IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ROB BOELK, JERRY SEGER,
DAVE JACAK, GREG CONGDON,
DAVID MOFFITT and JEFF SOPEL,
on behalf of themselves and all others
similarly situated,

OPINION AND ORDER

Plaintiffs,

12-cv-40-bbc

v.

AT&T TELEHOLDINGS, INC.,
WISCONSIN BELL, INC., AMERITECH
SERVICES, INC. and AT&T SERVICES, INC.,

Defendants.

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This is a proposed collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, and a proposed class action under Fed. R. Civ. P. 23. Plaintiffs Rob Boelk, Jerry Seger, Dave Jacak, Greg Congdon, David Moffitt and Jeff Sopel contend that defendants AT&T Teleholdings, Inc., Wisconsin Bell, Inc., Ameritech Services, Inc. and AT&T Services, Inc. violated the FLSA and Wisconsin law (Wisconsin Wage Payment Act, Wis. Stat. §§ 104.02, 109.03, Wis. Admin. Code § DWD 272.04, 274.02, 272.12(2)(c)) by failing to pay wages for meal breaks. According to plaintiffs, defendants imposed such severe restrictions on what plaintiffs could do during the breaks that the breaks should have been compensated. Additionally, plaintiffs contend that defendants' performance and

efficiency rating system compels plaintiffs to work through their meal breaks without reporting the work. Plaintiffs contend that defendants knew or should have known that plaintiffs were working through their meal breaks.

Plaintiffs brought this lawsuit on behalf of a class composed of defendants' current and former field technician working in Wisconsin. They have now moved for conditional certification of an opt-in collective action under 29 U.S.C. § 216(b), class certification of Rule 23 class and authorization to notify potential class members of their right to join this case. Dkt. #28. Defendants oppose the motion, contending that plaintiffs' claims depend on the resolution of too many individualized issues. Defendants also filed a motion for leave to file a sur-reply, dkt. #102, to which plaintiffs responded by filing a motion to strike, or in the alternative, to file a response to defendants' sur-reply. Dkt. #107. Additionally, defendants filed a motion requesting oral argument. Dkt. #111.

After reviewing the facts in the record, I conclude that this case cannot proceed as a class or collective action. With respect to Rule 23, plaintiffs have failed to identify a common issue of law or fact central to their claims that could be resolved on a classwide basis. Moreover, even if plaintiffs had identified a common issue, individual issues would predominate in this case, making the case unmanageable. For the same reasons, plaintiffs have failed to show that their situation is sufficiently similar to potential opt-in plaintiffs that it would be appropriate to conditionally certify this action under § 216(b) of the FLSA. Therefore, I am denying plaintiffs' motion for class and collective certification in full. I am granting the parties' requests to file sur-replies, though neither sides' filing had any effect on

the ultimate decision. Finally, I am denying defendants' request for oral argument as unnecessary.

In determining whether the class should be certified, I considered the allegations in the complaint and the affidavits and depositions that have been submitted. Sharpe v. APAC Customer Services, Inc., 2010 WL 135168, *1 (W.D. Wis. Jan. 11, 2010); Sjoblom v. Charter Communications, LLC, 571 F. Supp. 2d 961, 964 (W.D. Wis. 2008).

FACTS

A. Defendants' Business

Defendants AT&T Teleholdings, Inc., Wisconsin Bell, Inc., Ameritech Services, Inc. and AT&T Services, Inc are telecommunications companies operating a network of long-distance telephone, internet and television service for business and residential customers throughout the country. (The parties do not distinguish among defendants, so I will refer to them collectively as "defendants" throughout this opinion.) Within the Wisconsin network, there are three departments: Installation and Repair, Construction and Engineering and U-Verse. Defendants operate 37 garages in Wisconsin from which technicians work.

B. Defendants' Policies

1. All work hours must be reported and paid

Defendants have a policy that technicians must report and be paid for all hours

worked. The training materials for managers remind managers to insure that "non-exempt employees begin their meal periods on time, take the entire time allotted, and perform no work during the period." The materials also remind managers to insure that their employees are not working off the clock and that they are recording all of the time they work.

2. Productivity, quality and efficiency

Defendants also have policies encouraging efficient and quality work. Before 2010, the slogan for defendant's performance expectation was "4 good jobs in 8," meaning that technicians were expected to complete four quality jobs in every eight-hour day, without overtime. Since 2010, defendant has used a performance system called Management System and Operating Control. As part of the system, studies were conducted to determine the average amount of time for completing each of approximately 2,000 jobs. The extent to which technicians complete jobs within these targets is used to determine their efficiency. The system records precise dispatch and driving times for each assigned job and measures each technician's efficiency by dividing expected times established for each job by the time the technician actually takes to do them. Defendants post the technicians' scores at garages at least monthly, in rank order. A ranking in the bottom twenty percent (or below the goal) can put a technician into Performance Improvement Plan status and on track to possible discipline or termination.

