

No. 72750-8-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

King County Department of Transportation, Defendant/Appellant,

v.

Douglas Frechin, Plaintiff/Respondent,

BRIEF OF APPELLANT

Patrick M. Madden
Stephanie Wright Pickett
K&L GATES LLP
925 Fourth Avenue
Suite 2900
Seattle, Washington 98104-1158
Telephone: (206) 623-7580
Facsimile: (206) 623-7022
Attorneys for Defendant/Appellant
King Department of Transportation

2015 JUN 30 PM 4:56
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
W

TABLE OF CONTENTS

| | Page |
|---|-------------|
| I. INTRODUCTION..... | 1 |
| II. ASSIGNMENTS OF ERROR | 4 |
| III. STATEMENT OF THE CASE | 5 |
| A. Metro transit services and workforce..... | 5 |
| B. Metro’s work and break arrangements with its Drivers..... | 6 |
| C. Changes in the meal and rest break law and post-2003 negotiations over breaks | 10 |
| D. Respondent and his work history | 15 |
| E. Procedural History | 17 |
| IV. ARGUMENT | 19 |
| A. RCW 49.12.187 allows public employees to bargain with public employers and agree to working conditions that vary from or supersede the rest and meal period provisions in WAC 296-126-092..... | 19 |
| B. Metro and its employees agreed to specifically vary from or supersede the rest and meal period provisions in WAC 296-126-092 | 22 |
| 1. Metro and Local 587 agreed to supersede the state rules | 24 |
| 2. The CBAs specifically vary from the State rules..... | 25 |
| a. Articles 15 and 16 of the CBA (which cover Drivers) specifically vary from the meal and rest period provisions in WAC 296-126-092..... | 26 |
| b. The precise language in Section 15.3.I of the CBA (which covers Drivers) provides for “reasonable breaks” and specifically varies from and supersedes the State meal and rest period rules | 29 |
| c. When considered as a whole, the CBA between Metro and Local 587 details when (and if) meal breaks are allowed for all employees covered by the CBA | 33 |
| 3. Drivers’ selected schedules specifically vary from the State rules..... | 35 |

C. RCW 49.12.187 bars each cause of action asserted by
Respondent.....37

V. CONCLUSION 39

TABLE OF AUTHORITIES

Other Authorities

| | |
|---|----------------|
| <i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006) | 22 |
| <i>City of Kent v. Beigh</i> , 145 Wn.2d 33, 32 P.3d 258 (2001) | 28, 36 |
| <i>City of Ocean Shores</i> , Decision 10670 (PECB 2010) | 29 |
| <i>Davis v. State, Dep't of Transp.</i> , 138 Wn. App. 811, 159 P.3d 427 (2007)..... | 30, 35 |
| <i>Frese v. Snohomish County</i> , 129 Wn. App. 659, 120 P.3d 89 (2005)..... | 23, 30, 32, 35 |
| <i>Hearst Comm. Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005) | 30 |
| <i>Lowry v. Ralph's Concrete Pumping, Inc.</i> , 2013 WL 2099519 (W.D. Wash. May 14, 2013) | 22 |
| <i>McGinnis v. State</i> , 152 Wn.2d 639, 99 P.3d 1240 (2004) | 10, 23, 24, 28 |
| <i>Millay v. Cam</i> , 135 Wn.2d 193, 955 P.2d 791 (1998) | 29, 36 |
| <i>Pellino v. Brink's Inc.</i> , 164 Wn. App. 668, 267 P.3d 383 (2011)..... | 32 |
| <i>Weeks v. Chief of State Patrol</i> , 96 Wn.2d 893, 639 P.2d 732 (1982) | 32 |

Statutes & Regulations

| | |
|--------------------------|--------|
| RCW 41.56.080 | 6 |
| RCW 41.56.100 | 6 |
| RCW 49.12.005(3)..... | 2 |
| RCW 49.12.005(3)(b)..... | 11 |
| RCW 49.12.187 | passim |
| WAC 296-126-092..... | passim |
| WAC 296-126-128..... | 5 |

WAC 296-126-130..... 20

Other Authorities

Civil Rule 56(c)..... 19

DLI Admin. Policy ES.A.6..... 20

DLI Admin. Policy ES.C.1 21

DLI Admin. Policy ES.C.6 passim

House Bill Report for SSB 6054 (April 24, 2003)..... 23

I. INTRODUCTION

Consistent with their rights under RCW 49.12.187, public transit employees—through their union Amalgamated Transit Union Local 587 (“Local 587”)—bargained with Appellant King County Department of Transportation (“Appellant” or “Metro”) to agree to a different arrangement for meal and rest breaks rather than the standard rules provided under WAC 296-126-092. Respondent Douglas Frechin (“Respondent”), a member of Local 587, brought this case against Metro alleging that what his union and Metro agreed to did not comply with the law. Instead, he claims that Metro has not provided him and a putative class of bus drivers (“Drivers”) “with legally sufficient meal periods in accordance with Washington law.” CP 2. Respondent’s claim is without merit and ignores the law, the language of the controlling collective bargaining agreements (“CBAs”), and the undisputed evidence, including the testimony of the two parties to the CBAs: Local 587 and Metro.

The threshold issue in this case is application of RCW 49.12.187 (“Section 187”), which allows public employers flexibility to supersede or vary from the State meal break provisions in WAC 296-126-092.

Before 2003, public employers such as Metro were not covered by various laws, including the State rest and meal break provisions that had been in place since 1976 for private employers. In 2003, this changed and

the Legislature decided for the first time that various provisions of the Industrial Welfare Act—including the rest and meal break provisions of WAC 296-126-092—apply to public employers. RCW 49.12.005(3). At the same time, the Legislature amended Section 187 to read:

This Chapter shall not be construed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing concerning wages or standards or conditions of employment.....

Employees of public employers may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods.

CP 93. In adopting Section 187, the legislative history makes clear that the law does not diminish the rights of public employees to bargain with public employers when it comes to meal and rest periods, including the “ability to negotiate different terms,” “to seek innovative solutions” (such as “straight-eight” shifts), and to allow “mutual employment agreements to continue to control rest and meal break arrangements.” CP 100-101.

Local 587 and Metro did precisely that. After adoption of RCW Section 187, the parties took action to supersede and vary from the WAC 296-126-092 meal and rest break provisions. The uncontroverted evidence Metro presented to the superior court shows this, including:

- The CBAs negotiated between Metro and Local 587 provide meal and lunch breaks for many groups of employees (but not Drivers), and those arrangements are often not consistent with

the WAC. *See* CP 835-1030 (CBA §§ 17, 18, 20, 21, 22, and 25).

- Articles 15 and 16 of the applicable CBAs cover Drivers and do not provide for meal or lunch breaks for Drivers. Instead, these Articles provide for (1) “straight runs” that must be at least seven hours and eleven minutes and (2) “combos” that must include a “split” (which is a period of at least 30 unpaid minutes when Drivers are off duty between runs). CP 912-13. Whether Drivers work “straight runs” or combos is not left to Metro’s discretion: the CBAs require that a certain percentage of runs must be straight runs (at least 58% of all full-time schedules on weekdays, at least 70% on Saturdays, and 100% on Sundays) and Drivers are allowed to select the particular route they work. CP 78, 912.
- Sections 15.3.H and 15.3.I also provide for “a minimum five-minute layover” after each trip and, in “order to provide reasonable breaks, ... at least one 15-minute layover in assignments over five hours in length.” CP 910-11. In Driver-speak, these layovers are the equivalent of meal and rest breaks.
- Local 587 President Paul Bachtel testified that the union, on behalf of the public employees it represents, wants the language in their collective bargaining agreement on breaks, not the WAC 296-126-092 provisions. CP 74-75, CP 121 (at

26:25-27:4), CP 124 (at 114:1-6, 114:15-21, 115:21-24, 116:12-19), CP 125 (at 121:11-15).

