S251135

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN BUSKER,
Plaintiff and Appellant,

v.

WABTEC CORPORATION, ET AL.,
Defendants and Respondents.

AFTER A DECISION BY THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT, CASE NO. 17-55165
JUDGE OTIS D. WRIGHT, II, CASE NO. 2-15-CV-08194-ODW-AFM

PLAINTIFF'S COMBINED ANSWER TO AMICI CURIAE BRIEFS OF SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY AND LEAGUE OF CALIFORNIA CITIES AND OTHER GOVERNMENTAL ASSOCIATIONS

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RESPONSE TO SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY'S AMICUS BRIEF

I. THE WORK OF PARSONS AND ITS SUBCONTRACTOR WABTEC WAS "IN EXECUTION" OF THE METROLINK CONTRACT AND COVERED BY THE PWL

The amicus brief filed by the Southern California Regional Rail Authority ("Metrolink")[1] ignores the plain reading of the applicable statutes. It reiterates Wabtec's unfounded position that there exists an exemption or exception to California's Prevailing Wage Law (Labor Code §1770 et seq.) that somehow applies to Parson's subcontractor's Wabtec.

As with Wabtec's response, the problem with the argument is there is simply no statute, regulation or case law that supports the position. In fact, it is Wabtec and Metrolink who seek to rewrite the PWL to create a judicial an exemption where none exists.

Without reference to statute or regulation, Metrolink characterizes plaintiff's position as seeking "to change and significantly expand the scope of "public works" subject to California's prevailing wage laws." (Metrolink's amicus brief, pp. 8-9.) Similarly, without citation to any specific statute, case, or regulation Metrolink argues that finding that Wabtec's work was covered by the PWL would "overturn decades of settled precedent as well as direction from the State's Department of Industrial Relations." (Ibid.)

This sky-is-falling hyperbole is simply without any basis in the law. There is no statute, case or regulation that supports it. There is, however, a regulation that supports *plaintiff's* argument that the statutory scheme specifically *prohibits* what Metrolink and

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[1] Metrolink may be considered an interested entity under Cal. Rules of Court rule 8.208 as it contracted with Parsons for the contract at issue and is therefore "awarding body" of the project at issue as that is defined in Labor Code §1722.

Wabtec seek to do here - subcontract a project into pieces- some covered by the PWL, some not- to avoid compliance with the PWL. Cal. Code Regs., 8 §16100(b) requires that "The Awarding Body shall: . . . (6) Ensure that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771." (Cal. Code Regs. 8 § 16100(b).) This is exactly what Metrolink and its contractors did here.

Here, as explained in plaintiff's briefs on the merits, plaintiff does not ask this Court to make broad pronouncements relating to application of the PWL to "rolling stock" or "realty." Rather, plaintiff simply asserts that the single comprehensive integrated Metrolink contract, paid for with public funds, whose purpose was to *construct and install* a single integrated communication system connecting railroad tracks in control stations and in locomotives, is a public works contract. As a public works contract, by statute, the general contractor, and its subcontractors, must pay prevailing wages to the workers who execute that contract. (Labor Code §§1771, 1772, 1774.)

Awarding bodies like Metrolink and contractors such as Parsons may not "subcontract" away their obligations to pay prevailing wages by subcontracting specific work of a general contract and claiming that work to not be "covered" by the PWL. (*O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 463:

> These statutory obligations are imposed on the contractor whether the contractor or a subcontractor failed in his obligation to pay prevailing wages . . . . It must be remembered that a prime contractor subcontracts work on a construction project primarily for his own convenience. The Legislature has expressed its intention that the prevailing wage provisions apply to all workmen on public projects and that the provisions of the act not be frustrated because of the subcontracting of work required to be done under the provisions of the prime contract. It is not unreasonable to require that the contractor assume contractual responsibility for his subcontractor's compliance with the prevailing wage law.

(*Id.*, at p. 463.)