Defendants track the technicians' activities and whereabouts throughout the day using a GPS Vehicle Tracking System. GPS devices in the technicians' vehicles report where

each vehicle goes, how fast it goes, every time it stops for a minute or more, where and how long it stops and whether it is idling or the ignition is turned off. Managers use "near real-time inquiries and analysis" from the GPS data "to identify patterns of inefficient travel, inefficient work methods, and other productivity inhibitors."

In addition to the productivity and efficiency measures, technicians are evaluated under other performance standards, including the frequency with which a job needs to be reserviced, customer experience, quality of work, observing company policy, attendance and punctuality, dependability and safety.

2. Meal break

Defendants' policies provide for an unpaid meal break to be taken at some point during or between the third and sixth hours of the shift. The length of the daily meal break depends on the department in which the technician works. Technicians in Construction and Engineering and U-Verse have one 30-minute meal break each shift. In January 2010, the meal break for Installation and Repair technicians was extended from 30 to 45 minutes. Technicians do not clock in and out for meals and are not required to report to payroll the times they actually start and end their meal breaks. Defendants do not track technicians' meal breaks with the GPS system.

Technicians are subject to certain restrictions on how they are allowed to use meal break time. The meal break restrictions applicable to Installation and Repair and Construction and Engineering technicians are set forth primarily in defendants' "2008 Non-

Management Employee Expectations." Under the Expectations, technicians are expected not to drive "off route" between one job to the next; not to use company vehicles for personal business; and not to read, nap or operate electronic equipment in the vehicles. They may not idle company vehicles for personal comfort, such as to heat or cool the vehicle, but may idle vehicles for safety or health reasons. Technicians may be subject to corrective action for violating these policies. (A different set of guidelines, the U-Verse Field Operations Premises Technician Guidelines, applies to U-Verse technicians. Dkt. #36-8. It contains similar restrictions.)

C. Testimony of Named Plaintiffs and Other Technicians

Plaintiffs are current and former field technicians employed by defendants in Wisconsin. They began their shifts at garages throughout the state and were then dispatched to job sites in company vehicles where they installed, maintained and repaired elements of the company's telecommunications network. They worked shifts of 8.5 or 8.75 hours, which included one unpaid meal break of 30 or 45 minutes.

All named plaintiffs submitted declarations stating that they were aware of the meal break restrictions imposed by defendants. Several declared that because of the meal break restrictions, they were unable to fill the 30 or 45 minute meal break and typically ate lunch while driving from job to job, spending between five and 20 minutes eating. Some read about their next jobs during their meal breaks and others talked to their supervisors on the phone. Some were interrupted by customers in public places. Some technicians believed

they could increase their productivity ratings by using all or part of their meal break for work. All plaintiffs declared that either the meal break restrictions or the pressure from the performance rating system caused them to work during all or part of their meal breaks without reporting the work to their supervisors or on their time sheets.

Plaintiffs and other technicians testified during their depositions that whether the meal break restrictions affected their meal breaks depended on the day, their route location and their supervisor's interpretation of the restrictions. For example,

- Plaintiff Seger testified that whether something was "out of route" depended on the supervisor's definition, and whether he wanted or needed to go out of route for lunch depended on where he was assigned on a particular day. Seger Dep., dkt. #71, at 141-42, 148. If he was assigned to an urban location, it was easy to find a place "on route" to eat. Id. at 148. He also testified that the out of route restriction would not prevent him from stopping for lunch at a fast food restaurant or his house if it was on route. Id. at 142.

- Plaintiff Congdon testified that his proximity to restaurants depended on his route. Congdon Dep., dkt. #72, at 138. Congdon testified that he sometimes studied his college materials or napped in his vehicle, sometimes did personal errands, depending on his supervisor, and frequently got hair cuts on his lunch break, at a salon that was on route. Id. at 81-82, 106-08. Congdon also testified that he idled his truck for warmth during his meal breaks in the winter. Id. at 108.

- Plaintiff Moffitt testified that he met other technicians and supervisors for lunch and that technicians sometimes drove out of route to meet each other for lunch, depending on the day. Moffitt Dep., dkt. #73, at 135-36. He testified that the out of route restrictions did not affect him because "most places that we're at, going from one place to another, you would have the ability to get something to eat, either leaving or getting into the next town." Id. at 185. He also testified that he runs his truck when necessary to use the heater and understands and complies with the expectation that he idle his truck as needed if there is a safety concern. Id. at 161, 164, 247.

- Plaintiff Sopel testified that he has never had trouble keeping warm in his truck, Sopel Dep., dkt. #74, at 79-80, and that restrictions prohibiting him

from driving out of route had no affect on him because he "never ha[d] a reason to go out of route." Id. at 167. He stated that he had "no issues" with the restrictions on his meal breaks. Id. at 176.

