

72750-8

72750-8

FILED
September 17, 2015
Court of Appeals
Division I
State of Washington

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,

REPLY 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 Appellant/Defendant
King County Department of
Transportation

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ARGUMENT	4
A. The Legislature granted public employees and public employers a special right to supersede or specifically vary from the WAC 296-126-092 meal and rest period rules.....	4
B. Section 187’s “specifically vary from or supersede, in part or in total” language does not require any particular term or language	8
C. The CBAs are not silent and their express language varies from and supersedes the WAC rest and meal period rules	14
1. CBA Sections 15.3.H and 15.3.I provide that Drivers receive “reasonable breaks” through scheduled “layovers”	14
2. The CBAs and other agreements with Drivers supersede and vary from the WAC rest and meal period rules.....	17
D. Respondent’s remaining arguments are of no consequence	21
1. Respondent’s transparency arguments are a red herring	21
2. Respondent’s reconsideration arguments are misplaced	23
3. The CBA Preamble does not preserve the WAC rules.....	24
III. CONCLUSION	25

TABLE OF AUTHORITIES

Case Authorities

<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006)	9
<i>Clawson v. Grays Harbor Coll. Dist. No. 2</i> , 148 Wn.2d 528, 61 P.3d 1130 (2003).....	4
<i>Frese v. Snohomish County</i> , 129 Wn. App. 659, 120 P.3d 89 (2005).....	19
<i>Keeton v. DSHS</i> , 4 Wn. App. 353, 661 P.2d 982 (1983)	17
<i>Lowry v. Ralph’s Concrete Pumping, Inc.</i> , 2013 WL 2099519 (W.D. Wash. May 14, 2013)	6, 8
<i>Orr v. Bank of Am.</i> , 285 F.3d 764 (9th Cir. 2002)	22
<i>Sentry Select Ins. Co. v. Royal Ins. Co. of Am.</i> , 481 F.3d 1208 (9th Cir. 2007)	17
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005)	7
<i>State v. Veliz</i> , 176 Wn.2d 849, 298 P.3d 75 (2013)	7, 8
<i>Timeline, Inc. v. Proclarity Corp.</i> , 2007 WL 1574069 (W.D. Wash. 2007)	13
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980)	13

Statutes & Regulations

RCW 41.56.080	22
RCW 41.56.100	22
RCW 49.12.187	<i>passim</i>
WAC 296-126-092	<i>passim</i>

Other Authorities

Am. Heritage College Dictionary at 786 (4th ed. 2007) 10

Am. Jur.2d Contracts § 331 19

Black’s Law Dictionary 1667 (10th ed. 2014) 10

Black’s Law Dictionary 1787 (10th ed. 2014)..... 10

CR 56(e)..... 22

CR 59(a)(2) 24

DLI Admin. Policy ES.C.6 20

Elkouri & Elkouri, How Arbitration Works, at 9-39 (7th ed. 2012) 19

RPC 3.3(a)(1) 24

I. INTRODUCTION

The following facts are undisputed by Respondent:

Undisputed Fact No. 1: The meal and rest break rules in WAC 296-126-092 (the “WAC rules”) can be modified or eliminated by public employees pursuant to RCW 49.12.187 (“Section 187”). Section 187 allows public employees and employers such as Appellant King County Department of Transportation (“Metro”) to “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.” Response at 6, 18-19.

Undisputed Fact No. 2: Metro and Amalgamated Transit Union Local 587 (“Local 587”), the sole bargaining representative for the bus drivers Respondent purports to represent (“Drivers”), agree that since Section 187 was amended in 2003, they have always intended and understood that their collective bargaining agreements (“CBAs”) superseded and specifically varied from the WAC rules.¹ CP 74, 78-81, 124-25, 132-34.

Undisputed Fact No. 3: The speaking agents for Local 587 and Metro agree that their CBA language (unique terms like routes, trips, straight runs, combos, splits, and layovers for Drivers) fully addresses the

¹ The Response (at 30) questions the intent of Local 587 by citing deposition testimony of Local 587 President Paul Bachtel out of context. In his deposition, Bachtel later clarifies that Local 587 always intended to supersede the WAC meal break provisions and any statements to the contrary in bargaining were merely posturing and a bargaining position. CP 1315, 1317.

timing and scope of a Driver's workday activities, and provides a different arrangement for Drivers than provided under the WAC meal and rest period rules. *See* Opening Brief at 24-37.

Undisputed Fact No. 4: The language in the current CBA references this “long standing agreement [between Local 587 and Metro] to specifically supersede in total the State provisions regarding meal and rest periods for Employees.” Response at 10-11.

Despite these undisputed facts, the Response (*e.g.*, at 25) argues that this Court should ignore the intent of the parties based on words that are *not* in CBA Articles 15 and 16 (covering Drivers) - terms like “meal, lunch, supersede, vary, exempt, and replace” rather than focusing on the holistic meaning of the language that *is* in the CBA:

- Articles 17, 18, 20, 21, 22, and 25 detail rest and meal breaks for employees other than Drivers, and those standards are often not consistent with the WAC rule. Opening Brief at 12-14, 33-35.
- Articles 15 and 16 (covering Drivers) do not use the terms “meal period” or “rest period.” Rather, they state that Drivers have (1) “straight runs” and “combos” (which are two to three pieces of work with a “split” of 30 or more unpaid off-duty minutes), and (2) are provided 15-minute and 5-minute scheduled layovers “in order to provide reasonable breaks.” CP 911-12. The CBAs limit the scheduling of combos (with unpaid splits), and require that most routes are straight runs (with straight-through work). CP 78, 911-12.

