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

ANSWER BRIEF ON THE MERITS

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ISSUE CERTIFIED FOR REVIEW

This Court granted the Ninth Circuit's request to resolve the following 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

Enacted during the Great Depression, the California public works statute requires the payment of prevailing wages to individuals employed on "public works." The statute's text, structure, and purpose all demonstrate that "public works" refers to works on realty as commonly understood—buildings, dams, roads, railways, sewage lines. Placing equipment on rolling stock such as trains has never been understood to be a public work.

Court precedent confirms this conclusion, interpreting the term "public works" to mean all fixed works constructed for public use. And the agency charged with administering the statute—the Department of Industrial Relations—has consistently determined that prevailing wages must be paid only for work done on realty and that work done on rolling stock is excluded. As the agency chief explained, "[t]he Department has determined, consistent with previous court rulings and opinions from the Attorney General's Office, that maintenance/repair of rolling stock, i.e. vehicles, vessel[s], rail cars, etc., is not covered under the prevailing wage laws." In particular, the Department has twice found that placing communications equipment on railcars is not covered work even though such equipment may be integral to operating the communications network

system as a whole. That guidance is entitled to considerable deference, particularly since the Department possesses special expertise, the Legislature has acquiesced in the Department's interpretation, and the Department has the exclusive responsibility and quasi-legislative authority under the statute to make coverage and wage determinations that are then relied upon by contracting parties. Under the statute, a subcontractor cannot be held liable for not paying never-determined prevailing wages for work that the Department has *expressly excluded* from coverage.

Nor can placing equipment on railcars be considered integral to the completion of other work so as to be deemed a public work under Labor Code § 1772.[1] Under that section, work that is done "in the execution of" a contract for public work is subject to prevailing wage laws, even though it may not independently qualify as "construction" or "installation" under section 1720. The work done here on the railcars was not done in the execution of a contract for public work. The railcar work was done in execution of the contract for the railcar work, which is not a public work. It was not necessary to completing the public work of erecting structures along the tracks; the latter could be completed without the former. Consistent with that reading of section 1772, courts have required that the work be integrated into the "flow process of *construction*" of the public work for prevailing wages to apply—and here, it is conceded that the railcar work was not part of that *construction* process. Contrary to Plaintiff's argument, a work is not a public work simply because it is included in the same contract with other work that is public.

Nor is Plaintiff correct that the test is whether the work in question is necessary to the *operations* of the communications network as a whole. That novel argument defies the statutory text and would render

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[1] Unless otherwise indicated, all statutory references are to the Labor Code.

longstanding precedent interpreting section 1772 obsolete. The argument would contravene, too, established and on-point agency guidance concluding that work on trains necessary to operating a communications network is not public work. The established test is whether a work is necessary to construction of a public work. Plaintiff fails that test.

STATEMENT OF FACTS

In 2010, the Southern California Regional Rail Authority (Metrolink) awarded Parsons Transportation Group a contract to develop a publicly funded communications network called the Positive Train Control system (PTC). This system was designed to make rail transportation safer by using GPS technology to prevent train collisions and derailments.

The contract, as relevant here, distinguished between two types of work. *First*, the contract called for "field installation work," which involved installing communications equipment along the wayside or the tracks, such as installing towers and radio antennas on existing structures. (9 ER 1979, 1981.)[2] *Second*, the contract called for "on-board work," which involved placing communications equipment on Metrolink's locomotives and railcars. (9 ER 1976.) Although the contract specified that California's prevailing wage laws would apply to the field installation work, it did *not* specify that those laws would apply to the on-board work. (7 ER 1505; 9 ER 1976, 1979, 1981.)

The distinction between field installation and on-board work is based on well-settled law and longstanding agency guidance. During the bidding stage and throughout the project, the contracting parties relied on consistent determinations by the Department of Industrial Relations that work on rolling stock such as locomotives and railcars is not subject to prevailing

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[2] "ER" refers to the Excerpts of Record (cited by volume and page number) from the Ninth Circuit.

wage requirements. (10 ER 2050, 2081, 2085.) The statute gives the Department the exclusive authority and responsibility to determine the type of work that is subject to prevailing wages. (§§ 1770, 1773.5.) Metrolink and the other contracting parties were thus statutorily entitled to rely on the Department's exclusion of rolling stock from coverage. (§§ 1773, 1774.) Because the Department had not determined that work on rolling stock is subject to prevailing wages—and in fact, had excluded it from coverage—Metrolink did not specify prevailing wages for that work in the contract. (10 ER 2086.)

Parsons subcontracted with Westinghouse Air Brake Technologies Corporation (Wabtec) to perform the on-board work. (8 ER 1783.) Wabtec did not perform any field-installation work. (8 ER 1782.) Plaintiff John Busker was hired to perform the on-board work. (9 ER 1960.) He worked only on the trains. (8 ER 1783–84; 9 ER 1951, 1957–58, 1960.) He did not do any field-installation work, nor any other work on the wayside, tracks, or other realty. (*Ibid.*)

Plaintiff decided to sue after he left Wabtec and was contacted by a former colleague who encouraged him to talk to a lawyer. (9 ER 1947.) He filed a complaint with the Division of Labor Standards Enforcement, a division within the Department of Industrial Relations, seeking prevailing wages. (9 ER 1954.) Before this complaint was resolved, Plaintiff also filed a class action in state court.

Although a Division investigator initially issued Wabtec a penalty, that penalty was later vacated and released in full after Wabtec and Parsons sought review from the Assistant Chief of the Division. (8 ER 1785.) The investigator had misread the contract as requiring Wabtec to pay prevailing wages for on-board work—there was no contractual obligation, as the Ninth Circuit held. (*Compare* 10 ER 2044 ["That was why we issued [the penalty] in the first place . . . because it look[ed] like . . . there is a

contractual obligation."]; *with Busker v. Wabtec*, Ninth Circuit No. 17-55165 (Sept. 6, 2018) Dkt. 46 at p. 5 ["we see no basis for holding that Wabtec had a contractual duty to pay a prevailing wage"].)

Also, in assessing the penalty, the investigator had incorrectly selected a "prevailing wage classification"—a category pre-determined by the Department that identifies a particular kind of work and assigns a prevailing wage for it—that purported to "most closely resembl[e]" the work here. (7 ER 1462; 8 ER 1714, 1740.) But that classification bore no resemblance; it only confirmed that rolling stock was not covered. The "scope of work" for that classification—taken from an unrelated labor agreement—was "intended to cover electrical work on public streets and freeways, above or below the ground" to the exclusion of rolling stock. (5 ER 886.) The work was "not intended nor shall it include electrical work performed beyond the property line or public streets." (5 ER 887.) The investigator had also mistakenly concluded that "the intersection" between the field installation and on-board work supported a penalty. (7 ER 1432.) In vacating the penalty, the Assistant Chief rejected that conclusion and reasoned that "historically, work in the train is not covered." (7 ER 1420–21, 1422, 1427.)

Contrary to Plaintiff's representations, the penalty was vacated *not* "because [the Division] was aware of Busker's pending class action." (Br. 20.) Rather, the penalty was vacated because work on trains was historically not covered under the prevailing wage laws. (10 ER 2045 ["Q: [D]oes that mean that the [Division] released the [penalty] because there was a civil case? A: No. . . . [The Assistant Chief] said that historically . . . work done on the rolling stock . . . is not covered on the train[.]"]); 10 ER 2048 ["historically . . . those works are not covered . . . [a]nd based on that, he directed that we dismiss the case"].) Plaintiff refers to a statement by the investigator describing the Assistant Chief as

purportedly "saying it looks like there's a contract problem here, and let them resolve it, you know, in the civil court." (7 ER 1456.) But that purported statement reflects only that the Department has authority to make coverage and prevailing wage determinations and not to adjudicate contract claims. Indeed, when asked to clarify whether the Division closed the case because of pending civil litigation, the investigator stated—in a portion of the record Plaintiff omits—he did not "know the intent" of his boss "other than there's an instruction, we don't do rolling stock . . . [s]o for that reason, close the case." (*Ibid.*)

Plaintiff did not appeal the release of the penalty. Instead, Plaintiff pursued his prevailing wage claim as a class action in the civil courts. The case was removed to federal court. And after that, the district court granted summary judgment to Wabtec. Plaintiff appealed to the Ninth Circuit, which rejected Plaintiff's breach of contract claim and certified the case to this Court to resolve two remaining issues: (1) whether work performed on trains is public work under section 1720; and (2) whether that work is done "in the execution of" a public work (field installation work) such that prevailing wages would apply under section 1772.

ARGUMENT

I. WORK PERFORMED ON TRAINS IS NOT "PUBLIC WORK" UNDER THE LABOR CODE.

The Legislature enacted the public works statute during the Great Depression. It requires the payment of "prevailing" wages to workers employed on "public works" projects. Codified later in the Labor Code, the statute addresses projects on realty; its provisions all address work on streets, railways, highways, and other structures for public use. It does not contemplate as "public work" tasks carried out on trains or other forms of rolling stock. The statute's text, structure, and purpose as well as court precedent all point to this conclusion. Agency rulings confirm as much.

A. The text, structure, and purpose of the statute as well as court precedent show that work on trains is not "public work."

