97193-5

Nos. 35767-8
35890-9

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

In re: the Arbitration of

BARNES, INC.,

Petitioner,

v.

MAINLINE ROCK & BALLAST, INC.,

Respondent.

PETITION FOR REVIEW OF BARNES, INC.

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A. IDENTITY OF PETITIONER

Barnes, Inc. ("Barnes") seeks review of the Court of Appeals opinions set forth in Part B.

B. COURT OF APPEALS DECISIONS

The Court of Appeals issued published opinions in Cause Nos. 35767-8 and 35890-9 on April 16, 2019.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Under Washington's version of the Uniform Arbitration Act, RCW 7.04A, upon judicial review under RCW 7.04A.230, is a trial court foreclosed from considering the written document at issue in a contractual dispute or dissenting arbitrator's analysis in reviewing the arbitral award?

2. Should the award here have been vacated pursuant to RCW 7.04A.230(1)(d) where Barnes blasted millions of tons of rock, which it owned and for which it should have been paid, and the arbitration panel, ignoring the parties' controlling, integrated agreement, failed to quantify the rock Barnes blasted as it was charged to do in the parties' arbitration agreement?

3. Should the award have been vacated pursuant to RCW 7.04A.230(1)(d) because Barnes was the prevailing party under the parties' controlling agreement and was entitled to a fee award?

4. Should the award have been vacated under RCW 7.04A.230(1)(d) because the parties' controlling agreement expressly required a payment of a late fee, or interest, to Barnes, Mainline was late in paying, and the panel did not award the late fee as the agreement mandated?

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[1] Division III declined to consolidate the cases even though they arose out of the same trial court review of the same arbitration panel award. References to the clerk's papers and to the opinion in this petition refer to Cause No. 35767-8, unless otherwise indicated. The petitions for review are filed in both Court of Appeals Cause Numbers.

5. Is review of the companion case remanding to the trial court to consider Mainline's attorney fees as the prevailing party under RCW 7.04A.250(3) warranted where review and reversal of the first appeal necessitates reversal of the second?

D. STATEMENT OF THE CASE

Division III's rendition of the facts here is inaccurate in many respects, requiring Barnes to provide this more accurate factual discussion.

Barnes is a drilling and blasting contractor with its principal place of business located in Idaho. CP 22. Mainline is a rock crushing and general contractor and developer with its principal place of business located in Washington. *Id.* In 2004, by a Letter of Understanding ("LOU"), Mainline retained Barnes to drill and blast solid rock at its new quarry site in Torrance County, New Mexico. CP 20.[2]

For this new operation, Barnes first performed the drilling and blasting to open the site, and helped to construct the access roads, so that Mainline could build a railroad siding and other necessary facilities to develop the site. CP 4. After the site development work was completed, Barnes drilled and blasted rock on site at the quarry; Mainline sorted, crushed, screened, loaded, and stockpiled the rock to the specifications of

[2] The LOU did not contain an arbitration provision. CP 20.

railroad entities so that it would be sold and delivered to cars from the quarry's siding. Rock by-product of that effort meeting Mainline's specifications was sold either to the railroad at the quarry's siding or shipped for sale to others in Texas. *Id*.

The initial LOU between the two parties stipulated that a certain amount of rock blasted would be considered "reject" material, but would nonetheless be sold, because Mainline expected railroads to buy most of such "reject" material during the first year of operation. CP 20. The price of material blasted, whether for railroad sales, Texas sales, or any other sale by Mainline was then $0.78 per ton, including anticipated "rejects" of approximately 10%. CP 20.[3]

At the time of the LOU, both parties intended that Barnes was to be paid for *all* of the rock blasted, including the so-called "reject" materials. CP 4, 20. Mainline specifically promised Barnes that all such "reject" materials would be sold to the railroad or other entities which were located in Texas, due to a shortage of crushed materials there. *Id.* There was no intention to have any substantial stockpiles on site. CP 5. Division III, nevertheless, insists upon referencing these materials as "waste materials,

[3] The LOU also provided that in the event "reject" materials proved to be more than 10% of the rock material blasted, the parties would renegotiate the price. CP 20.