These provisions of the CBAs clearly supersede and vary from WAC 296-126-092. That regulation requires a 10-minute rest break and 30-minute meal break if an employee works over five hours. In contrast, the CBAs' language starkly differs and makes clear that "layovers" provide the only "breaks" for Drivers. Further, a 30-minute lunch is prohibited for straight runs, which by contract must be 58 to 100 percent of the work depending on the day of the week. CP 78, 912.

In sum, as intended by the Legislature, RCW 49.12.187 applies here and excludes Metro from the coverage of WAC 296-126-092 and its meal and rest break requirements. Because Metro is a public employer that has entered into agreements that specifically vary from and supersede the meal break requirements in WAC 296-126-092, Appellant respectfully requests that the Court reverse the superior court's denial of summary judgment and dismiss the matter or remand for dismissal.

II. ASSIGNMENTS OF ERROR

1. The superior court erred by not finding that Respondent's claim for violation of the meal break rules in WAC 296-126-128 is barred as a matter of law by RCW 49.12.187 (which provides that public employees and employers "may enter into collective bargaining contracts, labor/ management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total,"

those rules) when the CBAs covering Respondent provide rest and meal breaks to non-drivers; provide minimum scheduled layovers to Drivers like Respondent “in order to provide reasonable breaks;” and were intended by Respondent’s union, Local 587, and Metro to supersede the rest and meal break rules.

2. The superior court erred when it failed to grant Metro’s summary judgment and reconsideration motions and dismiss Respondent’s claims when Respondent admits there are no issues of fact; the plain language of the CBAs addresses breaks through “layovers” in a way that varies from the meal break rules; bargaining notes and materials demonstrate that the parties negotiated over and rejected 30-minute layovers and agreed to shorter ones; both parties to the CBAs testify that their intent was to vary from and supersede the meal period rules; and Respondent provides no evidence to counter this testimony.

III. STATEMENT OF THE CASE

A. Metro transit services and workforce

Metro provides transit services throughout King County, operating over 200 routes out of seven transit bases and covering a service area of more than 2,000 square miles and 2 million residents. CP 76. Metro has over 4,300 employees, with approximately 3,800 represented by Local 587, including Full-Time and Part-Time Transit Operators (collectively

the Drivers at issue here), Vehicle and Facilities Maintenance Employees, Customer Information Office Employees, Supervisors, and a broad variety of other classifications. CP 77. Local 587 is the “sole bargaining agent” for these employees.¹ CP 77. Metro and Local 587 have historically negotiated and entered into CBAs that cover all these employees for successive three-year periods, including the 2001 CBA (from 2001 to 2004), the 2004 CBA (from 2004 to 2007), the 2007 CBA (from 2007 to 2010), and the 2010 CBA (from 2010 to 2013). CP 77. At the time of summary judgment, the parties had reached impasse in negotiations over the 2013-2016 CBA and employees continued to work under the 2010 CBA until the new agreement was approved. CP 133-34. After continued bargaining and interest arbitration, a new contract went into effect in 2015. See http://your.kingcounty.gov/ftp/des/hr/410C0115_scsg.pdf.

B. Metro’s work and break arrangements with its Drivers

The work performed by Metro’s Drivers is unique. Unlike most jobs where production can be stopped or other employees can be substituted at scheduled break times, Drivers operate bus routes that are scheduled but can run longer or shorter depending on an array of

¹ Metro and Local 587 engage in bargaining under the Public Employees’ Collective Bargaining Act, RCW Chapter 41.56. As the exclusive bargaining agent pursuant to RCW 41.56.080, Local 587 negotiates and enters into agreements with Metro that govern the wages, hours, and working conditions of its members, including Drivers like Respondent. RCW 41.56.100.

circumstances. CP 77. Drivers cannot, as a matter of routine, stop in the middle of a street or route to take a break while passengers are sitting and waiting on the bus. CP 77-78. Moreover, as Local 587's President testified, the union's and Drivers' position "has long been that we do not want an unpaid period of time in our work schedule" because most Drivers prefer to work a "straight through" eight-hour shift rather than 8-1/2 hours with an unpaid meal break in the middle. CP 78, 121.

Understanding these unique circumstances, Metro and Local 587 have bargained over and agreed on the types of schedules available to Drivers and a seniority-based bidding process for Full-Time and Part-Time Operators to select the schedules they want to work. CP 78. While Article 15 (for full-time) and Article 16 (for part-time) of the CBAs address these issues in detail, the arrangements can be summarized as:

Full-time operator ("FTO") schedules: FTOs can choose straight runs or run combinations ("combos"). CP 78, 912. A straight run is "straight-through work which is at least seven hours and eleven minutes" in length. *Id.* A combo is "two or three pieces of work which are at least seven hours and eleven minutes in total work time" that include at least one unpaid period (called a "split") between the pieces of work that lasts at least 30 minutes (but usually much longer). *Id.* The CBAs provide that at least 58% of all FTO schedules must be straight runs on weekdays; at

least 70% of all FTO schedules must be straight runs on Saturdays; and all FTO schedules must be straight runs on Sundays. *Id.* The CBAs thus prohibit **any** unpaid breaks for FTOs on Sundays. *Id.*

Part-time operator (“PTO”) schedules: PTOs can choose a tripper or dual tripper assignment (“DTA”). CP 78, 930-32. A tripper is a single assignment in the morning or afternoon, with a guarantee of 2:30 of paid time. CP 78-79, 930-32. A DTA combines morning and afternoon trippers that cannot exceed 6:40 in total pay time, is completed “within a 13-hour spread,” and contains no more than one split. CP 79, 931. PTOs working a DTA are guaranteed at least 4:40 of paid time. *Id.*

Provisions addressing breaks for Drivers: In their CBAs, Metro and Local 587 do not use terms like meal period² in relation to Drivers. Instead, they address breaks through other terms that have been defined through historic bargaining. CP 79. The CBAs use the term “split” to mean a period of at least 30 unpaid minutes between separate pieces of work in a combo.³ CP 79, 912. The CBAs use the term “layover” to mean periods between routes, which includes, for example, time waiting at a platform and time taken as breaks. CP 79, 910-11. Section 15.3.H provides

² Other sections, such as Section 17.3.A, use “an unpaid one-half hour lunch break and two paid 15-minute rest breaks” to refer to meal and rest periods. CP 939.

³ Splits of less than 30 minutes are paid. The CBAs provide that “Any combo with a split of 29 minutes or less will be paid straight-through and classified as a straight run.” CP 79, 912.

for “a minimum five-minute scheduled layover after each revenue trip.”

CP 910. And Section 15.3.I (at CP 911, emphasis added) provides:

In order to ensure **reasonable breaks**, METRO shall schedule at least one 15-minute layover in assignments over five hours in length and an additional 15-minute layover in weekday assignments over eight hours in length. When an Operator working an assignment finds it does not provide **reasonable break time**, the Operator should notify METRO of such by filing a service report.

The selection of schedules by Drivers: The CBAs provide that, approximately every four months, a “system shake-up” occurs whereby Drivers pick their work assignments for the next four months in two separate picks (for FTOs and PTOs). CP 79, 913-15. The pick process operates as follows: (1) Metro determines the schedules that are available for FTOs and PTOs (specifying the routes/trips involved, the length of layover periods, the total anticipated schedule time, and the transit base from which the work will originate) and provides Local 587 with a list of those assignments; (2) Local 587 provides seniority lists for FTOs and PTOs, which are posted; (3) copies of all assignment sheets are posted in the pick room (FTO for six days and PTO for five days) before the start of each pick; and (4) FTOs then select assignments in seniority order, reporting to the pick room 20 minutes before their scheduled pick time so that they can examine the remaining schedules and make their selections, and (5) the process is then repeated for PTOs. CP 79-80, 913-15. Drivers who cannot appear at their scheduled pick time can complete an absentee pick form or a Local 587 representative picks for them. CP 80, 914.