- Plaintiff Jacak testified that he usually went out to eat for lunch, depending on where he was, Jacak Dep., dkt. #75, at 59, 174, and that "so many things [] change from week to week." Id. at 33-35. He also testified that the "out of route" rules "change by whoever you talk to," and that he and "[e]verybody" else have gone "out of route" to go to a restaurant. Id. at 172, 174. He stated that the idling rule was "just like any rule that's out there, you know, some of them get looked over and some of them get hammered on and it depends on who the boss is and what rule it is, I guess." Id. at 182-83. He testified that he idled his truck to get warm or cool. Id. at 184, 188.

- Plaintiff Boelk testified that his supervisors allowed him to read newspapers in his truck during meal breaks, Boelk Dep., dkt. #76, at 68, that he could request permission from a supervisor to have lunch at home, id. at 62, and that whether technicians can congregate for lunch depended on the location. Id. at 173.

- Potential opt-in plaintiff Bolwerk testified that if he had asked his supervisor permission to got out of route to do a personal errand on his meal break, he is "sure" he would have been permitted to do so. Bolwerk Dep., dkt. #77, at 81.

- Potential opt-in plaintiff Gustavus testified that during his meal breaks, he was able to go to restaurants, shop or stop at home, and that it was generally easy to visit restaurants on route. Gustavus Dep., dkt. #78, at 53-54, 57-58.

Plaintiffs and other technicians testified that whether they took a full meal break or reported all the time they worked depended on the day, the volume of work and their supervisor. For example,

- Plaintiff Congdon testified that whether he took a lunch, how long the lunch was and whether he reported it depended on the day. Congdon Dep., dkt. #72, at 51, 79. Some days he took a full 45 minute lunch; some days he worked through his lunch, reported the work and was paid overtime for it; some days he worked through lunch and left early; and on other days, he did not take a 45 minute lunch but reported taking one. Id. He stated that "[e]very day [was] unpredictable." Id. at 31-32.

- Plaintiff Seger testified that he sometimes reported the time he worked during lunch as overtime. Seger Dec., dkt. #33, ¶ 31. He also testified that he did not really understand how the productivity rating system worked, Seger Dep., dkt. #71, at 184, but that he occasionally looked at his efficiency numbers that were posted. Id. at 186. He testified that he had low efficiency ratings because he was assigned more difficult jobs. Id. at 56. He stated that if he had been given easier jobs, like other technicians, he would have had less pressure. Id.

- Plaintiff Moffitt testified that he if he took a shortened lunch, he did not report it, unless he worked through lunch completely. Moffitt Dec., dkt. #32, at 20. He also testified that he did not like taking his full meal breaks because he does not like "spend[ing] time sitting idle," and would rather start his next job. Moffitt Dep., dkt. #73, at 144. Additionally, he testified that how busy he was on a particular day depended on whether he was working the day or night shift and how large a territory he covered. Id. at 57-58, 69-71. When he had a small territory, he did not have enough jobs to fill the day. Id. at 56-57. He also testified that some departments require technicians to work harder than others and that some managers are more aggressive than others. Id. at 51.

- Plaintiff Jacak testified that when he did not take a lunch break, he asked permission from his supervisor to leave work early and be paid for eight hours, or to be approved for overtime. Jacak Dep., dkt. #75, at 57, 66. He testified that he generally takes a 45 minute lunch, id. at 59, but that other technicians do not, depending on the day and whether they are trying to increase their efficiency numbers. Id. at 48-49, 56, 58-59.

- Plaintiff Sopel testified that he worked more than eight hours almost every day because of "forced overtime." Sopel Dep., dkt. #74, at 28, 207-08. He was paid overtime premium for any hours worked above eight. Id. at 31. Whether he took a meal break depended on how much work was available, id. at 32, and whether he could achieve good productivity ratings depended on the difficulty of jobs he was assigned. Id. at 134-35. He also testified that U-Verse managers were particularly harsh and threatening and affected his motivation. Id. at 145.

- Potential opt-in plaintiff Bolwerk testified that his lunch practices "had a lot to do with what [he] was doing that day." Ordinarily, he would take a full lunch if he worked air pressure jobs but other times he would take a "quick, quick lunch" depending on the amount of jobs in the load." Bolwerk Dep., dkt. #77, at 69. He also testified that he would take no lunch at all when he

had long drives between jobs, but that it was not very often that he was not near a gas station or fast food place to eat. Id. at 34. Bolwerk testified that he was never pressured about his performance rankings and that he always had good rankings. Id. at 81.

D. Defendants' Knowledge of Underreporting

Some plaintiffs testified that their supervisors knew of their short lunch breaks or encouraged them to shorten or skip meal breaks. In particular, plaintiff Sopel stated that he was encouraged by supervisors to improve his productivity by eating lunch while driving to the next job. Plaintiff Boelk told a garage manager in Beaver Dam that technicians were already working through meal breaks and could do no more to meet the company's productivity goals. Other plaintiffs testified that their supervisors would have no way of knowing whether they or other technicians were working during their meal breaks.

