

# Busker v. Wabtec – California Supreme Court Rules That On- Board Work Is Not Public Works

Yesterday, the California Supreme Court [issued an important ruling in a case](#) that had the potential to profoundly affect how public entities budget and pay for publicly funded projects in California, *Busker v. Wabtec Corp.* (Cal., Aug. 16, 2021, No. S251135) \_\_ Cal.5th \_\_, 2021 WL 3612126.

Rather than upset many decades of practice and precedent, the Supreme Court ruled that the definition of “public works” requires work on buildings or other structures affixed to real property, and that work on board rolling stock is therefore not public works subject to prevailing wages. The Court’s ruling settles longstanding questions as to the scope of California’s prevailing wage laws and avoided introducing chaos into public entities’ budgeting and planning processes for all manner of publicly funded projects.

## Legal Background: California’s Depression-Era Prevailing-Wage Law

Enacted in the wake of the Great Depression, the California public works statute requires the payment of “prevailing wages” to individuals employed on “public works.” (Labor Code, §§ 1720 *et seq.*) “Prevailing wages” are set by the Director of the California Department of Industrial Relations (“DIR”), according to the type of work and location of the project.

Historically, California courts, the California Attorney General, and the DIR have defined “public works” as “fixed works” and “structures,” *i.e.*, things that are fixed to the ground and cannot move from one place to another. For that reason, those authorities have held that California’s prevailing-wage law does not govern work performed on “rolling stock,” including trains, boats, buses, etc.

## Case Background

*Busker* arose from a contract between the Southern California Regional Rail Authority (“Metrolink”) and Parsons Transportation Group, Inc. to design and implement Positive Train Control (“PTC”), a publicly funded safety technology system. PTC uses GPS technology to prevent train collisions and derailments, making rail transportation safer.

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Parsons subcontracted with Defendant-Respondent Westinghouse Air Brake Technologies Corp. (“Wabtec”) to perform the portion of the PTC work on board the trains themselves.

Plaintiff-Petitioner John Busker worked for Wabtec installing electronic equipment on Metrolink railcars. Mr. Busker did not perform any field-installation work or any work on the wayside, tracks, or land.

After he left his position with Wabtec, Mr. Busker decided to sue, alleging that he was entitled to wages under California’s prevailing-wage law above and beyond his contractually agreed wages. The federal district court granted summary judgment to Wabtec, ruling that work on board the railcars (*i.e.*, “rolling stock”) was not covered by the prevailing-wage law, and Busker appealed.

## The Question Presented

On appeal, the Ninth Circuit certified the following question to the California Supreme Court: Did Mr. Busker’s onboard work installing electrical equipment on locomotives and rail cars as part of the PTC project fit the statutory definition of “public works,” either (a) because it is itself ‘construction’ or ‘installation’ under the statute, or (b) because it is “integral to” other “public work” performed for the PTC project on the wayside?

## The Supreme Court’s Opinion

The California Supreme Court granted the Ninth Circuit’s request to answer the question presented, and answered both parts in the negative. Justice Corrigan authored the majority decision in favor of Wabtec, (1) affirming the State’s longstanding definition of “public works” as being limited to construction or installation of structures fixed to real property, and excluding work on rolling stock; and (2) affirming the long-established rule that the work itself, and not the nature of the project at large, determines whether the work is “integral” to a public work.

*1. The Court affirmed that “public works” do not include rolling stock.*

With respect to the first issue, the Court declined the invitation to interpret the statutory terms “construction” and “installation” broadly to apply the definition of “public works” to all manner of work, including work on trains. Rather, it confirmed that “public works” are “fixed works” and “structures,” *i.e.*, things that are fixed to the ground and cannot move from one place to another. An unbroken line of opinions of the Court of Appeal, Attorney General, and DIR, dating back nearly a century, confirm that the prevailing-wage law does not govern work performed on rolling stock like Metrolink trains.

*2. The Court limited the prevailing-wage law to work actually performed constructing or installing “public works.”*

Busker argued in the alternative that his electrical work on the train was a “public work” because it was “integral to” work that others performed on the wayside, such as installing electrical equipment that would communicate with the PTC system on board the trains.

The Court rejected this alternative argument, ruling that “onboard installation labor is not transformed into ‘public work’ merely because the railcar and locomotive components operate together with the towers built on land next to the tracks.” (Slip Op. at p. 26.) Importantly, the Court observed that adopting such a broad definition of “public works” would have “no discernable limiting principle”: “If ‘construction’ included any activity necessary to the *operation* of a public work, that term would bring within its expansive sweep any

activity necessary to make the public work functional, whether or not the activity is related to the construction process.” (*Id.* at p. 30.)

### ***Busker’s Implications for Public Agencies***

The Court’s opinion in *Busker* is a welcome affirmation of longstanding precedent and practice affecting California’s public agencies.

Metrolink, represented by Steven Miller, Adam Hofmann, and Josephine Petrick of Hanson Bridgett LLP, filed an amicus brief in support of Wabtec representing the perspective of California public agencies. Metrolink contended that, to guard the predictability of public budgets and the related viability of taxpayer-funded projects, the California Supreme Court should affirm the longstanding definition of “public works,” to exclude work performed aboard railcars and other rolling stock.

The Court’s opinion in *Busker* means that contracts for work on board rolling stock, or otherwise not affixed to the land, do not need to include Labor Code public works provisions.

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