generally not commercially sellable." Op. at 2. That characterization was wrong.[4]

Mainline, however, never delivered these stockpiled materials to Texas and instead stockpiled substantial amounts of rock on-site in New Mexico, all of which had been blasted by Barnes and crushed by Mainline. CP 5, 34. But Mainline did not compensate Barnes for this stockpiled material. *Id.*

Barnes continued to perform drilling and blasting work at the Torrance site until the parties executed a Master Blasting Agreement ("MBA") in June 2008. CP 22-32. The MBA was for a three-year term with periodic price adjustments, which also occurred several times. CP 22, 31-32, 78. It contained an integration clause providing that it "is intended by the parties to be the final, complete and exclusive statement of their agreement relating to the matters covered herein." CP 29. The LOU was not referenced or included in the MBA. The MBA provided that Barnes was subject to the terms of the MBA, and any subsequent work orders,

[4] The term "waste materials" exists nowhere in the MBA or subsequent work orders. Although not controlling for interpreting the written terms of the parties' fully executed contract, even the LOU stated that "most of the rejects" would be commercially sellable. CP 20.

only.[5] *Id.* Those work orders specifically provided that Barnes *owned* the by-product stockpiled on-site to be sold by Mainline at a later date. *See, e.g.*, CP 31. Mainline was required to keep track of the total tonnage of rock stockpiled, but failed to do so. CP 5, 41, 53.

On April 7, 2017, Mainline sold the assets of its Torrance operation, including all stockpiled material Barnes owned that had accumulated onsite over the years (including the so-called "reject materials), CP 6, to Vulcan Materials Corporation ("Vulcan"). CP 53. Mainline had three drone surveys performed to determine the amount of stockpiled inventory before the site was sold. CP 35, 41. Mainline advised Barnes that these surveys revealed 2.8 million tons of Barnes by-product, and it offered to pay Barnes $2.8 million for them (at $1 per ton). CP 34.

On May 17, 2017, notwithstanding its own prior calculation of 2.8 million tons, Mainline tendered its "final" payment of $905,596 to Barnes, excluding millions of tons of rock owned by Barnes and stockpiled onsite that it suddenly claimed were unsellable "waste and reject materials" outside the scope of the parties' agreement.[6] CP 5, 53.

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[5] The MBA and work orders issued under it could only be modified by a writing signed by all of the parties or their respective agents. CP 27. No such writing changing the status of the MBA as the controlling document was ever executed.

[6] The dissenting arbitrator correctly found that "it is clear the by-product in

Based on the MBA, Barnes asserted that Mainline owed it more for the stockpiled materials and demanded payment; Mainline refused to pay anything more and sought arbitration of the parties' dispute, CP 34-36. Specifically, the arbitrators were to quantify the tons of by-product for which Mainline owed Barnes. CP 35 ("Mainline will request that the arbitrator(s) determine the fair and equitable amount to be paid to Barnes is $1.00/ton *with the tonnage to be determined by the independent surveys of the stockpiles obtained by Mainline.*") (emphasis added).

The three-person arbitration panel, by a vote of 2-1, awarded Barnes a total amount of $354,839.50. It failed to make a finding on the quantity of stockpiled materials, the central issue in the dispute. CP 38-42. It also did not award attorney fees or interest on the award, even though Barnes was the prevailing party, as defined in the MBA. CP 38-42. The panel incorrectly based its award on the LOU instead of the terms of the MBA and work orders issued under it. CP 38-40. The dissenting panelist correctly concluded that only the MBA and its subsequent amendments were relevant and would have awarded $3,499,670.25 to Barnes based on surveys showing that Mainline had stockpiled 2.5 million tons of materials

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stockpile that was measured and excluded by Mainline was to be sold at a later date." CP 42.

onsite but wrongfully excluded those materials from its payment to Barnes. CP 41-42.