Section 1771 requires that "prevailing" wages "be paid to all workers employed on *public works*." (Emphasis added.) Both before and after the statute's enactment, the term "public works" has been uniformly understood to mean works on realty: "all fixed works constructed for public use, [such] as railways, docks, canals, water-works, roads." (6 Century Dictionary and Cyclopedia (1897) p. 4830; A Standard Dictionary of the English Language (1908) p. 1443 ["permanent works or improvements made for public use or benefit, as roads, canals, or harbors"]; 22 California Jurisprudence (1925) p. 74 ["The term 'public works' may be said to embrace all fixed works constructed for public use or protection"]; Webster's New International Dictionary (1936) p. 2005 ["[a]ll fixed works constructed or built for public use or enjoyment, as railroads, docks, canals"]; Concise Oxford English Dictionary (2008) p. 1161 ["[t]he work of building roads, schools, hospitals, etc., carried out by the state"]; American Heritage Dictionary (2011) p. 1424 ["[c]onstruction projects, such as highways or dams, financed by public funds"].) The term "work" or "works" also refers to "a fortified structure (as a fort, earthen barricade, or trench)" or "structures in engineering (as docks, bridges, or embankments) or mining (such as shafts or tunnels)." (Webster's Ninth New Collegiate Dictionary (1988) p. 1358.)

The statutory definition of "public works" reflects this common understanding of the term. The subparagraphs within section 1720(a) describing specifically what constitutes public works make that clear. Subparagraph (a)(2) says "public works" includes "[w]ork done for irrigation, utility, reclamation, and improvement districts"; subparagraph (a)(3) refers to "[s]treet, sewer, or other improvement work"; subparagraphs

(a)(4) and (a)(5) refer to "laying of carpet" in a "building"; subparagraph (a)(6) refers to "[p]ublic transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code," which defines a "[t]ransportation project" as the "construction . . . of highway, public street, rail, or related facilities" operated by local transportation agencies; subparagraph (a)(7) refers to "[i]nfrastructure project grants"; and subparagraph (a)(8) refers to "[t]ree removal work." All refer to work on realty.

The subparagraph at issue here "must be construed in [that] context." (*California Mfrs. Assn. v. P.U.C.*. (1979) 24 Cal.3d 836, 844.) Section 1720(a)(1) describes "public works" as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds." These terms make sense only in the context of public works as ordinarily understood. In particular, "construction" in this setting means the process of erecting a structure on realty, and "installation" means fixing in place items, such as equipment, on or inside a structure as part of the construction process. (See *infra*, at p. 20 n. 3.)

Likewise in this context the remaining terms ("alteration," "demolition," and "repair" work) must also be construction-related terms. Absent any context, "installation" might be conceived as encompassing tasks unrelated to realty such as *software* installation; "alteration" could be read to include *clothing* alteration; or "repair" might be interpreted to cover *eyeglass* repair. But such context-less interpretations would fall outside of what the Legislature had in mind when it enacted the public works statute, which "was designed to benefit the construction worker on public construction projects." (*O.G. Sansone Co. v. Dept. of Trans.* (1976) 55 Cal.App.3d 434, 461.) Words cannot be read "in a vacuum," and interpretations that "defy common sense" should "be avoided." (*California Mfrs.*, *supra*, 24 Cal.3d at p. 844; *People v. Garcia* (2016) 62 Cal.4th 1116,

1124.) Several dictionaries—including one about *public works*—confirm that the terms in section 1720(a)(1) refer to works on realty. These sources all refer to construction and installation in the context of projects on realty.[3]

Nor is the term "installation" rendered superfluous if understood as part of the "construction" process. The Legislature added "installation" in 2001 to *codify* then-existing interpretations by the Department of Industrial Relations that included within the public works statute installing fixtures on realty as part of the construction process.[4] The Legislature was concerned

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[3] See, e.g., The Contractors' Dictionary of Equipment, Tools, and Techniques for Civil Engineering, Construction, Forestry, Open-Pit Mining, and Public Works (1995) pp. 140, 171, 313 ["construction work" defined as "[w]ork that contributes to a *physical structure*"; "demolition" means "[b]reaking and removal of buildings and structures"]; A Dictionary of Environmental and Civil Engineering (2000) p. 123 ["construction" means "[p]lacement, assembly, or *installation of facilities or equipment* (including contractual obligations to purchase such facilities or equipment) *at the premises* where such equipment will be used, including preparation work at such premises"]; Architecture and Building Trades Dictionary (3d ed. 1950) pp. 7, 85, 255 ["construction" means "[t]he process of assembling materials and *erecting a structure*"; "alteration" refers to "any change in rearrangement in the *structural parts of a building or in the facilities*"; "repairs" means "[a]ny labor or materials provided to restore, reconstruct, or renew any existing part of a *building, its fixtures or appurtenances*"]; Dictionary of Architecture and Construction (2000) p. 227 ["construction" means "[a]ll the *on-site work done in building or altering structures*, from land clearance through completion, including excavation, erection, and the assembly and *installation of components and equipment*; "[*a*] *structure*"].

[4] See Enrolled Bill Report re: SB 975, Department of Industrial Relations (Sept. 20, 2001) pp. 2–3 (RJN, Ex. A) ["installation" amendment "would codify existing DIR precedential public works determinations on installations issued by the current Director"], citing *Installation of Playground Equipment* (Sept. 22, 1999) PW 99-006 (RJN, Ex. I) ["installation of the playground equipment involves construction"]; *Installation of Gym Lockers* (Sept. 22, 1999) PW 99-011 (RJN, Ex. J) ["The installation includes on site assembly, which consists of bolting the lockers to existing concrete pads."]; *Foodservice Contract Design* (Sept.

that a future administration might "rescind the precedential determinations" and exclude such installation work as not rising "to the level of construction." (Enrolled Bill Report re: SB 975, at p. 3 (RJN, Ex. A).) The amendment forecloses that possibility and reinforces the conclusion that "installation" means work on realty as part of the construction process.

More contextual confirmation exists for this view. The *exceptions* to section 1720(a)'s definition of public work all address real property; none involves rolling stock. Sections 1720(c) and (d) exempt the following: certain "[p]rivate residential projects built on private property" (c)(1); when a state "requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project" (c)(2); when a state "reimburses a private developer for [certain] costs" (c)(3); "construction or rehabilitation of affordable housing units" (c)(4); "construction or rehabilitation of [certain] privately owned residential projects"; "[q]ualified residential rental projects" (d)(1); "[s]ingle-family residential projects" (d)(2); "[l]ow-income housing projects" (d)(3). That no exceptions exist for projects on movable objects or other personal property shows that the definition never covered such

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22, 1999) PW 99-024 (RJN, Ex. K) [installing "kitchen equipment, tables, and countertops at the school"]; *Installation of Fencing* (Sept. 23, 1999) PW 99-012 (RJN, Ex. L) ["[Temporary fencing] will be erected as a permanent fence using concrete footings to hold the metal posts"]; *Installation of Signage by Marketshare* (Sept. 29, 1999) PW 99-034 (RJN, Ex. M) ["The installation of the signage constitutes construction"]; *Installation of Gym Lockers, Bleachers, Basketball and Volleyball Equipment* (Nov. 10, 1999) PW 99-050 (RJN, Ex. N) ["installation . . . consists of bolting the lockers to existing concrete pads"]; *Toilet Partition/Bathroom Accessories Installation* (Nov. 10, 1999) PW 99-061 (RJN, Ex. O) ["installation of toilet partitions and bathroom accessories involves construction"]; *Metal Lockers and Metal Storage Shelving* (Nov. 30, 1999) PW 99-060 (RJN, Ex. P) ["installation of metal lockers and metal storage shelves" at police facility "involves construction"].

projects in the first place. But the Legislature *did* see a need to exempt certain types of work done on realty, such as the construction of affordable housing units—an exemption designed to keep down costs. (See *infra*, at p. 24; cf. *Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785, 795 & n.9 ["[P]rovisions of the Prevailing Wage Law specifying exceptions only reinforce the existence of the general principle that maintenance work is covered"].)

Amendments to the statute substantiate its focus on realty. (See, e.g., § 1720.2 ["'public works' also means any construction work done under private contract" if "more than 50 percent of the assignable square feet of the property is leased to the state or a political subdivision for its use"].) When work is not directly done on the site itself—such as transporting materials—but the Legislature wished to subject that type of work to prevailing wages, it made its intent clear by adding narrow definitions. (See § 1720.3(a) ["hauling of refuse from a public works site to an outside disposal location"]; § 1720.9 ["hauling and delivery of ready-mixed concrete to carry out a public works contract"].) If the Legislature had intended to cover rolling stock, it would have done so already.