To hold that Metrolink's singular comprehensive contract is not a public works contract, or to hold that the work of Wabtec's electricians in executing that contract is exempt from the PWL, would be a rewriting of the PWL and would create a much

broader chaos then the parade of horribles articulated by Metrolink. It would undermine the fundamental structure of the PWL, so that contractors and awarding bodies could contract around the PWL. As stated by this Court in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976,

> Moreover, Lusardi's proposed interpretation would defeat the legislative objective. The object that a statute seeks to achieve is of primary importance in statutory interpretation. (*People v. Jeffers* (1987) 43 Cal.3d 984, 997; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 669.) CA(1b) (1b) The overall purpose of the prevailing wage law, as noted earlier, is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. (*Division of Labor Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 123; *O. G. Sansone Co. v. Department of Transportation*, *supra*, 55 Cal.App.3d at pp. 458-460.) CA(2b) (2b) These objectives would be defeated if we were to accept Lusardi's interpretation.
>
> As the facts of this case show, both the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law. To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects that would otherwise be deemed public works. To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view.
>
> Lusardi argues that the legislative history of the prevailing wage law supports its position that the law applies only when the contractor agrees to it in writing. Yet there is nothing in the legislative history that establishes an intent by the Legislature that contractors on public works projects who failed to execute such agreements are not bound by the prevailing wage laws. The awarding body and contractor are required to take steps to assure that the prevailing wage law is observed. It does not follow, however, that the law is intended to be optional with the contracting parties.

(*Id.*, at pp. 987-988.)

Metrolink's review of the history of the PWL is notable for the failure to cite any California authority holding what Metrolink wishes was the law- that the term "public works" expressly excludes the type of work performed by Wabtec as part of an integrated construction and installation of a communications system along hundreds of miles of tracks. In fact, the contrary is true. The cases cited by Metrolink support coverage.

Metrolink argues, for example, that "legislative history of California's prevailing-wage law all confirm that 'public works' are 'fixed works' and 'structures,' i.e., things that are fixed to the ground and cannot move from one place to another. (See *Swanton v. Corby* (1940) 38 Cal.App.2d 227, 230 ("Swanton") ["[T]he term 'public works' may be said to embrace all fixed works constructed for public use or protection[,]" such as "bridges, waterworks, sewers, light and power plants, public buildings, wharves, breakwaters, jetties, seawalls, schoolhouses and street improvements."]. (Metrolink amicus brief, pp. 10-11.)

But *Swanton* is distinguishable. To the extent this 80 year old case (decided long before the existing Labor Code §1720 was enacted) has any precedential value, *Swanton* does not hold that such a definition *limits* the definition of public works in this context, where the work is part of large complex $116 million public works project.

In *Swanton* the City of Arcadia police department in the 1930s purchased a radio, including some miscellaneous ropes and pulleys, and the largest part being a high frequency transmitter and frequency meter monitor. Two bills for labor, one for $8 and one for $78 were paid. (*Swanton,* at p. 1077.) The question on appeal was whether under section 874 of the Municipal Corporation Act (Stats. 1883, p. 93, as amended, Stats. 1933, p. 1334) the city was required to advertise for bids for the materials and labor used in building the radio. (*Ibid.*) The court held it was not, that the radio was more like a furnishing, not a public work.

> "The term 'public works' may be said to embrace all fixed works constructed for public use or protection. However, as has been remarked, the question as to what works fall within this classification seems to be, so far as the decisions are concerned, one of construction and application of statutes. In view of the acts authorizing public improvements the term probably includes

> bridges, waterworks, sewers, light and power plants, public buildings, wharves, breakwaters, jetties, seawalls, schoolhouses and street improvements. And the term 'building' as used in such an act has been held to include a fence to be constructed around public property." (See, also, *Cutting v. McKinley*, 130 Cal. App. 136 [19 P.2d 507].)
>
> It is not alleged that the radio was installed in the erection, improvement or repair of any public building. We think from the allegations of the complaint that it more nearly resembles a furnishing in a public building and comes within the rule announced in *Sarver v. Los Angeles*, *supra*, where it was held that steel cells and tanks installed in a jail after the building was completed were in the nature of furnishings for the building that could be purchased without advertising for bids and without letting a contract, even though the cost was more than $ 500. We therefore conclude that the words public works, as used in section 874 of the Municipal Corporation Act, should not be held to include a two-way short wave radio erected for the exclusive use by the Arcadia police department.