Division III issued two published decisions in Mainline's favor arising out of the trial court's decision to confirm the arbitral award. CP 138-40. It affirmed the trial court's refusal to vacate the arbitration award in an opinion which conflicts with precedent from this Court and from other Courts of Appeal. *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 35767-8-III, 2019 WL 1612806 (2019). It also reversed the trial court's denial of fees, remanding to the trial court to reconsider fees under RCW 7.04A.250(3).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED[7]

(1) Division III's Interpretation of Judicial Review of Arbitral Awards under RCW 7.04A Eviscerates Judicial Authority to Correct Erroneous Arbitral Decisions Regarding Contractual Disputes

RCW 7.04A, Washington's version of the Uniform Arbitration Act, governs the arbitration process and enforcement of arbitration awards in the state of Washington. An arbitral award is subject to review and possible

[7] In addition to the more substantive errors in the two published opinions, Division III references its required treatment of unpublished authority subject to GR 14.1 in *Crosswhite v. Dep't of Soc. & Health Servs.,* 197 Wn. App. 539, 544, 389 P.3d 731, *review denied,* 188 Wn.2d 1009 (2017). Op. at 27. Division II has rejected that interpretation of GR 14.1, *Karanjah v. Dep't of Soc. & Health Servs.,* 199 Wn. App. 903, 913, 401 P.3d 381 (2017). This Court should resolve the conflict. RAP 13.4(b)(2).

vacation of the award based on the grounds set forth in RCW 7.04A.230. *See* Appendix.[8]

Barnes moved to vacate the award pursuant to RCW 7.04A.230(1)(d), because the arbitrators exceeded their powers. *Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg,* 101 Wn. App. 119, 123, 4 P.3d 844 (2000), *review denied*, 142 Wn.2d 1025 (2001). Under that provision, this Court has "repeatedly articulated a rule that explicitly includes facial errors of law as grounds for vacation." *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 237, 236 P.3d 182, 184–85 (2010) (*quoting Davidson v. Hensen,* 135 Wn.2d 112, 118, 954 P.2d 1327 (1998)); *Boyd v. Davis,* 127 Wn.2d 256, 263, 897 P.2d 1239 (1995).[9] Facial errors are those recognizable from the language of the award. *Cummings*, 163 Wn. App. at 389 (noting example of an award including punitive damages

[8] *Cummings v. Budget Tank Removal & Envt'l Servs., LLC*, 163 Wn. App. 379, 388, 260 P.3d 220, 226 (2011); *Pegasus Const. Corp. v. Turner Const. Co.,* 84 Wn. App. 744, 747, 929 P.2d 1200 (1997). The burden of showing that such grounds exist is on the party seeking to vacate the award, here, Barnes. *Pegasus*, 84 Wn. App. at 747–48.

[9] Division III begins its opinion directly questioning this Court's holding in *Broom* that a "facial legal error constitutes an instance in which arbitrators exceeded their powers." 169 Wn.2d at 237 (quotation omitted); op. at 14. Division III cites with approval the concurrence in *Boyd*, a concurrence which this Court rejected for a second time in *Broom*, holding that "it is the *Boyd* majority that continues to guide us." *Id.* This shot across the bow serves no purpose but to undermine this Court's authority. Division III is bound by this Court's decisions and has no reason to *sua sponte* criticize this Court's analysis of a settled issue. And, by choosing to publish its decision, Division III only creates more ambiguity and uncertainty in the law for future litigants, which this Court should correct. Moreover, as discussed in this petition, this passage shows Division III's willingness to disregard controlling authority which should have led to reversal in this case.

although Washington law forecloses awards of such damages). Contrary to Division III's belief, op. at 18, this includes the arbitrator's reasoning. *Id*.[10]

Division III, however, chose to make a *precipitous* departure from this Court's precedents and those of other divisions of the Court of Appeals in concluding that under the "face of the award" analysis of *Boyd/Broom*, it could not consider the parties underlying contract, op. at 17 ("Because we review only the arbitration award, we may not examine contract language relevant to the dispute."),[11] or the dissenting arbitrator's reasoning. Op. at 20. This analysis is bad public policy, eviscerates judicial review of arbitrator facial errors, and conflicts with published precedent, thus meriting review. RAP 13.4(b)(1), (2), and (4).