Other statutes pertaining to public works also exclude rolling stock. (Gov. Code, § 4002 ["'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"]; Pub. Contract Code, § 1101 ["'Public works contract,' . . . means an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind"].) Plaintiff contends that the specificity of the definition in these statutes means that the more general language in section 1720 should be interpreted to include rolling stock. (Br. 44.) To the contrary, the statutes show that they share a common understanding of public works as construction

projects on realty. That was the Legislature's intent. (See Senate Third Reading of SB 1999 (Aug. 23, 2000) (RJN, Ex. E) [citing the Public Contract Code's definition of a "public works contract" as relevant authority when discussing an amendment to the Labor Code].) And that is how the Attorney General has understood it. (See AG Op. 11-304 (Dec. 24, 2012) 95 Ops. Cal. Atty. Gen. 102 (9 ER 2030–32) [stating that the definitions in the Labor Code, Government Code, and Public Contract Code refer to the same common understanding of public works].)

Plaintiff's approach of construing "public works" differently across the statutes makes no sense. The Government Code requires an "accurate account of the cost of the public work" (Gov. Code, § 4003), and the Public Contract Code requires that the "contents of bids or offers" for "the construction of any public work" contain information including a "public works contractor registration number issued pursuant to Section 1725.5 of the Labor Code." (Pub. Contract Code, § 4104.) But under Plaintiff's view, a contract for "public work" (under the Labor Code) may not be subject to the accounting requirements for construction of a "public work" (under the Government Code) or the bidding requirements for a "public works" contract (under the Public Contract Code). That disjointed result contravenes the canon that statutes pertaining to the same subject "should be read together and harmonized." (*Louisiana-Pacific Corp. v. Humboldt Bay* (1982) 137 Cal.App.3d 152, 156.) The statutory cross-referencing also confirms that the statutes share the same understanding of public works. (See § 1771.1(a) [citing "the requirements of Section 4104 of the Public Contract Code"].)

Section 1720's purpose validates this point. The statute "was designed to benefit the construction worker on public construction projects"—and generally "construction projects of substantial dimension," such as highways and dams. (*O.G. Sansone*, *supra*, 55 Cal.App.3d at

p. 461; AG Op. 11-304 (Dec. 24, 2012) 95 Ops. Cal. Atty. Gen. 102 (9 ER 2030, 2032) ["The term [public works] . . . appears consistently to signify construction projects on a substantial scale"]; AG Op. 86-803 (Dec. 31, 1986) 69 Ops. Cal. Atty. Gen. 300, 303 ["The purpose of prevailing wage laws is to obtain well-qualified, competent and efficient workers for the construction of public facilities by assuring that they are paid commensurate with those working in private industry"].) As precedent has recognized, "[t]here is a natural, intrinsic distinction between public works contracts and other public contracts." (*O.G. Sansone*, *supra*, 55 Cal.App.3d at p. 461.) "The Legislature having ascertained the existence of a situation in the field of construction of public works which called for remedial action could act to remedy that situation without making the legislation applicable to every public contract." (*Ibid.*) Work on fixed projects on realty fits this purpose; work on personal property such as rolling stock does not.

The legislative history points in the same direction. The law reflects a balance between labor interests and cost. For instance, a proposal to expand public works to include certain affordable housing projects failed due to public concern that labor costs would constrain development. (See Senate Bill 975 (RJN, Ex. B) [as amended in Assembly on June 25, 2001]; Letter from California Redevelopment Assn. to Sen. Alarcon re: SB 975 (June 28, 2001) (RJN, Ex. C); D. Weintraub, Sacramento Bee, *Taking from the Poor and Giving it to the Unions* (Sept. 6, 2001) (RJN, Ex. D).) Similarly, increased costs on transportation projects would be borne by commuters (*i.e.*, higher train fares and fewer public transit options) many of whom rely on affordable public transportation. (Cf. R. Gallamore & J. Meyer, *American Railroads: Decline and Renaissance in the Twentieth Century* (Harv. Univ. Press 2014) p. 109 ["deficits, coupled with increasing demands from railroad labor, caused railways to raise fares"].) Imposing prevailing wage burdens would multiply costs to the public in other ways as

well: requiring not only businesses to create and maintain additional records and to pay above-market wages, but also the government to expend more taxpayer resources to enforce the law through increased investigations, prosecutions, and adjudications. These are "issues of high public policy." (*State Bldg. & Const. Trades Council of Cal. v. Duncan* (2008) 162 Cal.App.4th 289, 324.) And "to strike a balance between the[m] is the essential function of the Legislature, not a court." (*Ibid.*) Here the Legislature reasonably required prevailing wages only for public works as commonly understood.[5]

Court cases support the ordinary meaning of public works. In *Swanton v. Corby* (1940) 38 Cal.App.2d 227, the court interpreted a provision of the Municipal Corporation Act that required that "public works" over five hundred dollars be "done by contract" and "let to the lowest responsible bidder." (*Id.* at p. 229.) The question was whether "the erection of a two-way short wave radio for use by the city police" was a "public work," requiring the city to "advertise for bids for the materials and labor used in building the radio." (*Id.* at p. 227.) Citing a California treatise, the court interpreted "public works" to "embrace all fixed works constructed for public use or protection." (*Id.* at p. 230, quotation marks omitted.) "[T]he term," the court said, "probably includes bridges,

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[5] Other legislative history supports that view. On January 17, 1974, a bill (SB 1581) was introduced to subject certain "lease-purchase contracts" to prevailing wage requirements. A school district complained that while it had "no objection to the prevailing wage provisions in lease-purchase contracts related to buildings," "the bill as written would also seem to apply to lease-purchase contracts involving personal property, such as school buses, to which the provisions are not as readily applicable." (Letter from LAUSD to Sen. Zenovich re: SB 1581 (Mar. 18, 1974) (RJN, Ex. G).) The bill was then amended to cover "lease-purchase contracts *for buildings*." (Senate Bill 1581 (RJN, Ex. H) [as amended in Senate, Apr. 3, 1974].) Although the bill failed for unrelated reasons, its history shows that public works excluded rolling stock.

waterworks, sewers, light and power plants, public buildings, wharves, breakwaters, jetties, seawalls, schoolhouses and street improvements." (*Ibid.*) Building a radio did not fit that definition, because it was "not alleged that the radio was installed in the erection, improvement or repair of any public building." (*Ibid.*) Rather, the radio "more nearly resemble[d] a furnishing in a public building," which had "never been held to be 'public wor[k]'." (*Ibid.*) Similarly in *Cutting v. McKinley* (1933) 130 Cal.App. 136, the court said that "[t]here is no doubt that the term 'public works' means 'all fixed works constructed for public use,'" in the course of holding that a party was entitled to certain pay under the terms of a city charter for being "employed on public works outside the city and county." (*Id.* at pp. 137–138, citations omitted.) These cases support the common understanding that public works are performed on realty.

B. The Legislature has respected the agency's longstanding interpretation that work on trains is not a public work.

The agency charged with administering the statute—the Department of Industrial Relations—has reached the same conclusion that the statute's text, structure, and purpose compel. In multiple rulings, that agency has determined that work performed on rolling stock, such as trains or vessels, is not public work and falls outside the scope of prevailing wage requirements. The Legislature has respected the Department's interpretation. No basis exists for a court to disregard that judgment.

1. The agency charged with administering the statute has repeatedly concluded that work on rolling stock is not a public work.

The Legislature has granted the Department "quasi-legislative authority to determine coverage of projects or types of work under the prevailing wage laws." (§ 1773.5(d).) Using its authority, the Department has concluded on at least nine different occasions over a period of more than 30 years that the prevailing wage laws do not apply to rolling stock.

"The Department has determined, consistent with previous court rulings and opinions from the Attorney General's Office, that maintenance/repair of rolling stock, i.e. vehicles, vessel, rail cars, etc., is not covered under the prevailing wage laws." (Vuksich, Chief of the Department of Industrial Relations, *Response to Madeline Chun of Hanson, Bridgett* (Mar. 18, 1994) (10 ER 2067); Rinaldi, *Determination of the Director re: Boat Repair and Fire Pump Engine Replacement* (June 26, 1990) (10 ER 2068) [boat repair and engine replacement project "is *not* a public works"]; Rinaldi, *Determination of the Director in Response to Regional Administrative Officer, Dept. of Fish and Game* (Mar. 31, 1989) (10 ER 2069) [work on boats not public work].)[6]

The Department has twice denied coverage for work identical to the work here. It examined a project to develop a communications network for the Southern California Rapid Transit District. It found that, while "[t]he installation of that portion of the transit radio system which involves installation of equipment in buildings and other structures is covered work under the California prevailing wage laws," "that portion of the project which is installation of equipment in District trains, buses and other vehicles is not covered work under the Labor Code." (Robbins, Counsel for Department of Industrial Relations, *Southern California Rapid Transit District – Transit Radio System* (Dec. 28, 1987) (10 ER 2139).)

And the Department found no coverage for placing equipment on Bay Area Rapid Transit trains as part of an Automatic Train Control

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[6] Where indicated in this brief, a copy of the cited Department determinations or decisions can be found in the Excerpts of Record ("ER") from the Ninth Circuit. For determinations dated 2002 and later for which no citation to the ER is provided, the determination can be found on the Department's website at https://www.dir.ca.gov/OPRL/pwdecision.asp. Pre-2002 determinations for which no ER citation is provided in this brief are attached to Wabtec's Request for Judicial Notice.