C. Changes in the meal and rest break law and post-2003 negotiations over breaks

The Industrial Welfare Act, RCW Chapter 49.12, was enacted in 1913, but did not give rise to requirements for employee rest and meal periods until, in 1976, the Department of Labor and Industries (“DLI”) promulgated WAC 296-126-092. *See McGinnis v. State*, 152 Wn.2d 639, 642-44, 99 P.3d 1240 (2004). At that time, most of the Industrial Welfare Act (including WAC 296-126-092) did not apply to public employers. *Id.* at 644-46.

In 2001, Metro and Local 587 entered into the 2001 CBA applicable to all Local 587 employees and that was effective through 2004. CP 132, 135-313. That agreement included the unique arrangement for Driver schedules, layovers and splits, and bidding that exists through today. CP 132-33. However, up through that CBA, the parties had no need to address WAC 296-126-092 because it did not apply to public employers.

That changed in 2003. At that time, the Legislature amended RCW 49.12.005(3) to provide that “[o]n or after May 20, 2003,” the term “employer” “includes the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation.” CP 92. RCW 49.12.005(3)(b) was further amended to provide that “this chapter and the rules adopted thereunder apply to these public employers only to the extent that this chapter and the rules adopted thereunder do not conflict with: (i) Any state statute or rule;

and (ii) respect to political subdivisions of the state and any municipal or quasi-municipal corporation, any local resolution, ordinance, or rule adopted under the authority of the local legislative authority before April 1, 2003.” *Id.* At the same time, the Legislature amended Section 187 to read:

49.12.187 Collective bargaining rights not affected

This Chapter shall not be construed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing concerning wages or standards or conditions of employment.....

Employees of public employers may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods.

CP 93. These legislative actions did not disturb the arrangements in the 2001 CBA, but had the potential for impacting future arrangements between Metro and Local 587.

Soon after the 2003 legislative changes, King County’s chief negotiator for the CBAs between Metro and Local 587 informed the union that the new 2004 CBA would need to supersede the rest and meal period rules as provided in Section 187, and the union agreed. CP 124 (at 115:21-24), CP 131-32. As the President of Local 587 explained: “We were all aware of the 2003 change, and we discussed it ad nauseum. I mean, we went over and over and over what we were doing, the changes in the law, and exactly what we were agreeing to.” CP 124 at 115:21-24. Thus, Metro and Local 587 agreed to the 2004 CBA with Driver provisions for

(1) straight runs with no unpaid meal break, (2) combos and DTAs with an unpaid split of at least 30 minutes (but often hours), (3) Driver layovers “to provide reasonable breaks,” and (4) a bidding process that allowed Drivers to select the routes they wanted (based on seniority). CP 132-33. The 2004 CBA (and subsequent CBAs) also contained a broad range of other rest and meal break provisions for other employee classifications that vary from the rules in WAC 296-126-092, including for example:

- Sections 17.3.A and 17.10.F: Vehicle Maintenance Employees receive an unpaid 30-minute lunch break and two paid 15-minute rest breaks during an 8.5-hour shift, and can choose between a 30-minute unpaid meal break or 15-minute paid break if they work more than two additional hours before or after their shift. CP 939, 948.
- Section 18.5.A and 18.12.F: Facilities Maintenance Employees receive an unpaid 30-minute lunch break and two paid 15-minute rest breaks during an 8.5-hour shift, and have the option of an additional 30-minute unpaid meal period if they work in excess of two additional hours before or after their shift. CP 952, 960.
- Sections 20.2.A, 20.7.B, and 20.7.C: Special Classification Employees receive an unpaid 30-minute lunch break and two paid 15-minute rest breaks during an 8.5-hour shift (except where modified by historical practice), and have the option of an additional 30-minute unpaid meal period or 15-minute paid break

if they work in excess of two additional hours before or after their shift. CP 965, 967.

- Sections 21.3.B, 21.8.A, and 21.8.B: Customer Information Office Employees receive an unpaid 30- or 60-minute lunch break and two paid 15-minute rest breaks during their shifts, and can choose between a 30-minute unpaid meal break or 15-minute paid break if they work more than two hours before or after their shift; however, graveyard shift is completed in a continuous eight-hour period with no meal break. CP 968-69, 972.
- Sections 22.6.B and 22.6.C: Some Supervisors work “a continuous eight hour period, unless the assignment is designated for an unpaid 30-minute lunch break” and others work “straight through” shifts, with no meal break “unless mutually agreed by the PARTIES.” CP 979.
- Sections 25.3.A, 25.8.A, and 25.8.B: Pass Sales Office Employees receive an unpaid 30-minute lunch break and two paid 15-minute rest breaks during an 8.5-hour shift (except where modified by historical practice), and have the option of an additional 30-minute unpaid meal period or 15-minute paid break if they work in excess of two additional hours before or after their shift. CP 989, 992.

The 2004 CBA not only varied from the state rest and meal period rules, but Metro and Local 587 agreed that the 2004 CBA superseded those rules. CP 74-75, 124 (at 115:21-24), CP 131-32.

Subsequent negotiations in 2007 and 2010 further highlight the parties' agreement that the CBAs specifically vary from and supersede WAC 296-126-092. For instance, in 2007, Local 587's Operator Subcommittee made a proposal that layover periods in Sections 15.3.H and 15.3.I be increased to 30 minutes because "[a]ccording to the DOL we are entitled to a 30 minutes [*sic*] every five hours of work," and various union proposals included redlined language allowing for 30-minute layovers in those articles (CP 1338, CP 1344-1353); however, Metro and Local 587 eventually agreed to 15-minute layovers (CP 628). Similarly, during bargaining in 2010, Local 587's President proposed: "If the AVL/GPS data shows there is insufficient layover or **guaranteed meal break layover time**, METRO shall adjust the run cards within two shakeups to restore sufficient layover." CP 1339, 1356 (emphasis added). Regardless, in both 2007 and 2010, Metro and Local 587 reached an agreement that, pursuant to Section 187, the terms of the CBA would vary from and supersede the rest and meal period rules in WAC 296-126-092. CP 74-75, CP 132-34.

The 2010 CBA was scheduled to expire on October 31, 2013. CP 133. During the negotiations in 2013 and 2014, Metro and Local 587 once again discussed Section 187 and agreed that the new CBA would supersede the state rest and meal period rules. CP 74-75, 81, 133-34. To

eliminate any potential ambiguity on the subject in light of this lawsuit, the parties reached a tentative agreement to add new sections to the CBA that state:

NEGOTIATED MEAL AND REST PERIODS

The PARTIES agree to continue the long standing agreement to specifically supersede in total the State provisions regarding meal and rest periods for Employees. Full Time Operators, Part Time Operators, and First Line Supervisors do not receive a designated meal period. Additionally, Employees in these job classifications will be entitled to meal and rest periods only as described in this AGREEMENT, and not those provided by State law. Meal and rest periods for other Employees covered by this AGREEMENT have also been negotiated in ways that supersede State provisions in whole, or in part.

