# 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

# APPELLANT'S OPENING BRIEF ON THE MERITS

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## ISSUE CERTIFIED FOR REVIEW

This Court granted the Ninth Circuit's request to resolve the following certified question: "Whether work installing electrical equipment on locomotives and rail cars (i.e., the 'on-board work' for Metrolink's PTC project) falls within the definition of 'public works' under California Labor Code § 1720(a)(1) either (a) as constituting 'construction' or 'installation' under the statute or (b) as being integral to other work performed for the PTC project on the wayside (i.e., the 'field installation work')?"

## INTRODUCTION

While the issue certified by this Court for review is profoundly important to employees in this state, the Court may resolve that issue in a relatively narrow manner by deciding the following question: When a general contractor enters into a government contract for a public work entitling workers executing the contract to a prevailing wage and the general contractor then subcontracts aspects of that contract to another employer, are the employees working on that subcontract also entitled to a prevailing wage if their work is necessary to the successful completion of the general contract? Stated another way, can employers who enter into a general contract for a public work avoid paying a prevailing wage for an aspect of that work by subcontracting it to a subcontractor regardless of whether, without the work under the subcontract, the remaining work performed under the general contract would be useless. The clear answer is that employers cannot avoid paying the prevailing wage in this manner.

Under Labor Code section 1772, so long as the subcontract was "in the execution of any contract for public work," plaintiff was "deemed to be employed upon public work" and entitled to prevailing wages. (*Ibid.*)

Under controlling case law, this determination turns on whether the subcontract was "integral" to the general contract. As described in detail below, there is no question that here the subcontract entered into by Plaintiff's employer (Wabtec) was integral to the general contract between Parsons and Metrolink.

The general contract between Parsons and Metrolink was to install a computerized communications system known as a Positive Train Control ("PTC") System. The parties to the general contract agreed that the work retained by Parsons to install the communications equipment on track wayside (referred to by the Ninth Circuit as the Field "Installation work") was a public work entitling the employees performing that work to be paid a prevailing wage. Parsons subcontracted with Wabtec to install into the rail cars the equipment which would communicate with the equipment installed along with wayside. The Ninth Circuit referred to this Work as the "On-board" work Without the On-board work the Field Installation work would be useless because there would be no communications transmitted to be received by the equipment installed in the field.

The Ninth Circuit agreed that the work Wabtec performed was in execution of the Parsons general contract. However, the Court read certain cases as recognizing an alternative test under which work under a subcontract falls within section 1772 only if that work were necessary to the physical completion of the general contract. The Court reasoned that if this alternative test were accepted by this Court then it would be questionable whether the Wabtec subcontract fell within section 1772.

As explained, the cases referenced by the Ninth Circuit do not support adoption of this alternative test. Those cases instead actually support the primary test identified by the Ninth Circuit. If the work being performed under the subcontract was integral to the work under the general contract, then section 1772 is implicated and a prevailing wage is required.

There is nothing in the language, history or purpose of section 1772 to support holding that only work under a subcontract necessary to the physical completion of the general contract falls within section 1772 while work under a subcontract which is necessary to avoid rendering the general contract absolutely useless would fall outside of section 1772. A central purpose of section 1772 is to prevent employers from contracting around their obligation to pay a prevailing wage. But that is precisely what Wabtec seeks to accomplish here.

Thus, plaintiff urges this Court to hold what the Court of Appeal opinions on point already recognize. If work under the subcontract is needed to avoid rendering the work under the public works general contract futile, then section 1772 is implicated and the employees under section 1772 are entitled to be paid a prevailing wage.

Second, even viewing the Wabtec subcontract in isolation, plaintiff was entitled to a prevailing wage. That subcontract met the definition of both "installation" and "construction," each of which triggered the obligation to pay a prevailing wage. In ruling to the contrary, the district court grafted a requirement onto section 1720 so that it applied only to an installation or construction involving fixed works on realty or land. But nothing in the language, purpose or history of the statute, or applicable regulations, justified this judicially-enacted condition. Nor is there an arbitrary exception for work that otherwise falls within the public works statutes just because the work is performed on rolling stock, as Wabtec argued below. The Legislature has never promulgated a "rolling-stock" exception and the Court should not do so here.

## STATEMENT OF FACTS AND PROCEEDINGS BELOW

### A. Introduction To The Southern California Regional Rail Authority, Otherwise Known As Metrolink.

The Southern California Regional Rail Authority, otherwise known as "Metrolink," is a public entity formed by a Joint Exercise of Powers Agreement pursuant to Government Code section 6500 et seq. that consists of five member agencies including the Los Angeles County Transportation Commission. (IV-ER-780; VII-ER-1572-85.)[1] With more than 500 miles of rail network spanning six Southern California counties and an average weekday ridership in excess of 40,000, Metrolink is the second largest commuter rail system by size and the fifth largest by ridership in the United States. (IV-ER-780.)

### B. Metrolink Contracts with Parsons To Build and Install a Single, Comprehensive Communications Network That Would Link Wayside Signals and Trains to a Centralized Dispatch Office.

On October 15, 2010, Metrolink entered into a $116 million contract with Parsons Transportation Group, Inc. ("Parsons") to build and install a comprehensive communications network, known as a Positive Train Control ("PTC") System that would link wayside signals and trains to a

[1] The citations to the "ER" are to the excerpts of record that were filed in the Ninth Circuit Court of Appeals in connection with plaintiff's appeal in this matter.

centralized dispatch office. (IV-ER-781; VII-ER-1477, 1478.)[2] The project was in response to the tragic Chatsworth commuter train collision which resulted in 25 fatalities. (IV-ER-781.) The project, which in total cost more than $216 million, was publicly funded with approximately 85% of the funding coming from state and local sources, and the remaining 15% coming from federal funds—including $17.8 million from American Reinvestment and Recovery Act ("Recovery Act") formula funds, and a $3.4 million grant awarded under the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA").[3] (III-ER-556; IV-ER-778, 782.)

Under the terms of the contract, the PTC System to be "designed, furnished, and installed" by Parsons included "without limitation each, every, and all systems, subsystems, components, [and] constituent parts." (VII-ER-1475.) Metrolink's approach to the PTC System project was "to structure the required work . . . so that a major portion . . . is delivered through a single advanced technology" and through a single contract with a single contractor, Parsons. (VI-ER-1296.) Metrolink determined that "[s]ystem integration and interface conflicts and other problems will be avoided by having a single contract and entity, [Parsons], responsible for developing, delivering, [and] integrating" the PTC System. (VI-ER-1296.) Metrolink acknowledged that the PTC System would be "complex" and

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[2] The PTC System is designed to prevent train-to-train collisions, over-speed derailments, unauthorized incursion into work zones, train movement through switches left in the wrong position, as well as accidents caused by the running of a red light. The PTC System monitors and, if necessary, controls train movement in the event of human error. (IV-ER ER-781.)