The parties dispute whether any corporate officer knew that technicians underreported the time they worked during meal breaks. Plaintiff Boelk says he told Peggy Texeira, defendants' labor relations manager, that he and other technicians believed that the restrictions on the meal breaks combined with the efficiency ranking system were pushing technicians to work through meal breaks. Boelk also says that Texeira told him that she knew technicians were working through their meal breaks without reporting. Texeira denies knowing that any technician worked through his meal break to boost his efficiency scores or for any other reason without being paid for the time.

OPINION

A. Class Certification under Fed. R. Civ. P. 23

Plaintiffs seek Rule 23 certification of their claims under the Wisconsin Wage Payment Act on behalf of all current and former field technicians employed by defendants in Wisconsin since January 18, 2009. Plaintiffs are asserting two claims under the Wisconsin Wage Payment Act and its accompanying regulations: (1) companywide restrictions on where technicians can take their lunch breaks and what they cannot do during the breaks so restricted the technicians' use of the breaks as to render the breaks not bona fide and therefore, compensable work; and (2) combined with defendants' productivity and efficiency ranking system, the restrictions caused technicians to work during their meal breaks without pay.

Before the court may certify a class, the plaintiffs seeking certification must satisfy the requirements of both subsection (a) and (b) of Rule 23. Rosario v. Livaditis, 963 F.2d 1013, 1017 (7th Cir. 1992). First, plaintiffs must show that they can sue as representative parties on behalf of others by meeting the four prerequisites laid out in Rule 23(a): (1) numerosity, that "the class is so numerous that joinder of all members is impracticable"; (2) commonality, that "there are questions of law or fact common to the class"; (3) typicality, that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and (4) adequacy, that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Next, plaintiffs must show that the proposed class action "may be maintained" as one of the four types of class actions permitted

under Rule 23(b).

Defendants do not challenge plaintiffs' ability to satisfy the numerosity requirement of Rule 23(a), and, because plaintiff has adduced evidence that there are approximately 1,300 people falling within the proposed class definition, I conclude that numerosity is satisfied. However, defendants contend that plaintiffs cannot satisfy any of the remaining Rule 23(a) requirements. Additionally, defendants contend that plaintiffs' proposed class does not satisfy the predominance and superiority requirements of Rule 23(b)(3) and cannot be maintained under any other subsection of Rule 23(b)(3).

1. Commonality

A plaintiff can meet the commonality requirement if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Supreme Court has instructed district courts that they are to perform a "rigorous analysis" to determine that the commonality requirement is satisfied, "because actual, not presumed, conformance with Rule 23(a) remains indispensable." Wal–Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 (2011) (citation omitted). As the Supreme Court explained in Dukes, plaintiffs cannot satisfy the commonality requirement simply by crafting a common question:

> Reciting [general common] questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members have 'suffered the same injury.' This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they

> have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. In other words, the common question must be one that will resolve an essential fact or issue of the plaintiffs' claim. Ross v. RBS Citizens, N.A., 667 F.3d 900, 908 (7th Cir. 2012) (what matters for class certification is whether claim rests on factual and legal questions that are common to class and whether resolution of one or more of these questions is "apt to drive the resolution of the litigation").

With this is mind, I turn to plaintiffs' two claims.

a. Plaintiffs' claim that their meal breaks should have been compensated because they were overly restrictive

Plaintiffs' first claim is that defendants violated Wisconsin law by failing to pay plaintiffs for the mandatory 30 or 45 minute meal breaks. Under Wisconsin law, employers must pay their employees for all hours worked, which means "all time spent in 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer's business.'" Wis. Admin. Code § DWD 272.12(1). Employers do not have to pay employees for rest and meal periods if the meal period is a "[b]ona fide meal period of 30 minutes or more." Id. § DWD 272.12(2)(c). A lunch break does not qualify as bona fide, unless the employee taking it is

"completely relieved of duty" and not "required to perform any duties, whether active or inactive, while eating." Id.

Plaintiffs' theory is that their mandatory meal breaks were "rendered not bona fide" by the restrictions defendants placed on what field technicians could do during the breaks. Plts.' Br., dkt. #37, at 12; Plts.' Reply Br., dkt. #98, at 1 (claim is that "array of restrictions so limits what they can do during lunch as to preclude meaningful use of the break for personal pursuits"). According to plaintiffs, they typically ate a sack lunch or grabbed a quick lunch at a fast food establishment or convenience store. This took only a few minutes, leaving technicians with several minutes of their 30 or 45 minute break for other activities. However, plaintiffs contend that because they were prohibited from driving off-route, idling for comfort, using company vehicles for personal business or for reading, napping or using electronic equipment, they could not actually use the remaining time for personal pursuits. There were simply too many restrictions on what they were permitted to do. Plaintiffs contend that, by themselves, these restrictions render their meal breaks compensable work time. Plaintiffs contend that the proposed class satisfies the commonality requirement with respect to this claim because the primary question that must be resolved is common to all class members, namely, whether the restrictions limited technicians' breaks so much that the breaks should have been compensated.