In *Boyd*, this Court determined that when reviewing an arbitration award, a trial court may look to the parties' "contract in order to ascertain the law governing the disputed point." 127 Wn.2d at 260-61. This Court cited numerous cases where courts looked to contracts to ascertain the law

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[10] *Accord*, *Salewski v. Pilchuck Veterinary Hosp.*, 189 Wn. App. 898, 903-04, 359 P.3d 884 (2015), *review denied*, 185 Wn.2d 1006 (2016); *see also, Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 32 P.3d 289 (2001) (court could address ambiguity in award); *Nguyen-Aluskar v. Chicago Title Ins. Co.*, 193 Wn. App. 1005, 2016 WL 1133877 (2016) (vacated arbitrator award where arbitrator awarded attorney fees as damages where parties' contract did not so provide).

[11] That this analysis makes little sense is further evidenced by the fact that only the MBA contains an arbitration clause. CP 28. To know if this dispute was subject to arbitration at all, the MBA is relevant.

governing the dispute.[12] Likewise, in *Broom*, this Court looked to both the parties' arbitration agreement and to the parties' contract to determine whether the arbitration panel properly applied the statute of limitations. 169 Wn.2d at 240-46.

Looking at the underlying contract to determine whether there was a legal error on the face of the arbitration award is no different than a court looking at any other source of controlling the law to determine legal error, whether the authority is a statute, an administrative regulation, or a court opinion.[13] In a contract setting, there is no more fundamental law governing

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[12] *E.g., ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 738, 862 P.2d 602 (1993), *review denied* 124 Wn.2d 1005 (1994) (the court examined an arbitration clause); *Marine Enters., Inc. v. Security Pac. Trading Corp.*, 50 Wn. App. 768, 775-76, 750 P.2d 1290 (1988) (the court scrutinized a contract clause regarding production); *Kennewick Educ. Ass'n v. Kennewick Sch. Dist. No. 17*, 35 Wn. App. 280, 282, 666 P.2d 928 (1983) (the court referred to a contract clause making the governing law that of Washington); *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 288-89, 654 P.2d 712 (1982), *review denied*, 99 Wn.2d 1006 (1983) (the court looked to the contract's attorney fees clause); *Moen v. State*, 13 Wn. App. 142, 145, 533 P.2d 862, *review denied*, 85 Wn.2d 1018 (1975) (the court reviewed a contract clause granting the plaintiff extra construction costs)).

[13] For example, in *Price v. Farmers Insurance Co. of Washington*, 133 Wn.2d 490, 497, 946 P.2d 388 (1997), this Court reviewed the face of the arbitration award, made assumptions about the nature of the proceedings (deciding that it was a controversy about the amount of UIM benefits and not a controversy about whether there was UIM coverage), and then looked at an external source of controlling law, the Court's own opinion in *Olympic Steamship*, to determine whether the arbitration award demonstrated facial legal error. If courts performing judicial review can perform this type of analysis to conclude that a party is *not* entitled to attorney fees or some other claimed benefit of the contract, it is only fair that courts should be able to perform the same analysis to determine whether a party *is* entitled to attorney fees or some other right under the contract. It would be error to ignore contract language, just as it would be error to ignore a controlling statute. If courts can consider case law and statutes not quoted on the face of the award, a court should be able to consider another source of law (i.e. the parties' contract) that is just as determinative of the law in a contract dispute.

the parties than their contractual agreement itself.[14] In a recent decision arising under the FAA, the Ninth Circuit held that an arbitrator exceeded his powers where the arbitrator's award was "irrational," by failing to draw its essence from the parties' contract. The award was subject to vacation where it ignored contract provisions to achieve a desired result. *Aspic Engineering & Constr. Co. v. ECC Centcom Constructors, LLC,* 913 F.3d 1162 (9th Cir. 2019). Plainly, the terms of the underlying contract were very much before the federal courts.

In addition to this conflict with published Supreme Court and Court of Appeals precedent justifying review under RAP 13.4(b)(1)-(2), the practical and public policy implications of Division III's analysis are breath-taking, making review under RAP 13.4(b)(4) appropriate. For example, if that court is correct, trial courts on judicial review could not consider the insurance policy in insurance arbitrations, the employment agreement or other employment-related documents in employment disputes, or even a lease in a landlord-tenant dispute, to name just a few. Division III's opinion would permit such serious legal errors by arbitrators to make arbitration more "attractive" for people seeking "a more expeditious and final

[14] *See, e.g.*, *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004) ("It is black letter law of contracts that the parties to a contract shall be bound by its terms"); *Mike M. Johnson, Inc. v. Cty. of Spokane*, 150 Wn.2d 375, 386–87, 78 P.3d 161, 167 (2003) ("[C]ontract requirements must be enforced absent either a waiver by the benefiting party or an agreement between the parties to modify the contract.").

alternative to litigation." Op. at 15. However, parties – especially the ones listed above who are often forced to sign mandatory arbitration agreements – do not realize that they are assuming the risk that an arbitration panel may wholly disregard the underlying contract when considering a contract dispute.

By providing for judicial review in RCW 7.04A, the Legislature intended to provide a corrective public mechanism in private arbitrations, a system that does not enjoy equivalent safeguards as are present in our public courts. Wash. Const. art. I, § 10. Division III's opinion undercuts the protections granted by the Legislature in RCW 7.04A. Further, the opinion also risks making arbitration *less attractive* to contracting parties. If parties know that they their contractual rights may be completely disregarded without any remedy, they will be less likely to find arbitration an appealing mechanism for resolving disputes, contrary to Division III's belief. These important issues of public policy warrant review by this Court. RAP 13.4(b)(4).

Barnes here merely asks that this Court adhere to its "face of the award" analysis and allow consideration of the language of the parties' contract to determine whether the arbitration award shows legal error on its face. Review is merited. RAP 13.4(b).

(2) Division III's Opinion Conflicts with Published Authorities Regarding Facial Errors Appearing on Arbitration Awards

(a) Division III's Opinion Disregards Contract Law, the Controlling Agreement Between the Parties, and the Central Purpose of the Parties' Arbitration

Review and reversal is warranted where Division III condoned the arbitration panel's misapplication of published precedent on contract law.[15] Washington interprets contracts based on the objective manifestation of the parties' intent as set forth in the parties' agreement, rather than unexpressed, subjective intent of the parties. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). This also means that where the parties, as here, have made their intent known in writing to *reject* any reliance on agreements (such as the LOU) other than the one at hand (the MBA), courts must respect that intent; the presence of an integration clause strongly supports the conclusion that the parties' agreement is fully integrated. *M.A. Mortensen Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 580, 998 P.2d 305 (2000). Simply put, where, as here, a writing is completely integrated, any terms or conditions

[15] Confusingly, Division III discussed several of the contractual claims in lengthy dicta despite determining that it did could not look to the contract to determine whether the arbitrators committed a legal error. Op. at 19-22. The opinion contains confusing *dicta* elsewhere, for example *sua sponte* raising the specter of the Federal Arbitration Act, 9 U.S.C. § 10 ("FAA"), despite no party briefing or even addressing this issue. Op. at 13. Without review by this Court, this *dictum* will only create more confusion in this area for future litigants.

that are not contained in the final integrated agreement *must be disregarded*. *Lopez v. Reynoso*, 129 Wn. App. 165, 171, 118 P.3d 398 (2005), *review denied*, 157 Wn.2d 1003 (2006).

Here, on the face of the award, the panel relied on the July 27, 2004 LOU between Barnes and Mainline to determine that the negotiated unit price stated in the LOU was inclusive of anticipated so-called "reject" material. CP 38-40.[16] By this determination, the panel ignored the express controlling terms of the MBA which included an integration. CP 29. Such an integration clause barred the panel from relying on writings extrinsic to the MBA. Coleman & Perillo, *Contracts* § 3.6 at 122 (6th ed. 2009). These express terms nullify any prior agreements and the panel's reliance on the July 2004 and the February 2006 letters between Barnes and Mainline was error appearing on the face of the award.