Drivers, Local 587, and Metro all understand how these contractual provisions work and that Drivers do not receive designated rest and meal periods. While the Response repeatedly (and disingenuously) argues for “transparency” and asserts lack of clarity, it fails to identify a single Driver (not even Respondent) who did not understand that the only breaks Drivers receive under the CBA are layovers, unpaid splits (of 30 minutes or more), or paid splits (of 29 minutes or less as well as all splits after 8:00 pm or on Sundays). CP 78-79, 911-12. Drivers could not possibly be confused about these CBA arrangements because they bid on routes every four months and, before they bid, they see the exact route, trip, split and layover times. CP 79-80, 913-15. Thus, although the CBAs do not use the terms rest, meal, vary, or supersede in the Driver sections, Drivers are not confused and fully understand that the system their CBA establishes does not provide them with designated meal or rest periods, which is why they do not receive them.

Respondent would seemingly like this appeal to turn on whether Local 587 and Metro used language that Respondent (or his counsel) prefers. However, Respondent’s preferences are not relevant. As every contract case cited by Respondent explains, the key question when interpreting a contract is what the parties meant through the language they used. Section 187 does not require any specific, talismanic language or the use of the term (or provisions for) “meal periods” for public employees. Instead, Section 187 provides that public employees and employers can enter into a range of agreements to specifically vary from or supersede the

WAC rules. In this case, a review of the CBAs as a whole - rather than through the strained and isolated interpretation proposed by Respondent - leaves no doubt that the CBAs fully reflect the intent of the parties to specifically vary from and supersede the WAC meal and rest period rules.

II. ARGUMENT

A. **The Legislature granted public employees and public employers a special right to supersede or specifically vary from the WAC 296-126-092 meal and rest period rules**

The Response repeatedly references various public policies regarding worker protection, including rest and meal breaks (*e.g.*, Response at 16-17), but disregards the strong public policy underpinning Section 187.² When it amended Section 187 in 2003, the Legislature granted public employees special rights with respect to meal and rest periods that are not available to other employees. Public employees have the right to agree with their employers to change the standard WAC 296-126-092 rules (requiring 10-minute rest breaks and an unpaid 30-minute meal break for every five hours worked). This **right to bargain** cannot be whisked away by Respondent's personal interests or anyone else's beliefs about what should be stated in a CBA or what seems fair. Rather, Section

² For example, the Response (at 15-17) claims "exemptions" and "waivers" are narrowly construed, relying on cases discussing overtime exemptions for private employees. But this case does not involve overtime or private employees, and Section 187 does not waive employee rights. Instead, the Legislature specially designed Section 187 to empower public employees (and their unions) to bargain over meal and rest break rules so they could find and agree to innovative ways to address public employee circumstances. CP 100-101. Nowhere does Respondent cite a case stating otherwise, or that public employee bargaining rights established in Section 187 should be narrowly construed. Moreover, as the Washington Supreme Court has emphasized, rhetoric about public employee wage rights must be balanced against "principles of public accountability." *E.g.*, *Clawson v. Grays Harbor Coll. Dist. No. 2*, 148 Wn.2d 528, 543-44, 61 P.3d 1130 (2003).

187 emphasizes the strength of this public employee **right to bargain**, noting: “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.”³ In adopting Section 187, the Legislature made clear that the intent was to preserve greater flexibility so that public employers could meet the unique needs of public employees and the public they serve. CP 100-101.

The **right to bargain** given to public employees in Section 187 is different than the rights available to other employees in Washington. Only one small group of private employees - those in construction trades - have any right to modify the WAC 296-126-092 meal and rest period rules. Thus, at one end of the spectrum, all non-construction private employees must fully comply with the WAC rules and cannot modify them. In the middle of the spectrum, private construction workers have a narrow right to modify the WAC rules through CBAs that “specifically require rest and meal periods and prescribe requirements concerning those rest and meal periods.” And, at the other end of the spectrum, public employees have the broadest right: they can “enter into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment

³ Notably, the Response (at 18) omits this sentence when it states “Section 187 reads in its entirety” and then quotes only part of the statutory language. As the Response (at 16) admits, “shall” “imposes a ‘mandatory obligation’” - thus Section 187 provides public employees and employers with an unfettered right to negotiate alternatives to the WAC rules. Private employer cases like *Demetrio* and *Pellino* (cited at 16 and throughout the Response) thus have no bearing on public employee cases involving Section 187 like this.

agreements that specifically vary from or supersede, in part or in total” the WAC meal and rest period rules. RCW 49.12.187.

The difference between the meal period rights of regular employees, construction workers, and public employees is key here. Respondent spends much of his brief discussing general rules for employees who do not have the special **right to bargain** that the Legislature granted public employees under Section 187: in other words, the private employees and employers who are required to follow WAC 296-126-092. *E.g.*, Response at 15-17. The Response (at 20) also tries to obscure the significant differences between Section 187’s provisions for construction workers and public employees and discusses at length a case involving the Section 187 construction worker exception, *Lowry v. Ralph’s Concrete Pumping, Inc.*, 2013 WL 2099519 (W.D. Wash. May 14, 2013). What Respondent seemingly ignores is that *Lowry* does not involve the “public employee” standard applicable to this case.