As an initial matter, plaintiffs have not framed their common question in terms of the actual elements of a claim under Wisconsin or federal law. (Both parties agree that federal law is used to interpret Wisconsin wage laws in this area. Dfts.' Br., dkt. #51, at 28; Plts.'

Reply Br., dkt. #98, at 11.) This is important because, as the Supreme Court made clear in Dukes, commonality is not simply a matter of common questions, "even in droves," but rather, whether the class proceeding can generate "common *answers* apt to drive the resolution of the litigation." Id. at 2551 (emphasis in the original). That requires a close scrutiny into the class allegations and in some circumstances, even a consideration of merits questions to determine whether the lawsuit can generate common answers that are central to the validity of the plaintiffs' claim. Id. at 2551-52. See also Messner v. Northshore University Health System, 669 F.3d 802, 815 (7th Cir. 2012) (consideration of class certification begins with elements of plaintiffs' claim).

Plaintiffs have cited nothing in Wisconsin or federal law supporting the proposition that employers must pay employees for meal breaks simply because the employee is restricted in what he can do during the break, regardless whether the employees are performing work for the employer. Under plaintiffs' theory, they should be paid, even if they are just sitting in their trucks, because defendants' restrictions prohibit them from doing the things they would like to be doing with their meal breaks. Plts.' Reply Br., dkt. #98, at 9. However, the law requires only that employees be compensated for performing "work." Wis. Admin. Code § DWD 272.12(2)(c). See also Musch v. Domtar Industries, Inc., 587 F.3d 857, 859 (7th Cir. 2009) (employees must be paid for time spent engaged in "physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."); Wis. Admin. Code § DWD 272.12(1)(a) (applying same standard).

As the court of appeals has explained in cases involving similar meal break claims, the relevant question is whether meal break restrictions resulted in the employee's devoting his time and attention "predominantly for the benefit of the employer," in other words, whether the officers were unable "comfortably and adequately to pass the mealtime because the officer's time or attention [was] devoted primarily to official responsibilities." Alexander v. City of Chicago, 994 F.2d 333, 337 (7th Cir. 1993). See also id. at 341 (Crabb, J. concurring) ("The regulations do not affirmatively require the performance of active duties or so restrict the officer's choice of location and activities as to make his lunch break the equivalent of work time. It is the allegation of frequent interruptions that raises the possibility that the officers could show that their 'attention is devoted primarily to official responsibilities' during meal periods."). In Leahy v. City of Chicago, 96 F.3d 228, 232 (7th Cir. 1996), the court confirmed that the relevant question is whether restrictions on meal breaks constituted "work." In that case, police officers contended that the extent of restrictions on their meal breaks required that they be compensated under the FLSA. In affirming dismissal of the collective action, the court of appeals explained that

> [t]he situation here—a police department of some 12,000 officers in different districts with different shift schedules and different exigencies arising each day that might affect officers' meal periods—is not conducive to a one-shot solution. The officers want just such a solution: because some officers on some days miss all or part of their meal periods, the plaintiffs want all meal periods to be compensable work time. That would brook a result we cannot sanction, where officers might be paid for doing nothing more than eating during their meal periods.

Id. at 232. See also Jonites v. Exelon Corp, 522 F.3d 721, 725-26 (7th Cir. 2008) (rejecting as "preposterous" argument that because some employees may sometimes do some work at

lunch, all employees are entitled to pay during their lunch breaks).

Thus, the relevant question for plaintiffs' claim is whether the meal break restrictions resulted in field technicians' engaging in activities that predominantly benefited defendants during their meal breaks. White v. Baptist Memorial Health Care Corp., 699 F.3d 869, 873 (6th Cir. 2012) ("As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation" for the break); Haviland v. Catholic Health Initiatives-Iowa Corp., 729 F. Supp. 2d 1038, 1063 (S.D. Iowa 2010) ("[I]n determining whether the restrictions on the [plaintiffs'] meal break time make[] the time spent predominantly for Plaintiffs' benefit or for [defendant]'s benefit, the Court must look not just at what Plaintiffs *could not do* during their lunch breaks; it must also look at what Plaintiffs *could*, and *in fact did*, do during their lunch breaks.") (emphasis in original).