[3] It was undisputed below that "[p]rojects funded through the Recovery Act and all projects funded through PRIIA that use rights-of-way owned by a railroad are required to comply with [federal prevailing wage requirements as set forth in] the Davis-Bacon Act (40 U.S.C. [§] 3141 *et seq.*)." (III-ER-568; *see also* III-ER-549-54; II-ER-99 (Wabtec asserting that this fact is "not disputed for purposes of this motion").)

would rely 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; *see also* VI-ER-1313 ("the PTC System shall provide integrated control and communications capabilities").)

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.)

Wabtec contends that the general contract only required payment of prevailing wages on "Field Installation" work in the railroad track wayside. But a specific contract provision specifically addresses that contention and whether the parties to the general contract intended to exempt certain subcontracts from the requirement. Section 34.10.2 entitled "Prevailing Wages" provides:

> Vendor/Integrator [Parsons] shall comply with California Labor Code Sections 1770 to 1780, inclusive. In accordance with Section 1775, the Vendor/Integrator shall forfeit as a penalty to the Authority an amount as determined by the Labor Commissioner not to exceed $50 for each calendar day or portion thereof for each worker paid less than stipulated prevailing wage rates for such work or craft in which such worker is employed for any work done under the contract by

> him or by any Subcontractor under it in violation of the revisions of the Labor Code and in particular, Labor Code Sections 1770 to 1780, inclusive. In addition to said penalty and pursuant to Section 1775, the difference between such stipulated prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the stipulated prevailing wage rate shall be paid to each worker by Vendor/Integrator. Pursuant to the provisions of Section 1773 of the Labor Code, the Authority has obtained the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work applicable to the work to be done from the Director of the Department of Industrial Relations. However, if any work is Federally assisted, Vendor/Integrator must also comply with Federal labor standards, including the requirements of the Davis-Bacon Act, as listed in Section 34.12. In addition, the Vendor/Integrator must ascertain with the U.S. Department of Labor the prevailing hourly rate. However, if Federal and State wage rates both are applicable, then the higher of the two will prevail.

The entirety of section 34 was expressly incorporated and made applicable to Wabtec in the Wabtec-Parsons subcontract. (VI-ER-1227, 1286; see also VII-ER-1339.)

### C. Parsons Subcontracts With Wabtec To Furnish, Install, Test, And Certify The PTC Equipment On Metrolink Trains.

In November 2010, Parsons entered into a $27 million subcontract with appellee Wabtec Corporation ("Wabtec") under the terms of which Wabtec was responsible for "implementation of the on-board PTC System Segment on the [Metrolink] fleet"—i.e., the "on-board work" discussed above. (VI-ER-1234, 1285; *see also* VII-ER-1561, 1565.) In particular, Wabtec was responsible for the "design, furnishing, installation, testing,

and certification of the on-board PTC components, equipment and system." (VI-ER-1234.) The Parsons-Wabtec subcontract incorporated by reference several provisions from the Metrolink-Parsons prime contract—*including* the prevailing wage provisions in Article 34 of the general contract, quoted above. (VI-ER-1227, 1286; *see also* VII-ER-1339.)

Despite the express language incorporating compliance with the PWL into its subcontract, language to which Wabtec did not object, Wabtec admitted it proceeded with the work in execution of its subcontract without paying prevailing wages. (VII-ER-1339-1340.)

### D. Busker Is Hired By Wabtec To Install And Test PTC Equipment On Metrolink Locomotives.

Plaintiff John Busker is a highly skilled electrician and electronics technician with many years of training and experience—including eight years of service in the United States Navy—performing installation, maintenance, troubleshooting and repair of complex and specialized electronic and communication systems and subsystems. (VI-ER-1089-90; VIII-ER-1735-36.) Following his honorable discharge from the Navy in 2012, Busker was hired by Wabtec as a "Field Service Technician" to perform Wabtec's work on the Metrolink PTC System project. (VIII-ER-1736; V-ER-880.) He learned of the Field Service Technician position from an online job posting and was introduced to Wabtec through a vendor, Visron Technical, LLC, that had posted and advertised the position. (VI-ER-1119; VIII-ER-1736; IX-ER-1914.) After being interviewed by Wabtec Project Manager Sonny Fricia at Keller Yard in Los Angeles, California, Busker was hired by Wabtec to perform installation and testing

of the on-board components of the Metrolink PTC System.[4] (VI-ER-1120-21; VIII-ER-1736.)

Busker worked for Wabtec on the Metrolink PTC System project from April 2013 until March 2015. (VIII-ER-1736.) Busker's work was performed entirely on-site at the project's Keller Yard and the Central Maintenance Facility, and included installing electrical, electronic and communications components of the PTC System on Metrolink locomotives and cab cars. (VI-ER-1125-27; VIII-ER-1736, 1738.) Busker's work on the Metrolink project was directed, controlled, and supervised by Wabtec manager Mark Martin, who also determined Busker's compensation. (VIII-ER-1737, 1739.) Initially, Busker was paid an hourly rate of $22.50 for his work on the Metrolink project; by the time he stopped working for Wabtec in March 2015, his pay had increased to $25 per hour. (VI-ER-1124; VIII-ER-1737; IX-ER-1954.)

### E. Busker Files A Prevailing Wage Complaint With The California Department Of Industrial Relations, Division Of Labor Standards Enforcement.

In May 2015, shortly after he stopped working for Wabtec, Busker submitted a complaint to the Department of Industrial Relations ("DIR"), Division of Labor Standards Enforcement ("DLSE"), averring that he had not been paid prevailing wages for his work on the Metrolink PTC System

[4] For purposes of resolving the prevailing wage issue, Busker's status as a Wabtec employee was not disputed below. (VIII-ER-1783; *see also* III-ER-316.)

project.[5] (IX-ER-1963-64.) After receiving a second, similar complaint from another worker on the Metrolink PTC System project, the DLSE opened an investigation in June 2015. (VII-ER-1395-96; IX-ER-1915.) The investigation was led by Deputy Labor Commissioner Yoon Mi-Jo and was supervised by Kenneth Madu, a Senior Deputy Labor Commissioner III with twenty-five years of experience working for the DIR. (VII-ER-1392-93, 1395.)