(*Id.*, at p. 230.)

If anything *Swanton* shows why Wabtec's work as a subcontractor to Parsons is covered by the PWL, it involves an integrated construction and installation of a complex public works project, not the purchase and installation of a single radio in the 1930s.

A specific regulation requires awarding bodies to "ensure" that it does not happen.

Like Wabtec, Metrolink attempts to focus on Wabtec's work in isolation, rather than to consider the Metrolink contract as a whole, including its purpose and the integrated nature of the work to construct and install the complete PTC system. But the analysis ignores the purpose of the PWL and the statutory scheme. Courts faced with this dichotomy in application of the PWL focus on the "complete" nature of the integrated contract. (See *Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 547.) There, the DIR Director and the trial court concluded that the replacement conveyors and a roof were part of a "'complete integrated object'" subjecting the entire project to the PWL. (*Id.*, at pp. 544-545, 548 [noting amended section 1720, subdivision (a)(1) in 2000, broadening its meaning "to explicitly include *preconstruction* activities that previously were not referenced."]; similarly, in *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 210-211, the Court explained:

> "as in *Oxbow*, here the parking lot and the theater were constructed at the same time, and, as the trial court observed, "were built together on the same vacant parcel of land." In the end, Cinema West's attempt to segment the development into separate components so as to avoid application of the PWL to construction of the theater is no more persuasive than the similar attempt made by the developer and city in Oxbow."

(*Id.*, at p. 213.)

Applying the same *Oxbow* analysis to the facts here yields the same conclusion. Under a single contract, both the on-board work and the field installation work are integral to the operation of the completed project (i.e., the PTC system). Here, the $116 million Metrolink-Parsons general contract was a single contract with a single contractor for what is undeniably a public work—the construction and installation of a single Positive Train Control ("PTC") system described as "an integrated command, control, communications, and information system." (VI-ER-1296.) The PTC system relies on the "successful integration of many complex products, . . . with systems and components located on trains, at wayside locations including signals, terminals, yards, communication sites, and at centralized train control centers all linked through a highly reliable communications network." (VI-ER-1296.)

Further, it was admitted that Wabtec's work, including the work performed by plaintiff performed at the same time and in the execution of the Metrolink Contract performed at the yard site. (VII-ER-1338.) Parsons was required to build and install the system "through a single advanced technology" per a single contract. (VI-ER-1296.) The contract contemplated several different types of work, including the installation of PTC equipment on all 57 cab cars and 52 locomotives in the Metrolink fleet ("on-board work"), as well as extensive equipping of the "wayside" (the area along the side of the tracks). (IV-ER-781; VI-ER-1313-15; VII-ER-1554-57, 1561.) The work performed along the wayside—which the contract characterized as "field installation work" (VI-ER-1140; VII-ER-1505)—included trenching, welding, installing towers for radio antennas, driving forklifts, and operating cranes. (VII-ER-1555-57.) The successful integration of both the on-board work and the field installation work was critical to the ultimate

functioning of the PTC System. (VI-ER-1130; VII-ER-1566-68; VIII-ER-1738, 1739-40.) In addition, the Wabtec subcontract expressly incorporated the portions of the Metrolink-Parsons general contract requiring the payment of a prevailing wage further demonstrating the integrated nature of the two contracts with respect to the obligation to pay prevailing wages. (VI-ER-1227, 1286; *see also* VII-ER-1339.)

II. THE DIR HAS NEVER HELD WORK LIKE WABTEC'S, AS A SUBCONTRACTOR ON AN UNDISPUTED PUBLIC WORK, IS NOT COVERED

Metrolink parrots Wabtec's argument that there exists a longstanding DIR "precedent" holding that public work must be affixed to realty or that it excludes work on "rolling-stock." But there no such holdings and the snippets cited by Wabtec and Metrolink from old DIR letters are taken out of context and do not stand for the propositions asserted.