System. According to the Department, "[t]he installation and testing of ATC carsets on BART cars is not the type of work that falls within the coverage of Labor Code 1720, et seq." (Robbins, Counsel for Department of Industrial Relations, *Response to Contract Management Transportation Division, Westinghouse Electric Corporation* (Dec. 11, 1987) (10 ER 2140).) The ATC system is very similar to the PTC system here. Both depend on communication between equipment installed at the railyards and equipment placed on the trains to reduce the risk of train collisions. If there is no coverage for placing *ATC* equipment on trains, there should be no coverage for placing *PTC* equipment on trains either.

These decisions are part of the Department's long and consistent history of construing the statute to exclude work on rolling stock. (See Madu, Senior Deputy Labor Commissioner (Sept. 8, 2016) (10 ER 2044–2046, 2048) ["historically, work in the train is not covered"]; Liang, *Response to Request for Prevailing Wage Information Contract with the Southern California Regional Rail Authority* (Dec. 8, 2004) (10 ER 2141) ["[T]he installation of seats on passenger rail cars is not subject to prevailing wage law[s]."]; Ouyang, *Response to Request for Classification Determination* (Dec. 18, 2006) (10 ER 2137) ["installation of police lights, sirens, radios, radar, and other equipment on police motorcycles" not covered]; David Mar to Tim Stahlheber (Mar. 18, 2015) (10 ER 2146) ["This is the CBA where we discussed that work on ships and barges would not be covered because they are considered to be 'rolling stock.'"].)

Nor has the Department accepted calls to expand the scope of public works on the theory that work on rolling stock is public "construction" or "installation" work. "Construction" involves "the building of a structure." (*Howe Creek Ranch Habitat Restoration Project* (Oct. 19, 2005) PW 2004-050 at p. 3.) And "'[i]nstallation' has consistently been defined in prior public works coverage determinations as work involving the bolting,

securing or mounting of fixtures *to realty*." (*Installation, Repair and Maintenance of Freeway and Highway Emergency Call Boxes* (Mar. 27, 2012) PW 2011-009 at p. 5 (9 ER 1999), emphasis added; *County-Sponsored Messages on Private Billboards* (Sept. 9, 2016) PW 2015-015 at p. 3 (2 ER 196) [no "installation" because there was "no physical attachment of the vinyl prints to the realty by cement, plaster, nails, bolts, screws, or anything similar"]; *Kiwi Substation – Orange County Water District* (Apr. 25, 2007) PW 2005-039 at p. 2 (9 ER 2004) ["the coverage analysis of installation work" asks "if it involves the bolting, securing or mounting of fixtures to realty"].)

Plaintiff argues that "installation" cannot mean only the bolting, securing, or mounting of fixtures to realty because the Legislature amended the statute in 2012 to say that "installation" included assembling "freestanding" modular office systems. (Br. 38–39.) But the amendment does not apply here because it was enacted after Wabtec entered the contract in 2010—the "benchmark date" for determining the governing version of the statute. (See *Kiwi Substation*, *supra,* PW 2005-039 at p. 2 (9 ER 2004).) Nothing in the amendment in any event suggests the Legislature intended to cover rolling stock. Placing an "office system" on realty is different from placing wiring on rolling stock. If anything, the amendment confirms that rolling stock is not covered. The 2012 amendment was enacted to overturn a specific agency determination regarding freestanding modular office systems, and it was specifically limited only to such installation projects. (See *Modular Furniture* (Nov. 24, 2009) PW 2008-035 (9 ER 2012–18).) If the Legislature had intended that the statute broadly cover all installation projects, including those not on real property, it easily could have so provided, either in the 2012 amendment or on many other occasions before or since that amendment.

That it chose not to shows that the Department's many determinations excluding rolling stock remain valid.

Attorney General opinions support the agency's practice of excluding rolling stock. In one opinion, the Attorney General stated that the term "public works" as it appeared in various state statutes (including section 1720) "comport[ed] with the common usage and ordinary meaning of 'public works' as reflected in dictionary definitions," which defined "public works" as "fixed works (as schools, highways, docks) constructed for public use or enjoyment esp. when financed and owned by the government." (AG Op. 11-304, *supra*, 95 Ops. Cal. Atty. Gen. at p. 5 (9 ER 2023–2036) [concluding that the Prison Industry Board's power to establish "procedures governing the purchase of . . . goods and services" was not exempt "from state laws governing public works contracts"].) Earlier Attorney General opinions made similar statements. (See, e.g., AG Op. 86-803, *supra*, 69 Ops. Cal. Atty. Gen. at p. 305 [concluding that a fire station and library are "public works" upon which prevailing wages must be paid, reasoning in part that "[o]ur conclusion is supported by the common definition of 'public works' [as] 'all fixed works constructed for public use'"]; AG Op. 54-231 (Feb. 23, 1955) 25 Ops. Cal. Atty. Gen. 153 at p. 154 [addressing a provision in the Sacramento County charter, which provided for an eight-hour work day for employees "employed upon any public works" and stating that "[i]t is now well settled in this State that the phrase 'public works' as used in these provisions [of the Labor Code] is not applicable to the general work done by public employees, but has a restricted meaning and applies only to the work done upon fixed works constructed for public use or production"].)

Plaintiff suggests that some of these Department or Attorney General decisions were issued before the Legislature added the term "installation"

in 2001 and so lack relevance. (Br. 44.) That argument fails. The amendment was intended to "codify existing DIR precedential public works determinations on installations issued by the current Director." (Enrolled Bill Report re: SB 975, at pp. 2–3 (RJN Ex. A).) As discussed, those determinations were limited to installing fixtures to realty. Thus, after the 2001 amendment, "the coverage analysis of installation work did not change." (*Kiwi Substation, supra,* PW 2005-039 at p. 2 (9 ER 2003-10).) "[T]he work is covered if it involves the bolting, securing or mounting of fixtures to realty." (*Ibid.*) In any event, at least five determinations were issued after 2001 and so still apply against Plaintiff. (*Ibid.*; *Installation of Smart Classroom Technology* (July 27, 2009) PW 2008-034 (9 ER 1991); *Erection and Removal of Portable Fencing System* (June 26, 2007) PW 2007-005 (9 ER 1986); *Maintenance Work, Western Municipal Water District* (Feb. 5, 2016) PW 2015-016 at p. 3; *County-Sponsored Messages on Private Billboards* (Sept. 9, 2016) PW 2015-015 (2 ER 196).)

2. This Court should adhere to the Department's interpretation that rolling stock falls outside public works coverage.

This Court should respect the Department's interpretation for several reasons: the statutory scheme requires deference; the Department's interpretation is longstanding; and the Legislature has acquiesced.

(a) The statutory scheme requires adherence to the Department's interpretation.

The statutory scheme makes clear that contracting parties are entitled to rely on the Department's exclusion of public works coverage.

The statute expressly allocates the responsibilities of the actors involved. The very first section concerning prevailing wages is section 1770, which states: "The Director of the Department of Industrial Relations *shall determine* the general prevailing rate of per diem wages in accordance with the standards set forth in Section 1773." (Emphasis

added.) Section 1773 states in turn: "The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages . . . in the locality in which the public work is to be performed for each craft, classification, or type of worker needed to execute the contract *from the Director of Industrial Relations*." (Emphasis added.) In "determining the rates," the Department shall consider, among other things, wage rates in collective bargaining agreements. (§§ 1770, 1773.) Corollary to the power to determine rates is the Director's power "to *determine coverage* of . . . types of work under the prevailing wage laws." (§ 1773.5, emphasis added.) The body awarding the "contract for public work" then "shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract." (§ 1773.2.)

The statutory scheme confirms the centrality of the Department's decisionmaking. "The director of the Department has the responsibility to determine the general prevailing wage" and "is vested with authority to render opinions as to whether a specific project or type of work requires compliance with the [prevailing wage law]." (*Azusa Land Partners v. Dept. of Industrial Relations* (2010) 191 Cal.App.4th 1, 15, quotation marks omitted; *Oxbow, Carbon & Minerals v. Dept. of Industrial Relations*, (2011) 194 Cal.App.4th 538, 547 ["the Director . . . has the initial authority to determine whether a specific project is public work subject to the prevailing wage law"].) The Department's "determination of the classification or type of work covered is an essential step in the wage determination process and a rate cannot be fixed without such a determination." (*Winzler & Kelly v. Dept. of Industrial Relations* (1981) 121 Cal.App.3d 120, 128.)

The legal obligations of other actors, such as subcontractors, thus flow from the Department's determinations. "These determinations have the corollary effect of allowing awarding bodies and interested parties to specify that category of worker in calls for bids and bid proposals." (*Independent Roofing Contractors v. Dept. of Industrial Relations* (1994) 23 Cal.App.4th 345, 352.) "These rules exist so that awarding bodies and competing bidders can estimate labor costs and enjoy pre-bid certainty." (*Prevailing Wage Rates, Richmond-San Rafael Bridge* (Jan. 23, 2006) PW 2004-023 at p. 7.)

Under this scheme, a subcontractor cannot be held liable when the Department has not only not determined that prevailing wages need be paid but in fact has determined the opposite. Without the Department's guidance, the subcontractor cannot know what the prevailing rate should be. That is a determination made only by the Department using its statutory authority, its expertise, and the information (labor statistics and local collective bargaining agreements) it has access to. (§ 1773.)