Section 187 details the distinction, with the construction employee test in the first paragraph and the public employee test in the second:

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. However, rules adopted under this chapter regarding appropriate rest and meal periods as applied to **employees in the construction trades** may be superseded by a collective bargaining agreement negotiated under the national labor relations act, 29 U.S.C. Sec. 151 et seq., if the terms of the collective bargaining agreement covering such employees specifically require rest and meal periods and prescribe requirements concerning those rest and meal periods.

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.

(emphasis added). There are two key distinctions differentiating the ability of construction employees to vary the WAC rules from the stronger rights of public employees. The first difference is the form of agreement needed to vary from the rules. For *construction employees*, only a “collective bargaining agreement negotiated under the national labor relations act” will suffice. For *public employees*, the list is broader: “collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements” all can be used to vary the WAC rules. The use of broader language for public employees must be given meaning. *State v. Veliz*, 176 Wn.2d 849, 862, 298 P.3d 75 (2013) (“When the legislature uses different terms in the same statute, we presume that it intends different meanings.”); *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (same).

The second difference is the manner in which the permitted agreement may vary from the rules. For *construction employees*, the CBA must “specifically require rest and meal periods and prescribe requirements concerning those rest and meal periods.” Simply eliminating rest and meal periods would not work for construction workers, and neither would any other attempted variation that did not “specifically require” those periods. In contrast, for *public employees*, there is no parallel requirement that the separate agreement actually provide for meal

or rest periods. Rather, public employees may “specifically vary from or supersede, in part or in total,” the WAC rules.

Given these completely different standards, *Lowry* is irrelevant.⁴ The Response (at 20) inexplicably discusses *Lowry* at length and actually quotes language from *Lowry* - with added italicized emphasis - stating that if the CBA was silent, the basis of the *Lowry* plaintiff’s claims (the statutory right to rest and meal periods) would still exist. This is on point for construction workers and what Section 187 requires for them, but there are no construction workers here and that different standard is completely irrelevant to public employees. The different language afforded the different groups of employees in Section 187 has to have meaning, and thus public employees cannot be held to the restrictive standards applicable to private construction workers. *E.g.*, *Veliz*, 176 Wn.2d at 862.

Significantly, the Section 187 **right to bargain** belongs to *employees*. Even public employers are powerless to modify the WAC rules unless public employees agree to modify them. That is precisely what happened here: the Drivers, through their sole bargaining representative, Local 587, reached a different arrangement with Metro on reasonable breaks for Drivers than those provided in the WAC rules.

B. Section 187’s “specifically vary from or supersede, in part or in total” language does not require any specific term or language

Respondent’s central argument is that the CBAs are silent with

⁴ *Lowry* also is irrelevant because it 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. *Lowry*, 2013 WL 2099519 *2-4.

respect to meal periods for Drivers.⁵ *E.g.*, Response at 5-6, 23-26. Not true. As discussed in Section C below, CBA Articles 15 and 16 (covering Drivers) detail the work schedules and breaks that Drivers receive. This is not silence. It is true that those Articles do not use the term “meal periods” and do not generally state what employees *do not* receive.⁶ Instead, they use terms (straight run, combo, split, and layover) defined through historic bargaining that supersede and vary from the WAC rules. CP 78-80.

Respondent misstates what is required for public employees to “specifically vary from or supersede” the WAC rules under Section 187. Nothing in Section 187 requires public employees to use the term “meal periods” to expressly state that they are superseding the WAC rules in a CBA, 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).

What it means to “supersede” and “specifically vary” is key. “Supersede” means “[t]o annul, make void, or repeal by taking the place

⁵ The Response (at 2-3) asserts (without support) that the superior court agreed with its legal arguments below. Respondent actually asked the court to enter summary judgment for him. CP at 1377, 1397. The court declined and thus clearly did not adopt his position.

⁶ The Response (at 10-11) references a new section of the CBA that now expressly states that Drivers do not receive meal and rest periods under the WAC rules. A quick perusal of the CBAs at issue (or any CBAs) demonstrates that this negative language (what a party does not receive) is not standard CBA language. The Response (at 11) admits that this language complies with Section 187, apparently because it expressly references the WAC rules. But simply because the parties added new language that references the WAC rules does not mean that such language is required under Section 187. Instead, this language (which the parties added to the CBA following Respondent’s lawsuit) only demonstrates that Local 587 and Metro both wanted to assure that Respondent’s frivolous claims would not continue. Importantly, the current provision states: “The PARTIES agree to continue the long standing agreement to specifically supersede in total the State provisions regarding meal and rest periods for Employees.” Respondent does not even attempt to address this “long standing agreement” language.