The award at paragraph one states "that the unit price negotiated between Mainline and Barnes in June 2008 was inclusive of anticipated reject material," and that such a view was supported by the parties' "course of performance" and previous treatment of the question, including the July

[16] The dissenting arbitrator correctly stated the law when he said: "Only the Master Blasting Agreement dated June 1, 2008, the work authorization dated June 1, 2008, and the Amendment dated June 1, 2016 apply as to this dispute, previous letters of understanding or other correspondence are superseded by the agreement and are not relevant." CP 42. The majority disregarded the law and the contract by including evidence outside of the contract in determining the award.

27, 2004 LOU. CP 39. That was wrong on its face. *Nothing* in the MBA so provides and, in fact, that determination is expressly contradicted by the express terms of the work orders annexed to the MBA. The work orders executed under the MBA made clear that Barnes was to be paid a specific price for tons of rock blasted. *See, e.g.,* CP 31. Under the plain terms of the work orders, Barnes owned the blasted rock whether sold immediately or stockpiled for sale at a later date. *Id.* at ¶ 7.0.

The dissenting arbitrator properly found that Mainline acted in bad faith when it excluded stockpiled materials – 2.5 million tons worth according to three drone surveys – and withheld payment to Barnes. CP 42. Ultimately, Mainline was enriched by selling those valuable materials to Vulcan *without compensating Barnes*. The panel exceeded its powers and disregarded the law by incorrectly using course of performance to determine the inclusion of anticipated "reject" material within the parties' agreed price, which substantially affects the outcome of the award, rather than express terms stipulated in the MBA and subsequent work orders between Mainline and Barnes.

Moreover, the panel exceeded its powers when it failed to execute its central obligation in the arbitration. The panel's award did not make a finding on the total tonnage of rock by-product located on-site at the Torrance rock quarry, despite explicit instructions from Mainline asking the

panel to rule on the issue.[17] At no point in the award did the panel answer the question of the total tonnage of rock by-product on site at Torrance.

The dissenting arbitrator did make a finding regarding the total stockpiled materials onsite, based on an average of three drone surveys that estimated 2.5 million tons of inventory onsite that Mainline refused to pay Barnes for blasting. CP 41-42. While Barnes believes this estimate was too low, at least the dissenting arbitrator made a ruling on the key question in the case. The fact that the dissenting arbitrator made this quantity determination, while the majority wholly ignored the central question in the case, shows that the majority committed a facial error in its award. *See Cummings*, 163 Wn. App. at 389 (the arbitrators' reasoning is "considered as part of the face of the award."). Division III's failure to address these errors warrants review. RAP 13.4(b).

(b) Division III's Opinion Conflicts with Published Authority Regarding Attorney Fees in Contract Disputes Submitted to Arbitration

Division III refused to even address the plain error on the face of the award where the panel refused to award Barnes its fees, despite the fact that

[17] Mainline's arbitration brief stated, "Therefore, the main issues for the arbitration panel to decide are: (1) What is the total tonnage of commercially sellable by-product materials contained within the stockpiles at the Torrance site on April 7, 2017?" *See also*, CP 35 (Mainline's letter invoking arbitration because the parties could not reach an "agreement regarding the quantity of stockpiled materials."). As discussed *supra*, this Court has considered the parties' agreement to arbitrate when evaluating facial legal error. *Boyd*, 169 Wn.2d at 240-46.

the parties allowed the prevailing party to recover fees and Barnes prevailed to the tune of $354,839.50. Rather, Division III simply ignored the parties' fee provision based on its mistaken belief that the face of the panel's award does not mention it. Op. at 24. At the outset, this is a patent error where both the majority and dissenting arbitrator mentioned fees *on the face of the award*. CP 39, 42; *Agnew*, 33 Wn. App. at 287 n.1 (rejecting contention that attorney fee issue did not appear on face of the award where the award expressly stated "each party shall bear its own attorney fees."). But more importantly for the purposes of this petition, Division III's published opinion creates a conflict among published cases, and, therefore, this Court should grant review. RAP 13.4(b)(1)-(2).

In *Agnew*, Division I held that by ignoring a mandatory attorney fee provision in the parties' contract an arbitration panel exceeded its authority. 33 Wn. App. at 290-91. The court looked not only to the face of the award – which mentioned fees just like the award does in this case – but it also interpreted the parties' contractual attorney fee provision with identical language to the provision in this case. *Id.* at 286 (contract stated that the prevailing party "*shall be entitled to* reasonable attorney fees"). In holding that the arbitration panel must award fees, the court reasoned that "[i]f a dispute is not arbitrable, the arbitrators have no power to resolve it." *Id.* at 288. "The arbitrators awarded neither party attorney's fees in paragraph 4

of the award. Thus, they considered and decided a non-arbitrable issue, and thereby exceeded their powers." *Id.*

This Court cited *Agnew* approvingly in *Boyd*. 127 Wn.2d at 260-61. In doing so, this Court determined that a court may consider the contract "to ascertain the law governing the disputed point" when reviewing an arbitration award. This makes sense, both in *Agnew* and in this case, the attorney fee provision in the parties' contract provided the governing law to award fees. This Court should grant review to resolve this blatant conflict in published decisions.

Review is also warranted under RAP 13.4(b)(1)-(2) because Division III's opinion conflicts with published authority regarding prevailing parties in Washington. Whether a party has prevailed for purposes of a fee award is a mixed question of law and fact and is reviewed as an *error of law*. *Sardam v. Morford,* 51 Wn. App. 908, 910-11, 756 P.2d 174 (1988). The arbitration panel and Division III refused to recognize that Barnes was the prevailing party where it was *forced to arbitrate to recover monies owed under the contract for work performed*. Both Barnes and Mainline agreed to a contractual fee provision in 2008 as a part of the MBA. CP 29. The panel ruled in Barnes's favor, awarding it the amount of $354,839.50, but refused to award it fees. CP 81. At its core, the panel misperceived the concept of a prevailing party within the meaning of the

parties' agreement and Washington law, thus committing an error in law.

Although the MBA did not define a "prevailing party," that term is well-understood in Washington law. Indeed, the Legislature has made contractual fee provisions bilateral as a matter of public policy and has *defined* a prevailing party as "the party in whose favor final judgment is rendered." RCW 4.84.330. This Court has also made clear that for purposes of a contractual fee shifting agreement where "prevailing party" is not otherwise defined, the party *in whose favor a final judgement is rendered is the prevailing party*. *Riss v. Angel,* 131 Wn.2d 612, 633, 934 P.2d 669 (1997); *Niccum v. Enquist*, 175 Wn.2d 441, 449, 286 P.3d 966 (2012). *See also*, *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Northwest, Inc.,* 168 Wn. App. 86, 98, 285 P.3d 70, *review denied*, 175 Wn.2d 1015 (2012). Barnes plainly prevailed under this simple definition.

Barnes was forced into arbitration because Mainline refused to pay monies owed under the contract. Mainline conceded that it tendered only $908,586 to Barnes as a final payment for all work owed under the contract. CP 53. According to Mainline, "Mainline believed it owed Barnes nothing further." *Id.* Barnes knew this was incorrect and was forced to arbitrate under the contract, incurring legal expenses as a consequence of Mainline's actions. The arbitration panel agreed that Barnes was underpaid and awarded Barnes an additional $354,839.50 *that it never would have*

recovered had it not arbitrated under the contract. Barnes was the prevailing party, given this significant judgment in its favor.

It has long been the law in Washington that a party "prevails" under a contractual fee provision if it recovers a judgment in its favor even if the judgment is for an amount of damages lower than the party sought.[18]

This is not a case, for example, in which Barnes had claims and Mainline had counterclaims. *See, e.g., Hertz v. Riebe*, 86 Wn. App. 102, 936 P.2d 24 (1997) (finding that a proportionality approach to fees is only required if there are distinct claims by each party). Mainline received no award as a result of the arbitration. Rather, the panel simply did not award Barnes as much as it sought on its claim for payment due, the sole issue in arbitration.

