Case No. S251135

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN BUSKER

Plaintiff-Appellant,

v.

WABTEC CORPORATION, ET AL.,

Defendants-Respondents;

On Certification from 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

APPLICATION FOR PERMISSION TO FILE BRIEF OF *AMICUS CURIAE*; BRIEF OF *AMICUS CURIAE* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 11 IN SUPPORT OF PLAINTIFF-APPELLANT

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APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule of Court 8.520(f), International Brotherhood of Electrical Workers Local 11 ("IBEW Local 11") hereby applies for permission to file the *amicus curiae* brief attached to this Application.

I. INTEREST OF THE APPLICANT

IBEW Local 11 is an unincorporated association representing over 12,000 electricians in Los Angeles County. A significant portion of their work is on public-works projects, including projects for Metrolink, the contracting agency in this case. Those electricians, like all other workers on public works projects, deserve to be paid the prevailing wage, and the answers to the certified questions in this case will have a substantial effect on whether certain work is classified as subject to the prevailing wage under the Labor Code. In particular, IBEW Local 11's members have a significant interest in ensuring that public agencies and their contractors are not provided with legal loopholes to avoid paying prevailing wages for work, like the installation on trains in this case, that by law and logic should be included in the definition of "public works."

II. HOW THE PROPOSED AMICUS CURIAE BRIEF WILL ASSIST THE COURT

IBEW Local 11's attached brief points out the significant policies that animate the Labor Code's prevailing-wage requirements for public

works and shows why those policies mean that the statutory language should be construed in favor of broad, common-sense coverage, and should not be read in a way that permits carve-outs via non-statutory exemptions.

The proposed brief also describes IBEW Local 11's recent and ongoing experience in a dispute over prevailing-wage coverage. That matter illustrates the importance of ensuring that the Department of Industrial Relations makes appropriate coverage determinations that do not undermine the salutary purposes of the prevailing-wage law.

III. RULE 8.520(F)(4) DISCLOSURES

No party in this case authored any part of IBEW Local 11's proposed *amicus curiae* brief, nor made any monetary contribution toward its preparation or submission. No person or entity other than IBEW Local 11, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the attached *amicus curiae* brief.

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IV. CONCLUSION

For the foregoing reasons, IBEW Local 11 respectfully requests that the Court accept the attached brief.

DATED: July 15, 2019

BUSH GOTTLIEB, A Law Corporation

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PROPOSED *AMICUS CURIAE* BRIEF

I. INTRODUCTION

The Ninth Circuit's certified questions in this case—whether installation work performed on a train, rather than on land, is public work under Labor Code section 1720,[1] and whether that installation work was performed "in the execution of [a] contract" for public work under section 1774—provide this Court with an opportunity to reaffirm important principles of prevailing-wage law, namely (1) that the central purpose of the prevailing-wage requirements is the protection of workers on public-works projects, and (2) that because of that central purpose, the coverage of the prevailing-wage requirements should be broad. Further, to enhance the ability of workers to understand and enforce the law themselves and to vindicate their rights, the Court should strive to interpret the prevailing-wage requirements in clear, common-sense, logical ways that comport with the lived experience of workers, and avoid legalistic drawing of distinctions grounded more in fine linguistic parsing than on-the-ground reality.

Amicus Curiae International Brotherhood of Electrical Workers Local 11 ("IBEW Local 11") urges the Court to clearly express those important principles, and to apply them to this case by rejecting Wabtec's request for an exemption from prevailing-wage requirements for work done

[1] All statutory citations are to the Labor Code unless otherwise noted.

on "rolling stock," and by endorsing an understanding of section 1774 that focuses less on whether the disputed work is physically integrated with the indisputably public work, and more on whether the work is engaged in for the common purpose of the creation of an integrated object.

II. ARGUMENT

A. Protection of Workers is at the Heart of the Labor Code's Requirement of a Prevailing Wage on Public Works

As this Court has long recognized, "[t]he fundamental rule of statutory construction is that the court should ascertain the intent [of] the Legislature so as to effectuate the purpose of the law." *Select Base Materials v. Bd. of Equalization* (1959) 51 Cal. 2d 640, 645; *see also Carmack v. Reynolds* (2017) 2 Cal. 5th 844, 849 (same).

The Court has found that "[t]he overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." *Lusardi Constr. v. Aubry* (1992) 1 Cal. 4th 976, 985. The Court has also identified more "specific goals" that it found included under the larger worker-protection goal:

> 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.

Id. at 987. Thus, while Wabtec would have this Court focus on the increased usage of taxpayer and private business resources in complying with prevailing-wage requirements (Answer Br. 24–25), those interests are at best secondary to the worker-protection purposes of the law.

B. The Court Should Interpret the Statutory Language Broadly to Serve its Aims

The Court should resolve any doubts about prevailing-wage coverage in a way that honors the purposes of the statute. If the law might or might not be read to exclude work on "rolling stock" from the definition of "public work" in section 1720(a)(1), as Wabtec argues, then the worker-protection orientation of the legislation should lead to the answer that no such exclusion exists. Similarly, if the phrase "in the execution of the contract" in section 1774 might be read to refer literally and narrowly to the Wabtec subcontract, as Wabtec argues, or more broadly to refer to the contract with Parsons for a single integrated object, as Busker argues, then the goals of the statute should lead to the answer that causes more work to come under the statute's coverage. Such treatment is consistent with the longstanding recognition by the courts "that a prevailing wage statute should be liberally construed in favor of the worker . . . ." *Goodrich v. City of Fresno* (1946) 74 Cal. App. 2d 31, 36.

Metrolink's contract with Parsons was for over $100 million, entirely publicly funded, and concerned upgrades, including physical

construction, on a regional rail network. It was any layperson's idea of a contract for public work, to say nothing of the *law's* idea. The work at issue in this case, installation on trains, was similar in character to at least some of the work performed in the field, which nobody disputes was covered by the prevailing-wage law. To interpret the statute to exclude the on-board work for the sole reason that it was performed on something that moves rather than something fixed would elevate context-free, technical dictionary definitions over the statute's requirement that public funds be spent in ways that benefit the workers who build the state's infrastructure.

Putting the Court's imprimatur on Wabtec's non-statutory "rolling stock" exception is also sure to invite attempts by agencies and contractors to expand the scope of that exception and to assert new carve-outs based on linguistic parsing, resulting in further erosion of the statute's core purpose. Indeed, Wabtec's argument in this case illustrates the dangers well: It may be the policy of the state that a contract solely for the installation of seats on a train is not a contract for public work, but to apply that reasoning to find that substantially similar and integrated installation work performed in two different locations—by the track and on the train—should be paid at the prevailing wage in one place while being left to the vicissitudes of the labor market in the other would undermine the law's aims.

IBEW Local 11 is involved in a case in which a subcontractor is attempting to avoid liability for the prevailing wage by arguing to the

Department of Industrial Relations that the work—which the subcontractor admits is on a public-works project—is not itself public work. The subcontractor there is pointing to superficial distinctions between the way the work at issue is performed now, due to technological changes, and how it was performed in decades past. The argument in that matter is therefore different from Wabtec's here, to be sure, but it shares a common core of attempting to carve out coverage from a statute that should be applied broadly and without exception. It is thus an illustration of the substantial implications of approving Wabtec's "rolling stock" exception.

The same considerations apply to determining whether the on-board work was done "in the execution of the contract" for public work. The Ninth Circuit identified two possible tests, one asking whether the work "is integrated into the flow process of construction" and the other shifting the focus to whether the disputed work combines with clear public work to form a "complete integrated object." *See Busker v. Wabtec Corp.* (9th Cir. 2018) 903 F.3d 881, 886 (quoting *Sheet Metal Workers, Local 104 v. Duncan* (2014) 229 Cal. App. 4th 192, 206; *Oxbow Carbon & Minerals v. Dep't of Indus. Relations* (2011) 194 Cal. App. 4th 538, 549). The "flow process of construction" concept is overly narrow, focusing as it does on the physical work, rather than the object of that work, and thus will prioritize certain classes of work over others in a way the statute does not contemplate. There is no policy reason to elevate installation of electronic

equipment at trackside over the installation of counterpart equipment on trains, yet the "flow process" test would do just that.

Focusing on broad coverage will also eliminate incentives for agencies and contractors to structure their contracts in an attempt to avoid the prevailing wage. Here, for instance, the Metrolink-Parsons contract referred separately to trackside and on-board work, and Parsons then subcontracted the on-board work to Wabtec. Had the trackside and on-board work been dealt with in combined fashion in the prime contract, or been performed by the same workforce employed by the same employer, drawing a distinction between the two would be much harder. In *Lusardi Construction*, this Court held that parties could not simply contract away their prevailing-wage obligations; dividing and parsing coverage along contract and subcontract lines, as Metrolink, Parsons, and Wabtec are attempting to do in this case, is simply a subtler method of doing so. *See also Oxbow Carbon*, 194 Cal. App. 4th at 550 ("[T]he danger of Oxbow's argument is that if given effect, it would encourage parties to contract around the prevailing wage law by breaking up individual tasks into separate construction contracts.").

C. The Court Should Apply Simple, Straightforward Coverage Definitions

This Court has noted that "both the awarding body and the contractor may have strong financial incentives not to comply with the

prevailing wage law." *Lusardi Constr.*, 1 Cal.4th at 987. Enforcement of the law falls, in the first instance, to the workers themselves, as the Department of Industrial Relations can only act on matters brought to it. Those workers may or may not have union representation, and even unions may or may not have resources to devote to compliance. Statutory commands without enforcement are rendered merely advisory. Thus, it is of deep importance to the prevailing-wage scheme that workers subject to the law be able to hold their employers to their obligations. The first step in doing so is enabling *workers*, not just lawyers, to understand when they should in fact be receiving the prevailing wage. A secondary benefit of this Court adopting the broader interpretations described above is that those interpretations are also the more common-sense and clear of the possibilities, which will create greater understanding of the boundaries of the law among the workers most affected.

Even awarding bodies and contractors that desire to comply may have a hard time doing so if the relevant legal definitions are complicated, technical, and riddled with exceptions. The entities involved in this case (Metrolink, Parsons, and Wabtec) are large and sophisticated, but for every $200 million Metrolink project, there are scores a fraction of the size, completed by contractors with a fraction of the compliance and legal resources of Parsons and Wabtec. A simple, straightforward, common-sense construction of the type of work to which the prevailing wage applies

will ensure that employees working on the $711,760.86 contract for the Yuba County Sheriff's Department's Integrated Electronic Security Systems[2] are protected in equal measure to those working on Metrolink's Positive Train Control system. Easy-to-apply interpretations will also result in consistency across contracts and localities.

A decision that work on "rolling stock" is excluded from coverage would be premised on the idea that it has always been thus. Anyone lacking that knowledge is left in the dark. By contrast, holding that substantially similar work to that done at trackside is covered is logical and straightforward, requiring no special learning or analysis.

Similarly, a decision that work of a mixed character done for a common "integrated object" is *all* public work is substantially easier to understand and apply than invoking the "flow process of construction," a phrase that has no inherent meaning and seems designed to maximize opportunities for legal argument at the expense of plain application.

III. CONCLUSION

For the foregoing reasons, IBEW Local 11 respectfully requests the Court to adopt logical, common-sense, and appropriately broad interpretations of the prevailing-wage statute that provide coverage for the on-board work at issue in this case. The work should be recognized as

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[2] See project documents publicly available on the Yuba County website at https://www.yuba.org/bid_detail_T13_R3.php.

"construction" or "installation" under section 1720, rejecting the "rolling stock" exception, and it should be found to have been performed "in the execution of the contract" for public work under section 1774.

DATED: July 15, 2019

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STATEMENT AS TO LENGTH OF BRIEF

Pursuant to Rule of Court 8.520(c), counsel for Proposed *Amicus Curiae* International Brotherhood of Electrical Workers Local 11 hereby certifies that this brief was produced on a computer using Microsoft Word, and that the word count for the brief, relying on that computer program, is 1,950 words, including footnotes.

DATED: July 15, 2019

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of July, 2019, a copy of the **APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE; BRIEF OF AMICUS CURIAE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 11 IN SUPPORT OF PLAINTIFF-APPELLANT** in Case No. S251135 was electronically filed via the TrueFiling System, and was served via U.S. Mail, on the following:

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