CP 81, 84, 133-34. Thus, both the chief negotiator for Metro and the President of Local 587 confirm that, since WAC 296-126-092 was made applicable to public employers in 2003, Metro and Local 587 have agreed to vary from and supersede the state rest and meal period rules and intentionally negotiated that Drivers receive layovers (as provided in the CBAs) but do not receive designated meal breaks. CP 74-75, CP 80-81, CP 124 (at 114:1-6, 114:15-21, 115:21-24, 116:12-19), CP 125 (at 121:11-15), CP 132-34.

D. Respondent and his work history

Metro hired Respondent as a Driver on February 9, 2009, and he works in a position covered by the CBAs between Metro and Local 587. CP 81-82. During his employment, Respondent took part in the bidding

process as provided under the relevant CBAs. CP 82. He was a PTO for 11 shake-ups and therefore picked from work that had to be less than six hours and 40 minutes in duration (and in fact was less than five hours). *Id.* Before the shake-up that started June 9, 2012, he was promoted to FTO and then demoted at the end of that shake-up and returned to picking PTO. *Id.* He then requested and was returned to FTO for the February 15, 2014, shake-up. *Id.* Since June 2010, his selections have been as follows:

| Start Date | Days | Run Number | Scheduled Duration | Scheduled Layovers |
|-------------------|-------------|-------------------|---------------------------|---------------------------|
| 6/14/10 | M-F | 064/08ST | 2:47 | 0 |
| 10/04/10 | M-F | 064/05ST | 3:52 | 0 |
| 2/07/11 | M-F | 041/37ST | 3:38 | 1 with 15 minutes |
| 6/13/11 | M-F | 312/07T | 2:34 | 0 |
| 10/03/11 | M-F | 358/15VT | 3:33 | 2 with 25 total minutes |
| 2/20/12 | M-F | 358/11VT | 3:44 | 2 with 41 total minutes |
| 6/9/12 | W-S | VARIOUS | 7:58 to 8:49 | 7-11 with 109-139 minutes |
| 9/29/12 | M-F | 358/11VT | 3:43 | 1 with 21 minutes |
| 10/27/12 | M-F | 032/12T | 3:52 | 1 with 23 minutes |
| 2/18/13 | M-F | 041/26ST | 3:51 | 2 with 21 total minutes |
| 6/10/13 | M-F | 041/37ST | 3:53 | 0 |
| 9/30/13 | M-F | 358/18VT | 3:45 | 2 with 37 total minutes |
| 2/15/14 | F-T | VARIOUS | 8:32 to 8:55 | 5-8 with 91-132 minutes |

CP 82, 86. During most shake-ups, Respondent selected schedules of short duration, ranging from two hours and 43 minutes to three hours and 53 minutes. *Id.* The two times that Respondent was eligible to pick full-time work (the 6/9/12 and 2/15/14 start dates), he selected straight runs with substantial layover time, including some layovers of 30 or more minutes. *Id.* Those layovers were all paid time. CP 82. Based on his seniority for the February 15, 2014, shake-up, he could have elected to work all combos (with at least 30 minutes of unpaid break time between pieces of work); however, he did not pick that type of schedule even though it was available.⁴ *Id.*

E. Procedural History

On behalf of himself and a putative class of Drivers, Respondent filed a complaint on June 20, 2013, asserting claims against Metro based on the premise that Drivers “are not and have not been provided with legally sufficient meal periods in accordance with [WAC 296-126-092]” and “Metro has adopted a pattern and practice of requiring bus drivers to work shifts of greater than five consecutive hours without an uninterrupted thirty-minute meal period.” CP 2. Respondent asserted four causes of action (failure to pay overtime, failure to provide meal breaks, failure to

⁴ During the time he was a PTO, Respondent never picked work close to five hours, so he would not have been subject to the meal period provisions in WAC 296-126-092 even if the parties had not superseded and varied from them. *See* DLI Admin. Policy ES.C.6 at 2 (June 24, 2005) (at CP 115) (“Employees working five consecutive hours or less need not be allowed a meal period.”).

pay for work at agreed upon rates, and willful withholding of wages) that have no stated basis other than the alleged failure to provide meal breaks. CP 4-6.

Metro and Respondent agreed that a threshold issue in the case is whether Metro is excluded from the meal period rules in WAC 296-126-092 pursuant to Section 187. The parties thus stipulated to and the Court ordered a briefing schedule on this threshold issue. CP 42-45. Pursuant to that schedule, Metro filed a motion for summary judgment to dismiss Respondent's claims because Metro and Local 587 entered into CBAs that specifically vary from and supersede the meal period rules in WAC 296-126-092. CP 48-70. Although Respondent's Opposition admitted there were no issues of material fact, CP 1382, the superior court denied summary judgment without explanation, CP 1320-21. Metro filed a motion for reconsideration or alternatively for certification under RAP 2.3(b)(4). CP 1322-32. Respondent filed a response, agreeing that the summary judgment Order should be certified for immediate appeal. The superior court then denied reconsideration (without explanation), but certified for discretionary review. CP 1369-70. Metro filed a Notice of Discretionary Review on November 26, 2014 (CP 1371-75), and a Motion for Discretionary Review on December 11, 2014.

The Commissioner's Ruling Granting Discretionary Review was entered March 11, 2015.

IV. ARGUMENT

Civil Rule 56(c) provides that summary judgment is proper if the pleadings, depositions, and affidavits on file “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Plaintiff did not raise any issues of fact and agrees that whether RCW 49.12.187 applies is a purely legal issue. CP 1382.

A. RCW 49.12.187 allows public employees to bargain with public employers and agree to working conditions that vary from or supersede the rest and meal period provisions in WAC 296-126-092

Although WAC 296-126-092 provides that employees must generally receive an unpaid 30-minute meal break for every five hours the employees work, the Washington Legislature adopted legislation that expressly allows public employees and employers to agree to other break arrangements and forbids diminishing the employees’ rights to bargain collectively with their employers.⁵ The language of Section 187 is unequivocal. Public employers and their employees “may enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, rules adopted under this chapter regarding appropriate rest and meal periods.”

DLI has repeated and explained this statute in its regulations and

⁵ The Legislature’s stated intent was to preserve greater flexibility for public employers to meet the needs of their employees and the public they serve. CP 100-101.

administrative policies.⁶ DLI's most detailed explanation is provided in its guidance on the rest and meal period requirements:

Does a collective bargaining agreement (CBA) or a labor/management agreement allow public employers to give meal and rest periods different from those under WAC 296-126-092?

Yes. Effective May 20, 2003, the legislature ... brought public employers under the protections of the IWA, including the meal and rest period regulations, WAC 296-126-092. ...

Exceptions — The meal and rest periods under WAC 296-126-092 do not apply to:

- Public employers with a local resolution, ordinance, or rule in effect prior to April 1, 2003 that has provisions for meal and rest periods different from those under WAC 296-126-092, or
- Employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods, or
- Public employers with collective bargaining agreements (CBA) in effect prior to April 1, 2003 that provide for meal and rest periods different from the requirements of WAC 296-126-092. The public employer may continue to follow the CBA until its expiration. Subsequent collective bargaining agreements may provide for meal and rest periods that are specifically different, in whole or in part, from the requirements under WAC 296-126-092.

DLI Admin. Policy ES.C.6 at 2 (June 24, 2005) (at CP 115).

⁶ *E.g.*, WAC 296-126-130 (amended in 2010 to clarify that a variance is not necessary for a public employer that has entered into CBA, labor/management agreement, or other employment agreement that varies from or supersedes “the rules regarding meal and rest periods”); DLI Admin. Policy ES.A.6 at 1 (June 24, 2005) (at CP 103) (providing that public employer CBAs do not need to be “at least equal to or more favorable than” the rules for rest and meal periods); DLI Admin. Policy ES.C.1 at 6 (June 24, 2005) (at CP 111) (noting that public employer agreements can vary from, supersede, or be different in whole or in part from the rest and meal period regulation).