The penalties for violations of the prevailing wage law reinforce the centrality of the Department's role. Violations carry serious consequences: civil liability, criminal penalties, and prohibitions on bidding. (See, e.g., § 1777.) Hence "it is of prime importance" that, before a contractor can be held liable, the public entity "has performed its duty" to "determin[e]" coverage; otherwise, the law "in view of [its] penal provisions" would be unconstitutionally vague. (*Metropolitan Water Dist. of So. Cal. v. Whitsett* (1932) 215 Cal. 400, 408.) "When [a] final decision is made," the Court held, "no uncertainty would arise in the requirement" to pay prevailing wages for a particular type of work. (*Ibid.*) The statutory scheme is clear: the subcontractor is entitled to rely on the Department's determinations regarding whether a particular type of work is covered public work requiring prevailing wages.

Prevailing wages were *not* determined for the work at issue here. Instead, the Department has long determined that work on trains is not subject to prevailing wages. Wabtec cannot be faulted—and subjected to criminal penalties—for relying on the Department's longstanding determinations excluding rolling stock.

The statutory scheme establishes the Department's "quasi-legislative authority to determine coverage of projects or types of work under the prevailing wage laws." (§ 1773.5(d).) "Quasi-legislative rules are the substantive product of a delegated *legislative* power conferred on the agency," and "[w]hen a court assesses the validity of such rules, the scope of its review is narrow"—narrower than review of an "agency interpretation of the meaning and legal effect of a statute." (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8, 10, emphasis in original.) If the Department has not determined that work on rolling stock is covered—and in fact, has determined the opposite—then a subcontractor has no legal obligation to pay prevailing wages (whatever they might be) for such work. Without that quasi-legislative determination, there is no "law" that Wabtec could violate. To be sure, a quasi-legislative determination can be so "arbitrary or capricious or in conflict with the clear terms of the Department's statutory mandate" as to require overruling, since a court conducts an "independent review of issues of law." (*Internat. Brotherhood of Electrical Workers v. Aubry* (1996) 41 Cal.App.4th 1632, 1635–1636; *California Slurry Seal Assn. v. Dept. of Industrial Relations* (2002) 98 Cal.App.4th 651, 662.) But here, the Department's rule excluding rolling stock is not arbitrary, capricious, or against the clear terms of the statute. To the contrary, its rule is dictated by the statute's text, purpose, and history.

The Department's designation of determinations as "non-precedential" does not remove their "quasi-legislative" character. One case

has stated that, because the Department has deemed its determinations non-precedential, "coverage determinations are no longer, if they ever were, treated as quasi-legislative by the Department itself." (*State Bldg.*, *supra*, 162 Cal.App.4th at pp. 302, 303.) But "non-precedential" merely means that the Department may not rely on those determinations as precedent in an adjudicative proceeding. (See Gov. Code, §§ 11425.10, 11425.60.) Such a Department *practice* cannot affect the Department's "quasi-legislative authority" to make coverage determinations—authority conferred upon the Department by *statute*. (See § 1773.5(d) ["The director shall have quasi-legislative authority to determine coverage of projects or types of work"].) Indeed, right after stating that determinations were not quasi-legislative, the court in *State Building* quoted from a regulation that expressly declares the opposite. (See 162 Cal.App.4th at p. 303 [quoting Cal. Code Regs., tit. 8, § 16303 as "declaring that the Director's authority 'to establish the prevailing wage for any craft, classification, or type of worker is quasi-legislative'"].) Several court of appeal decisions, before and after *State Building*, have also affirmed the "quasi-legislative" status of a determination, thus implicitly rejecting *State Building*'s outlier view that it lacks that status. (See, e.g., *Vector Res., Inc. v. Baker* (2015) 237 Cal.App.4th 46, 55 ["The Department's authority pertaining to prevailing wage determinations is quasi-legislative and it has legislative discretion with respect to such decisions," quotation marks omitted]; *Independent Roofing, supra*, 23 Cal.App.4th at p. 354 ["[T]he Department's authority to make prevailing wage determinations. . . is quasi-legislative"].)

Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976 is not to the contrary. There, the Court rejected an argument that the obligation to pay prevailing wages arises solely from the contract. That is not Wabtec's position. Rather, Wabtec's position is that, given the Department's central role under the statute (including the express grant of quasi-legislative

authority) and given its consistent and longstanding determination that the statute does not cover work on rolling stock, the Department's determination must be given effect unless it is arbitrary, capricious, or against the clear terms of the statute, which Wabtec has shown it is not.

(b) The Department's interpretation, a product of its special expertise, is longstanding and not clearly erroneous.

Even if viewed simply as an agency interpretation—without considering its quasi-legislative status—the Department's interpretation "is entitled to consideration and respect by the courts." (*Yamaha, supra*, 19 Cal.4th at pp. 7–8; see also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 799, 801 [stating that the agency rule at issue "has both quasi-legislative and interpretive characteristics" and concluding that it is "entitled to deference" whether it is quasi-legislative or interpretive].) "[T]he department has special expertise in administering the prevailing wage law." (*Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 207). As the agency charged with the law's administration, it "is entitled to deference when interpreting policy in its field of expertise." (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1155, internal quotation marks omitted.) Its "determinations—which are issued by the director of the department—are plainly the product of careful consideration by senior members of the administrative agency." (*Sheet Metal, supra*, 229 Cal.App.4th at p. 207.) Its interpretation deserves even "greater credit when it is consistent and long-standing." (*Ibid.*) Unless "clearly erroneous," that interpretation "should generally not be disturbed." (*Id.* at pp. 207, 209.) "This is true particularly where there has been continued public reliance upon and acquiescence in such interpretations." (*City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 530.)

Contrary to these well-settled principles, one case—in which this Court recently granted review—asserted that, because Department "decisions are not precedential," they "should not be entitled to deference." (*Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778, 796, review granted Feb. 27, 2019, No. S253458.) Respectfully, that conclusion is incorrect: "Although the department has determined that its coverage determinations do not have precedential value, the determinations nonetheless constitute administrative interpretations entitled to considerable deference." (*Sheet Metal, supra*, 229 Cal.App.4th at p. 207.)

The principles of deference apply fully here. The Department's interpretation excluding rolling stock is consistent, longstanding, and not clearly erroneous. On every occasion the Department has addressed the issue over a period of 30 years, it has found work on rolling stock not to be subject to prevailing wages. (See *supra*, at pp. 26–29.) Plaintiff fails to identify a single determination to the contrary. Nor is the interpretation erroneous—let alone clearly so. As discussed (*supra*, at pp. 18–25), the agency's interpretation is consistent with the statute's text, structure, and purpose, all of which demonstrate that public works are performed on realty and not on rolling stock. But even if we assume ambiguity in the statute, it is at least "susceptible to both of the opposing interpretations offered by the parties," as the Ninth Circuit recognized. (*Busker*, *supra*, at p. 7.) An agency interpretation that adopts a reasonable reading cannot be clearly erroneous.

(c) The Legislature has acquiesced in the Department's interpretation.

The Legislature has demonstrated its acceptance of the Department's interpretation. Although courts "liberally construe prevailing wage statutes," the "rule of liberal construction is subject to an important proviso: . . . they cannot interfere where the Legislature has demonstrated

the ability to make its intent clear and chosen not to act." (*City of Long Beach v. Dept. of Industrial Relations* (2004) 34 Cal.4th 942, 950; *State Bldg.*, *supra*, 162 Cal.App.4th at p. 324.)

Here the Legislature has made its intent clear. It has amended the public works statute: to add the word "installation" (Stats. 2001, ch. 938), to include within "construction" pre-construction activities (Stats. 2000, ch. 881), to include within "installation" the assembly of freestanding modular office units (Stats. 2012, ch. 810), to include within "public works" certain private "construction work" (§ 1720.2), to include within "public works" hauling refuse from public works sites (§ 1720.3), to exempt certain work performed by volunteers (§§ 1720.4 and 1720.5), to include within "public works" work performed in connection with renewable energy (§ 1720.6), to include within "public works" private contract work done on certain hospitals (§ 1720.7), to include within "public works" hauling and delivery of "ready-mixed concrete" to public work sites (§ 1720.9).

But the Legislature has never sought to override the longstanding administrative rule that excludes rolling stock. "Because the Legislature is presumed to be aware of a long-standing administrative practice, the failure to substantially modify a statutory scheme is a strong indication that the administrative practice is consistent with the Legislature's intent." (*Sheet Metal*, *supra*, 229 Cal.App.4th at p. 207.) This is especially true when the Legislature has amended the statute in other ways. (See *Gerawan Farming*, *supra*, 3 Cal.5th at p. 1156 [upholding a longstanding administrative practice where the Legislature's amendments did not concern that practice and the "Legislature offered no indication that it intended [the statute] to depart from more than two decades of [court and agency] precedent"].) The Legislature's preservation of the agency rule demonstrates assent.