of.” Black’s Law Dictionary 1667 (10th ed. 2014) (CP 129). To “vary” means “[t]o change in some usu. small way; to make somewhat different.” Black’s Law Dictionary 1787 (10th ed. 2014) (CP 130). Respondent does not dispute these definitions. Response at 19 (vary means “to change in form, appearance, nature, substance, etc.; to alter, to modify”). Here, providing for straight-through work and layovers of half the time that would otherwise be required under the WAC rules to provide “reasonable breaks” supersedes and specifically varies from the WAC rules.⁷ The Response (at 29) makes a brief, confusing argument about this, and suggests (without any evidence) that meal and rest periods cannot be conflated or combined “within the concept of a layover” because they are separate WAC rules. This ignores the **right to bargain** that Section 187 provides to public employees and employers as well as the plain language of CBA § 15.3.I (providing layovers “in order to provide reasonable breaks”) and evidence from Local 587 and Metro witnesses stating that layovers include time for meal and rest breaks. *E.g.*, CP 1356 (Union President discussing “guaranteed meal break layover time”). This also ignores the plain meaning of the terms “layover”⁸ and “breaks.”⁹ Disregarding all of this, the Response (at 20)

⁷ While Respondent admits that rest breaks are not at issue in this case, the five-minute layovers under Section 15.3.H are similarly half the time specified in WAC 296-126-092.

⁸ See Am. Heritage College Dictionary at 786 (4th ed. 2007) (defining “layover” as “a short stop or break in a journey, usu. imposed by scheduling requirements”); see also Transit Service Planning Glossary (available at www.kingcounty.gov/transportation/~/_media/transportation/kcdot/MetroTransit/HaveASay/Glossary.ashx) (“Layover/Recovery Time: The scheduled time spent at a route’s terminal between consecutive trips by a single bus ... ‘Layover’ or ‘recovery’ time is necessary to allow bus drivers a break and provide a time cushion in event the preceding trip is delayed.”).

seems to argue that the CBAs must use the term “meal periods.”

An application of Respondent’s argument demonstrates its absurdity. For the examples below, presume a statute provides: “Schools must provide all public school employees one apple a day if they work more than five hours, but that this requirement does not apply to public school employees if they have entered into CBAs or other agreements with the school that specifically vary from or supersede this requirement.”

Example 1: Everett teachers enter into a CBA that provides that the only food the district can provide teachers is bananas or peaches. Under Respondent’s theory, as this agreement is silent regarding apples, it would not specifically vary from or supersede the requirement to provide apples and the school would still be required to provide apples under the statute. This illogical argument parallels Respondent’s claim that the CBA provisions requiring a certain percentage of straight runs - which per the CBA require straight-through work and cannot have unpaid meal breaks - do not specifically vary from or supersede the WAC rules.

Example 2: Presume the same facts as above, but instead the CBA includes different articles covering teachers, principals, and classified staff. Per the CBA, principals always receive Fuji apples if they work more than five hours, and classified staff receive a Gala apple if they work more than six hours and an extra apple if they work overtime. In contrast,

⁹ As discussed in the Opening Brief (at 29-33), the term “breaks” means “a respite from work” and includes “lunch breaks,” “meal breaks,” and “rest breaks” as evidenced by the use of those terms throughout the CBAs. The Response ignores this extensive discussion of the meaning of “breaks.”

the CBA provides that teachers must work without food for at least seven hours, EXCEPT that the district will arrange for a half sandwich after five hours to address their reasonable food needs. Under Respondent's theory, as the article covering teachers does not mention apples, the district still must provide them. This argument is just as nonsensical as Respondent's argument that Article 15's references to layovers to provide "reasonable breaks" is not adequate to vary from the WAC rules under Section 187 as Article 15 does not reference "meal breaks."

These examples demonstrate why Respondent's arguments are illogical. Under Section 187, there are countless ways that public employees can specifically vary from or supersede the WAC rules. They can provide for meal periods at different times of day, provide for meal periods of a shorter or longer duration, or provide for no breaks at all.¹⁰ They also can provide for a completely different system that fits the workplace at issue and can vary by using workplace terms (*e.g.*, straight runs, splits) they want in detailing that system. That is what Local 587 employees and Metro did here: they specified an arrangement of splits, layovers, combos (which include a 30-minute unpaid break), and straight runs (which involve over seven hours of straight-through work). Is there more than one way to spell out this arrangement? Of course. (Just as there is more than one way to specify that a district does not need to provide teachers with apples.) Regardless, Respondent's perspective on what could

¹⁰ In contrast, construction workers cannot eliminate meal periods, so this option is not open to them. Section 187 does not impose this same requirement on public employees.

have been said, what words might have been clearer, or that the CBAs could have expressly referenced WAC 296-126-092 is irrelevant.¹¹

Respondent was not part of the bargaining committee, and the issue here is what the parties who bargained these CBAs elected to say in them.

The Response (at 11) highlights that Local 587 and Metro have now entered into a new CBA that includes language expressly referencing “meal and rest periods.” The language the parties agreed to 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. 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. (emphasis added)

Response at 11; *see* CBA 3.15 (available at http://your.kingcounty.gov/ftp/des/hr/410C0115_scsq.pdf). The current language that reflects the parties’ longstanding agreement to supersede the WAC rules does not detract from the fact that the prior CBAs complied with Section 187. While the current language is certainly one way to comply with the statute, it is clearly not the only way. In fact, the current language (which was adopted following

¹¹ Respondent’s desired alternative language is irrelevant. “Under Washington law, a court must strive to give effect to all provisions in a contract and to give meaning to every term: ‘In construing a contract, a court must interpret it according to the intent of the parties as manifested by the words used. Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it. An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.’” *Timeline, Inc. v. Proclarity Corp.*, 2007 WL 1574069, *5 (W.D. Wash. 2007) (quoting *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980)).