To qualify under the Section 187 exception, no magic or talismanic language is required. Instead, Section 187's public employer exception merely states public employees may enter into "[CBAs], labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total," the WAC. Nothing in Section 187 requires that public employer CBAs state an intent to supersede the WAC or to use the term "meal periods," and it is improper to add requirements not in the statute. *E.g., Cerrillo v. Esparza*, 158 Wn.2d 194, 200-04, 142 P.3d 155 (2006). In contrast, Section 187's exception for employees in the construction trades is different and mandates that a CBA "**specifically require** rest and meal periods and **prescribe requirements concerning** those... periods." The different language used by the Legislature for these two exceptions shows that public employer CBAs do not need to discuss rest and meal periods.⁷ *Id.* Rather, the Legislature intended to provide public employees and employers with great flexibility, allowing any agreement to vary from or supersede the WAC. CP 100-101.

In sum, public employees and employers are not bound by the rest and meal period regulation and are free to negotiate alternatives to that provision. Local 587 and Metro did just that.

⁷ Before the superior court, Respondent relied on an unpublished federal opinion that dealt with the construction exception—not the public employer exception—under Section 187. *Lowry v. Ralph's Concrete Pumping, Inc.*, 2013 WL 2099519, *2-4 (W.D. Wash. May 14, 2013). Those provisions are very different. *Lowry* also focused on removal jurisdiction and complete preemption (whether plaintiff's meal period claim arose from state law or a CBA), and did not even address the use of Section 187 as a defense to meal break claims.

B. Metro and its employees agreed to specifically vary from or supersede the rest and meal period provisions in WAC 296-126-092

There is little judicial guidance on RCW 49.12.187,⁸ but it is clear that the agreements between Metro and Local 587 fall within its bounds. The statutory language of Section 187 is best understood in the context of the events that lead to its amendment. In January 2002, state employees filed a class action lawsuit claiming that the State’s practice of bargaining for and paying its employees for “straight eight” shifts⁹ that did not include any defined meal or rest periods violated WAC 296-126-092. *See McGinnis*, 152 Wn.2d at 641; House Bill Report for SSB 6054 at 4 (April 24, 2003) (at CP 100) (“In this case, state employees worked ‘straight eight’ work shifts. The employees allege that under this shift they work through rest and meal periods without additional compensation, in violation of rules adopted under the IWA.”). The potential exposure to the State was \$229.4 million. CP 100. The parties brought cross-motions for summary judgment on the applicability of WAC 296-126-092 to public

⁸ The only published Washington decision to address the application of Section 187 after its 2003 amendment is *Frese v. Snohomish County*, 129 Wn. App. 659, 667-69, 120 P.3d 89 (2005). However, the Court merely denied summary judgment for Snohomish County on this issue because Snohomish County “has thus far failed to show that the collective bargaining agreement specifically varies from, or supersedes, the provisions of the regulation in question.” *Id.* at 668. The Court further noted that both the regulation and the CBA contemplated a meal period, thus the CBA did not appear to specify arrangements “that are different from what the regulation provides.” *Id.* at 669. In contrast, Metro provided detailed evidence on this issue and, as explained herein, its CBA provisions supersede, are different from, and conflict with the regulatory standards.

⁹ The straight-eight shifts started in 1953. CP 100. “Because of practical considerations and awkward staffing configurations, especially at transition times, state and local governments and unions negotiated collective bargaining and union-management agreements that allowed these employees to work ‘straight eights.’” *Id.* “[E]mployees like and have continued to ask for [them] since these shifts were started.” *Id.*

employers, and the superior court erroneously granted summary judgment in favor of the employees. *McGinnis*, 152 Wn.2d at 641, 646. The Legislature then took up the matter, unanimously adopting Substitute Senate Bill 6054 (SSB 6054), which became effective on May 20, 2003. CP 90. SSB 6054 clarified that the meal and rest period rules in the IWA did not apply to public employers in the past, but also expressly applied the IWA to public employers in the future, with the exception created in Section 187. *Id.*; *McGinnis*, 152 Wn.2d at 641; CP 99-101. The legislative history makes clear that the intent behind adoption of Section 187 was to reaffirm that public employers have the “ability to negotiate different terms” and “to seek innovative solutions,” such as the straight-eight shifts at issue in the *McGinnis* case, and the Bill was expressly “allowing mutual employment agreements to continue to control rest and meal break arrangements.”¹⁰ CP 100-101.

In light of this history, the negotiations and agreements between the parties, and the specific provisions in the relevant CBAs, there is no doubt that Metro and Local 587 agreed to specifically vary from or supersede the rest and meal period provisions in WAC 296-126-092.

¹⁰ Before the superior court, Respondent argued that (after *McGinnis*) the State adopted CBA language that states it is superseding the rest and meal break requirements in WAC 296-126-092 and that King County should have done the same. However, how the State and its unions decided to implement Section 187 has no impact on what that statute means or requires. What is clear from both the State and King County arrangements, however, is that arrangements for straight-through, eight-hour shifts are viewed as inconsistent with (and supersede and vary from) WAC 296-126-092’s meal break requirements.

1. Metro and Local 587 agreed to supersede the state rules

As RCW 49.12.187 dictates and DLI explains: “The meal and rest periods under WAC 296-126-092 do not apply to ... employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that ... supersede, in part or in total, the rules.” DLI Admin. Policy ES.C.6 at 2 (CP 115). The “supersede” standard is satisfied here. “Supersede” means “[t]o annul, make void, or repeal by taking the place of.” Black’s Law Dictionary 1667 (10th ed. 2014) (at CP 129).

The uncontroverted evidence establishes that, during negotiations, Metro and Local 587 agreed that the ensuing CBAs were intended to and, in fact, did supersede the rest and meal period provisions in WAC 296-128-092. This conclusion is supported by Metro’s spokesperson in negotiations, David Levin, as well as Local 587’s President and Business Agent, Paul Bachtel. CP 134 (“Metro and Local 587 have discussed and agreed to vary from and supersede the state standards regarding rest and meal periods”); CP 74 (“Under the authority of RCW 49.12.187, the parties have superseded the state standards regarding meal periods”); CP 124 (at 114:1-6, 114:15-21, 115:21-24, 116:12-19), CP 125 (at 121:11-15). Both these witnesses confirm that the decision to provide alternatives for breaks and supersede the State rules extends back to at least 2003. CP 132-33 ¶ 7 (for 2004 CBA), ¶ 8 (for 2007 CBA), ¶ 9 (for 2010 CBA); CP 74 ¶ 6 (since the start of his involvement in 2001); CP 124 (at 115:2-5, 21-24).

In light of the current lawsuit, Metro and Local 587 have now reached a Tentative Agreement on new sections and language to include in the 2013 CBA that document their historical agreement to supersede the State rest and meal period rules. CP 81, 84, 133-34. The Tentative Agreement provides:

The PARTIES agree to continue the long standing agreement to specifically supersede in total the State provisions regarding meal and rest periods for Employees.

CP 81, 84. It further states:

Employees in these job classifications will be entitled to meal and rest periods only as described in this AGREEMENT, and not those provided by State law.

Id. It is difficult to imagine clearer evidence that the provisions in WAC 296-126-092 are superseded by a labor/management agreement: since 2003, Metro and Local 587 have expressly and repeatedly agreed that their CBAs supersede the State meal period rules.

2. The CBAs specifically vary from the State rules

Even absent an agreement to supersede, Section 187 dictates and DLI explains that “[t]he meal and rest periods under WAC 296-126-092 do not apply to ... employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from ..., in part or in total, the rules.” DLI Admin. Policy ES.C.6 at 2 (CP 115).