Upon learning that an investigation had been opened, Wabtec wrote to Deputy Labor Commissioner Jo on June 24, 2015 and asserted its position that the "work that Wabtec has provided on the Metrolink project is not subject to California's prevailing wage laws." (III-ER-407.) Noting that the Metrolink-Parsons contract distinguishes between "'field installation'" work and "system installation work on board of locomotives," counsel insisted that the contract "clearly" states that only field installation work is potentially subject to California's prevailing wage laws. (III-ER-407.) And according to counsel, "[t]he provision of on-board locomotive Positive Train Control systems and their incidental installation is the only work that Wabtec provides on the Metrolink project." (III-ER-407.)

Similarly, in a letter to Deputy Labor Commissioner Jo dated August 17, 2015, counsel for Metrolink asserted that "the PTC Project is not a public works project, and the work in question performed by Wabtec is not

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[5] The DLSE investigates worker complaints, but it does *not* make "coverage determinations." (VIII-ER-1397-1401, 1403, 1435-36.) A coverage determination is a formal process in which the awarding body or any other interested party (such as a contractor, employee, union or labor-management compliance organization) may request a written determination by the director of the DIR about a specific construction project or type of work to be performed. (VIII-ER-1436-37; *see* Cal. Code Regs. tit. 8, § 16001(a).) Only the Office of the Director of the DIR is empowered to make a coverage determination. (VIII-ER-1397-1401, 1403, 1436; *see* Cal. Code Regs. tit. 8, § 16001(a).)

subject to prevailing wage or other Labor Code requirements." (III-ER-390.) According to Metrolink, the software and hardware installation work performed by Wabtec on Metrolink trains was not covered by prevailing wage requirements because trains are "not 'fixed works.'" (III-ER-390-91.) Rather, in Metrolink's view, trains, boats, buses, and the like all qualify as "rolling stock," and installation work performed on rolling stock is always exempt from prevailing wage and other Labor Code requirements. (III-ER-391.) Metrolink acknowledged that the installation work performed on the wayside *is* subject to prevailing wage requirements, but noted that this work was not performed by Wabtec. (III-ER-1179-80.)

### F. While The DLSE Investigation Is Pending, Busker Initiates A Putative Class Action In Los Angeles County Superior Court; Wabtec Removes The Action To Federal Court.

On September 11, 2015—while the DLSE investigation was pending—appellant John Busker initiated the underlying putative class action against Wabtec and his former supervisor, Mark Martin, in Los Angeles County Superior Court.[6] (XIV-ER-3115-30.) Thereafter, on October 15, 2015, Busker filed the operative, first amended complaint (again, in state court) alleging causes of action for (1) failure to pay minimum and overtime wages; (2) failure to pay prevailing wages on a public work; (3) failure to provide accurate itemized wage statements; (4) waiting time penalties under California Labor Code section 203; (5) unfair business competition; (6) declaratory relief; and (7) penalties pursuant to

[6] Unless context requires otherwise, Wabtec and Martin are collectively referred to as "Wabtec" throughout this brief.

California Labor Code section 2699.[7] (XIII-ER-2873-89.) On October 19, 2015, Wabtec removed the action to federal court under the Class Action Fairness Act ("CAFA"), codified at 28 U.S.C. § 1332(d). (XIV-ER-3218-24.)

### G. The DLSE Concludes That Wabtec Violated The California Labor Code By Failing To Pay Prevailing Wages And Issues A Civil Wage And Penalty Assessment For Nearly $6.5 Million.

On December 22, 2015, the DLSE formally determined that the Metrolink PTC project was a public works project and that Wabtec had violated the California Labor Code by "fail[ing] to pay prevailing wages." (III-ER-347.) The DLSE issued a Civil Wage and Penalty Assessment against Parsons and Wabtec for prevailing wages in the amount of $5,786,349 and related penalties of $682,215. (III-ER-347.)

Senior Deputy Labor Commissioner Madu later explained that the DLSE's focus in its investigation of the Metrolink project was two-fold. (VIII-ER-1430-31.) First, the DLSE looked at the language of both the prime contract between Metrolink and Parsons and the subcontract between Parsons and Wabtec, which when read together, seemed to create a contractual obligation on the part of Wabtec to pay its employees prevailing wages. (VIII-ER-1419, 1430-31.) Second, the DLSE looked at the "connection" between the work that Wabtec employees performed installing the PTC electrical system and components on the locomotives (the on-board work) and the work that was performed by non-Wabtec

[7] The fifth, sixth and seventh causes of action were brought against Wabtec only. (XIII-ER-2885-87.)

employees on the wayside (the field installation work)—the latter of which was indisputably subject to prevailing wage requirements. (VIII-ER-1430-31.) Madu explained that because the on-board work and the field installation work were inextricably intertwined, the DLSE determined that the entire project was subject to prevailing wage requirements. (VIII-ER-1430-32.)

To illustrate his second point, Madu provided the following example, unrelated to the facts of this case: off-site fabrication of certain components would normally not be covered by California's prevailing wage requirements; however, according to Madu, such work *might* be covered if the fabricated materials were being *integrated* into a public works project. (VIII-ER-1443-44; *see also* VIII-ER-1404-05 (Madu hypothesizing that a project involving a modular building that is *not* affixed could still qualify as a public works project and be subject to prevailing wage requirements).) He also explained that the nature of the work being performed and the manner in which that work relates to other work on a project are both considerations that go into any formal coverage determination. (VIII-ER-1445.)

### H. Parsons And Wabtec Seek DIR's Settlement Of The Civil Wage And Penalty Assessment And The DLSE Ultimately Releases The Assessment—*Not* Because It Determines That The Work Was Not Covered By California's Prevailing Wage Laws But Because The Coverage Issue Will Be Resolved In This Pending Class Action.

Meanwhile, as Busker's motion to remand was pending, Parsons and Wabtec sought review of the DLSE's Civil Wage and Penalty Assessment. (X-ER-2079-88, 2090-2105.) Following a "settlement conference" that

was attended by counsel for Parsons, Metrolink, and Wabtec, as well as two Deputy Labor Commissioners, Assistant DIR Chief Eric Rood directed the 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.) In so doing, however, the DLSE did *not* make any determination as to whether the work performed by Wabtec employees on the Metrolink project was subject to prevailing wage requirements; indeed, even though he directed Madu to release the assessment, 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.) Rather, the 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.)

## I. The Parties Agree That The Threshold Prevailing Wage Coverage Issue May Be Resolved Through A Summary Judgment Motion Prior To Class Certification; The District Court Ultimately Grants Summary Judgment In Favor Of Wabtec And Busker Appeals.