Respondent's lawsuit) expressly acknowledges the parties' "long standing agreement" to supersede the WAC rules. That long standing agreement was effectuated in prior CBAs by using different terms chosen by the parties to accomplish the same purpose.

C. The CBAs are not silent and their express language varies from and supersedes the WAC rest and meal period rules

Despite Respondent's assertions to the contrary, the CBAs are not silent. When the words in the CBAs are read in context, the CBAs clearly and unequivocally vary from and supersede the WAC rules.

1. CBA Sections 15.3.H and 15.3.I provide that Drivers receive "reasonable breaks" through scheduled "layovers"

Rather than silence, CBA Articles 15 and 16 (covering Drivers) provide a substitute for meal breaks. Section 15.3.I of the 2007 and 2010 CBAs provides for "reasonable breaks." This provision 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. This plain language both specifically varies from and supersedes the WAC meal and rest break rules.¹² After five hours, WAC 296-126-092

¹² See, e.g., CP 79 (layovers include "time taken as breaks"); CP 123 (Local 587 President testifying that layovers include break time); CP 133 (layovers include break time); CP 1314 (layover may provide opportunity for break); CP 1336 (parties agreed to provide layovers instead of WAC rest and meal breaks); CP 1345 (union committee proposed changing 15.3.H.4 five-minute layover and 15.3.I 15-minute layover to 30-minute layovers and referenced being "entitled to 30 minutes every five hours of work"); CP 1348 ("union proposal" with handwritten changes to make 15.3.H layovers 10 minutes and 15.3.I layovers 30 minutes); CP 1352-53 (same in "List of Union Issues"); CP 1356 (Union President's statement that if data shows "insufficient layover or guaranteed meal break layover time," Metro will adjust run cards to restore layover).

provides 30-minute meal breaks, whereas CBA § 15.3.I provides Drivers with scheduled 15-minute layovers (which is half the time of regular meal breaks). CP 911. Likewise, WAC 296-126-092 provides 10-minute rest periods for each four hours worked, whereas CBA § 15.3.H provides five-minute scheduled layovers after each revenue trip. CP 910-11. The following chart summarizes these terms under the WAC rules and CBA:¹³

	WAC 296-126-092 summary	CBA: Full-Time Drivers Working Straight Runs	CBA: Full-Time Drivers Working Combos
Meal periods or layovers	30-minute lunch period if work five consecutive hours. WAC 296-126-092(1). Additional 30-minute meal period if working three or more hours longer than normal work day. WAC 296-126-092(3).	“In order to provide reasonable breaks,” at least one scheduled 15-minute “layover” in assignments over five hours. Section 15.3.I (CP 911). Additional 15-minute layover in weekday assignments over eight hours. Section 15.3.I (CP 911).	Drivers working combos have a “split,” which is a period of at least 30 unpaid minutes between separate pieces of work in a combo. Section 15.4.A.2 (CP 912). Also may have additional paid splits of 29 minutes or less and additional paid splits after 8:00 pm. Section 15.4.A.2 (CP 912).
Rest periods or layovers	10-minute rest period for each four hours of work time (no more than three hours without rest period); intermittent rest periods may be allowed. WAC 296-126-092(4)-(5).	Minimum 5-minute scheduled layover after each revenue trip (unless certain exclusions are met). Section 15.3.H (CP 910).	Minimum 5-minute scheduled layover after each revenue trip (unless certain exclusions are met). Section 15.3.H (CP 910).

¹³ The chart does not cover part-time Drivers. However, the same sections 15.3.H and 15.3.I that apply to full-time operators also apply to part-time operators if the conditions are satisfied. CP 930.

This direct comparison of the WAC rules and CBA shows that, instead of the standard meal and rest breaks, the CBA replaces them with scheduled layovers of half the time.¹⁴ The Response (at 13) argues that layover minutes can “evaporate” and are different than the WAC rules. True. Such variances are exactly what Section 187 authorizes.

There is no silence in the CBAs.¹⁵ They spell it out in black and white: Drivers are provided scheduled layovers.¹⁶ While Respondent may prefer a different variation or no variation from the WAC rules, or prefer that the CBAs state something such as “splits and 30-minute layovers replace meal periods” and “five-minute layovers replace rest periods,” it is unquestionable that the CBAs specifically vary from the WAC rules. Respondent’s preference on how this could have been written differently or more clearly (to him and his counsel) is irrelevant.¹⁷

¹⁴ Although the minimum layover time is shorter than the WAC rules times, layovers are scheduled and more frequent. CP 82, 86 (for example, instead of two rest periods and one meal period - for a total of 50 minutes - Respondent was scheduled for 5-11 layovers covering 91-139 minutes when he worked full time).

¹⁵ To support their claim that the CBA is silent and this means the WAC rules apply, Respondent cites a case where the contract was silent regarding who must pay sales tax obligations: a buyer or provider of services. Response at 26 (quoting *Urban Const.*). However, that case is irrelevant. Here, the CBAs give Drivers layovers to provide for reasonable breaks and the controlling law (Section 187) allows public employees to specifically vary from the rules.