What it means to “vary” is key. “Vary” means “[t]o change in some usu. small way; to make somewhat different.” Black’s Law Dictionary 1787 (10th ed. 2014) (CP 130). Despite this definition,

Respondent argued to the superior court that the CBA must expressly reference “meal periods” and ignored the fact that the CBA clearly varies (in a big way) from the State rules. Respondent’s argument is inconsistent with the term “vary”—which calls for something different, e.g., not necessarily a meal period—and certainly does not require something that is “the same.” *See* CP 1385 (“vary” means “to change in form, appearance, nature, substance, etc.”). Metro and Local 587 varied from a 30-minute meal period and agreed to a 15-minute layover—thus changing the form, appearance, nature, and substance of the breaks available to Drivers. The requirement that public employer agreements “vary from or supersede, in part or in total,” rest and meal period rules is in stark contrast with Section 187’s requirement for CBAs for employees in the construction trades (which must “specifically require rest and meal periods and prescribe requirements concerning those . . . periods”).

Here, looking at either the plain language of the Driver sections or the CBAs as a whole, the “specifically vary” standard is satisfied.

a. Articles 15 and 16 of the CBA (which cover Drivers) specifically vary from the meal and rest period provisions in WAC 296-126-092

The CBA provisions for Drivers—and, indeed, the entire structure of the straight-through work day—specifically vary from the State rules. As in *McGinnis*, the present lawsuit attacks the agreement between Metro and Local 587 that most full-time Driver shifts must be “straight runs” of approximately eight hours, with layover time but no designated time for rest or meal periods. As recognized in *McGinnis* and the legislative history

of Section 187 (as well as by Metro and Local 587), such straight-eight shifts are inherently inconsistent with the rest and meal period provisions in WAC 296-126-092. Metro and Local 587 evaluated the structure and demands of different job positions (as well as historical and current expectations), and negotiated conditions of employment for each position, including provisions for whatever breaks the parties determined were appropriate under the circumstances. CP 74-75, 78-81, 132-34. Thus, the CBAs provide designated rest and meal periods for some job positions, but do not provide rest or meal periods for Drivers and instead provide breaks per Section 15.3.I of the CBAs. The provision for meal periods in some sections of the CBAs—while not providing for meal periods but only layovers as a “break” in the Driver sections—demonstrates that standard meal periods are not intended for Drivers.¹¹

As a general rule, the CBAs do not state what employees *do not* receive (and thus do not use the term “meal period”). That is because the parties use terms (straight run, combo, split, and layover) defined through historic bargaining.¹² CP 78-80. As used in CBA Sections 15-16, those

¹¹ *E.g., City of Kent v. Beigh*, 145 Wn.2d 33, 45-46, 32 P.3d 258 (2001) (“where the state toxicologist uses certain language in one instance and not in another, the difference is intentional”); *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (providing relief in one section but not another indicates that relief is not intended in the second section).

¹² At the superior court level, Responded argued that the court should apply the CBA’s plain language and ignore the history and understanding of the parties. Metro agrees the CBA is unambiguous in denying meal periods; however, bargaining history is always relevant in understanding a CBA’s terms. *City of Ocean Shores*, Decision 10670 at 5 (PECB 2010) (CBAs “are often the product of complex negotiations that occur at regular intervals, building upon previous contract language... In order to ascertain the meaning of a particular clause, the parties often rely upon evidence of what transpired during bargaining.”).

terms are inconsistent with and vary from the WAC:

- CBA Section 15.4.A.1 states: “A ‘straight run’ shall mean straight-through work which is at least seven hours and eleven minutes.” CP 912. In contrast, WAC 296-126-092 (2) provides an employee cannot be required to work “more than five consecutive hours without a meal period.”
- CBA Section 15.4.A.2 provides for combos, which must include a “split” (a period of at least 30 unpaid minutes when a Driver is off duty between runs). CP 912. A “split” meets the definition of a meal period, but splits may be much longer than 30 or 60 minutes. CP 78. Regardless, CBA Section 15.4.F & G limits the number of combos and mandates the primary use of straight runs. CP 912.
- CBA Section 15.3.H & I provides for “a minimum five-minute layover” after each trip and, in “order to provide reasonable breaks, ... at least one 15-minute layover in assignments over five hours in length.” CP 910-11. In contrast, WAC 296-126-092 requires a 10-minute rest break and 30-minute meal break if an employee works over five hours. The CBA’s unambiguous language makes clear that “layovers” provide the only “breaks” for Drivers and providing meal periods would violate the CBA. CP 78-80; CP 122-23 (at 105:21-106:7).

Before the superior court, Respondent (CP 1390) argued the meaning of these terms; however, if there is ambiguity, the Court should look to the understanding and intent of the parties to the contract and both Metro and Local 587 agree the CBAs (with straight runs and layovers) supersede the WAC.¹³ CP 74-75, CP 80-81, CP 124 (at 114:1-6, 114:15-21, 115:21-24, 116:12-19), CP 125 (at 121:11-15), CP 132-34.

Unlike *Frese*, 129 Wn. App. at 669, the uncontroverted provisions

¹³ If any ambiguity exists, the Court should look to “circumstances surrounding the making of the contract,” “subsequent acts and conduct of the parties,” and “the reasonableness of respective interpretations urged by the parties.” *Hearst Comm. Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502-03, 115 P.3d 262 (2005); *see also Davis v. State, Dep’t of Transp.*, 138 Wn. App. 811, 817-18, 159 P.3d 427 (2007) (“**the intent of the parties controls**” (emphasis added)).

in the CBAs here “are different” from what the regulation provides.¹⁴

Thus, WAC 296-126-092 provisions “do not apply” to Metro employees covered by the CBAs, including the Respondent. DLI Admin. Policy ES.C.6 at 2 (CP 115).

b. The precise language in Section 15.3.I of the CBA (which covers Drivers) provides for “reasonable breaks” and specifically varies from and supersedes the State meal and rest period rules

As discussed above, Article 15 and 16 and the very nature of the transit operation and straight-through work day for Drivers specifically vary from the meal and rest break provisions in WAC 296-126-092. Beyond that, the precise language of Section 15.3.I of the 2007 and 2010 CBAs provides for “reasonable breaks.” This provision covers all breaks and is not limited to rest breaks, as Respondent asserted before the superior court. Section 15.3.I states:

In order to provide **reasonable breaks**, METRO shall schedule at least one 15-minute layover in assignments over five hours in length and an additional 15-minute layover in weekday assignments over eight hours in length. When an Operator working an assignment finds it does not provide **reasonable break time**, the Operator should notify METRO of such by filing a service report.

CP 911. The plain language of this provision addresses, varies from, and supersedes the rest and meal break regulation, providing for scheduled 15-minute layovers (in addition to 5-minute layovers under Section 15.3.H) to

¹⁴ In contrast, in *Frese*, 129 Wn. App. at 667-669, the parties disagreed on what the CBA stated and whether it was inconsistent with state requirements. That CBA provided for a 30-minute lunch during an 8-hour shift with no other qualifications, and the union claimed the WAC did apply. *Snohomish Cy. Corrections Guild*, PERC No. 20697-1-06-484, Award at 50-51 (Dec. 26, 2007).

give reasonable breaks and reasonable break time in lieu of 30-minute meal breaks and 10-minute rest breaks as specified in WAC 296-126-092.

Without identifying any basis for her assertion, Respondent's counsel told the superior court that the reference to "reasonable breaks" and "reasonable break time" in Section 15.3.I is irrelevant: "The layover provision [Section 15.3.I] refers to a break. Maybe it replaces the requirement of a rest break, but it does not replace a meal period. This case is about meal periods and not rest breaks." RP at 51:12-15. A plain language analysis establishes that the use of "breaks" in Section 15.3.I is broader than "rest breaks" and includes "meal breaks," and the plain language of the CBAs establishes that the relevant parties (Metro and Local 587) used the term "breaks" broadly to encompass both meal and rest periods.