As explained in more detail in plaintiff's reply brief on the merits, the DIR's opinions, to the extent that any opinions support Metrolink, are not entitled to deference. (*See State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 302–303 [DIR opinions should not be given any particular deference, in the aftermath of this Court's opinion in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574–575, where the Court questioned the efficacy of underground administrative regulations which are not in compliance with the Administrative Procedures Act.].) As explained in the opinion "the DIR Director "discontinued the practice of designating coverage determinations as precedential; he also stripped prior determinations of precedential value, and announced that past and future coverage determinations would be "advisory" ... only." (*Id*,. at p. 303.).)

The Court continued: "In other words, coverage determinations are no longer, if they ever were, treated as quasi-legislative by the Department itself. (See Cal.Code Regs., tit. 8, § 16303 [declaring that the Director's authority "to establish the prevailing

wage for any craft, classification, or type of worker is quasi-legislative," and "[a]ny hearing under this process is quasi-legislative ...."]; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574–575, 59 Cal.Rptr.2d 186, 927 P.2d 296 ["A written statement of policy that an agency intends to apply generally ... and that predicts how the agency will decide future cases is essentially legislative in nature"].)" (*Id.*, at p. 303.)

The exact same thing can be said about each of the DIR opinions on which Wabtec and Metrolink relies. Those opinions are not, if they ever were, entitled to any precedential effect and as explained below, since the issue here is the meaning of certain statutory language – which is purely a judicial function – those DIR opinions would carry little weight even if they were still given precedential effect. The cases Wabtec cites (AB 35) to argue that the DIR opinions are "quasi-legislative" and therefore should be followed by this Court either do not discuss the DIR's own proclamation that its decisions are not entitled to precedential effect (see *Vector Resources, Inc. v. Baker* (2015) 237 Cal.App.4th 46, 55) or were decided well before this Court's *Tidewater* decision and the DIR's reaction to it. (*Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 354.) Metrolink does not explain how opinions which the DIR itself has concluded have no precedential effect should nevertheless be relied upon by this Court in a separate matter.

III. PLAINTIFF'S TEST IS SIMPLY THE APPLICATION OF EXISTING LAW

Whether plaintiff's work was integral to the field work is not the test, but rather whether the work was integral to the completion of the "entire process" contemplated by the Metrolink contract. (*Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756.)

There is no evidence that general application of existing statutes and case law, as cited by plaintiff, creates uncertainty or increases costs to awarding bodies. For over 80 years the PWL has been applied by such agencies to contract for completion of large

public works such as this project. The application of the law here required payment of prevailing wages.

Moreover, awarding agencies like Metrolink have powerful tools available to them to obtain preconstruction coverage determinations from the Director of the Department of Industrial Relations ("DIR") pursuant to Title 8 of the Cal. Code of Regulations. (See, Cal. Code Regs., tit. 8 §16100 et seq. CCR §§ 16202, 16302.) Pursuant to these regulations an awarding body may obtain coverage determinations or special wage determinations from the DIR, before projects are advertised. (*Ibid.*; *see also Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 126 ["The failure to request a special determination was the fault of the [awarding body] and/or the contractor; it was not the fault of the workers whom the prevailing wage laws were designed to protect."].)

As explained in *Bennett v. Simplexgrinnell LP* (2014) U.S. Dist. LEXIS 28326, *24-25: "[i]n light of the purpose of the prevailing wage laws, which is to "protect and benefit employees on public works projects," Plaintiffs have the absolute right to sue SimplexGrinnell for its failure to pay them prevailing wages for the work at issue even if the contracts under which the work was performed did not state that prevailing wages would apply to such work, and even if the contracting parties never sought a determination from the Director as to the applicability of the prevailing wage law. (*See City of Long Beach v. Dep't of Indus. Relations* (2004) 34 Cal.4th 942, 949-50, (holding that "[t]he overall purpose of the prevailing wage law is to protect and benefit employees on public works projects" and the law must be construed liberally in light of such purpose).)

IV. CONCLUSION

As stated in the applicable regulation, the role of the awarding body is to "ensure" that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771. Cal. Code Regs. 8 § 16100(b). That was Metrolink's obligation in connection with this project. Here, the district court's ruling effectively did what the regulation prohibited, ignoring the integral nature of the Metrolink contract and permitting Wabtec to avoid application of the PWL.