¹⁶ The CBA also provides an option if Drivers are not receiving reasonable breaks: “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.

¹⁷ The Response (at 24-25) criticizes Metro because it allegedly did not cite “a single contract case;” however, the Opening Brief (at 28, 35) cites the very cases (*Hearst* and *Davis*) upon which the Response relies. Regardless, the parties agree on the principals of contract interpretation: any analysis starts with the words in a contract; the parties’ intent should be divined from those words; it is appropriate to use extrinsic evidence to determine the meaning of terms used in a contract; and, if a term has more than one reasonable meaning, the term is ambiguous and the understanding of the parties should be considered. See Response at 24-25. The additional point that Metro noted (and that

2. The CBAs and other agreements with Drivers supersede and vary from the WAC rest and meal period rules

In addition to the direct language giving Drivers layovers “in order to provide reasonable breaks” as discussed above, other provisions of the CBAs also supersede and specifically vary from the WAC rules.

First, Article 15 regarding Drivers focuses on straight runs, combos, and splits—terms that are defined by the CBA in a manner that varies from the WAC meal and rest period rules:¹⁸

- Section 15.4.A.1 addresses **straight runs**, the first type of run for Full-Time Operators. “A ‘straight run’ shall mean straight-through work which is at least seven hours and eleven minutes.” CP 912. This varies from WAC 296-126-092(2), which prohibits working “more than five consecutive hours without a meal period.”

Respondent suggests that straight runs could include meal periods. How?

Undisputed testimony from Local 587 establishes that a 30-minute unpaid meal period (as required by WAC 296-126-092) would violate the plain language of the CBAs (“straight-through work”). CP 122-23. Although straight runs are inconsistent with 30-minute meal periods, they are not

remains rebutted) is that, in a collective bargaining context, bargaining history can be relevant to understanding the terms used in an agreement. Ironically, after citing these contract interpretation rules and declaring that the CBAs are unambiguous, the Response (at 27-30) ignores the plain meaning of key terms used in the CBAs (*e.g.*, straight runs, straight-through work, layovers, and breaks) and, instead, argues why the plain meaning of those terms should be disregarded or modified. The Response (at 28-29) also resorts to extrinsic evidence totally unrelated to the CBAs in an effort to distort these terms while, at the same time, ignoring unequivocal testimony and evidence from Local 587 and Metro as to what they intended the terms to mean.

¹⁸ When interpreting a public employee CBA, words and phrases are given their ordinary meaning except when “otherwise defined by the parties” and when “technical terms or words of art” are “given their technical meaning... within that field or context.” *Keeton v. DSHS*, 34 Wn. App. 353, 360-61, 661 P.2d 982 (1983); *see Sentry Select Ins. Co. v. Royal Ins. Co. of Am.*, 481 F.3d 1208, 1222 (9th Cir. 2007) (general Washington rule is that terms of art or technical language “is to be given its technical meaning when used in a transaction within its technical field”).

inconsistent with layovers. While 30-minute meal periods could not count as time worked, layovers are part of normal work hours under the CBA.

- Section 15.4.A.2 addresses **combos**, the other type of runs for Full-Time Operators. Combos must include a “**split**,” which is a period of at least 30 unpaid minutes when a Driver is off duty between runs. CP 912. A split thus assures an unpaid break that is consistent with a WAC meal period, but the CBAs expressly provide for different timing and length of splits (which can last for hours). CP 78-79. Further, Sections 15.4.E, 15.4.F, and 15.4.G require that straight runs be the predominant run type and even prohibit combos on Sundays. CP 912.

Respondent completely fails to address the concept of splits and the fact that all combo drivers would receive at least a 30-minute unpaid break during which the Driver is off duty. While the Response (at 38) is somewhat unclear, its only comment on splits seems to suggest that a combo “i.e., a split shift that may be separated by several hours” does not necessarily mean an employee will have a meal period. To the contrary, providing an employee an unpaid break lasting at least 30 minutes during which they are off duty is precisely what is required under the WAC rules. Does the CBA call a split a meal period? No, it uses the term “split” - a specific variance from the WAC - as that makes sense in the transit industry and also because the split’s length could be much more than the 30 minutes required by WAC rules.

Second, read as a whole, each CBA addresses meal and rest periods, expressly providing them for certain groups of employees, but not Drivers. Each CBA is a single document that covers various types of employees, including Drivers. Although Respondent attempts to separate out the sections of the CBAs that discuss Drivers, Section 187 focuses on

whole “collective bargaining agreements.” *See Frese v. Snohomish County*, 129 Wn. App. 659, 667, 120 P.3d 89 (2005) (employer must “show how the collective bargaining agreement varies from, or supersedes, those rules”). It is undisputed that many CBA sections address meal periods. CP 54-56. The Response (at 31) argues without authority that because the Driver sections do not use the term “meal periods,” that what is in other sections is not probative of whether Drivers receive meal periods and that it “highlights the fact that the parties know how to address meal periods when they want to.”¹⁹ That is the precise point. When a CBA includes language in one section but does not include the language in another section, the exclusion of that language has meaning. *E.g.*, Elkouri & Elkouri, *How Arbitration Works*, at 9-39 (7th ed. 2012) (“The mention of one thing is the exclusion of another...when parties list specific items, without any more general or inclusive term, they intend to exclude unlisted items, even though they are similar to those listed.”).