First, the case law uses the term "break" when referring to both meal and rest periods. As background, WAC 296-126-092 establishes standards for two types of breaks: a 30-minute meal period for every five consecutive hours worked; and a 10-minute rest period for every four hours worked. Although WAC 296-126-092 does not use the term "breaks" and only refers to meal periods and rest periods, Washington courts have repeatedly used the term "breaks" when discussing that regulation. *E.g.*, *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, *passim*, 639 P.2d 732 (1982) (using "1-hour lunch break" and "lunch period" interchangeably); *Pellino v. Brink's Inc.*, 164 Wn. App. 668, *passim*, 267 P.3d 383 (2011) (referring to "50-minute break time," "lawful breaks,"

“meal and rest breaks,” “meal breaks,” “breaks,” and “meal periods” interchangeably); *Frese*, 129 Wn. App. at 669 (referring to “meal break arrangements”).

Second, the use of “breaks” to refer to both rest periods and meal periods is consistent with the plain language use of the word. For instance, Wikipedia explains a break as:

A break at work is a period of time during a shift in which an employee is allowed to take time off from his/her job. There are different types of breaks, and depending on the length and the employer's policies, the break may or may not be paid.

CP 1359. Similarly, Merriam Webster’s Collegiate Dictionary at 140 (10th ed. 1996) (CP 1368) defines “break” as “a respite from work, school, or duty.” Moreover, Respondent’s Complaint itself refers to “meal breaks,” demonstrating that Respondent understands that a “break” can be a meal break. *See* CP 2-3 ¶ 4.4 (“thirty-minute uninterrupted **meal break**”), CP 3 ¶ 5.4 (“fails to provide uninterrupted thirty-minute **meal break** periods . . . without an uninterrupted thirty-minute **meal break** period; . . . in failing to provide for required **meal breaks** . . .”), CP 5 ¶ 7.2 (second cause of action titled “Classwide Failure to Provide **Meal Breaks**”; “legally sufficient **meal breaks**”) (emphasis added). This generic use of “breaks” to refer to meal and rest periods is also consistent with the way that Washington appellate courts have used the term.

Third, the CBAs show that, as in Respondent’s Complaint, the parties used the term “breaks” to refer to both lunch and rest breaks

throughout the CBAs. *See, e.g.*, CP 1024-1028 (index to 2010 CBA).¹⁵ Moreover, to the extent the term “breaks” is ambiguous, the Court should look to the intent of the parties and bargaining history—which establish that Drivers were entitled to layovers and splits but no other rest or meal breaks. In September 2014, Local 587 provided extensive bargaining history documents to Respondent’s (and Metro’s) counsel in relation to a subpoena issued by Respondent’s counsel. CP 1337-39. Those documents demonstrate that Local 587 proposed a 30-minute layover in Section 15.3.I in 2007 because Drivers “are entitled to a 30 minutes [*sic*] every five hours of work,” CP 1338, CP 1343-53, but the parties ultimately agreed to a 15-minute layover instead, CP 628. In addition, documents from 2010 demonstrate that Local 587’s President understood that these provisions addressed “guaranteed meal break layover time.” CP 1339, CP 1356. These documents demonstrate that Respondent’s assertion that the term “breaks” (as used in Section 15.3.I) is limited to “rest breaks” has no support in the record. To the contrary, those involved in bargaining fully

¹⁵ Like the references to “meal breaks” in Respondent’s Complaint, examples of references to “lunch breaks” occur throughout the CBA. CP 939 (“shift . . . will include an unpaid one-half hour **lunch break** and two paid 15-minute rest breaks”), CP 952 (“shift . . . will include an unpaid one-half hour **lunch break** and two paid 15-minute rest breaks”), CP 963 (“Each Revenue Coordinator shift will include a one-half hour **lunch break**.”), CP 965 (“Each shift, except where modified by historical practice, will be completed within a continuous eight and one-half hour period and will include an unpaid one-half hour **lunch break** and two paid 15-minute rest breaks.”), CP 969 (“Shifts with one-hour lunches . . . will include an unpaid one-hour **lunch break** and two paid 15-minute rest breaks.”; “Assigned Weekday shifts . . . will include an unpaid one-hour **lunch break** and two paid 15-minute rest breaks.”; “Assigned Weekend shifts . . . will include an unpaid one half-hour **lunch break** and two paid 15-minute rest breaks.”), CP 979 (“All assignments in the classification of Schedule Maker and Transit Instructor shall be completed within a continuous eight hour period, unless the assignment is designated for an unpaid 30-minute **lunch break**.”) (emphasis added).

understood that “breaks” and “layovers” as used in Sections 15.3.H and 15.3.I encompassed both meal and rest breaks. CP 1336.

In sum, the break language in Section 15.3.I satisfies Section 187. Section 15.3.I of the CBAs addresses “breaks” (*i.e.*, meal and rest periods). The arrangements in Section 15.3.I “specifically vary from and supersede” the WAC 296-126-092 standard because Section 15.3.I uses “layovers” to assure “reasonable breaks,” it only provides for a 15-minute layover after five hours instead of a 30-minute meal break (which was expressly proposed and rejected during bargaining), and it provides a second 15-minute layover after eight hours instead of waiting for the completion of another five-hour period. It is difficult to imagine greater variation. Thus, under Section 187 and DLI’s interpretations of that provision, WAC 296-126-092 does not apply to Metro’s Drivers and Metro’s motion for summary judgment should have been granted.

c. When considered as a whole, the CBA between Metro and Local 587 details when (and if) meal breaks are allowed for all employees covered by the CBA

Besides the provisions for Drivers, the provisions for other classifications—that are contained in the **same CBA** that covers the Drivers—specifically vary from WAC 296-126-092 **Error! Bookmark not defined.** and make clear that meal breaks for Drivers were expressly omitted. Each relevant CBA covers all Metro employees represented by Local 587 and repeatedly discusses “lunch breaks” and “meal periods.” *See supra* Section III.C; CP 1024 (index to 2010 CBA). While Respondent suggested to the superior court that every section of a CBA must

independently vary from and supersede the WAC, there is no authority for this proposition. Instead, Section 187 focuses on whole “collective bargaining contracts.” *See Frese*, 129 Wn. App. at 667 (employer must “show how the **collective bargaining agreement** varies from, or supersedes, those rules”); *Davis*, 138 Wn. App. at 818 (“we ascertain...intent from reading the contract as a whole”).

The plain language of each CBA leaves no doubt that meal breaks are allowed for some employees, but not Drivers. For example, CBA sections covering many non-driving positions provide for an unpaid 30-minute meal break, but sometimes require employees to choose between a 30-minute unpaid meal period and a 15-minute paid break when the employee works two hours before or after their shift. *E.g.*, CP 939 (at 17.3.A), CP 960 (at 18.12.F), and CP 992 (at 25.8.A & B). More telling, for Customer Information Office Employees, the CBA provides for these breaks except for graveyard shift (where the work is completed in a continuous eight-hour period with no designated meal break). CP 968-69 (at 21.3.B). Further, as with Drivers, the CBA generally provides that Supervisors will work “straight through” for “a continuous eight hour period;” however, it makes clear that this does not apply if “the assignment is designated for an unpaid 30-minute lunch break.”¹⁶ CP 979 (at 22.6.B).