RESPONSE TO LEAGUE OF CALIFORNIA CITIES AND OTHER GOVERNMENTAL ASSOCIATIONS' AMICUS BRIEF

I. PLAINTIFFS DO NOT SEEK A BROAD RULING RELATED TO "ROLLING STOCK" OR "REALTY" BUT A NARROW RULING MERELY HOLDING THAT WABTEC'S WORK IN EXECUTION OF THE METROLINK CONTRACT WAS COVERED BY THE PWL

The amicus brief filed by the League of California Cities and other governmental associations (collectively "the League") reiterates Wabtec's unfounded position that there exists a "rolling stock" exemption in California's Prevailing Wage Law. (Labor Code § 1770 et seq.) Like Wabtec's response, the problem with amici's argument is there is simply no statute, regulation or case law that supports the position. In fact, it is Wabtec and amici who seek to rewrite the PWL to enact an exemption where none exists. That activity is the purview of the Legislature.

Without reference to statute or regulation, amici follow Wabtec's lead to create classic strawmen when they characterize plaintiff's position as one where "all work performed pursuant to a government contract requires payment of a prevailing wage, even if the work performed is not a public work . . ." (League's amicus brief, p. 8-9) or that "installation work on rolling stock is subject to prevailing wage requirements . . ." (Id. at 11.) Neither is a position articulated by plaintiff.

Here, plaintiff does not ask this Court to render abroad pronouncement relating to application of the PWL to "rolling stock" or "realty." Rather, plaintiff simply asserts that the single comprehensive integrated Metrolink contract, paid for with public funds, whose purpose was to *construct and install* a single integrated communication system connecting railroad tracks in control stations and in locomotives, is a public works contract. As a public works contract, by statute, the general contractor, and its subcontractors, must pay prevailing wages to the workers who execute that contract. (Labor Code §§1771, 1772, 1774.)

The fact that some of the electricians installing the communication system per this comprehensive general contract performed their electrical work onsite inside locomotives does not somehow exempt that statutory requirement. Simply put, the electricians executing the Metrolink contract onsite in the locomotives were no less entitled to the prevailing wage than the electricians installing the same system, pursuant to the same contract, along the railroad tracks.

It has long been held that awarding bodies and contractors may not "subcontract" away their obligations to pay prevailing wages by subcontracting specific work of a general contract and claiming that work to not be "covered" by the PWL. As explained in *O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 463:

> These statutory obligations are imposed on the contractor whether the contractor or a subcontractor failed in his obligation to pay prevailing wages . . . . It must be remembered that a prime contractor subcontracts work on a construction project primarily for his own convenience. The Legislature has expressed its intention that the prevailing wage provisions apply to all workmen on public projects and that the provisions of the act not be frustrated because of the subcontracting of work required to be done under the provisions of the prime contract. It is not unreasonable to require that the contractor assume contractual responsibility for his subcontractor's compliance with the prevailing wage law.

To hold that Metrolink singular comprehensive contract is not a public works contract, or to hold that the work of Wabtec's electricians in executing that contract is exempt from the PWL, would be a rewriting of the PWL and would create a much broader chaos then the parade of horribles articulated by amici. It would undermine the fundamental structure of the PWL, so that contractors and awarding bodies could contract around the PWL. As stated by this Court in *Lusardi v. Aubry* (1992) 1 Cal.4th 976, 987-988:

> Moreover, Lusardi's proposed interpretation would defeat the legislative objective. The object that a statute seeks to achieve is of primary importance in statutory interpretation. (*People v. Jeffers* (1987) 43 Cal.3d 984, 997; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 669.) CA(1b) (1b) The overall purpose of the prevailing wage law, as noted earlier, is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect

> employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees. (*Division of Labor Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 123; *O. G. Sansone Co. v. Department of Transportation, supra*, 55 Cal.App.3d at pp. 458-460.) CA(2b) (2b) These objectives would be defeated if we were to accept Lusardi's interpretation.
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> As the facts of this case show, both the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law. To construe the prevailing wage law as applicable only when the contractor and the public entity have included in the contract language requiring compliance with the prevailing wage law would encourage awarding bodies and contractors to legally circumvent the law, resulting in payment of less than the prevailing wage to workers on construction projects that would otherwise be deemed public works. To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view.
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> Lusardi argues that the legislative history of the prevailing wage law supports its position that the law applies only when the contractor agrees to it in writing. Yet there is nothing in the legislative history that establishes an intent by the Legislature that contractors on public works projects who failed to execute such agreements are not bound by the prevailing wage laws. The awarding body and contractor are required to take steps to assure that the prevailing wage law is observed. It does not follow, however, that the law is intended to be optional with the contracting parties.