When the common question is framed in these terms, whether the meal break restrictions resulted in the technicians performing activities for the benefit of defendants, instead of themselves, it becomes clear that the question cannot be resolved on a classwide basis. Plaintiffs submitted little evidence to support a finding that field technicians who took meal breaks commonly ended up engaging in activities for the benefit of defendants during those breaks. Even setting aside that issue (which is arguably a merits issue), the facts in the record show that whether any meal break restriction foreclosed a technician's use of his break for his own purposes depended on the circumstances. Whether the restriction on

driving "out of route" for lunch on a particular day would result in not being able to stop at a restaurant or fast food establishment for 30 or 45 minutes depended on the location, job assignment and particular supervisor. Similarly, whether a technician could conduct personal errands depended on his route location and the discretion of his supervisor. Whether the restriction on reading personal materials in a truck had any effect on a technicians' use of his meal break depended on whether the technician wanted to read, whether he could read at a fast food establishment, a park or somewhere else and whether his supervisor enforced the prohibition against reading in company vehicles. The rules regarding idling affected technicians differently depending on the weather and the proximity to indoor establishments where the technician could spend a meal break. These differences between the technicians' experiences and supervisor discretion make it impossible to generate common answers on a classwide basis. Bolden v. Walsh Construction Co., 688 F.3d 893, 896 (7th Cir. 2012) ("[W]hen multiple managers exercise independent discretion, conditions at different stores (or sites) do not present a common question."); Vang v. Kohler Co., Case No. 12-8029, 2012 WL 3689501, *1 (7th Cir. Aug. 28, 2012) (unpublished) (vacating and remanding wage and hour class certification decision "to determine whether this suit concerns one firm-wide policy or congeries of supervisor-level practices").

It is true, as plaintiffs' argue, that courts frequently conclude that class treatment is appropriate in cases in which plaintiffs are challenging company-wide official or unofficial policies that result in violations of the law. In the two cases on which plaintiffs rely most heavily, Ross, 667 F.3d 900, and McReynolds v. Merrill Lynch, Pierce, Fenner & Smith,

Inc., 672 F.3d 482, 484 (7th Cir. 2012), the court of appeals concluded that commonality was satisfied and rejected the defendants' arguments that it was defeated by individualized differences in the class members' circumstances and supervisors. In both cases, the plaintiffs were challenging corporate policies or practices of classwide application. Ross, 667 F.3d at 902-03 (Charter One's alleged enforcement of an unofficial policy denying lawfully due overtime); McReynolds, 672 F.3d at 483 (company-wide policy allowing brokers to form "teams" and another basing account distributions on competing brokers' past success, resulting allegedly in racial discrimination).

However, in those cases, the court of appeals was satisfied that the plaintiffs had presented proof that any violations of the law were caused by policies enforced at the corporate level, rather than by individual supervisors. McReynolds, 672 F.3d at 489 (distinguishing Dukes on grounds that plaintiffs in Dukes were challenging actions of local management, rather than corporate policy); Ross, 667 F.3d at 909 (distinguishing Dukes, in part, because plaintiffs had submitted significant evidence in Ross of company-wide policy and limited supervisor discretion). In this case, by contrast, plaintiffs have failed to submit proof showing that the companywide meal break restrictions deprived plaintiffs and other technicians of bona fide meal breaks. Additionally, the evidence they submitted suggests that local supervisors had significant discretion in the enforcement of the meal break restrictions. Thus, plaintiffs have failed to show that there are common questions that could be resolved on a classwide basis using common proof. Gonzalez v. Millard Mall Services, Inc., 281 F.R.D. 455, 463 (S.D. Cal. 2012) (district courts "den[y] class certification where

a plaintiff has failed to show common proof that its employer prevented the putative class from taking required breaks"); Brown v. Federal Express Corp., 249 F.R.D. 580, 587 (C.D. Cal. 2008) (plaintiffs showed no method of common proof to establish that defendant's policies prevented putative class from taking required breaks). See also Espenscheid v. DirectSat USA, Case No. 09-cv-625-bbc, 2011 WL 2009967, *5 (W.D. Wis. May 23, 2011) (decertifying Rue 23 class action and FLSA collective action because "proof of plaintiffs' claims depends on how individual technicians responded to the numerous policies and practices at issue in this case" and "the evidence shows that opt-in plaintiffs and class members have different work experiences and were affected by defendants' policies in different ways"); Ruiz v. Serco, Inc., Case No. 10-cv-394-bbc, 2011 WL 7138732, at *6 (W.D. Wis. Aug. 5, 2011) ("[T]he answer to th[e common] question must be susceptible to proof that can be extrapolated to the class plaintiffs seek to represent.").

b. Plaintiffs' claim that they are owed compensation for unpaid meal breaks during which plaintiffs actually worked

Plaintiffs' second claim is that the combination of the meal break restrictions and defendants' efficiency and performance system caused them to work during their unpaid meal breaks without reporting their time. In light of defendants' policy mandating that employees report and be paid for all hours worked, the crucial question with respect to this claim is *why* plaintiffs and other technicians worked through all or part of their meal breaks without reporting their doing so. Plaintiffs have failed to show that this question could be

resolved on a classwide basis. Although plaintiffs and other technicians submitted declarations stating that they often worked through meal breaks because of the meal break restrictions, the productivity rating system or a combination of both, it is clear from the deposition testimony of plaintiffs and other technicians that the reason for doing so depended on the circumstances, which varied on a day-to-day basis. As discussed above, whether technicians decided to work through meal breaks because of the meal break restrictions depended on the day, the volume of work, the route, the supervisor and the technician's individual needs and desires.