Here we have more than a presumption of the Legislature's awareness of a longstanding administrative practice. When the Legislature

has disagreed with a specific Department interpretation, it has amended the statute to correct it. (Stats. 2012, ch. 810 § 1 [overruling an agency interpretation excluding modular office systems].) But it has never overridden the Department's interpretation excluding rolling stock. And when the Legislature has codified Department interpretations, it has confirmed that the statute applies to work on realty. The Legislature has never amended the statute to expand coverage to projects outside that category. (See Enrolled Bill Report re: SB 975, at pp. 2–3 (RJN, Ex. A) [addition of "installation" "codif[ied] existing DIR precedential public works determinations on installation issued by the current Director" that involved work on realty); Senate Third Reading of SB 1999 (RJN, Ex. E) [amendment to include "preconstruction phases of construction" merely "codifie[d] current Department practice by including construction inspectors and land surveyors among those workers deemed to be employed upon public works"].)

The same principle of acquiescence applies with respect to prior judicial and Attorney General interpretations. "[W]hen the Legislature amends a statute, we presume it was fully aware of the prior judicial construction." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572.) Courts also presume that an Attorney General interpretation "has come to the attention of the Legislature, and if it were contrary to the legislative intent that some corrective measure would have been adopted in the course of the many enactments on the subject in the meantime." (*Meyer v. Board of Trustees of San Dieguito Union High School Dist.* (1961) 195 Cal.App.2d 420, 432.) Consistent with the Department's interpretation, cases and Attorney General opinions have described public works as works

on realty. The Legislature has never adopted any "corrective measure" overriding those interpretations and has hence signaled its approval.[7]

(d) None of Plaintiff's arguments against deference has merit.

Plaintiff does not deny the abundance of Department decisions against his position. Instead, he contends that those decisions should not be respected because they (1) are "hearsay"; (2) are on "a single page or less"; (3) are "legally void" for non-compliance with the Administrative Procedure Act (APA); (4) do not address "anything like the project at issue here"; and (5) exhibit "vacillating, inconsistent positions" because the initial penalty issued in this case was later withdrawn. (Br. 44–45.)

None of these arguments has merit. No court has disregarded an agency's coverage decision on hearsay grounds. Agency decisions fall within the public record hearsay exception, and a court may "presume that the tendered public records are trustworthy." (*Johnson v. City of Pleasanton* (9th Cir. 1992) 982 F.2d 350, 352.) The "burden of establishing a basis for exclusion falls on the opponent of the evidence"

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[7] If the Court were inclined to disagree with the Department's interpretation, it should at least allow the Director to rule in the first instance and reconsider that interpretation. A court decision against Wabtec without a Department finding that prevailing wages apply would be advisory, because no prevailing wage has been determined for Wabtec's work and thus no remedy can issue. Alternatively, the Court should restrict the application of any new rule to future cases to avoid due process concerns. (See *Metropolitan Water Dist. of So. Cal., supra*, 215 Cal. at p. 408; cf. § 1773.6; *Cuesta College/Offsite Fabrication of Sheet Metal Work* (Mar. 4, 2003) PW No. 2000-027 at p. 16 ["While the project in question has long since been completed, this determination issues to clarify the test for whether off-site fabrication is covered by the prevailing wage law. Accordingly, it will not be enforced retrospectively on this or other applicable projects advertised for bid prior to the date this determination is posted on the Department's website"].)

(*ibid.*), but Plaintiff made no attempt to meet this burden at the district court, nor has he made any attempt on appeal or before this Court.

Nor is page count relevant. "Coverage determinations," without regard to the number of pages they may contain, "are plainly the product of careful consideration by senior members of the administrative agency." (*Sheet Metal, supra*, 229 Cal.App.4th at p. 207.) In any case, many of the agency decisions span multiple pages—not one page, as Plaintiff claims.

Contrary to Plaintiff's assertion that the agency decisions violate the APA, they are exempt from the APA. Section 1773.5(d) states that "determinations" regarding coverage of types of work and "any determinations relating to the general prevailing rate of per diem wages . . . shall be exempt from the Administrative Procedure Act." (§ 1773.5(d); *Winzler, supra*, 121 Cal.App.3d at p. 128 [holding that coverage determinations are not subject to the APA].) "In the numerous court challenges to coverage determinations since, no court has ever found that authority lacking, or suggested that it is subject to the APA." (*Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components* (May 3, 2010) PW 2007-008 (Decision on Administrative Appeal) at p. 11, *affd. in Sheet Metal, supra*, 229 Cal.App.4th 192.) In any event, courts have deferred to the Department's *interpretations* without finding any compliance problems. (*Sheet Metal, supra*, 229 Cal.App.4th at p. 207 [decisions "constitute administrative interpretations entitled to considerable deference"].) Plaintiff's citation of *Tidewater Marine Western, Inc. v. Bradshaw* (1990) 14 Cal.4th 557—which found DLSE interpretations not promulgated under the APA to be void "underground regulations"—is misplaced. (Br. 44.) Although the Labor Code does not "expressly exempt the DLSE from the APA" (as *Tidewater* recognized, see 14 Cal.4th at p. 570), it does expressly exempt Department coverage determinations.

Nor is it true that the Department has never addressed "anything like the project at issue here." (Br. 45.) As discussed above, the Department has twice denied coverage for the work of placing equipment in railcars that would operate as part of a communications network for a rail system. (*Supra*, at pp. 27–28.)

Finally, the Department has not acted inconsistently. "It is not correct to say the department has been inconsistent in its approach [where as here] any inconsistencies have been corrected or resolved before a determination is final." (*Sheet Metal, supra*, 229 Cal.App.4th at p. 210.) As discussed (*supra*, at pp. 15–16), the initial penalty issued by a lower-level official was based on a misreading of the contract and an erroneous conclusion that "the intersection" between the field installation and on-board work supported a penalty. (7 ER 1432.) Senior authority within the Department *vacated* that penalty because "historically, work in the train is not covered." (10 ER 2044–45.) And the Department did not adjudicate the breach of contract claim presumably because it had no statutory authority to do so; the Ninth Circuit later held there was no breach of contract. The decision to vacate the initial finding that work on rolling stock was subject to prevailing wages actually proves the point: work on rolling stock is *not* subject to prevailing wages.

II. WORK PERFORMED ON TRAINS IS NOT DONE "IN THE EXECUTION" OF A CONTRACT FOR PUBLIC WORK UNDER SECTION 1772.

Plaintiff argues that, even if the on-board work is not itself "construction" or "installation," it should still be deemed subject to prevailing wages under section 1772. That section provides that "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." According to Plaintiff, he was employed "in the execution" of a contract for public

work because his work was done under a general contract that covered the entire project and was "integral" to completing the overall project. The text, structure, and purpose of the statute foreclose that contention. The courts and the Department, too, have squarely rejected it.

A. The statute's text, structure, and purpose demonstrate that work on trains is not done in execution of a contract for public work.

"Execution" means "[t]he act of carrying out or putting into effect." (Black's Law Dict. (10th ed. 2014).) It denotes "achievement"—as in, "the execution of . . . a work." (Webster's New International Dict. of the English Language (2d ed. 1934) 891.) And to "execute" a contractual duty means "[t]o perform or complete" it. (Black's Law Dict. (10th ed. 2014).)

Plaintiff was not employed in the *execution* of a contract for public work. The work Plaintiff was "carrying out" or "performing" was placing equipment on rolling stock, which is not a public work. (8 ER 1782–84.) Nor was he employed to perform work necessary to the "completion" of a public work—namely, the field installation. (*Ibid.*; 9 ER 1951, 1958, 1960.) The public work of field installation was completed without the on-board work. As the Ninth Circuit found, "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." (*Busker, supra,* at p. 11.) Plaintiff does not dispute that his work was not integral to the construction of the field installation work. (Br. 31.)

The term "subcontractor" in section 1772 confirms that Plaintiff was not employed in the execution of a contract for public work. A "subcontractor" is a "subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works." (§ 1722.1.) And a "subcontract" refers to "[a]n agreement between a prime or general contractor and a subcontractor for the execution of a portion of

the contractual obligation of the prime contractor to the owner." (Dictionary of Architecture and Construction (2000) 903.) The only contract to which Wabtec was a party was the *subcontract*, and that is the contract that it and its workers were executing. Plaintiff was hired to do work that was neither public nor necessary to the completion of a public work.[8]

The term "contract for public work" in section 1772 reinforces that conclusion. Section 1772 refers to the execution of not any contract, but a contract "*for public work.*" (Quirk, et al., *A Comprehensive Grammar of the English Language* (1985) 696 ["for" denotes purpose].) Here Plaintiff's work under the subcontract did not involve completing any public work. Neither he nor Wabtec had any "legal duty" under contract to complete a public work. (See Black's Law Dictionary (10th ed. 2014) [defining "contract"].) Their only duty was to complete the on-board work, which is not a public work.

The statutory structure supports this point. Section 1772 must be read together with section 1720, which defines a "public work" as "[c]onstruction, alteration, demolition, installation, or repair work" that is "done under contract." The threshold requirement is thus that the work be "construction, alteration, [installation,] demolition or repair work" on its own terms (including work necessary to the completion of that work). (*Howe Creek Ranch Habitat Restoration Project, supra*, PW 2004-050 at

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[8] Plaintiff asserts that "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." (Br. 25, citing 7 ER 1338.) The record does not say that. Instead, a Wabtec representative was asked at deposition to confirm if "[t]he work done by Wabtec's employees on the project was an execution of the Parsons contract, *at least Wabtec's portion of that*"—to which the representative said yes. (7 ER 1338, emphasis added.) Plaintiff omits the crucial qualifier that Wabtec only performed its portion of the contract that did not involve a public work.

p. 2). *Then, that* work "must be done under contract" to qualify as public work. (*Ibid.*) Although Plaintiff's work was done under contract, his work was not a public work nor necessary to completing a public work to begin with.