After the court denied remand, the parties stipulated to address the threshold coverage issue through a summary judgment motion. Clerk's Record ("CR") 58. On September 30, 2016, Wabtec moved for declaratory and summary judgment on the basis that Wabtec's work on the Metrolink PTC System project was not subject to the PWL. (X-ER-2150-79.) Busker

opposed Wabtec's motion (VIII-ER-1749-78) and on January 10, 2017, following the filing of Wabtec's reply (III-ER-312-28), the district court issued an order granting Wabtec's motion for summary judgment. (I-ER-17-23.) The court entered judgment in favor of Wabtec that same day (I-ER-24-25), and Busker filed a timely notice of appeal on February 7, 2017. (II-ER-26-28.)

### J. The Ninth Circuit Certifies A Question For This Court To Review.

Plaintiff moved the Ninth Circuit to certify prevailing wage issues raised in this action to this Court for resolution. The Court deferred ruling on that request. Following oral argument, the Ninth Circuit issued two opinions. In one opinion the Court concluded that plaintiff properly raised his breach of contract claim but that there was no basis to conclude that Wabtec's failure to pay a prevailing wage constituted such a breach. The Court also concluded that the district court did not err in declining to remand this action to state court under the local controversy exception to the Class Action Fairness Act. (*Busker v. Wabtec Corporation* (9th Cir., Sept. 6, 2018, No. 17-55165) 2018 WL 4233068, at *1.) In its other opinion, the Court certified the question to this Court which is presently under review relating to whether the work Wabtec performed under its subcontract was a public work entitling plaintiff to the payment of a prevailing wage.

## ARGUMENT

## I. WHEN WORK UNDER A SUBCONTRACT IS AN INTEGRAL PART OF A GENERAL CONTRACT WHICH IS A PUBLIC WORK REQUIRING THE PAYMENT OF A PREVAILING WAGE, LABOR CODE SECTION 1772 REQUIRES THE PAYMENT OF A PREVAILING WAGE FOR THE WORK UNDER THAT SUBCONTRACT.

### A. Prevailing Wages Must Be Paid On Contracts For "Public Works".

Dating back to 1931, California's prevailing wage law for "public works" projects is a minimum wage law that predates the adoption of the California Labor Code. (*See Metro. Water Dist. of S. Cal. v. Whitsett* (1932) 215 Cal. 400, 417-18; *Kirby v. Immoos Fire Prot., Inc.* (2012) 53 Cal.4th 1244, 1252.) "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.)

Under California's prevailing wage law, "public works" is generally defined as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds." (Lab. Code § 1720(a)(1).)[8] The statute requires workers employed on public works projects be paid at least "the general prevailing rate of per

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[8] All further statutory references are to the California Labor Code unless otherwise indicated.

diem wages" (commonly referred to as the "prevailing wage") for their work. (§ 1771; *Rd. Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 778-79.)

### B. Since The Wabtec-Parsons Subcontract Was An Integral Part Of The Parsons-Metrolink General Contract Which Was Unquestionably A Public Works Contract, Labor Code Section 1772 Entitled Plaintiff To A Prevailing Wage For His Work Under That Subcontract.

The parties agree that the Parsons-Metrolink general contract involved "public works" thus triggering the obligation to pay a prevailing wage. The district court recognized that "the larger Parsons contract did involve some work on fixed areas of the Metrolink system such as the wayside of the train tracks." (I-ER-21-22.) And Wabtec likewise acknowledged that aspects of the Parsons-Metrolink contract required payment of a prevailing wage because it was a public work. (X-ER-2160-61; *see also* II-ER-103-04.) Wabtec further acknowledged that Metrolink agreed that aspects of its contract with Parsons was a public work. (*Id.*) Indeed, in Article 34 of their general contract, Metrolink and Parsons explicitly agreed that "all applicable State and federal prevailing wage requirements shall apply to work performed under this contract. In particular, certain provisions of the California Labor Code may be applicable to those portions of the work pertaining to [field installation work]." (VII-ER-1505.)

It is plaintiff's position that because (1) without the work Wabtec performed on-board the locomotive, the field-installation work would have been useless and (2) because the field-installation work was indisputably a

public work then (3) under Labor Code section 1772 plaintiff was entitled to a prevailing wage for the on-board work performed on the locomotive.

Section 1772 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.)

In its opinion, requesting this Court resolve this pivotal issue in this appeal, the Ninth Circuit stated:

> Some courts have framed the inquiry as whether the work at issue "is truly independent of the contract construction activities—i.e., whether it is integrated into the flow process of construction." *Sheet Metal Workers'*, 229 Cal.App.4th at 206, 176 Cal.Rptr.3d 634; see also *Williams*, 156 Cal.App.4th at 752, 67 Cal.Rptr.3d 606 ("What is determinative is the role the [subcontractor's work] plays in the performance or 'execution' of the public works contract."). Other courts have taken a different approach by considering whether the work at issue and the work that is indisputably covered by the prevailing wage law together result in a "complete integrated object." *Oxbow Carbon & Minerals, LLC v. Dep't of Indus. Relations*, 194 Cal.App.4th 538, 549, 122 Cal.Rptr.3d 879 (2011); see also *Cinema W., LLC v. Baker*, 13 Cal.App.5th 194, 210–15, 220 Cal.Rptr.3d 415 (2017) (focusing on the necessity of the publicly-funded work (a parking lot) to the ultimate product of the privately-funded work (a theater)).
>
> This case likely turns on the selection of the appropriate standard. From the language of the prime contract and the Wabtec subcontract and the other information provided by the parties, it is clear that both the on-board work and the field installation work are integral to the operation of the completed project (i.e., the PTC system). If that were the correct formulation, Busker should prevail. But the contracts and other information about the project do not suggest that completion of the on-board work is integral to the completion of the field installation work. If that were the correct formulation, Wabtec's work is probably analogous to off-site work or off-hauling that courts have held to be non-integral to the construction process and thus not covered by the prevailing wage law. See Sheet Metal Workers', 229 Cal.App.4th at 214,

176 Cal.Rptr.3d 634; Williams, 156 Cal.App.4th at 754, 67 Cal.Rptr.3d 606.

(*Busker v. Wabtec Corporation* (9th Cir. 2018) 903 F.3d 881, 886.)

Initially, plaintiff agrees with the Court that 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 plaintiffs was 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 Parsons-Metrolink 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.)

Plaintiff urges this Court to conclude that the critical role the on-board work played in the completion of the integrated project, under which the field work was being performed, establishes that the on-board work was "*in the execution of any contract for public work* are deemed to be employed upon public work" under section 1772.

