*, 59 Cal. 4th 1, 28 (2014) (holding that well before a case is slated to proceed to trial, it is a plaintiff's "burden" to advance a trial plan demonstrating that the "litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently," and failure to provide this advance notice would violate a defendant's Due Process rights); *Desilva v. North Shore-Long Island Jewish Health System, Inc.*, 27 F.Supp.3d 313 (E.D. N.Y. 2014) (decertifying FLSA collective action based on off the clock claims, recognizing that permitting a plaintiff to proceed without a trial plan would leave the court in the "untenable position of either having to hold, in effect, 1,196 mini-trials, or depriving Defendants of their due process right to present its full defense").

allowing the claims to proceed to a collective and representative trial. Nor would decertification make it impractical for plaintiffs' FLSA claims to proceed. *See Haugen*, 2021 WL 3418848, at *4 (decertifying collective comprising 28 opt-in plaintiffs, noting that each plaintiff would need to take the stand and therefore judicial economy and fairness require decertification).

Allowing Plaintiffs to continue to litigate this case on a representative basis without any showing that they can establish liability on classwide basis will place this Court in the "untenable position of either having to hold, in effect, [39] mini-trials, or depriving [TNT] of [its] due process right to present its full defense." *Desilva*, 27 F.Supp.3d 313. Conversely, any meritorious claim of individual Class members may be unfairly dismissed based on the testimony of a representative Class member. Plaintiffs have not demonstrated that the Class members are similarly situated and there is no need to trample TNT's Due Process rights or bootstrap the Class members. Management of this case and procedural considerations weigh heavily for decertification.[77]

V. CONCLUSION

Attempting to try this case on a collective basis would devolve into 39 trials of dissimilarly situated individuals, which is the antithesis of a representative action. Plaintiffs have not, and cannot, present a coherent plan to try in a single trial their own claims with the varied claims of the 37 Opt-in Plaintiffs. TNT respectfully requests the Court grant its Motion, dismiss the Opt-in Plaintiffs without prejudice, and proceed on only the claims of Plaintiffs Repass and McCandless.

[77] Though TNT has pressed Plaintiffs to explain how a single trial can determine the claims of all Class members, Plaintiffs have failed to present a trial plan. *See, e.g.,* Docs. 101-103, 134, 138; **Ex. 6,** Pls' Response to ROG 19.

Dated: October 1, 2021

Respectfully submitted,

/s/ G. Mark Jodon

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 202, I served a copy of the foregoing via the Court's ECF system, which automatically sends notice to all counsel of record.

/s/ *G. Mark Jodon*
G. Mark Jodon

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