The parties’ decision to include meal breaks in some CBA sections and not in others demonstrates that Drivers do not get meal

¹⁶ This CBA language makes it clear that Metro and Local 587 understood a “straight through” shift and an “unpaid 30-minute lunch break” to be mutually exclusive.

breaks. *City of Kent*, 145 Wn.2d at 45-46; *Millay*, 135 Wn.2d at 202. Moreover, the CBA limits Drivers to working conditions negotiated in “the express language” of the CBA or established through past practice. CP 847 (at § 5) (“management and direction of the workforce, including work assignments, . . . shall be vested exclusively in METRO, except as limited by the express language of this AGREEMENT and by any practice mutually established by the PARTIES”). Here, the CBA’s express language does not provide meal breaks for Drivers and the parties agree the practice is not to provide them. CP 74-75, CP 80-81, CP 124 (at 114:1-6, 114:15-21, 115:21-24, 116:12-19), CP 125 (at 121:11-15), CP 132-34.

3. Drivers’ selected schedules specifically vary from the State rules

In addition to the agreement to supersede and the specific variation in the break (layover and split) language in the CBAs, the third way that Metro has satisfied the Section 187 exception is through the Drivers’ own specific agreements. The CBAs provide a process through which Drivers select the schedules and routes that they drive and, to the extent those schedules are inconsistent with State rest and meal break rules, the schedules constitute “other mutually agreed to employment agreements that specifically vary from . . ., in part or in total, the rules.” DLI Admin. Policy ES.C.6 at 2 (CP 115).

Metro does not dictate what schedule or route any particular Driver drives. *See* CP 79-80; CP 123 at 108:25-109:4. Instead, the CBA provides for a “system shake-up” and bidding process approximately every four

months. CP 79-80; CP 123 at 108:13-24. Metro creates a master list of schedules (consistent with the CBA) and provides Drivers with detailed information about the particular runs or routes on the schedule as well as the length of any layovers or splits. CP 79-80. Drivers then select what schedule they will work based on their seniority. CP 80. Thus, an FTO Driver (or Local 587 on the Driver's behalf) can pick a straight run or a combo (or a frag or part-time schedule). CP 78-80. Respondent provides a perfect example of this selection process. From June 2010 until June 2012, he selected part-time schedules with expected durations well under four hours per day, and with limited layovers (from 0 to 2 layovers with up to 41 total minutes). CP 82, CP 86. Then, for the four months starting on June 9, 2012, Respondent worked straight runs that were scheduled for eight to nine hours per day, with extensive layovers (from 7-11 layovers with 109-139 total minutes). *Id.* He then returned to part-time schedules of substantially less than five hours until 2014. *Id.* In 2014, Respondent picked straight runs with substantial amounts of scheduled layover time. *Id.* Regardless, when Drivers (including Respondent) select their routes, they know exactly what is involved in the schedule, including any layovers and splits. *Id.* By selecting his or her schedule, each Driver is agreeing through the bidding mechanism in the CBAs to work that schedule until the next shake up (in approximately four months). *Id.*; CP 123 at 108:22-109:9 ("the County and the Union and the driver [are] bound by that selection"). This mutual agreement to a schedule that specifically varies from the rules in WAC 296-126-092 means that those

rules do not apply.¹⁷ See DLI Admin. Policy ES.C.6 at 2 (CP 115).

C. RCW 49.12.187 bars each cause of action asserted by Respondent

As Respondent's Complaint makes clear, his claims are built on the assumption that the State meal break rules in WAC 296-126-092 apply to Drivers. If RCW 49.12.187 applies and WAC 296-126-092 does not, Respondent's claims fail entirely.

The first cause of action is for failure to pay overtime. Paragraph 6.2 alleges that "Defendant's failure to pay class members additional wages for missed meal periods at one and one-half times their regular rate of pay when they have worked in excess of forty hours in their work weeks constitutes a violation of RCW 49.46.130." CP 4. Other than allegedly missed meal periods, there is no stated basis for the overtime claim. Metro paid Respondent overtime (or provided appropriate compensatory time) for all overtime hours reported. CP 82. Thus, any claim for overtime should be dismissed.

The second cause of action is for failure to provide meal breaks. Paragraph 7.2 alleges that "Defendant's failure to provide for legally sufficient meal breaks constitutes a violation of RCW 49.12 and WAC 296-126-092." CP 5. Section 187 was adopted to address this issue and bars any meal break claim by Respondent under WAC 296-126-092.

¹⁷ Before the superior court, Respondent argued that any agreements with Drivers would be inconsistent with collective bargaining and improper self-dealing. This argument is without merit. Each Driver's selection and agreement to a schedule is an extension and part of the CBA and constitutes a mutual agreement between Metro, Local 587, and the Driver as to the schedule that the Driver will work until the next "shake up."

The third cause of action is for failure to pay for work as required by employment policies and agreements. Paragraph 8.2 alleges that “Some of the meal periods missed by plaintiff and class members may have fallen in work weeks in which plaintiff and class members worked less than forty hours,” and paragraph 8.3 alleges that Metro violated the law “by failing to pay for these hours at the agreed upon hourly pay rates.” CP 5. Other than missed meal breaks, there is no stated basis for this “agreed upon hourly rate” claim. Metro paid Respondent his contract wages for all hours he reported. CP 82 ¶ 14. Thus, any claim for agreed wages should be dismissed.

The fourth cause of action is for willful withholding of wages in violation of RCW 49.52. Paragraph 9.2 merely states: “By the foregoing, defendant’s actions constitute willful withholding of wages in violation of RCW 49.52.050 and .070.” CP 6. As the foregoing complaint does not discuss anything other than missed meal periods, there is no other stated basis for this claim, and Metro paid Respondent for all time he reported (CP 82 ¶ 14), the claim fails because Section 187 applies.

Because Section 187 bars any meal period claim and Drivers are not entitled to meal periods under WAC 296-126-092, each of Respondent’s causes of action should be dismissed.

V. CONCLUSION

This Court should rule that RCW 49.12.187 bars Respondent's claims as a matter of law, reverse the superior court's denial of summary judgment, and dismiss the matter or remand for dismissal.

DATED this 30th day of June, 2015.

Respectfully submitted,

K&L GATES LLP

By 

Patrick M. Madden, WSBA #21356
Stephanie Wright Pickett, WSBA #28660
Attorneys for Appellant King County

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

| | | |
|------------------------------|---|----------------------------|
| King County Department, |) | |
| of Transportation |) | No. 72750-8-I |
| Defendant/Appellant |) | |
| |) | |
| v. |) | King County Superior Court |
| |) | Case No. 13-2-23545-5 SEA |
| Douglas Frechin, |) | |
| |) | PROOF OF SERVICE |
| <u>Plaintiff/Respondent.</u> |) | |

I hereby certify that I am a legal assistant at the law firm of K&L Gates. At all times hereinafter mentioned I was a citizen of the United States, a resident of the State of Washington, over the age of 18 years, competent to be a witness in the above action, and not a party thereto.

On the date shown below, I served true and correct copies of the following:

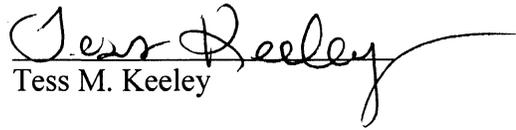
1. Brief of Appellant; and
2. Proof of Service,

on Respondent's counsel of record via hand delivery by a legal messenger service to the following address:

Adam J. Berger
Lindsay L. Halm
Schroeter Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104

2015 JUN 30 PM 4: 56
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

DATED this 30th day of June, 2015.


Tess M. Keeley

K&L GATES LLP
925 Fourth Avenue
Suite 2900
Seattle, Washington 98104-1158
Telephone: (206) 623-7580
Facsimile: (206) 623-7022