The League's review of the history of the PWL is most notable for the absence any authority to support the position argued: that statutes or regulations exclude or exempt the specific part of the Metrolink contract for the construction and installation of the communication system performed by Wabtec's electricians. In fact, the contrary is true.

There is a specific regulation requiring awarding bodies to "ensure" that it does not happen. Cal. Code Regs., 8 §16100(b) requires that "**The Awarding Body shall: . . . (6) Ensure that public works projects are not split or separated into smaller work**

orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771." (Cal. Code Regs. 8 § 16100(b) (emphasis added.).)

The League's analyses seek to focus on Wabtec's work in isolation in a locomotive rather than to consider the Metrolink contract as a whole, including its purpose and the integrated nature of the work to construct and install the complete PTC system. But the analyses ignores the purpose of the PWL and the statutory scheme. Courts faced with this dichotomy in application of the PWL focus on the "complete" nature of the integrated contract.

In *Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 547 the Court addressed the scope of "construction" for purposes of section 1720. At issue was a building on a pier used for receiving and storing petroleum coke and conveying it to ships for transport. (*Id.*, at p. 542.) After the Regional Air Quality Management District (District) amended its rules to require that coke be maintained in enclosed (i.e., nonopen-air) storage, the lessee of the facility, Oxbow, planned to place a roof on it. Once it did so, an existing conveyor device (stacker) could no longer be used. (*Id.*, at pp. 542–543.) Oxbow also planned to construct new conveyors. The City of Long Beach amended its lease with Oxbow agreeing to reimburse it for construction of the new conveyors, after which title to the conveyors would be transferred to the city. (*Id.*, at p. 543.) They agreed that construction of the conveyors would be done in compliance with the PWL, but the lease amendment did not mention the roof. (*Oxbow*, at p. 543.) Oxbow entered a contract with one company to erect the new conveyor system and another contract with a different company to construct the roof, and it paid for the roof with private funds. (Ibid.) The Director and the trial court concluded that the replacement conveyors and roof were part of a "'complete integrated object'" subjecting the entire project to the PWL. (*Id.*, at pp. 544-545.)

On appeal, the Court noted that the Legislature had amended section 1720, subdivision (a)(1) in 2000, broadening its meaning "to explicitly include *preconstruction* activities that previously were not referenced." (*Id.*, p. 548.) The Court also made note

of dictionary definitions "cited approvingly by the Supreme Court in *City of Long Beach [v. Department of Industrial Relations* (2004) 34 Cal.4th 942,] at page 951 [22 Cal. Rptr. 3d 518, 102 P.3d 904]: 'The act of putting parts together to form a complete integrated object.' (Webster's 3d New Internat. Dict. (2002) p. 489.) '[T]he action of framing, devising, or forming, by the putting together of parts; erection, building.' (3 Oxford English Dict. (2d ed. 1989) p. 794.)" (Id. at p. 549.)

Finally, the Court referenced language from two cases concerning the meaning of "construction." In *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756, the Court described "[a] s one thinks of 'construction' one ordinarily considers the entire process, including construction of basements, foundations, utility connections and the like, all of which may be required in order to erect an above-ground structure" And in *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1089, the Court opined that "[t]he plain meaning of the term 'construction' includes not only the erection of a new structure but also the renovation of an existing one" (See *Oxbow*, 194 Cal.App.4th at p. 549.)

Inherent in these various definitions, the *Oxbow* court opined, "is the concept that construction is the creation of the whole—the 'complete integrated object'—which is composed of individual parts." (*Ibid.*) The focus on a complete integrated object was also consistent with section 1720, which contains subdivisions that refer "construction" to mean "a complete product" and contains none that limit the term "to the formation of individual pieces of a whole." (*Oxbow*, at p. 549 & fn. 9.) The court concluded: "A reasonably broad interpretation of a 'public work' in the context of 'construction paid in whole or in part out of public funds' is also in keeping with the purpose of the prevailing wage law [to benefit and protect employees on public works projects]." (*Id.*, at pp. 549–550.)

In *Oxbow*, the Court declined to rely solely on the fact that there were separate construction contracts for the conveyors and the roof, because, as the Supreme Court recognized in *Lusardi*, *supra*, 1 Cal.4th at pages 987–988: "an awarding body and a contractor often have strong incentives to avoid the prevailing wage law and thus may

structure their contracts to circumvent it." (*Oxbow, supra*, 94 Cal.App.4th at p. 550.) Instead, the Court looked "at the totality of the underlying facts." (*Ibid.*) The facts on which it relied included that both the conveyor and enclosure work "occurred at the same site and at or near the same time," that the contracts required the work on the two to be coordinated and that both the roof and the new conveyor were necessitated by the amended rule. (*Ibid.*) Based on the totality of the facts, the Court endorsed the Director's approach in finding "the conveyor and enclosure improvements 'constitute parts that are put together to form "a complete integrated object," a petroleum coke handling and storage facility'" and the trial court's "similar analysis to hold that the entirety of the work was construction paid in part out of public funds." (Id. at p. 549.)

The well-reasoned analysis in *Oxbow* was followed by the First District in *Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 210-211. In *Cinema West* a movie theater developer challenged a decision of the Director of the State Department of Industrial Relations that the construction of the theater qualified as a public work under California's prevailing wage law. The court held the theater development was a public work within the meaning of the prevailing wage law because the theater, parking lot, and related amenities were part of a complete integrated object and thus constituted the construction done under contract paid for with public funds. (*Ibid.*)

The *Cinema West* court noted that the City and *Cinema West* agreed "to coordinate the design and construction of the Parking Lot Improvements and the [theater]." And "agreed to use the same engineering firm to prepare the plans for the design of the parking lot and the theater." The court further noted that:

> "as in *Oxbow*, here the parking lot and the theater were constructed at the same time, and, as the trial court observed, "were built together on the same vacant parcel of land." In the end, Cinema West's attempt to segment the development into separate components so as to avoid application of the PWL to construction of the theater is no more persuasive than the similar attempt made by the developer and city in *Oxbow*."

(*Cinema West, LLC v. Baker, supra*, 13 Cal.App.5th at p. 213.)

Applying the same *Oxbow* analysis to the facts here yields the same conclusion. Under a single contract, both the on-board work and the field installation work are integral to the operation of the completed project (i.e., the PTC system). Here, the $116 million Metrolink-Parsons general contract was a single contract with a single contractor for what is undeniably a public work—the construction and installation of a single Positive Train Control ("PTC") system described as "an integrated command, control, communications, and information system." (VI-ER-1296.) The PTC system relies on the "successful integration of many complex products, . . . with systems and components located on trains, at wayside locations including signals, terminals, yards, communication sites, and at centralized train control centers all linked through a highly reliable communications network." (VI-ER-1296.)

Further, it was admitted that Wabtec's work, including the work performed by plaintiff performed at the same time and in the execution of the Metrolink Contract performed at the yard site. (VII-ER-1338.) Parsons was required to build and install the system "through a single advanced technology" per a single contract. (VI-ER-1296.) The contract contemplated several different types of work, including the installation of PTC equipment on all 57 cab cars and 52 locomotives in the Metrolink fleet ("on-board work"), as well as extensive equipping of the "wayside" (the area along the side of the tracks). (IV-ER-781; VI-ER-1313-15; VII-ER-1554-57, 1561.) The work performed along the wayside—which the contract characterized as "field installation work" (VI-ER-1140; VII-ER-1505)—included trenching, welding, installing towers for radio antennas, driving forklifts, and operating cranes. (VII-ER-1555-57.) The successful integration of both the on-board work and the field installation work was critical to the ultimate functioning of the PTC System. (VI-ER-1130; VII-ER-1566-68; VIII-ER-1738, 1739-40.) In addition, the Wabtec subcontract expressly incorporated the portions of the Metrolink-Parsons general contract requiring the payment of a prevailing wage further demonstrating the integrated nature of the two contracts with respect to the obligation to pay prevailing wages. (VI-ER-1227, 1286; see also VII-ER-1339.)

II. PLAINTIFF'S TEST IS SIMPLY THE APPLICATION OF EXISTING LAW

Without reference to facts, documents or evidence in the record, amici argue that plaintiff's analysis is flawed because "the work being performed is not integral" to the Metrolink contract, or that "Plaintiff's work was not necessary for the completion of the field work." (Amicus brief, p. 19.) First, the arguments are contrary to the evidence just summarized. Second, whether plaintiff's work was integral to the field work is not the test, but rather whether the work was integral to the completion of the "entire process" contemplated by the Metrolink contract. (*Priest v. Housing Authority,* supra, 275 Cal.App.2d at p. 756.)

Nor is there any evidence that general application of existing statutes and case law, as cited by plaintiff, creates uncertainty or increase costs to awarding bodies. For over 80 years the PWL has been applied by such agencies to contract for completion of large public works such as this project. The application of the law here required payment of prevailing wages.

Moreover, awarding agencies have powerful tools available to them to obtain preconstruction coverage determinations from the Director of the Department of Industrial Relations ("DIR") pursuant to Title 8 of the Cal. Code of Regulations. (See, Cal. Code Regs., tit. 8 §16100 et seq. CCR §16202, 16302.) Pursuant to these regulations an awarding body may obtain coverage determinations or special wage determinations from the DIR, before projects are advertised. (Ibid; see also *Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 126 ["The failure to request a special determination was the fault of the [awarding body] and/or the contractor; it was not the fault of the workers whom the prevailing wage laws were designed to protect."].)

As explained in *Bennett v. Simplexgrinnell LP* (2014) U.S. Dist. LEXIS 28326, *24-25, "[i]n light of the purpose of the prevailing wage laws, which is to "protect and benefit employees on public works projects," Plaintiffs have the absolute right to sue

SimplexGrinnell for its failure to pay them prevailing wages for the work at issue even if the contracts under which the work was performed did not state that prevailing wages would apply to such work, and even if the contracting parties never sought a determination from the Director as to the applicability of the prevailing wage law. (See *City of Long Beach v. Dep't of Indus. Relations* (2004) 34 Cal.4th 942, 949-50 [holding that "[t]he overall purpose of the prevailing wage law is to protect and benefit employees on public works projects" and the law must be construed liberally in light of such purpose.].)

III. CONCLUSION

As stated in the applicable regulation, the role of the awarding body is to "ensure" that public works projects are not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of Labor Code Section 1771. (Cal. Code Regs. 8 § 16100(b).) Here, the district court's ruling effectively did what the regulation prohibited by ignoring the integral nature of the Metrolink contract and permitting Wabtec to avoid application of the PWL.

Dated: September 30, 2019

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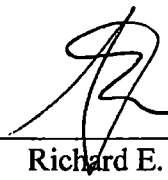
By  for

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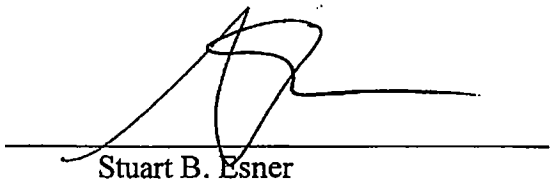

Stuart B. Esner

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **PLAINTIFF'S COMBINED ANSWER TO AMICI CURIAE BRIEFS OF SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY AND LEAGUE OF CALIFORNIA CITIES AND OTHER GOVERNMENTAL ASSOCIATIONS,** on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

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☒ BY ELECTRONIC SERVICE VIA FILE & SERVEXPRESS Based on a court order, I caused the above-entitled document(s) to be served through File & ServeXpress at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the File & ServeXpress Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 30, 2019, at Pasadena, California.

Marina Maynez

SERVICE LIST

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Supreme Court of California
(S251135 | 17-55165 | 2-5-cv-08194-ODW-AFM)

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