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 [finding that § 1772 was met when the general contractor contracted with a subcontractor to "perform an integral part of [the general contractor's] obligation under the prime contract"]; *Sheet Metal Workers' Int'l Ass'n, Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 212-14 [same].) As explained below, there can be no question here that the locomotive on which Busker was working was an *integral part* of

the general public works contract.[9]

Plaintiff disagrees with the Ninth Circuit, however, to the extent it interprets certain Court of Appeal decisions as concluding that section 1772 would apply only if the completion of the on-board work was necessary to the physical completion of the field installation work. To the extent the Court of Appeals is suggesting that one line of cases hold that the subcontracted work must be necessary to the physical completion of the on-site work in order for section 1772 to be implicated – regardless whether the on-site work would be useless without the subcontracted work -- then plaintiff urges this Court to reject that standard.

Neither *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, cited by the Court of Appeals, even interpreted section 1772 and certainly did not support the standard

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[9]In opposition to the summary judgment motion, plaintiff also submitted numerous DIR coverage decisions holding that in addition to considering whether a worker is entitled to prevailing wages if he falls within the definition of a public work under § 1720(a)(1), DIR routinely analyzes whether the worker is entitled to prevailing wages under 1772, analyzing whether the work integral to a public works contract is covered work under § 1772. (III-ER-387 (definitive question is whether work is "truly independent" or "work that was integral to the performance of that general contract"); III-ER-377 ("The only issue here is whether the dismantling and removal of modular units fall within one or more types of covered work enumerated in section 1720(a)(1) or are otherwise subject to prevailing wage requirements under sections 1771 and 1772"); III-ER-373 (off-site restoration of cast iron is public work under §1720(a)(1) and alternatively is "covered under section 1772 because it is done in execution of the larger exterior painting public works project"); III-ER-343 (finding that "[i]n addition to coverage under section 1720(a)(1), the work performed by Mettler-Toledo's employees at the Hyperion Plant is done in conjunction with the electrical and engineering work of Contractor [and thus] is performed by a subcontractor in the execution of a contract for public work and the Mettler-Toledo employees are therefore deemed to be employed upon public work.").)

referenced by the Court of Appeals. In *Oxbow*, a law was passed ("rule 1158") requiring the enclosure of open-air coke storage facilities. This new law required the transformation of an open air coke storage facility operated by Oxbow at the Port of Long Beach. In order to accomplish this task, it was also necessary to install conveyor systems to transport the coke into the storage facility, replacing the stackers that would lift the coke into the air so that it could be dumped into the open-air structure from overhead. (*Id.* at p. 542.) Oxbow entered into a contract with the City of Long Beach under which public funds would be used to construct and install the conveyor systems. Public funds were not used, however, to enclose the storage facility. The issue in that appeal was whether the installation of the enclosure was nevertheless a public works.

Oxbow argued that "the construction of the enclosure was separate and independent from the construction of the conveyor system and so cannot be considered paid for out of public funds." (*Id.* at p. 550.) In rejecting this argument, the Court of Appeal agreed that "the 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." (*Ibid.*) The Court relied on this Court's opinion in *Lusardi Constr. Co. v. Aubry*, supra, 1 Cal.4th at 985. The *Oxbow* Court explained:

> In *Lusardi*, the Supreme Court held that the obligation to pay prevailing wages may not be based solely on contractual provisions, but that the obligation instead flows from the statutory duty embodied within the prevailing wage law. (Lusardi, supra, 1 Cal.4th at pp. 986–988, 4 Cal.Rptr.2d 837, 824 P.2d 643.) The *Lusardi* 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, 4 Cal.Rptr.2d 837, 824 P.2d 643.) 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, 4 Cal.Rptr.2d 837, 824 P.2d 643.)

(*Oxbow Carbon & Minerals, LLC*, supra, 194 Cal.App.4th at p. 550.)

The *Oxbow* Court then reasoned: "In order for the [Oxbow] facility to be functional, it needed to incorporate both a method of enclosing the coke and of moving the coke into the facility. Oxbow contends that the conveyors may not have been necessary to render the site compliant with rule 1158 and speculates that other methods could have been used. Oxbow acknowledges that use of a stacker became impossible, however, and the record does not reveal any consideration of methods aside from the conveyors for loading coke into the enclosed facility. But even if alternatives had been considered, this would not change our analysis. A method of loading coke into the structure was required. The conveyor system was the chosen method and, in tandem with the enclosure work, it rendered the facility rule 1158–compliant and usable." (*Id.* at pp. 551–552.)

Contrary to how the Ninth Circuit seemed to read *Oxbow,* the Court did not rule that, if and only if it were the case that the public-funded conveyor could not be constructed without completion of the privately-funded roof construction, that the roof construction would be a public work. Rather, the focus of the opinion was that both were part of an integrated project and that "[w]ithout a rule–1158 compliant structure where it can dump coke [the publicly-funded conveyor] would appear to be useless." (*Id.* at p. 555.) The same is even more true here.

Here, there was one integrated contract between Metrolink and Parsons calling for the construction of a PTC system. Without *both* the field installation and the on-board installation, that system would have been useless. Metrolink subcontracted the on-board work to Wabtec. Under Wabtec's position, viewing that on-board independently of the field

installation work, would result in the very danger this Court sought to avoid in *Lusardi* and which the *Oxbow* Court sought to avoid in that case. It would allow parties to structure contracts to avoid the obligation to pay a prevailing wage. In short, the analysis employed in *Oxbow*, firmly supports plaintiff's position here. The same is true *Cinema West, LLC v. Baker*, *supra*, 13 Cal.App.5th at pp. 210–15.

In *Cinema West*, as part of a municipal redevelopment plan, Cinema West constructed a movie theatre. Cinema West claimed that because public funds were not used to construct the theatre, a prevailing wage was not required even though the parking lot adjacent to the theatre which was constructed as part of the same project, was a public works. Cinema West sought to distinguish *Oxbow* by arguing that "'the parking lot was entirely unnecessary to the operation of the Theater, and the Theater was entirely unnecessary to the operation of the parking lot.' It states [t]he City concluded that there was sufficient public parking in its downtown area to serve the Theater even without considering the new spaces provided by the parking lot to be constructed adjacent to the Theater,' and claims its evidence, if admitted, would have shown that the parking lot was not necessary to the operation of the theater." (Id. at p. 213.)

The Court rejected this assertion, explaining in part: "the City staff reports and the agreements consistently describe the parking lot as 'for the theater,' 'necessary to serve' the theater and a 'necessary' part of the development. Even more specific is the Reciprocal Access and Parking Agreement, which recites its purpose is '[t]o ensure ... that the Site has access to adequate parking under the Hesperia Municipal Code.' (Italics added.) A City staff report states the total number of parking spaces at existing government buildings that may be used in the evening was 370 and the minimum number of spaces required for the theater was 427, indicating

there was not a sufficient number of existing parking spaces to meet City code requirements." (*Id.* at p. 214.)

Thus, it is not the case that, for purposes of determining whether work performed under a subcontract falls within section 1772, the critical consideration is whether that work was necessary for the physical completion of the public work performed under the general contract as opposed to whether the work under the subcontract was necessary for the public work under the general contract to be effective.

Indeed, it would be entirely arbitrary to distinguish between work under a general contract that could not be physically completed absent the work under a subcontract and work that is physically completed but is nevertheless useless without the work under the subcontract for purposes of determining whether a prevailing wage is owed under section 1772. The Court should avoid interpreting section 1772 in this manner. "It is a well-settled maxim of statutory construction that "a statute is to be construed in such a way as to render it 'reasonable, fair and harmonious with (its) manifest (legislative) purposes . . . .' (citations), and the literal meaning of its words must give way to avoid harsh results and mischievous or absurd consequences." (*County of San Diego v. Muniz* (1978) 22 Cal.3d 29, 36, 148 Cal.Rptr. 584, 588, 583 P.2d 109, 113.)" (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 357.)

There is nothing in the text, history or purpose of section 1772 that justifies limiting it application to only those subcontracts the completion of which was necessary to the physical completion of the general contract. There is certainly nothing that would preclude application of section 1772 where the work under the general contract would be entirely useless absent completion of the work under the subcontract. Thus, to the extent the Ninth Circuit sought to recognize that, at least under some cases such as a

distinction has been recognized, plaintiff urges this Court to reject such a distinction.

Moreover, the district court's analysis in granting summary judgment likewise does not undermine the application of section 1772. The district court ruled that "the subcontract with Wabtec under which Busker was employed did not include any of that work." (I-ER-22.) The court's ruling contravenes Labor Code section 1772, which 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.) According to the court, section 1772 does not entitle plaintiffs to a prevailing wage because: "The plain text of this section does not broaden the meaning of public work; rather, it ensures that workers who are involved in a project on a contract for public work are covered by the prevailing wage requirement." (I-ER-22.) The court reasoned that section 1772 requires that when there is a contract for a public work, *only* employees working directly on that contract are entitled to a prevailing wage. The employees working directly under subcontracts are not. The district court's interpretation of section 1772 is wrong.

Under the district court's logic, section 1772 says 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.) According to the district court, section 1772 also provides that "workers who are involved in a project on a contract for public work are covered by the prevailing wage requirement." The district court ruling contravenes the fundamental rule of statutory construction against interpreting statutes in a way that renders any provision mere "surplusage." (See *Tuolumne Jobs & Small Business All. v. Superior Court* (2014) 59 Cal.4th 1029, 1038-39 .)

Section 1772 should instead be interpreted as having a meaning distinct from what is already stated in section 1771, as courts are required to give effect to statutes "'according to the usual, ordinary import of the language employed in framing them.'" (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-88.) The familiar meaning of "execution" as used in section 1772 is "the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment" (5 Oxford English Dict. (2d ed.1989) p. 521); "the act of carrying out or putting into effect" (Black's Law Dict. (8th ed.2004) p. 405, col. 1); or "the act of carrying out fully or putting completely into effect, doing what is provided or required." (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of "execution" in the phrase "in the execution of any contract for public work," plainly means the carrying out and completion of all provisions of the contract.

Further, the court's ruling ignores section 1774, which states that "[t]he contractor to whom the contract is awarded [Parsons], *and any subcontractor under him* [Wabtec], shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract." This section expressly prohibits carving out subcontracts, precisely what was done under the district court's ruling.

Finally, plaintiff anticipates that Wabtec will continue to make its "flood gates" argument that, under plaintiff's position, any time a subcontract is entered into under a general contract that involves a public work, that the subcontract automatically also becomes a public work under section 1772. That is not plaintiff's position. Rather, it is plaintiff's position that, under section 1772, the critical inquiry to determine whether the work under a subcontract is "'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.*, *supra*, 156 Cal.App.4th at p. 752.) If the work under the subcontract is "integral" to the general contract then, that work is in the "in the execution of [a] contract for public work" under section 1772.

In short, the Wabtec-Parsons subcontract should not be viewed independently from the Metrolink-Parsons general contract for purposes of determining whether that subcontract was for a public work. Rather, the Court should considered whether that subcontract was an *integral* part of the general contract which was concededly a public works contract. This analysis necessarily leads to the conclusion that the subcontract under which Wabtec employees were working was "in the execution" of a "contract for public work" under section 1772 entitling them to the payment of a prevailing wage.

Thus, under the Wabtec-Parsons subcontract, the work was undeniably "in the execution" of the general Metrolink-Parsons contract and therefore was a public works contract under section 1772.

## II. EVEN IF THE WABTEC SUBCONTRACT WERE VIEWED INDEPENDENTLY OF THE PARSONS-METROLINK GENERAL CONTRACT FOR PURPOSES OF EVALUATING WHETHER IT WAS A PUBLIC WORKS CONTRACT, A PREVAILING WAGE WAS STILL OWED BECAUSE THE WORK INSTALLING ELECTRICAL EQUIPMENT ON LOCOMOTIVES AND RAIL CARS (I.E., THE "ON-BOARD WORK" FOR METROLINK'S PTC PROJECT) FALLS WITHIN THE DEFINITION OF "PUBLIC WORKS" UNDER CALIFORNIA LABOR CODE § 1720(A)(1) BECAUSE IT CONSTITUTES "CONSTRUCTION" OR "INSTALLATION" UNDER THE STATUTE.

The second aspect of the question this Court has certified for review is whether, under Labor Code § 1720(a)(1), the work plaintiff was performing installing the PTC components onto the locomotives was either "construction" or "installation." The district court accepted Wabtec's position that the work under the subcontract was not a public works contract as a matter of law because, according to the court, "§ 1771 and § 1720 have been interpreted to mean that in order for workers to be entitled to prevailing wages, they must have been employed on a project involving fixed works or realty on land." (I-ER-21.)

In so ruling, the court erred. There is no such requirement in the statutes or in any regulations. Section 1720(a) defines "public works" to mean "Construction, alteration, demolition, *installation*, or repair work done under contract and paid for in whole or in part out of public funds . . . ." Moreover, in a recent amendment, the Legislature codified a rejection of such interpretations by adding the following definition of "installation" to section 1720(a)(1): "*For purposes of this paragraph, 'installation'*

*includes, but is not limited to, the assembly and disassembly of freestanding and affixed modular office systems.*" (Italics added.)

As now explained, the work being performed by plaintiffs was an "installation" or alternatively a "construction." Either way, the work of Wabtec was covered by § 1720(a).

### A. Under Its Common Meaning, "Installation" As Used In Section 1720 Clearly Describes The Work Wabtec Was Performing Under Its Subcontract With Parsons.

Under basic tenets of statutory construction, an "installation" need not be on a project involving "fixed works or realty on land," as the district court found here. "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) Importantly, as explained in *Oxbow*, the "foremost concern is enforcing the purpose of the legislation," which in this case is to provide a minimum wage rate for the work. (*Oxbow Carbon & Minerals, LLC v. Dept. of Indus. Relations, supra*, 194 Cal.App.4th at p. 548; citing *Lusardi*, 1 Cal.4th at 987; *see Pipe Trades Dist. Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1465.)

Although the Courts have not yet been called upon to define "installation," the well-established rules of statutory construction—and, indeed, common sense—require that the words of the statute are to be given "their ordinary, everyday meaning . . . unless, of course, the statute itself specifically defines those words to give them a special meaning." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238; *see also Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 755 [applying ordinary meaning to "construction" and "alteration" finding work at issue was a public work].)

Nowhere does section 1720 qualify the word "installation" as necessarily involving "fixed works on realty or land." Indeed, that phrase is not found in section 1720 at all. Websters, Third New Internat. Dict. (2002) defines "installation" as "the setting up or placing in position for service or use." The term "installation" was added to broaden § 1720(a)(1) in 2001, under AB 975. Legislative history shows the term was added to "codify existing DIR precedential public works determinations on installations issued by the current Director." (III-ER-490.)

Under the plain meaning of the word, the Metrolink contract, including the Wabtec subcontract, was an "installation." Metrolink determined that "system integration and interface conflicts and other problems will be avoided by having a single contract and entity, the Vender/Integrator [Parsons]," responsible for developing, delivering, *installing* and *integrating* the system. (VI-ER-1296; *see also* VI-ER-1234-35 (scope includes "furnishing all labor, materials, tools and equipment, and performing all operations necessary . . . for *installation*, test and commission of the on-board PTC System").)

Wabtec's work involved installing and connecting the on-board PTC components and installing required conduits, raceways, and extensive wiring, wire splicing, pulling conduit and wires, and accommodating the high-voltage nature of the on-board locomotive electrical system (1000 volts or more). (VIII-ER-1739.) The on-board work involved traditional electrical and electronic technician work including installation extensive conduit on board the trains. The conduit was used to house antenna cables and electrical wiring and came up from the floor of the train and into a walk-way compartment behind the cab. Installation included work in the subfloor compartment of the train and required operating in tight quarters and confined spaces. (VIII-ER-1739.) As determined by the DLSE, Wabtec's work most closely resembled the scope of work of a general

prevailing wage classification known as "Transportation System Electrician." (V-ER-886-87; VII-ER-1409-11, 1462-64; VIII-ER-1740.)

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 trial court ruled here, it knows how to accomplish that. For example, Government Code section 4002 provides: "As 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." Similarly, Public Contract Code section 1101 provides: "'Public works contract,' as used in this part, means an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind."

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. (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343 ["'when different words are used in contemporaneously enacted, adjoining subdivisions of a statute, the inference is compelling that a difference in meaning was intended.' [Citation.]"].)

Moreover, in 2012, section 1720(a) was amended to add the following language: "For purposes of this paragraph, 'installation' includes, but is not limited to, the assembly and disassembly of freestanding and affixed modular offices systems." (§ 1720(a)(1).) This amendment was 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 DIE'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, this same rule proposed by Wabtec and adopted by the district court must likewise be rejected. The Legislature has already spoken and said that an "installation" need not involve fixed works or work that is "affixed" or "bolted" to realty on land. Even installation of detached modular furniture is a public work.

### B. The District Court's Conclusion That "Construction" Must Involve "Fixed Works Or Realty On Land," Was Mistaken.

For the same reasons just explained, the district court's conclusion that only construction involving "fixed works or realty on land" constitutes a public work under section 1720 is equally flawed. As with that section's use of the word "installation," the word "construction" is also not defined in section 1720. However, two definitions were cited approvingly in *City of Long Beach*, 34 Cal.4th at 951 and followed in *Oxbow*, 194 Cal.App.4th

at 549: "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.) Courts view the 2000 amendment to section 1720(a)(1) as evidence of the Legislature's intent to give "construction" a broad meaning. (*Oxbow*, 194 Cal.App.4th at 549.) This reasoning has been consistently relied on in DIR coverage determinations for the proposition that work that is necessary and integral to the complete scope of the completed project is covered. (*See, e.g.*, III-ER-361-65 (site work designed as an essential element and "not as a stand-alone undertaking" that constitute "parts that are put together to form a 'complete integrated object.'").)

Here, using a plain reading of the term, the Metrolink-Parsons contract, including the on-board work performed by Wabtec, was "construction." The entire purpose of the PTC project is to design and build a fully integrated communications network on Metrolink's railways and locomotives. Indeed, in Metrolink's recent testimony before Congress, and affirmed in deposition testimony of Metrolink designee in this case, Metrolink characterized the work at issue here as the building of a communications network including on the trains, wayside and dispatch centers. (IV-ER-766-67, 781.)

Metrolink admitted that work in the Wayside Component and Communications Component was construction subject to the public works laws, including payment of prevailing wages. (IV-ER-763-65, 769-70; VII-ER-1505, 1508.) Metrolink admitted it recognized that the Wayside and Communications field work was public work and enforced public work and prevailing wage requirements. (*Id.*) The on-board work was just one part of the completion of the construction of the network. (VI-ER-1130; VII-ER-1566-68; VIII-ER-1738-40.) Without the on-board work, the entire

project would be "incomplete and not viable." (*See Oxbow*, 194 Cal.App.4th at 545.)

In addition, the on-board installation work occurred on the jobsite, involved traditional electrical and communication work, and was performed by Wabtec's Field Services Technicians/Field Installers installing electrical power supplies, equipment racks, cell modems, antennas, over-air radios, and recording equipment to capture all data related to train operation at time intervals. (VII-ER-1362; VIII-ER-1738-39.) The process of installing and connecting the on-board PTC components required conduits, raceways, and extensive wiring, wire splicing, pulling conduit and wires, and accommodating the high-voltage nature of the on-board locomotive electrical system (1000 volts or more). (VIII-ER-1739.) The conduit was used to house antenna cables and electrical wiring and came up from the floor of the train and into a walk-way compartment behind the cab. Installation included work in the subfloor compartment of the train and required operating in tight quarters and confined spaces. (VIII-ER-1739.) As determined by the DLSE, Wabtec's work most closely resembled the scope of work of a general prevailing wage classification known as "Transportation System Electrician." (V-ER-887-88; VII-ER-1409-11, 1462-64; VIII-ER-1740.) Because it was one part of a communication network, it was *construction*.

### C. None Of The Authorities Cited By The District Court Support Its Conclusion That An "Installation" Or "Construction" Must Involve Fixed Works Or Realty On Land In Order To Qualify As A Public Work Under Section 1720.

In nevertheless ruling that only those installations or construction projects involving fixed works or realty on land qualified under section 1720, the district court relied on one decision of this Court and an opinion of the California Attorney General. Neither supports the district court's conclusion.

First, in *City of Long Beach*, the issue presented was whether a project that was only partially publicly funded was a public work when the public funding "was expressly limited to project development and other *preconstruction* expenses." (34 Cal.4th at 946 (original italics).) The Court concluded that because the operative version of section 1720 did not then include "preconstruction costs," the project was not a public work. At no point did the Court discuss or decide whether section 1720, as it is presently worded, applies only to an installation or construction project involving fixed works or realty on land. Thus, *City of Long Beach* does not support the district court's conclusion here as to the limited meaning of "installation" since that issue was not discussed in the opinion.

"It is well settled that language contained in a judicial opinion is to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not there considered." (*People v. Banks* (1993) 6 Cal.4th 926, 945 (internal quotation marks and citations omitted).)

The district court also relied on an advisory opinion by the California Attorney General. (I-ER-21.) Again, however, that advisory

opinion does not support the court's ruling. First, in that opinion, the Attorney General's office analyzed the question: "Does the Prison Industry Board's power to 'establish, notwithstanding any other provision of law, procedures governing the purchase of . . . goods and services,' as provided in Penal Code section 2808(g), mean that the Prison Industry Authority is exempt from state laws governing public works contracts?" (95 Cal. Op. Atty. Gen. 102 *1 (2012).)

The Attorney General concluded that "the Board's discretion to adopt procedures for the purchase of parts, materials, goods, and services does not exempt the Authority from complying with state laws governing public works contracts." (*Id.*) The Opinion does not discuss, let alone decide, whether the use of "installation" or "construction" in section 1720 had a hidden condition that the installation or construction must involve fixed works or realty on land and does not lend any support whatsoever for the district court's ruling.

Further, even *if* that Attorney General's opinion did say what the district court ruled, then that Opinion would still be entitled to little if any deference, and it would certainly not justify disregarding the clear language of section 1720 and grafting a "fixed works or realty on land" limitation to the word "installation" or "construction," especially since there is no indication that the Attorney General has any special expertise in opining as to what the Legislature intended when it used "installation" or "construction" in section 1720. (*See City of Long Beach*, 34 Cal.4th at 952; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 20.)

### D. Contrary To Wabtec's Argument Below, There Is No Exemption From The PWL For "Rolling Stock."

According to Wabtec, no matter what type of work was performed pursuant to a contract paid for with government funds and no matter how much that work fit the definition of a "public work" under section 1720, if that work was performed on rolling stock (i.e., a train), then it was not a public work and cannot be subject to prevailing wage protections because such work is exempt from the PWL. (X-ER-2169-74.) Wabtec was not able to point to anything in any statute that supported such an exemption. This dooms Wabtec's assertion. (*Azusa Land Partners v. Dep't of Indus. Relations* (2010) 191 Cal.App.4th 1, 31 ("[e]xemptions to the general provisions of a statute are narrowly construed and only apply to those circumstances that are within the words and reason of the exception").)

Rather than rely on the language of the statute itself, Wabtec largely relied on old DIR letters proffered as administrative "determinations"—most of which consist of a single page or less, are outdated (most are pre-2001 amendment) and contain no statutory analysis. (X-ER-2169-74 (citing X-ER-2067-68, 2137-41, 2146).) These letters suffer fatal evidentiary defects (hearsay without foundation). And to the extent that they are relied on to decree a policy, guideline, or standard of general application, the letters are legally void and of no significance as they were not promulgated by the DIR under the Administrative Procedures Act ("APA"). Rather, under the law, they are "underground regulations" void pursuant to Government Code section 11340.5. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576 (no weight to DLSE interpretations not promulgated under APA).)

Even if considered, the letters are neither dispositive nor persuasive, nor show any administrative policy. Most relate to stand-alone contracts,

e.g., the installation of passenger seats in a passenger rail car. None of them address anything like the project at issue here, where a single $116 million public works contract requires a single integrated train control system be *built and installed* by a single contractor using electricians, welders, laborers and construction tradesman working in train tracks, in railway wayside areas, in dispatch centers *and* on locomotives to accomplish a singular installation of an integrated train control system. (IV-ER-781; VI-ER-1130, 1296, 1313-15; VII-ER-1475, 1554-57, 1561, 1566-68; VIII-ER-1738-40.)

Moreover, no judicial deference to such a policy can or should be given because in this particular case, the DIR and the DLSE took vacillating, inconsistent positions. First, the DLSE determined the work was a public work, the PWL applied, and that Wabtec violated the PWL and the DLSE issued a $6.4 million Civil Wage and Penalty Assessment against Parsons and Wabtec for Wabtec's failure to pay prevailing wages on the PTC project. (III-ER-347.)

Later, after lobbying by Metrolink, Parsons, and Wabtec, 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.) 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. v. Duncan* (1st Dist. 2008) 162 Cal.App.4th 289, 303 (quoting *Yamaha*, 19 Cal.4th at 13).)

## CONCLUSION

For the foregoing reasons, 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: January 21, 2019

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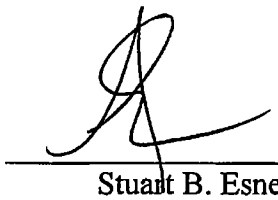

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## PROOF OF SERVICE

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 OPENING 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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| Judge Otis D. Wright, II<br>UNITED STATE DISTRICT COURT<br>CENTRAL DISTRICT OF CALIFORNIA<br>First Street Courthouse - Ctr 5D, 5th Fl.<br>350 W. 1st Street<br>Los Angeles, CA 90012 | ***Trial Court***<br>***(Via Mail)*** |