Similarly, whether a technician felt rushed in completing jobs or pressure from the performance scoring and ranking system depended on the size of the territory to which the technician was assigned, the number of technicians available to cover the territory, the type of job assigned, the technicians' experience and supervisors' varying expectations. In light of these variables, the common questions central to plaintiffs' claim could not be resolved on a classwide basis. York v. Starbucks Corp., Case No. 08-07919, 2011 WL 8199987, *26 (C.D. Cal. Nov. 23, 2011) (concluding that meal break claims failed to meet Rule 23 commonality requirement because plaintiff conceded that "whether an employee took a proper meal break depended on who was running the shift . . . which indicates that violations resulted from individual action and not a corporate-wide policy or practice. . . . [A]n evaluation of a meal break claim as to any individual would involve a variety of particularized factors that would not necessarily impact any other company employee.").

2. Predominance under Rule 23(b)(3)

Because I conclude that plaintiffs cannot satisfy the commonality requirement of Rule 23(a), I need not address the remaining factors of Rule 23(a) or whether plaintiffs may maintain a class under Rule 23(b). However, I will address subsection (b)(3) briefly because it is clear that even if plaintiffs had been able to satisfy the commonality requirement, they would be unable to satisfy the predominance requirement of Rule 23(b)(3).

As an initial matter, plaintiffs argue briefly that this action could be maintained under Rule 23(b)(2) or (b)(3). However, it would not be appropriate to certify this action under Rule 23(b)(2). Rule 23(b)(2) permits classes for actions in which "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." "[C]ertification under Rule 23(b)(2) 'does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.'" Kartman v. State Farm Mutual Automobile Insurance Co., 634 F.3d 883, 888 (7th Cir. 2011) (citation omitted). Additionally, courts should not certify classes under Rule 23(b)(2) solely to lay the groundwork for subsequent individualized monetary damage awards. Dukes, 131 S. Ct. at 2557. See also Jamie S. v. Milwaukee Public School, 668 F.3d 481, 499 (7th Cir. 2012) ("[A] claim for class-wide injunctive and declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made; this kind of relief would be class-wide in name only, and it would certainly not be final."); Randall v. Rolls-Royce Corp., 637 F.3d 818, 826 (7th Cir. 2011) ("[C]alculating the amount of back

pay to which the members of the class would be entitled if the plaintiffs prevailed would require 500 separate hearings . . . An injunction thus 'would not provide' relief as required by Rule 23(b)(2)."); Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 978 (5th Cir. 2000) (class certification not permitted where class members "have nothing to gain from an injunction, and the declaratory relief they seek serves only to facilitate the award of damages").

In this case, it is clear that plaintiffs' primary claim is for monetary damages: they want to recover back pay for their unpaid meal breaks. Plaintiffs requested only broad declaratory relief and did not specify any particular injunctive relief that would remedy their injuries. Some of the named plaintiffs are no longer employees of defendants and would receive final relief only from monetary damages. Thus, a declaration regarding the illegality of defendants' policies would not be a "final remedy" for purposes of Rule 23(b)(2); it would "merely lay an evidentiary foundation for subsequent determinations of liability." Randall, 637 F.3d at 826.

This leaves Rule 23(b)(3), which requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 615-16 (1997). Although similar to the commonality requirement under 23(a)(2), the predominance requirement is more demanding and is meant to test "whether proposed classes are sufficiently cohesive to warrant adjudication by

representation." Amchem, 521 U.S. at 623. To determine whether the liability issues would require individual fact-intensive determinations or whether they are subject to class-wide proof, the court examines such factors as the substantive elements of plaintiffs' claims, the proof necessary for those elements and the manageability of trial on those issues. Farmer v. DirectSat USA, LLC, 08 C 3962, 2010 WL 3927640, *22 (N.D. Ill. Oct. 4, 2010)

For the same reasons described above in discussing commonality, plaintiffs cannot show that common questions of law and fact predominate. Determining whether a given employee suffered a meal break violation will depend largely on numerous highly fact-specific inquiries as to the reason why a technician worked during all or part of his meal break on a particular day, including the volume of jobs, the territory and route on that day, the number of other technicians available for work, the technician's personal preferences and the particular supervisor involved. Thus, it would be exceedingly difficult to determine in one proceeding whether particular restrictions or productivity ranking concerns had any effect on a technician's meal break or reporting practices on a particular day. Under the circumstances, the case would be unmanageable as a class action. Therefore, plaintiffs cannot maintain this action under Rule 23(b). Kenny v. Supercuts, Inc., 252 F.R.D. 641, 646 (N.D. Cal. 2008) (denying class certification because individual issues would predominate as court would need to determine why each class member did not clock out for meal break on any particular day); Salazar v. Avis Budget Group, Inc., 251 F.R.D. 529, 534 (S.D. Cal. 2008) (denying class certification because individual issues would predominate in determining whether defendants forced plaintiffs to forgo missed meal periods).