Local 587 and Metro elected not to include meal and rest period language in the Driver sections: instead, they used straight runs, combos, splits, and layovers (unique terms used for Drivers in the transit industry that would not apply to other employees covered by the CBAs) to address all scheduling (including breaks) for Drivers. *See* Opening Brief at 26-33.

¹⁹ While the Response (at 25) quotes Am.Jur.2d for one concept, it ignores the next sentence that directs consideration of a contract in context, not isolation: “When deciding whether an agreement is ambiguous, particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole, and the intention of the parties as manifested thereby.” Am.Jur.2d Contracts § 331 (2004). Here, the whole CBA - not just isolated sections - must be considered.

Nowhere in Section 187 does it state that if some subpart of a CBA references meal periods, all subparts must. Instead, DLI Admin. Policy ES.C.6 provides that “meal and rest periods under WAC 296-126-092 **do not apply** to” public employees who enter CBAs “that specifically vary from or supersede, in part or in total, the rules.” CP 115 (emphasis added). Local 587’s and Metro’s CBAs - as a whole and in each section - do that.

Third, individual Driver selection of and agreement to drive a specific route are type of “other mutually agreed to employment agreements” that Section 187 authorizes as a manner for public employees to vary from or superseded the WAC rules. The Response’s arguments (at 31-32) that this is impermissible “direct dealing” misses the point: these are agreements between the Driver, Local 587, and Metro that implement one aspect of the CBA.²⁰ Drivers review, select, and agree to specific routes and know exactly how their trips and layovers are scheduled. CP 79-80, 913-15, 933. These arrangements are not direct dealing because the selection process is a creation of the CBA, and Local 587 is present during and manages that process (CBA § 15.5.N, at CP 914) and is party to each individual agreement. CP 79-80,123. These agreements between the Driver, Local 587, and Metro detail exactly (by time and place) how each Driver will spend each day, make no provision for 30-minute meal periods, and fully satisfy Section 187’s requirements to supersede or specifically vary from the WAC rules.

²⁰ The Response (at 32 n.17) argues that some Drivers have limited choices. Of course, the CBAs establish this seniority-based selection process. Section 187 recognizes the **right to bargain** over these issues, even if less senior Drivers have fewer choices.

D. Respondent’s remaining arguments are of no consequence

Respondent’s other arguments lack merit and are irrelevant.

1. Respondent’s transparency arguments are a red herring

Respondent argues about the importance of transparency and that Drivers do not understand that they bargained away separate meal breaks. *E.g.*, Response at 1, 23 (Drivers should “know when their meal break rights are being superseded”), 27 (WAC variance “is nowhere spelled out . . .for Drivers to find”), 33 (“Drivers are not told . . . how (or if) the CBA modifies those rights”). This is not only inaccurate, but also irrelevant.

First, Section 187 does not require transparency. For public employees, it merely requires CBAs, “labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total,” the WAC rules. Section 187 does not require talismanic language or “transparency” so that third parties can plainly see the variance without considering the full CBA language. If the statutory bargaining agents for public employees negotiate for and agree to particular arrangements, Respondent provides no reason to disregard that agreement (even if it is opaque).

Second, the fact that Drivers have scheduled layovers and no scheduled meal break is completely transparent. Every four months, the Drivers choose their routes. CP 79-80, 913-15, 933. As part of that process, they receive detailed information about the route and scheduled layovers and splits. *Id.*

Third, Respondent has not identified any Driver, not even

Respondent, who did not understand that the CBAs do not provide Drivers with the WAC rest and meal periods. Respondent and the other drivers fully understood. CP 1247-48 ¶¶ 3, 6; CP 1260, 1297, 1305.

The Response (at 14) claims a 2004 survey “shows insufficient breaks as the most pressing issue for bus drivers.”²¹ If true, the survey shows that Drivers knew they did not get regular rest and meal periods and, even with that knowledge, Local 587 entered into CBAs in 2007 and 2010 that only provide for 5-minute layovers and “one 15-minute layover” “[i]n order to provide reasonable breaks.” CP 628, 911. Regardless, whether Drivers think they should get more or different breaks is a union bargaining issue and irrelevant to the legal analysis.²²

Finally, the Response (at 32-33) suggests that Metro managers were confused about the meal period requirements. This is pure fiction. Respondent raised this issue - the exact same quotes - before the trial court. Metro noted how the testimony was quoted out of context in its reply brief to the trial court.²³ CP 1243. Rather than acknowledge or

²¹ As noted at the trial court level (at CP 1242-43), this and other exhibits to the Halm Declaration (at CP 1399-1400) are unauthenticated hearsay and should be stricken. CR 56(e); *Orr v. Bank of Am.*, 285 F.3d 764, 773-79 (9th Cir. 2002). Regardless, the surveys barely mention “meal periods” as compared to “layovers” and “breaks.” Notably, not one survey asked for unpaid 30-minute meal breaks. The Response suggests that Drivers want meal periods and support Respondent’s cause, but he made a motion in 2011 to file an unfair labor practice charge over meal breaks that was voted down, and Local 587 passed a motion in 2013 to oppose this lawsuit. CP 1247-48, 1260, 1269, 1282.