The statutory purpose validates this conclusion. Requiring that a worker be actually engaged in completing the public work is consistent with the statutory purpose of giving a prevailing wage to such workers. (*Lusardi, supra*, 1 Cal.4th at p. 987.) But it would go beyond the statutory purpose if workers who do no public work were also guaranteed a prevailing wage, devaluing the work done by those whom the statute was designed to protect. Courts have rejected "an expansive interpretation of the phrase 'in the execution of'" under section 1772 in which "nearly any activity related to the completion or fulfillment of a public works contract would be subject to the prevailing wage law, regardless of where it takes place or whether it plays a substantial role in the process of construction." (*Sheet Metal, supra*, 229 Cal.App.4th at pp. 201–202.) Consistent with that admonition, a subcontractor who employs a worker to do work unnecessary to the completion of a public work is not required to pay prevailing wages.

This interpretation of section 1772 does not disregard section 1774 as Plaintiff suggests. Plaintiff contends that section 1774—which states that "the contractor to whom the contract is awarded, and any subcontractor under him" must pay prevailing wages "to all workmen employed in the execution of the contract" for public work—"prohibits carving out subcontracts" from prevailing wage requirements. (Br. 33.) Wabtec's interpretation does not "carv[e] out subcontracts." If the subcontract work is a public work, then prevailing wages apply; but if the subcontract work is not a public work, prevailing wages do not apply. Here the subcontract work is not a public work; thus, prevailing wages do not apply.

Nor does Wabtec's reading of section 1772 render section 1771 surplusage. (Br. 32–33.) Section 1771 says that prevailing wages "shall be paid to all *workers employed on public works*." (Emphasis added.) But that section does not define what "employed on public works" means. Section 1772 provides that definition. It specifies that a worker is "employed on public works" if a contractor or subcontractor hires him to *execute* a contract for—namely, to *complete*—a public work. Being "employed on public works" does not merely mean doing work *related* to public works.

B. Court precedents demonstrate that Plaintiff's work was not done in execution of a contract for public work.

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. (*Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 752; *Sheet Metal*, *supra*, 229 Cal.App.4th 192; *O.G. Sansone Co.*, *supra*, 55 Cal.App.3d 434; *Mendoza v. Fonseca* (N.D. Cal. Nov. 28, 2016) No. 15-cv-05143-WHO, 2016 WL 6947552, at *5 [certified to this Court].) Plaintiff's work on the trains was not part of—let alone integrated into—"the flow process of construction" of the field installation work. Placing equipment on the trains did not contribute to completing the work on the wayside.

Sheet Metal makes this point particularly apparent. There the "subcontract provided that the project was to be built according to the specifications of the prime contract between the contractor and the community college district." (229 Cal.App.4th at p. 196.) The subcontractor "was required to 'furnish all labor, materials, equipment, services and supplies necessary to complete' the HVAC work" for the community college district—a heating, ventilation, and air conditioning facility, which was a public work. (*Ibid.*) The subcontract also "provided

that the project was subject to prevailing wage requirements and required [the subcontractor] to 'pay not less than the applicable prevailing wage to all laborers, workmen, and mechanics employed by him at the project site in the execution of work hereunder.'" (*Ibid.*)

The court held that the work subcontracted for was not a public work subject to prevailing wages under section 1772. That work did not qualify as public work, the court concluded, because it took place at an offsite location that was "not exclusively dedicated to the project" and thus was not "integrated into the flow process of construction." (229 Cal.App.4th at pp. 196, 206.) The court rejected the plaintiff's arguments—parroted by Plaintiff here—which placed primacy on the contract's language describing the purported closeness between the subcontractor's work and the general contractor's work. (*Sheet Metal*, Case No. A131489, Plaintiff's Br. on Appeal at pp. 3–4, 6 (Dec. 8, 2011).) Instead, the court assessed the nature of the work itself. And in particular, it held that the location on which the subcontractor performed its work compelled the conclusion that the work was not "integrated into the flow process of construction." (*Sheet Metal, supra*, 229 Cal.App.4th at pp. 196, 206.) The court deferred, too, to the Department's "consistent and long-standing practice" concluding that "fabrication work performed at a permanent offsite facility not exclusively dedicated to the public works project is not covered by the prevailing wage law." (*Id.* at p. 209.) In according deference, the court rejected the plaintiff's argument—again mimicked by Plaintiff here—that an initial decision finding coverage (which was later vacated) displayed inconsistency depriving the Department of deference. (*Ibid.*)

The reasoning in *Sheet Metal* applies *a fortiori* here. In *Sheet Metal,* the work at issue was not a public work even though it was necessary to the completion of the construction work. Here, the work was not necessary to

the completion of the construction work and thus does not rise even to the level found insufficient in *Sheet Metal*.

Other cases also show that Plaintiff's work falls far outside section 1772. In *Williams*, the court held that hauling materials offsite was not a public work where the offsite location was not "integrally connected to the project site." (156 Cal.App.4th at p. 752.) In *Mendoza*, the court held that transporting a milling machine from offsite to the public works site was not a public work where the offsite locations did "not depend on any particular public works project for their existence." (2016 WL 6947552, at *7.) And in *O.G. Sansone*, the court found that hauling materials onto the project site from another facility was a public work but only because that facility was "designed to supply the project site exclusively with subbase materials." (55 Cal.App.3d at p. 445.)

Plaintiff's work does not come close to being "integrated" into the construction process of a public work. If not even work contributing to the construction of a public works structure constitutes a public work (as cases have held), then Plaintiff's on-board work cannot be a public work when it does not contribute at all to the construction of the field installation work.

C. Agency decisions show that Plaintiff's work was not done in execution of a contract for public work.

The Department has also rejected Plaintiff's argument in factual circumstances indistinguishable from those here. If the "installation of equipment in District trains, buses and other vehicles" or the "installation and testing of ATC carsets on BART cars" is not a public work (as the Department concluded), then neither is the work done on the trains here a public work. (10 ER 2139, 2140; *supra*, at pp. 27–28.) Nor did the Department conclude that installing equipment on trains was integral to the public work of installing "that portion of the transit radio system which involves installation of equipment in buildings and other structures." (10

ER 2139.) The same conclusion follows here: work on trains was not integral to public work on the wayside.

A recent Department determination reinforces that conclusion. In *Boat Removal During Replacement of Slip Piling* (Feb. 8, 2012) PW 2011-029, the Department determined that "the boat removal work and relocation work around Santa Cruz Harbor during reconstruction of tsunami damaged piers and docks is not a public work subject to California's prevailing wage requirements." (*Id.* at p. 1.) Rejecting the assertion that such work was "integral" to the public work of reconstructing the docks under section 1772, the Department stated that "none of the boats in question [were] involved in the flow process of construction." (*Id.* at p. 3, n.3.) "Just because it is necessary to remove the boats from the construction area," the Department held, "does not mean the work was related to the performance of the prime public works contract." (*Id.* at p. 3.) The work of "relocati[ng]" the boats was "not necessary to the actual construction." (*Id.* at p. 4.)

The Department's reasoning applies with equal force here. Placing equipment on the railcars was "not necessary to the actual construction" of the field installation work.

The Department's decisions are entitled to deference for the reasons previously discussed. (*Supra*, at pp. 31–40.) And deference is particularly warranted when the inquiry involves a factual assessment of whether a work is necessary or integral to another work so as to fall within section 1772. (See *New Cingular Wireless PCS, LLC v. P.U.C.* (2016) 246 Cal.App.4th 784, 807 ["The rationale for deference is strongest . . . where the agency engages in factfinding based on conflicting evidence"].) To hold now that Plaintiff's work on trains falls within section 1772 because it was integral to a public work would contradict on-point case law and agency decisions and undermine the reliance interests that have long

existed around these decisions. That would throw into disorder all existing contracts that depend on the law's settled distinction between work on realty and work on rolling stock. Nothing in the statute, cases, or agency decisions requires that highly disruptive result.

D. Plaintiff's proposals to expand the scope of the prevailing wage law have no basis in law.

Perhaps realizing that the weight of authority rejects his position, Plaintiff advances two novel arguments: First, he asserts that *every* work included within a single contract is necessarily public work if *some* related work in the contract is. Second, because the work here is necessary to the operation of the PTC system, he contends, such work is integral to the field installation work and thus subject to prevailing wages. Both arguments lack merit.

1. Plaintiff's argument that all work subsumed within a general contract that includes some public work is meritless.

Nothing in the statute provides that *all* work in a single contract that contains *some* public work be deemed public work. "The obligation to pay prevailing wages flows from the statutory duty embodied within the prevailing wage law and cannot be based solely on contractual provisions." (*Antelope Valley Water Storage* (Jan. 17, 2017) PW 2016-007, at p. 3, internal citation omitted.) Again, to find a "statutory duty" to pay prevailing wages, the work in question must first itself be a "[c]onstruction, alteration, demolition, installation, or repair work" (including work necessary to the completion of that work), and then, it must be "done under contract." (*Supra,* at pp. 44–45.) Plaintiff fails to follow that analysis: first, he asks if some provision of a contract contains a public work; then if the answer is yes, he deems any related non-public work in the same contract to be a public work under section 1772. That approach is contrary to the statute.

Nor has any court adopted Plaintiff's position. Indeed the opposite: both the court of appeal and the Department have ruled that work that is not itself "public work" under the statute does not become a public work by being part of broader contract that includes some public work. (See, e.g., *Sheet Metal, supra*, 229 Cal.App.4th at p. 196 [denying coverage to a "component of the project" to erect a public structure where the general contract encompassed subcontracting work that was not a public work]; *Boat Removal During Replacement of Slip Piling, supra*, at p. 3 ["not all work performed under contract is subject to prevailing wage requirements"]; *Rosedale Project, City of Asuza* (July 2, 2008) PW 2005-038 at p. 7 ["only that portion of the Project encompassing the Public Facilities is subject to prevailing wage requirements"].)

Here, as Plaintiff concedes, "[t]he contract contemplated several different types of work." (Br. 25.) Field installation was public work; on-board work was not. Just because they are included in the same general contract does not make the on-board work a public work.

2. Plaintiff's argument that a work is integral to a public work under section 1772 if it is necessary to the operation of the PTC system is meritless.

Plaintiff asserts 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)" and thus subject to prevailing wages. (Br. 25.) He reasons 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 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." (Br. 23–24.)

This approach has no basis in law. Contrary to Plaintiff's assertion, whether a type of work is integral to the "*operation*" of the completed

"PTC *system*" or "PTC *project*" is *not* the test under section 1772. (Br. 25, 40.) As text and precedent show, the test is whether the work is "integrated into the flow process of *construction*" of an undisputed public work. Again, Plaintiff fails that test, since the on-board work was not necessary to the *construction* of the field installation work.

No court has ever adopted Plaintiff's proposal. Indeed, Plaintiff's projects-based approach already has been rejected: "a determination of 'public work' pursuant to section 1720, subdivision (a)(1) must be based on the actual terms in the section, and analyzing whether something is a 'project' paid for by public funds to the exclusion of analyzing whether it is 'construction' paid for by public funds would be improper." (*Oxbow*, *supra*, 194 Cal.App.4th at p. 552.) It would be improper, because the governing statute does not define a "public work" in terms of a publicly funded "project" or "system," but rather uses very specific terms to define "public work"—"[c]onstruction, alteration, demolition, installation, or repair" work done under a publicly funded contract. (§ 1720(a)(1).) A "project" or "system" is not a statutory term; it can include many different types of work, some that may qualify as "public work" under section 1720 and some that may not. Accordingly, it is improper to assume without any statutory analysis that the "PTC project or system" is a public work or that every work involved in completing the "PTC project or system" is a public work.

The imprecision of the term "PTC system"—for which Plaintiff provides no definition—also refutes Plaintiff's approach. Because the scope of such a system is indeterminate, the scope of the prevailing wage law under Plaintiff's approach would also be indeterminate. That is exactly the kind of "expansive" interpretive tactic courts have rejected, since "nearly any activity related to the completion or fulfillment of a public works contract would be subject to the prevailing wage law." (*Sheet Metal*,

supra, 229 Cal.App.4th at pp. 201–202.) Although the contract attempts to define the "PTC system," that definition only underscores its uncertain scope: "System – The positive train control system (inclusive of a dispatch system) to be designed, furnished, and installed by Vendor/Integrator 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*." (7 ER 1475, emphasis added.) The very breadth of this term defeats Plaintiff's view: even workers who write the software used in the PTC system could be deemed integral under his reading of section 1772. Far from a "narrow" resolution (Br. 7), Plaintiff's approach would sweep in work the Legislature never intended to cover under prevailing wage laws.

Plaintiff's view would have other disruptive effects. If as Plaintiff says the test were whether the work is integral to the operation of a completed project, then the cases interpreting section 1772 would have been wrongly decided. For example, in *Sheet Metal*, the fabrication of materials used for the public work surely was necessary to the "operation of the completed project"; without the materials, the public facility would have been non-operational. (229 Cal.App.4th at p. 196.) But courts have not applied section 1772 that way; instead, they ask whether the work was "integrated into the flow process of *construction*." Plaintiff's novel argument proves too much, rendering longstanding precedent applying section 1772 obsolete.

The Department has rejected Plaintiff's operational approach. As discussed, the Department has concluded that not every work necessary to the operation of a communications network for a transportation system is a public work. (See *supra,* at pp. 27–28.) The placement of "equipment in District trains, buses, and other vehicles is not covered work" even though

such equipment would be necessary for the operation "of the transit radio system." (10 ER 2139.) Nor was placing "ATC carsets on BART cars" covered work even though such work was integral to the operation of the Automatic Train Control system. (10 ER 2140.)

Nor does Plaintiff's approach contain any discernible limiting principle. Plaintiff says that any work is a public work if it is integral to the *operation* of a public system—or without which the public system would be *useless*. But if that is so, then what about work done on a satellite to ensure that the global positional system (GPS) on the PTC network operates as intended? What about the placement of transponder devices on vehicles to ensure that the express-lane infrastructure offered by Metro operates as intended? For that matter, what about the production of cars, since without them, the public roads would be useless? Or the production of railcars and locomotives, since without them, the public tracks would also be useless? Under Plaintiff's approach, it is unclear whether such work could be subject to the prevailing wage laws. And if Plaintiff believes that such work would not constitute public work, it is unclear what limiting principle would require that conclusion. By contrast, the limiting principle grounded in the text, case law, and agency precedent is clear: if work is not itself a public work under section 1720 and is not necessary to the completion of a public work construction under section 1772, it is not a public work.

Oxbow Carbon, supra, 194 Cal.App.4th 538, and *Cinema West v. Baker* (2017) 13 Cal.App.5th 194, do not suggest a different result. As Plaintiff admits, "[n]either *Oxbow* nor *Cinema West* . . . interpreted section 1772." (Br. 27.) Those cases instead addressed the "paid for in whole or *in part* out of public funds" language in section 1720(a)(1) (emphasis added) and asked whether privately funded construction work is subject to prevailing wages when it is *part* of a larger construction project that

includes publicly funded work. In both cases, *each* part—the publicly funded part and the privately funded part—was *itself* indisputably "construction work" under section 1720(a)(1). (See *Oxbow*, *supra*, 194 Cal.App.4th at pp. 542–544, 549 [privately funded construction of a roof over a petroleum storage structure and publicly funded construction of conveyors attached to the *same* structure]; *Cinema West*, *supra*, 13 Cal.App.5th at pp. 212–213 [privately funded construction of a movie theater and publicly funded construction of a parking lot attached to the theater].) Thus, the only question was whether together they formed a larger construction work—a "complete integrated object"—done under contract that was "paid for in whole *or in part* out of public funds." Both cases concluded yes. Arriving at that conclusion, the cases established the principle that contracting parties cannot circumvent prevailing wage requirements by segregating *construction* work on a single project into separate contracts (one publicly funded and another privately funded). That construction work is still subject to prevailing wages because it was paid for "in part out of public funds."

That is not this case. The question here is not whether construction work was paid for "in whole or in part out of public funds." The question here is whether the work was "construction" or "installation" work to begin with. In *Oxbow* and *Cinema West*, that threshold question was not in contention. (*Cinema West*, *supra*, 13 Cal.App.5th at p. 210 ["Since this case involves construction, . . . the question is whether part or all of the construction work . . . should be considered in assessing whether public funds were deployed"].) Those cases are simply inapposite.

Oxbow and *Cinema West* actually undermine Plaintiff. Just as parties cannot *circumvent* the prevailing wage laws by dividing one construction work into separate contracts, similarly here: one cannot *expand* the scope of prevailing wage laws to cover non-public work simply

by joining together public work and non-public work in one omnibus contract. The principle is the same: contracts cannot be used to circumvent or expand the scope of the prevailing wage laws. The focus remains on what the *statute* requires. (*Antelope Valley Water Storage*, *supra*, at p. 3.) Here it does not require prevailing wages.

CONCLUSION

This Court should hold that Wabtec is not required to pay prevailing wages for work performed on rolling stock.

Dated: March 25, 2019

Respectfully submitted,

JONES DAY

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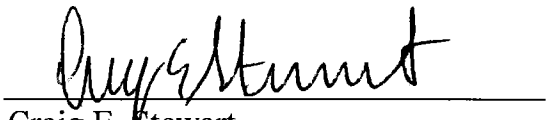
No. S251135

RULE 8.520(C)(1) CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I certify that the foregoing Answer Brief on the Merits contains 13,762 words.



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PROOF OF SERVICE

I, Margaret Landsborough, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 California Street, 26th Floor, San Francisco, California 94104. On March 25, 2019, I served a copy of the within document(s):

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 25, 2019, at San Francisco, California.

M. Landsborough

Margaret Landsborough