3. Rule 23(c)(4)

Plaintiffs contend that if the court concludes that their claims cannot be certified under Rule 23(b), the court should certify the "common issues" under Rule 23(c)(4). That rule states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). However, plaintiffs do not identify any common issues that could be resolved on a classwide basis. The only issues identified are those discussed above. Because plaintiffs failed to show that any common issue central to their claims could be resolved on a classwide basis, I will not certify any issue under Rule 23(c)(4). Therefore, I am denying plaintiffs' motion for class certification under Rule 23 in full.

B. Conditional Certification of FLSA Collective Class Action

Plaintiffs have also moved for conditional certification of a collective action for alleged violations of the FLSA's overtime compensation provision. Under that provision, "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Plaintiffs contend that defendants' failure to pay plaintiffs for their meal breaks resulted in plaintiffs working more than 40 hours each week without receiving overtime compensation. Under § 216(b), plaintiffs may bring a collective action under the overtime provision"for and [o]n behalf of himself or themselves and other

employees similarly situated."

This court has adopted a two-step process for class certification under the FLSA. Espenscheid v. DirectSat USA, LLC, 2010 WL 2330309, *6 (W.D. Wis. June, 7, 2010); Kelly v. Bluegreen Corp., 256 F.R.D. 626, 628-89 (W.D. Wis. 2009). At the first step, plaintiffs must make "a modest factual showing" that they are similarly situated to potential class members and that they and potential class members were "victims of a common policy or plan that violated the law." Kelly, 256 F.R.D. at 629-30. If this showing is made, the court conditionally certifies a class and authorizes notice to potential class members and the parties conduct discovery. Austin v. CUNA Mutual Insurance Society, 232 F.R.D. 601, 605 (W.D. Wis. 2006). The second step occurs at the close of discovery upon a motion for decertification from the defendant. At that point the court determines whether the plaintiffs are in fact similarly situated to those who have opted in. Id.

Plaintiffs contend that because this case is at the first stage of the process, they are required to make only a modest factual showing that they are similarly situated to the potential class members. However, the primary purpose of the two-stage process is to allow the parties to conduct discovery on the issue whether plaintiffs are similarly situated to class members. In this case, the parties have conducted significant discovery. The record contains several declarations from field technicians, depositions of all six named plaintiffs, depositions of two individuals who consented to opt in should a class be certified, and a Fed. R. Civ. P. 30(b)(6) deposition by plaintiffs. Under the circumstances, it is appropriate to apply more scrutiny to plaintiffs' claim than would normally be applied at the conditional certification

stage. Hawkins v. Alorica, Inc., Case No. 2:11-CV-00283-JMS, 2012 WL 4391095 (S.D. Ind. Sept. 25, 2012) (applying "intermediate level of scrutiny" to conditional certification where substantial discovery had been conducted but was not yet complete); Scott v. NOW Courier, Inc., Case No. 1:10-CV-971-SEB-TAB, 2012 WL 1072751 (S.D. Ind. Mar. 29, 2012) (same); Purdham v. Fairfax County Public Schools, 629 F. Supp. 2d 544, 547 (E.D. Va. 2009) (if court can determine at condition certification stage that notice is not appropriate, court can "collapse the two stages of the analysis and deny certification outright").

The facts in the record fail to establish that plaintiffs and potential class members were victims of a common policy or plan that resulted in common injuries. As explained above with respect to plaintiffs' Rule 23 motion, plaintiffs' experiences with the meal break restrictions were not common and varied depending on their individual practices and particular supervisor. Additionally, plaintiffs' own deposition testimony proves how variable their experiences were with respect to the way performance standards affected their day-to-day work activities and with respect to how other factors affected their work. Accordingly, for the reasons already explained, I find that plaintiffs have not shown that they are similarly situated to potential class members. Therefore, I will deny their motion for conditional certification under § 216(b).

ORDER

IT IS ORDERED that

1. The motion to file sur-reply filed by defendants AT&T Teleholdings, Inc., Wisconsin Bell, Inc., Ameritech Services, Inc. and AT&T Services, Inc., dkt. #102, is GRANTED.

2. The motion to respond to defendants' sur-reply filed by plaintiffs Rob Boelk, Jerry Seger, Dave Jacak, Greg Congdon, David Moffitt and Jeff Sopel, dkt. #107, is GRANTED, and the motion to strike is DENIED.

3. Plaintiffs' motion for class certification under Fed. R. Civ. P. 23 and conditional certification under § 216(b) of the Fair Labor Standards Act, dkt. #28, is DENIED.

4. Defendants' motion for oral argument, dkt. #111, is DENIED.

5. The case will proceed with the claims of the named plaintiffs.

Entered this 10th day of January, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge