S251135

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN BUSKER,
Plaintiff and Appellant,

V.

WABTEC CORPORATION, ET AL.,
Defendants and Respondents.

SUPREME COURT
FILED
MAY 15 2019
Jorge Navarrete Clerk
Deputy

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

In his opening brief on the merits, plaintiff John Busker first described why his work installing necessary components of the Positive Train Control systems ("PTC") on locomotives as part of the subcontract between his employer Wabtec and Parsons, was "in the execution" of the general contract between Parsons and Metrolink calling for the installation of the PTC system in its entirety. Since that general contract was indisputable a public works contract, plaintiff was entitled to a prevailing wage under Labor Code section 1772. As explained, this provides the most narrow means for this Court to resolve the prevailing wage issue that is at the core of this action. In its answer brief, defendant Wabtec elects to reverse the order of its discussion addressed in the opening brief, so that it starts with the issue whether the Wabtec subcontract standing alone, and without considering its relationship to the Parsons-Metrolink general contract, fell within the statutory definition of a public works contract. In this reply, plaintiff will respond in the order the issues raised in the opening brief, beginning with an explanation as to why Wabtec fails to undermine the application of section 1772. Plaintiff will then explain why the work he was performing installing the PTC equipment, is a public work under Labor Code section 1720 even if the Wabtec subcontract is viewed in isolation.

ARGUMENT

I. NOTHING WABTEC ARGUES UNDERMINES THAT, SINCE THE WABTEC-PARSONS SUBCONTRACT WAS AN INTEGRAL PART OF THE PUBLIC WORK BEING PERFORMED UNDER THE PARSONS CONTRACT, LABOR CODE SECTION 1772 ENTITLED PLAINTIFF TO A PREVAILING WAGE FOR HIS WORK UNDER THAT SUBCONTRACT.

A. The Work Plaintiff Was Performing Was "In Execution" Of The General Contract Between Parsons And Metrolink.

As explained in the Opening Brief, a number of California cases have concluded that under section 1772, the critical inquiry in determining whether one's work on a subcontract "'in the execution of [a] contract for public work' (§ 1772) [is] whether [the subcontractors] were . . . conducting an operation truly independent of the performance of the general contract for public work, as opposed to conducting work that was integral to the performance of that general contract.'" (*Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 752; *see also O. G. Sansone Co. v. Dep't of Transp.* (1976) 55 Cal.App.3d 434, 445; *Sheet Metal Workers' Int'l Ass'n, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 212-14.) This standard is met here because Busker's installation of PTC equipment on locomotives so that the installed equipment could communicate with the corresponding PTC equipment installed by Parsons on the track wayside, was required to be performed under the general contract and was *integral* to the functional completion of the public works aspect of the project.

Wabtec's answer brief is most notable for what it does not argue: Wabtec (1) does not contest that the Parsons-Metrolink general contract involved "public works" thus triggering the obligation to pay a prevailing wage; and (2) does not contest that without the work performed under the Wabtec-Parsons subcontract, the work performed by

Parsons on the wayside would have been worthless. Nor does Wabtec refute the basic principal long established by this Court that parties to a public works contract cannot structure the contract to avoid paying a prevailing wage. In *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 993, this Court reasoned that "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. (*Id.* at pp. 987–988.) The Court held that such circumvention conflicts with the law: 'To allow this would reduce the prevailing wage law to merely an advisory expression of the Legislature's view.' (*Id.* at p. 988. . ..)" (*Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 550.)

Wabtec instead takes vacillating positions in its answer brief as to when a subcontract is "in the execution of any contract for public work" under section 1772. Wabtec first takes the remarkable position – not accepted by any published decision -- that in determining whether a subcontract is "in the execution of any contract for public work" under section 1772, that subcontract standing alone must be a public works contract. Even though the term "in the execution" has been interpreted by numerous cases, Wabtec relies on dictionary definitions of the word "execution" as meaning "'[t]he act of carrying or putting into effect'" or to "'perform or complete'" a contractual duty and argue that the work plaintiff was performing was "placing equipment on a public work, which is not a public work." (AB 43.)

Wabtec then references that section 1772.1's general definition of "contractor" and "subcontractor" "include[s] a contractor, subcontractor . . . . or representative thereof, acting in that capacity, when working on public works . . ." and argues that this proves that subcontracts must be analyzed independently from general contracts. Therefore, Wabtec stakes the position that only those subcontract which, standing alone, would be a public work, falls with the PWL.

Wabtec overreaches. Initially, by isolating its focus on section 1772's use of the word "execution" to argue that a prevailing wage must be paid only on those subcontracts which are independently a public work, Wabtec ignores that section 1772 also uses the

word "deemed." That section provides: "Workers employed by contractors or subcontractors in the execution of any contract for public work *are deemed* to be employed upon public work. (Italics added.) The use of "are deemed" indicates that the Legislature intended that, even if the work being performed under a subcontract would not be a "public works" standing alone, it could still be "deemed" a public work, if the terms of that statute were satisfied. (See *People v. McCall* (2004) 32 Cal.4th 175, 188 ["[T]he definitional phrase 'shall be deemed' is a legislative staple that appears in thousands of California statutes. . . . . to define one thing in terms of another."] Wabtec's interpretation of section 1772 utterly ignores that section's use of the phrase "are deemed."

Moreover, under Wabtec's position, section 1772 would mean exactly the same thing as Labor Code section 1771, thus rendering section 1772 mere surplusage. Section 1771 provides in pertinent part that a prevailing wage "*shall be paid to all workers employed on public works*." (Italics added.) As explained in the opening brief, such a construction, rendering section 1772 superfluous, contravenes fundamental principles of statutory consultation. (OB 32-33.) To avoid this truth, Wabtec argues that section 1772 adds something missing in section 1771 because section 1771 does not define what "'employed on a public works' means." (AB 46.)

But, if section 1771 is deficient because it does not define what employed on public works means (as Wabtec argues), then exactly the same thing could be said about section 1772. That section likewise does not define what employed on a public work means. Wabtec nevertheless argues that section 1772's use of the word "execute" ("execution" is the actual word used) fills that gap because the use of that word means that a contract or subcontract to "complete . . . a public work. Being 'employed on public works' does not merely mean doing work related to public works." (AB 46.)

Thus, Wabtec conjures a definition of the word "execution" used in section 1772 and argues, that under that obscure definition, section 1772 means something different than section 1771 because section 1771 uses the word "employed" while section 1772 uses the word "execution." Wabtec's analysis fails. If the Legislature simply intended

section 1772 to add a definition of "employed on public works" that was missing in section 1771 it would have done so in a much more direct way than the mere use of the word "execution."

The published decisions in this area – including the ones cited by Wabtec – directly contravene the argument that the Legislature intended its use of the word "execution" in section 1772 to have the obscure meaning Wabtec seeks to give it. For example, Wabtec asserts that "Courts interpreting section 1772 have held that only work that is 'integrated into the flow process of construction' of a public work can be deemed to be done in execution of a public work." (AB 46.) Wabtec then launches an extended discussion of *Sheet Metal Workers' Int'l Ass'n, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192. But, this very argument is antithetical to what Wabtec just finished claiming. Just because a subcontract is "integrated into the flow of process of construction" does not mean that the subcontract standing alone would be a public works contract. That is why the cases in this area (largely relating to hauling to or from the work site or off-site fabrication) have developed such a nuanced analysis to decide whether work under a subcontract is a public work -- even though, the subcontract viewed in isolation would not constitute a public work.

In other words, at certain points in its brief, even Wabtec seems to accept that under section 1772 it is the relationship between the work performed under the public works general contract and the work performed under the subcontract that determines whether the employees of the subcontractor are entitled to a prevailing wage. Wabtec then switches gears and argues that the work under the Wabtec subcontract here "was not part of – let alone integrated into – 'the flow process of construction' of the field installation work. Placing the equipment on the trains did not contribute to completing the work on the wayside." (AB 46; see AB 45 [Under the purpose of the prevailing wage law "a subcontractor who employs a worker to do work unnecessary to the completion of a public work is not required to pay a prevailing wage."].)

Of course, whether that is the case depends on how one defines the word "completion." According to Wabtec the focus must be placed exclusively on the *physical*

completion of that aspect of the general contract's work which constitutes a public work. Case law in this area establishes that this is not the case. For instance, in *Duncan*, the lead case on which Wabtec relies, the issue was whether a subcontractor who fabricated materials which were to be then used by the general contractor, was required to pay a prevailing wage when that subcontracted work was at "a permanent offsite manufacturing facility that is not exclusively dedicated to the project." (*Ibid.*) The court agreed with the administrative appeal decision that "'prevailing wages do not apply to work performed at a permanent fabrication plant when the location and existence of the plant are determined wholly without regard to any particular public works project.'" (*Id.* at p. 198.)

The manner in which the *Duncan* court resolved the issue demonstrates why Wabtec is wrong. If the test for determining whether subcontracted work falls under section 1772 was dependent on whether the subcontractor's work was physically used to complete work at the general contract site, the *Duncan* court would simply have considered whether the materials fabricated by the subcontractor in that case were used by the general contractor at the work site and was integral to the work of the general contractor. Under this standard, the *Duncan* court would have found that the subcontract was a public work.

The fabricated materials were used at the work-site and were necessary to the completion of the project. But the court did not say that. Rather, the court concluded that the act of fabricating materials under a subcontract could be a "public work" if -- but only if -- the general contract for a public work was responsible for the location or existence of the fabrication facility.

Thus, *Duncan* teaches that, in order to determine whether a subcontract is a public works under section 1772, it is the relationship between the general contract and the subcontract that is important. It is not simply whether the subcontractor's work product was used at the general contractor's work site. In particular, the critical fact is whether the employees working on the subcontract were engaged in conduct that was (and could only be) exclusively dedicated to the completion of the general contract. This case of course does not involve an off-site "fabrication case." Plaintiff did not work at a

manufacturing facility that made the positive train control ("PTC") components that were ultimately installed at the project. But adapting the "exclusively dedicated" analysis here leaves no doubt that, under *Duncan*, Wabtec's work under the Parson's subcontract falls within section 1772.

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 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.)

Indeed, here plaintiff performed work at the very Metrolink facility designated as the worksite in the Parsons-Metrolink general contract. This case is therefore not a remote work site case. (VIII-ER 1712.)

Thus, the work involved here was exclusively dedicated to the completion of the project that in turn was concededly a public work. The issue here is whether that work was nevertheless exempted from the prevailing wage laws because it was performed remote from where defendants contend the "construction" was taking place. Again *Duncan,* recognizes, the remote location of the work is not dispositive of section 1772. Otherwise, that would have been all the *Duncan* court needed to say. Rather than a thoughtful 22-page opinion analyzing the issue as to the nature of the facility where the fabrication occurred, the *Duncan* Court would have focused on whether the fabricated materials were used at the work site and were integral to the work being performed by the general contractor.

Further proof that defendants' cramped view of "integral" is wrong stems from *Duncan's* discussion of the hauling cases (which were also cited in the Opening Brief). That discussion leaves no doubt that the work performed by subcontractor Wabtec was "in the execution of any contract for public work" under section 1772. As the *Duncan*

Court's discussion of these cases reflect, the key to whether the act of hauling materials was or was not "in the execution of any contract for public work" under section 1772 was dependent upon (1) whether the materials being hauled were "generic" in nature and had no relation to the public works contract and (2) whether the act of hauling was required under the general contract.

Here, the PTC equipment being installed by Wabtec was anything but generic in nature. And not only was that installation expressly required under the general contract – it was absolutely critical to the completion of that contract. Indeed, Wabtec's own witness designated to testify about prevailing wages, expressly agreed that "[t]he work done by Wabtec's employees on the project *was [in] execution of the Parson's contract.* . ." (VII-ER-1337-1338, italics added; *Id.* at 335.)

B. Wabtec's Reliance On DIR Letter Opinions Fails.

1. The DIR has itself determined that its decisions are not entitled to precedential effect – which is exactly what Wabtec seeks to do.

Throughout is answer brief, Wabtec relies on DIR letter opinions. With respect to its analysis of Labor Code section 1772, Wabtec argues that the DIR has rejected plaintiff's position "in factual circumstances indistinguishable from those here." (AB 48.) Wabtec first cites to two abbreviated DIR opinion-letters containing virtually no analysis (ER 1239-1240) that conclude that the work installing equipment in those cases was not a public work under section 1720. Neither letter references section 1772, let alone engages in any analysis if the work there involved was in the "execution of any contract for public work" under that section.

Wabtec then cites to a more recent decision relating to boat removal work. (AB 49.) Again, it is hard to see how this has anything to do with the issue here. Further, and more importantly, these decisions should be given no precedential effect under both the DIR's view and this Court's precedents.

In *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 302–303, the Court considered whether tax credits provided by the state to facilitate construction of low-income housing meant that the project was "paid for in whole or in part out of public funds" as to render the project a public works under section 1720. The Court considered the impact opinions of the Director of the Department of Industrial Relations had on the resolution of this issue. In concluding that those opinions should not be given any particular deference, the court first recognized that 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, 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.)[1]

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

[1] "The APA requires that an agency comply with the notice and comment procedures for formalizing a regulation and the failure to do so voids the regulation. (Gov.Code, § 11340.5, subd. (a); *Tidewater*, supra, 14 Cal.4th 557, 568, 59 Cal.Rptr.2d 186, 927 P.2d 296.) "A regulation subject to the APA ... has two principal identifying characteristics. [Citation.] First, the agency must intend its rule to apply generally... . Second, the rule must 'implement, interpret, or make specific the law enforced ... by [the agency]... .) " [Citation.] The first is a test of the generality of the agency's promulgation; the second is a test of the conformity of the interpretation with the statute interpreted." (*California Grocers Assn. v. Department of Alcoholic Beverage Control* (2013) 219 Cal.App.4th 1065, 1073.)]

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 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.) Wabtec does not and cannot 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. Webster's defines "precedent" as meaning "something done or said that may serve as an example or rule to authorize or justify a subsequent act of the same or an analogous kind." (https://www.merriam-webster.com/dictionary/precedent.) That is precisely what Wabtec seeks to do, here. No matter what characterization Wabtec prefers to use, it seeks to imbue the DIR opinions with precedential effect.[2]

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[2] Wabtec later argues that DIR decisions are exempt from the APA, citing to section 1773.5, subdivision (d). (AB 26.) Regardless whether the scope of that section is as broad as Wabtec argues (see *Vector Resources, Inc. v. Baker* (2015) 237 Cal.App.4th 46, 55) it does not alter the fact that the DIR has expressly determined that decisions such as the ones on which Wabtec relies, are not entitled to precedential effect.

2. It is the courts and not the DIR that are in the best position to resolve the statutory interpretation issues raised here.

In its effort to have this Court give weight to its chosen DIR letter opinions, Wabtec continues that "the Department's interpretation 'is entitled to consideration and respect by the courts.'" (AB 36.) However, while the Department has special expertise in administering the prevailing wage law, as Wabtec argues, that does not mean that it necessarily has special expertise in interpreting the meaning of certain provisions embedded in Labor Code statutes. That is especially true as to the statutory provisions which are presently before this Court which the Ninth Circuit has agreed are sufficiently uncertain under California law to justify certification to this Court.

As the court in *State Building & Construction Trades Council of California v. Duncan, supra,* 162 Cal.App.4th at p. 304, explained, the most important reason why it concluded that the DIR opinions in that case would not be deferred to by the court was because "the nature of the issue before us involves the quintessential judicial function. Because the issue here is a pure one of statutory interpretation, this is not a situation where the administrative agency has a comparative interpretative advantage over the courts. [Citations.] Statutory language is not something "where the materials are technical and engage an agency's expertise." [Citation.] To the contrary, it is the judiciary which has the ultimate authority for determining the meaning of a statute. (*Yamaha*, supra, at pp. 11–12, 78 Cal.Rptr.2d 1, 960 P.2d 1031; *Culligan Water Conditioning v. State Bd. Of Equalization*, supra, 17 Cal.3d 86, 93, 130 Cal.Rptr. 321, 550 P.2d 593 [the ultimate resolution of ... legal questions rests with the courts]; *Morris v. Williams* (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 433 P.2d 697 [Whatever the force of administrative construction ... final responsibility for the interpretation of the law rests with the courts.]; see Cal. Const., art. III, § 3.5 [only appellate courts, not administrative agencies, can declare laws invalid].)" (*Id.* at p. 304, internal quotation marks omitted.)

Precisely the same thing is true here. The first issue being discussed in this brief concerns the meaning of "in the execution of [a] contract for public work" contained in section 1772. The second issue concerns the meaning of "installation" contained in section 1772 and whether there is an invisible "rolling stock" exception to that section. Each of these are pure issues of statutory interpretation which this Court is uniquely qualified to resolve.

3. The DIR's vacillating position is not entitled to deference.

Wabtec misconstrues the record below, claiming that the DIR mistakenly issued the Civil Wage and Penalty Assessment and later withdrew it only because an "investigator" had "misread" the contract. (AB 15.) In fact, the Division of Labor Standards Enforcement ("DLSE" or "Labor Commissioner") issued the wage and penalty assessment through its Senior Deputy Supervisor because it was the "the opinion of the DLSE, and you as the senior deputy supervisor, specifically, that it was the appropriate thing to do . . ." (X-ER-2056.) Indeed, the record evidences that the DLSE's decision to assess the wages and penalties came only *after* repeated correspondence and communications between the DLSE and counsel for Wabtec, Parsons and Metrolink - all who argued Wabtec's work was not covered (X-ER-2055) - and after communications between Senior Deputy Supervisor Madu and DLSE counsel David Cross "advising whether the case as to pursue or not." (X-ER-2056.) Ultimately, in spite of "a lot of communications about whether to pursue this case in light of all these arguments" the DLSE made the decision to issue the multimillion-dollar wage and penalty assessment. (Ibid.) Only later, after lobbying by Wabtec Parsons and Metrolink, the DLSE released the assessment without making any coverage determination. (III-ER-346; VII-ER-1418-22, 1428-29, 1432-34, 1436-40, 1455-59; X-ER-2079-88, 2090-2105; 2107-10.)

The record reasonably infers a lobbying effort by Wabtec, Parsons and Metrolink to obtain a release of the assessment. (VII-ER-1418-20, 1428-29; X-ER-2107-10.) Accordingly, on March 14, 2016—the same date that the Court denied Busker's motion

to remand the class action to state court—the DLSE issued a full release of the Civil Wage and Penalty Assessment. (III-ER-346; VII-ER-1428-29, 1432-34, 1438, 1459.) Assistant Chief Rood acknowledged that "it looked like" Wabtec was obligated to pay prevailing wages. (VII-ER-1421-22; see also VII-ER-1436-40, 1456) but DLSE closed its file because it was aware of Busker's pending class action and knew that the coverage question would be determined there. (VII-ER-1421-22, 1455-59.) As Assistant Chief Rood put it, "Let them resolve it . . . in the civil court." (VII-ER-1456.)

Further, Wabtec misleads when it states "Plaintiff did not appeal the release of the penalty." (AB 17.) In fact, nothing in the record shows that Plaintiff had notice of assessment itself, let alone the parties' lobbying effort, the DLSE settlement meeting, the release, or of any right to appeal the release.

Given the DIR's vacillating positions and refusal to rule, this Court should give no judicial deference to any DIR or any DLSE "policy" at all. "Put more bluntly, '"[a] vacillating position . . . is entitled to no deference.'" (*State Bldg. & Const. Trades Council of Cal.*, 162 Cal. App. 4th at 303 (quoting *Yamaha*, 19 Cal. 4th at 13.)

4. The Legislature has not acquiesced in the DIR's interpretation claimed by Wabtec.

Finally, Wabtec argues that "[t]he Legislature has demonstrated its acceptance of the Department's interpretation." (AB 37.) Wabtec points to a series of legislative amendments the public works statutes and argues, "[b]ut the Legislature has never sought to override the longstanding administrative rule that excludes rolling stock." (AB 38.) As described below (at pages 26-29), this argument is built on the misnomer that there has been in fact a longstanding administrative exclusion of "rolling stock" – even though the Legislature has never enacted such an exemption and no such regulation has ever been promulgated. There is no such administrative exclusion.

In any event, the DIR would not have been entitled to enact an express exemption (such as the rolling stock exemption on which Wabtec relies) absent any statutory

language even arguably supporting such an exemption. "'It is fundamental in statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' Thus, when administrative rules or regulations 'alter or amend the statute or enlarge or impair its scope,' they 'are void and courts not only may, but it is their obligation to strike down such regulations. (Citations.)' (*Morris v. Williams* (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 699, 433 P.2d 697, 707.)" (*J. R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 29; *Monterey Coastkeeper v. State Water Resources Control Bd.* (2018) 28 Cal.App.5th 342, 370 ["'Where an agency's interpretation contradicts or alters the terms of a statute, it is entitled to no deference. (*Traverso v. People ex rel. Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1206–1207, 54 Cal.Rptr.2d 434.)' [Citation]"].)

C. Wabtec's Remaining Argument Regarding Section 1772 Are Based Upon Mischaracterizations Of Plaintiff's Position To Conjure An Imaginary Parade Of Horribles.

Wabtec next mischaracterizes plaintiff's positions and then proceeds to refute arguments plaintiff never made. First, Wabtec argues that "[n]othing in the statute provides that *all* work in a single contract that contains *some* public work be deemed public work." (AB 50.) That is not plaintiff's position. Rather, plaintiff's position is that when there is a general contract for a project that unquestionably is a public works project, then a subcontract calling for work which was (1) exclusively dedicated to and (2) necessary for the completion of the public works general contract is "in execution of that public works contract," under section 1772. Plaintiff is not arguing that so long as a general contract contains some public work, then every subcontract entered into by the general contractor is also a public work regardless whether the subcontract was integral to the completion of the aspect of the general contract constituting a public works. Thus, it is not plaintiff's position that "[j]ust because" Wabtec's work was contained in a

general contract that included public works, then that work was also a public work. Wabtec's argument is simply a strawman.

Wabtec next argues that plaintiff's position regarding the necessity of the work Wabtec was performing to the completion of the public work that was being performed on the way side "has no basis in law." (AB 51.) But, in attempting to explain why this is the case, Wabtec engages in sleight of hand by relying on authorities that do not address the issue. For example, Wabtec relies on cases concerning the "the scope of section 1720. . . ." (*Oxbow Carbon & Minerals, LLC v. Department of Industrial Relations* (2011) 194 Cal.App.4th 538, 547.) There was no mention of section 1772 in that opinion. For purposes of this discussion, this absence renders *Oxbow* irrelevant, especially in a case where it is undisputed that the work on the wayside was a public work.

Likewise, Wabtec's claimed confusion as to the meaning of the term "PTC system" under the Parsons-Metrolink contract to argue that plaintiff's position would lead to chaos (AB 52) is another red herring. Whether the term "PTC system" is or is not clearly defined under the general contract, is irrelevant for purposes of engaging in a section 1772 analysis here.[3] Rather, what is important is the relationship between the PTC work on the wayside which was unquestionably a public work, and the work Busker was performing installing the PTC equipment on locomotives. If there is other work under the general contract that is also characterized as part of the "PTC system" as that terms is defined in that contract, and that work is not sufficiently connected to the work on the wayside to fit within section 1772, then the employees performing that work perhaps would not be entitled to a prevailing wage. However, that would not mean that

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[3] In the general contract, the PTC system is expressly defined. The term "system" is defined as "The positive train control system (inclusive of a dispatch system) to be designed, furnished, and *installed* by Vendor /Integrator [Parsons] under this Agreement, as described in Exhibit A to this Agreement, including without limitation each, every, and all systems, subsystems, components, constituent parts (whether hardware, software, or anything else) -including without limitation Third Party Software and Vendor /Integrator Software." (AB 53, emphasis added.)

Busker would likewise not be entitled to a prevailing wage. Rather, it is the nature of the particular work Busker was performing and the relationship of that particular work to the work that was being performed on the wayside, that controls here.

Next, Wabtec predictably revives its "flood-gates" argument, claiming that plaintiff's position has "no discernable limiting principle." (AB 54.) As reflected by the cases concerning subcontracts for hauling and offsite fabrication, the courts have developed a standard for determining whether the work under those subcontracts are sufficiently connected to the on-site public works under general contract to entitle the employees to a prevailing wage. This case is no different. Of note, Wabtec's "physical completion" standard raises the same concerns it accuses plaintiff's position of creating. No matter what standard is adopted, it can and may be crafted in a way to avoid absurd results. This is not a reason to decline to address this project under this general contract or to create a standard in the first place.

Wabtec next recites a series of examples, but none of those examples involve subcontracts for work required under a general contract that called for the completion of a public work. The issue here is not simply whether the work Wabtec was performing was practically necessary for Parson's work to be operational. Rather the issue here is whether Wabtec's work which was directly required to be performed under the Parson's general contract and was integral to the completion of the public work's project called for under that general contract.

Wabtec argues that *Oxbow Carbon & Minerals, LLC v. Dep't of Indus. Relations* (2011) 194 Cal.App.4th 538, 549 nor *Cinema W., LLC v. Baker*, *supra*, 13 Cal.App.5th at pp. 210–15, are of no aid to plaintiff because (as plaintiff already acknowledged) those cases do not interpret section 1772 but rather involve the issue whether a prevailing wage must be paid for work on that portion of a project paid for with private funds when an aspect of that project is also paid with public funds.

But these cases at least provide an apt analogy. For present purposes, the point of both of those cases is that (1) based on the broad general goals of the prevailing wage law and (2) based on the principle that parties cannot structure their contracts to avoid paying

a prevailing wage, the work performed with the private funds in those cases was also a public work. In *Oxbow*, it was the work to enclose the storage facility that was necessary for there to be a functioning enclosure of open-air coke storage facilities. In *Cinema West* it was the construction of a theatre, when public funds were used to construct a parking lot adjacent to the theatre.

Ultimately, the Courts in both cases agreed that the proper rule is whether the work completed with the private funds (which, if viewed separately, would not be a public work) were necessary to the completion of the public work aspect of the project. While this analysis was not undertaken under section 1772, these cases are testament to the fact that, in determining what aspects of a project should be considered to be a public work (even if they would not meet the standard on its own), the relationship to the project as a whole must be considered. Otherwise, parties would be able to contract around their obligation to pay a prevailing wage. In these cases the defendants sought to avoid paying a prevailing wage because the employees' work was performed under a privately funded contract that was separate from the public works contract. Here, of course, plaintiff's work was under a publicly funded subcontract that was critical to the completion of the general contract. But this distinction only serves to strengthen plaintiff's position here.

Contrary to what Wabtec seems to argue, these cases are not based entirely on the fact that in defining "public work" section 1772 references a "contract and paid for in whole or in part out of public funds." In both of those cases, the particular contracts in question were not paid out of public funds at all. Nevertheless, the Courts focused on the integral relationship between those contracts and the contracts which were publicly funded, to conclude that the subject contracts were also public works.

Thus, as these cases conclude, the test should not be whether the subject work was necessary for the physical completion of the public work. *Rather, the test should be whether the subject work was required to be performed under the general contract and was integral to the functional completion of the public works aspect of the project.* These cases further directly undermine Wabtec's flood gate argument. Those very same arguments apply equally (if not more forcefully) in the setting involved in *Oxbow* and

Cinema West (where the work at issue was under a separate contract that was not publicly funded) yet those courts crafted a standard that was not dependent upon physical completion. This case should be treated no differently.

In short, nothing Wabtec argues negates that plaintiff's work installing the PTC equipment on locomotives was "'in the execution of [a] contract for public work" under section 1772. This provides an independent reason why plaintiff was entitled to a prevailing wage.

II. THE TEXT, STRUCTURE AND PURPOSE OF THE PWL DO NOT ESTABLISH EITHER THAT WORK ON A TRAIN CANNOT BE A PUBLIC WORK OR THAT WORK MUST ALWAYS BE ATTACHED TO REALTY TO BE A PUBLIC WORK.

As explained, Wabtec re-orders the arguments raised in the opening brief, beginning with the issue whether the Wabtec subcontract was a public works contract when viewed independently from the Parsons-Metrolink general contract. Wabtec begins its legal analysis of this issue with an argument that vacillates between two competing positions: (1) public works must be attached to realty and (2) public works can never be performed on "rolling stock." (AB 18.) At the outset it's worth noting that these two positions are, by their very nature, mutually inconsistent. If, as Wabtec argues, public works must be attached to realty, then there would be no need for there to even be a supposed rolling stock exception as such work, by definition, cannot be attached to realty. In any event, Wabtec ignores what must be the first step in any analysis of section 1720. "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (*Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 985.) Given this overarching purpose, courts are to construe the prevailing wage law liberally. (*City of Long Beach v. Dep't of Indus. Relations* (2004) 34 Cal.4th 942, 949-50.) Wabtec takes just the opposite approach, attempting to use statutory construction to support its cramped interpretation. Wabtec fails.

A. Public Works Need Not Always Be Attached To Realty.

Wabtec launches its discussion of this issue with selected quotes from standard dictionaries, which according to Wabtec, establish that the term "public work" means "work on realty." (AB 18.) These definitions have little relevance here. "To seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, in the legal and broader culture. Obviously, a statute has no meaning apart from its words. Similarly, its words have no meaning apart from the world in which they are spoken." (*State of California v. Altus Finance* (2005) 36 Cal.4th 1284, 1295–1296, internal quotation marks omitted.) Thus, while definitions of words which are contained in dictionaries that are published at or about the time a statute was enacted may be appropriate to understand the meaning of the words used (*California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 167–168), *that is not the case when the statute itself defines the very term in question.* (*Outfitter Properties, LLC v. Wildlife Conservation Bd.* (2012) 207 Cal.App.4th 237, 244 ["We use the ordinary dictionary meaning of terms when terms are not defined in the statute. (3B Singer & Singer, Sutherland Statutory Construction (7th ed. 2007) Conservation and Environmental Legislation, 77:1, p. 250.)"])"]; *Hammond v. Agran* (1999) 76 Cal.App.4th 1181, 1189 ["[I]n the absence of specifically defined meaning, a court looks to the plain meaning of a word as understood by the ordinary person, which would typically be a dictionary definition."].)

Here, the term "public work," which Wabtec resorts to dictionaries to define, has been defined by the Legislature itself in several different ways and in several different places – including section 1720 itself. There is therefore no need to resort to the dictionary to define the term "public work" generally.

As explained, in the opening brief, the definition actually used by the Legislature in section 1720 – especially when compared to the definitions used for that same term

elsewhere – makes it evident that the Legislature did not intend to limit a public work to only those projects affixed to realty.

When the Legislature intends a definition of "public work" to be tethered exclusively to construction projects involving fixed works or realty on land as the district court ruled here, it knows how to accomplish that. (OB 38; see Gov. Code, § 4002; Public Cont. Code, § 1101.) The fact that the Legislature defined "public work" to mean only certain construction projects on realty or land (for purposes of the Chapter of the Government Code dealing with keeping costs accounts or the Part of the Public Contracts Code dealing with public contracts) is strong proof that when it enacted section 1720—and then amended that section to specifically add "installation"—it did not intend that section to have a meaning similarly limited to construction projects involving fixed works or realty on land.

Nevertheless, Wabtec argues that these statutes defining the same term ("public works") differently than that term is defined in section 1720 actually shows "that they share a common understanding of public works as construction projects on realty." (AB 23.) To support this argument – directly at odds with fundamental rules of statutory construction – Wabtec cites to a Senate summary concerning the 2001 amendment of the PWL statutes. In its description of existing law, this summary references the definition of a "public works contract" contained in Public Contract Code section 1101. (Wabtec-RJN E.) Wabtec cites no authority – none exists – that, when the Legislature references a definition contained in one statute in connection with an amendment a separate statute, that means that the Legislature intended the two statutes to have the same meaning – even though the Legislature elected to enact significantly different definitions in the two statutes. If anything, this proves just the opposite of what Wabtec argues. The Legislature was clearly aware of the definition of a public works contract in the Public Contracts Code, but nevertheless elected not to use the same definition here. Likewise, Wabtec's reliance on an Attorney General opinion (AB 23) for its only on reality argument, fails. That opinion referenced a host of statutory definitions of the term "public works contract" in the context of concluding that "[t]he Prison Industry Board's

power to establish procedures for the purchase of goods and services, as conferred by Penal Code section 2808(g), does not exempt the Prison Industry Authority from state laws governing public works contracts." (ER 2023.) This hardly has any bearing here.

Wabtec next argues that plaintiff's position "makes no sense" (AB 23) because Government Section 4003 requires an accounting as to "public works," and therefore if the term "public works" has different meanings under different statutes it will cause mass confusion.[4] Wabtec again imagines issues that do not exist. The obligation to perform an accounting under section 4003 arises only with respect to "public works" defined under that chapter of the Government Code. Section 4002 provides that "[a]s used in this chapter, "public work" means the construction of any bridge, road, street, highway, ditch, canal, dam, tunnel, excavation, building or structure within the State by day's labor or force account." If the Legislature intended the accounting required under section 4003 to also be required for "public works" as defined under provisions of other codes, it would have said that. It did not.

Wabtec's view of harmonizing different code section is to disregard the actual language used by the Legislature. This is antithetical to the maxim: "In construing a statute, our task is to ascertain the intent of the Legislature so as to effectuate the purpose of the enactment. [Citation.] We look first to the words of the statute, which are the most reliable indications of the Legislature's intent." (*People v. Cottle* (2006) 39 Cal.4th 246, 254.)

Next, Wabtec cites *Swanton v. Corby* (1940) 38 Cal.App.2d 227, 230 as supposedly clearly holding that section 1720 only applies to work which is fixed to realty. (AB 25.) But the fact that the lead case defendants cite is this 78-year-old opinion by an intermediate appellate court that concerns an entirely different statute (involving public bidding requirements) and does not purport to even discuss the meaning of public works under section 1720 is testament to the fact that defendants cannot find any true

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[4] Section 4003 provides: "The engineer directing, supervising or superintending the construction, or in charge of the engineering work for or in connection with public work shall keep an accurate account of the cost of the public work."

controlling authority that would render certification unwarranted. Not one of the meager five cases that have cited *Swanton* in the past 78 years (the latest being over 30 years ago) cite that opinion as standing for the broad principle defendants argue.

Wabtec next seeks to dismiss 2012 amendment to section 17200 which clarified that "installation" included freestanding modular furniture, arguing that this amendment does not apply to work prior to Wabtec's 2010. Wabtec ignores that this amendment was expressly made in order to reject DIR coverage determinations—including *Modular Furniture, County of Sacramento*, PW 2008-035 (DIR Nov. 242009), on which Wabtec relied below—that could be interpreted to mean that "installation" applies only to "bolting, securing, or mounting of fixtures to realty." (III-ER-524, 530-31, 541-42.) The Assembly Committee report leading to the enactment of this amendment explained that even after the passage of the earlier amendment of section 1720 to add the term "installation," the "DIR continued to apply the affixed/freestanding dichotomy in determining whether such work was covered by the prevailing wage law." (111-ER-531.) The proponents of the bill explained that the amendment was therefore "necessary because DIR's continued insistence in recent years on the affixed/freestanding dichotomy means that the intent of SB 975's addition of the term 'installation' has not been completely effectuated." (Id. at p. 532.)

Thus, the fact that this amendment was made in 2012 is of no moment. "An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute....[Citation.] (*Hudson v. Board of Administration*, supra, 59 Cal.App.4th at p. 1322, 69 Cal.Rptr.2d 737.)" (*In re Ret. Cases. Eight Coordinated Cases* (2003) 110 Cal.App.4th 426, 481, internal quotation marks omitted.)

Wabtec next references several Attorney General opinions plucking selected language to argue that public works must be fixed to realty. (AB 30.) As plaintiff explained in his opening brief, these opinions have nothing to do with the Legislature's amendment in 2001 adding "installation" to section 1720. Wabtec responds that the

amendment to section 1720 adding "installation" was intended to codify those opinions. No it was not. Rather, the documents from the legislative history of that amendment on which Wabtec relies, indicate that the Legislature intended to ensure that section 1720 would continue to have the expansive meaning included in DIR opinions recognizing that installation work would be a public work. (AB 31.)

Wabtec perversely argues that because the legislative history to this amendment -- which was expressly intended to ensure that the scope of the PWC would remain broad – referenced DIR decisions that happened to be in the context of work connected to realty - - then it must be the case that the only installation work which qualifies as a public work is likewise connected to realty. Never mind that not one of those DIR letters actually says that or offers any inkling that this was intended. Wabtec cites no authority for the proposition that, just because installation work was recognized as a public work by the DIR in one setting, that recognition negatively implies that installation work performed in every other setting is not a public work. No such rule of statutory construction exists.

B. Wabtec Fails To Establish That The Legislature Supposedly "Respected" The Agency's Longstanding Interpretation That Work On Trains Is Not A Public Work.

Wabtec next argues that (1) the DIR has a long standing rule that work on a train is never a public work and (2) the Legislature has supposedly codified that rule. (AB 26.) Neither of these things is true.

First there are no longstanding DIR opinions that make clear that no work on a train can be a public work. Rather, not one of the DIR opinions Wabtec cites states that there is a rolling stock exemption to public works. Rather, each of those abbreviated opinions simply concluded without analysis that the work performed in those particular cases was not a public work. (See opinions cited at AB 28.)

In any event, as already explained, those DIR opinions are not entitled to any precedential effect and in any event the DIR has no power to enact a rolling stock

exception to the PWC when the Legislature itself has not given any inkling it intended such an exception to exist.

Further, and in addition to these reasons, Wabtec's position should be rejected because it makes no sense. Wabtec offers no rationale why work which otherwise has all of the earmarks of a public work on which employees are entitled to a prevailing wage, is not a public work simply because it was conducted on rolling stock. This Court should construe statutes to avoid an absurdity whenever possible, not to create one. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290 ["Our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results."].)

Finally, Wabtec continues to reference deposition testimony of Ken Madu a Labor Commissioner with the DIR. (AB 28.) In that deposition testimony Mr. Madu states that there has been a longstanding rolling stock exception to the PWC. If it is the case that, as already explained, actual DIR opinions are not entitled to precedential effect, then it is certainly the case that the deposition testimony of a DIR commissioner – the ultimate example of an unlawful "underground regulation" -- carries no weight.

CONCLUSION

For the foregoing reasons and for the reasons explained in the Opening Brief on the Merits, the Court should conclude that plaintiff was entitled to be paid a prevailing wage under the Wabtec subcontract either because (1) that work was being performed in the execution of the Parsons general contract under section 1772 or (2) the work plaintiff was performing involved either installation of construction.

Dated: May 15, 2019

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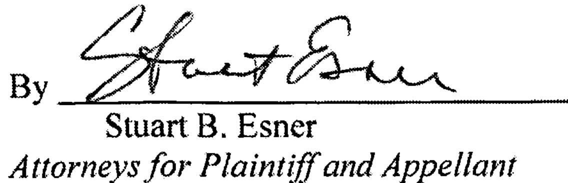
By 

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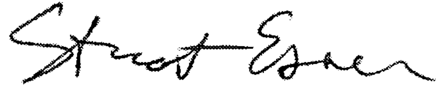

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PROOF OF SERVICE

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: **APPELLANT'S REPLY BRIEF ON THE MERITS**, 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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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 May 15, 2019, at Pasadena, California.

Marina Maynez

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John Busker v. WABTEC Corp., et al.

Supreme Court of California

(S251135 | 17-55165 | 2-5-cv-08194-ODW-AFM)

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