²² As an exclusive bargaining agent, Local 587 negotiates and enters agreements with Metro that govern wages, hours, and working conditions of its members. RCW 41.56.080, .100. Respondent cannot pick and choose which provisions apply.

²³ The reference to the Transit Operations Manager refers to a Jim O’Rourke email. He testified during his deposition that he was not confused: “My understanding at the time was that we had negotiated language that specifically superseded the state law and that our negotiated language was governing meal breaks and rest breaks.” CP 1307. After he heard about a new meal period case, he “wanted an opinion” as to whether the case

respond to what Metro said, the Response ignores the evidence and continues these misrepresentations, apparently in an attempt to obscure the facts. Despite these efforts, no one was confused: Local 587, Metro, and Drivers all understand that they do not receive WAC meal breaks.

2. Respondent's reconsideration arguments are misplaced

The Response argues that the materials submitted with Metro's Reconsideration Motion should not be considered. However, those materials were properly submitted in support of that motion. In its Opening Brief and Reconsideration Motion, Metro discussed the serious issue that warranted reconsideration: during the summary judgment hearing, Respondent's counsel made a factual assertion despite being in possession of materials Local 587 produced that proved the assertion was false. Counsel told the superior court that Section 15.3.I's references to "reasonable breaks" and "reasonable break time" were irrelevant because "[t]he layover provision [§ 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.

Nowhere does Respondent address this undisputed statement - shown in black and white on the hearing transcript prepared for this Court

impacted the County's position. CP 1307. The reference to the Streetcar Operation and Maintenance Chief email refers to an email exchange involving David Levin about vehicle maintenance employees (who are covered by the same CBA as Drivers), and not Drivers. CP 1310. Ironically, the CBA (§ 17.3.A & 17.10.F) has "lunch break" and "meal period" standards for these employees. Mr. Levin testified: "I am referring to the very, very complex system that is created in our contract... I certainly understand meals and breaks and what we negotiated, but I would have trouble describing all of the terminology and wonky words." CP 1310.

- that counsel made during the hearing or the fact that Respondent had possession of materials from Local 587 clearly demonstrating that this assertion was false. CP 1336-63. But ignoring it does not change the facts.

Given the misstatement of fact by counsel, Metro submitted evidence that was in Respondent's counsel's possession showing that the term "breaks" in Section 15.3.I was used broadly by Local 587 to include both "rest breaks" and "meal breaks." CP 1336-63. This evidence from Local 587 was not in Metro's possession when it filed its motion, and it only became relevant when Respondent's counsel misrepresented this fact. When such a misstatement occurs, it is always appropriate to submit additional evidence to correct the misstatement.²⁴ *E.g.*, CR 59(a)(2).

3. The CBA Preamble does not preserve the WAC rules

The Response (at 6) asserts that the Preamble to the CBAs preserves meal periods for Drivers; however, that language does nothing of the sort.²⁵ Instead, the Preamble (which applies to all covered employees and not just Drivers) states that "Employees are entitled to fair wages and working conditions as provided in this AGREEMENT, including all protections preserved by law." The focus of this recital is that the CBAs define the rights of covered employees. The reference to "protections preserved by law" begs the question and adds nothing to the analysis in this case. Indeed, one of the protections preserved by law is the

²⁴ In fact, an attorney who makes such a misstatement (whether intentional or not) is obligated to inform the court and correct the record on her own initiative. RPC 3.3(a)(1).

²⁵ If the Preamble preserves meal periods as claimed, Respondent's recourse would be the CBA grievance process for failure to comply with the CBA. He filed this lawsuit instead, clearly demonstrating he understood the CBA does not provide WAC meal periods.

right to bargain a contract that does not have lunches. Section 187 provides that the WAC rest and meal period rules are not preserved by law if public employees agree to specifically vary from or supersede them. As Local 587 and Metro both agree, the CBAs provide for straight runs, combos, splits, and layovers, and specifically vary from and supersede the WAC rules. Those rules are thus not preserved by law.

III. CONCLUSION

In sum, this Court should reject Respondent's overly simplistic analysis that ignores the CBA language bargained by Local 587 for its employees and the alternate system - including straight runs, combos, splits, and layovers ("to provide reasonable breaks") - that specifically varies from and supersedes the WAC meal and rest period rules. 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 17th day of September, 2015.

Respectfully submitted,

K&L GATES LLP

By: /s/ Stephanie Wright Pickett
Patrick M. Madden, WSBA #21356
Stephanie Wright Pickett, WSBA #28660
Attorneys for Petitioner King County

PROOF OF SERVICE

Arlene C. Naparan declares as follows: On September 17, 2015, I caused a true and correct copy of the foregoing document to be served upon the following in the manner indicated:

Attorneys for Respondent:

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

- via U.S. Mail, first-class postage prepaid
- via Hand Delivery
- E-Service
- via Facsimile
- via E-mail w/ hard copy to follow per agreement
- via Overnight Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated September 17, 2015, at Seattle, Washington.

/s/ Arlene C. Naparan
Arlene C. Naparan
Legal Assistant