The Court should hold that the arbitration panel exceeded its powers and disregarded the law by deciding not to award fees when the panel was only granted the authority to decide the amount of attorney fees to be awarded based on the MBA's language and Washington state law. The

[18] *E.g., Silverdale Hotel Assocs. v. Lomas & Nettleton Co.,* 36 Wn. App. 762, 774, 677 P.2d 773, *review denied*, 101 Wn.2d 1021 (1984) (prevailing party in contract dispute entitled to fees even when damages "were not as high as prayed for"); *Martinez v. City of Tacoma*, 81 Wn. App. 228, 914 P.2d 86, *review denied*, 130 Wn.2d 1010 (1996) (trial court had rejected the plaintiff's request for $80,737 in attorney fees and awarded only $4000 based, in part, on the jury's limited verdict of $8000 when plaintiff had requested damages of $4.3 million); *Piepkorn v. Adams*, 102 Wn. App. 673, 687, 10 P.3d 428 (2000) (party who received injunctive relief entitled to fees even when the party's claim for damages was dismissed).

panel's award erred on its face by failing to award fees to Barnes as the prevailing party. Review is merited. RAP 13.4(b).

(c) Division III's Opinion Ignores the Parties' Mandatory Interest Provision

Insisting on its extreme analysis of judicial review, op. at 23 ("The arbitration panel award does not mention the contract provision."), Division III refused to address interest. But the arbitration panel also erred on the face of the award by failing to award a late fee/interest to Barnes despite clear, unambiguous language in the MBA which mandated such an award:

> **9. Payment Terms:** Unless otherwise noted herein, Mainline agrees to pay for all materials sold and invoiced, in full, within 20 days of the end of the month in which the rock is sold and invoiced. A late fee computed by a periodic rate of 1.5% per month will be applied to any overdue balance. If products are for resale, no sales tax will apply.

CP 23. The parties' agreement directed that interest must be paid on late payments. That was not discretionary.[19] Because the MBA clearly states that if Mainline is late on a payment owed to Barnes, then Mainline must pay Barnes a late fee calculated at 1.5% per month, the panel erred. By its award, the panel concluded Mainline underpaid Barnes by at least $0.25 per ton on 827,394 tons of blasted rock byproducts, and based on the MBA's

[19] Again, this was error on the face of the award. The application of this contractual provision to the facts is a legal question. *Dep't of Corrs. v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 161 P.3d 372 (2007) (reviewing arbitration agreement and determining that it may control on the issue of interest).

unambiguous language, at minimum, Mainline would also owe Barnes an additional late fee of 1.5% per month for every month that Mainline did not pay Barnes the correct amount.[20]

Like attorney fee provisions discussed above, provisions providing for interest help to ensure that parties will not underpay on their contractual obligations. As Division I found in *Agnew*, an arbitration panel has no authority to ignore this mutually bargained for provision. Ignoring such a provision also creates a perverse incentive for parties like Mainline to underpay on their contractual obligations.[21] The failure to award a late fee/interest is a clear error on the face of the award, and the May 31, 2017 arbitration award should be vacated. Review is warranted to answer this question of substantial public interest and to resolve conflicts with published precedent. RAP 13.4(b)(1), (2), and (4).

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[20] Mainline sold the Torrance, New Mexico rock quarry on April 7, 2017 and issued a final payment to Barnes by May 17, 2017. The significance of the date, May 20, is that it is exactly 20 days after the end of the month, April, in which the rock byproduct was sold. Mainline paid Barnes an incorrect amount based on $1.00 per ton of blasted rock byproduct, instead of $1.25 per ton of blasted rock byproduct, thus shorting payment to Barnes by $0.25 per ton. Though Barnes disagrees with the total award by the panel, there is no denying that the payment Mainline did make to Barnes on May 20, 2017 was insufficient under the panel's own award. The payment was *not the full amount owed to Barnes*, thus making the award to Barnes by the panel an "overdue balance" pursuant to ¶ 9 of the MBA.

[21] Mainline paid no price for underpaying on the contract. Mainline essentially enjoyed an interest-free loan of $354,839.50, at Barnes's expense, that it could make use of until the arbitrators rendered their judgment.

(3) Review of the Published Companion Case Regarding Mainline's Fees is Warranted to Ensure Orderly Review of the Case

Review and reversal of Barnes's appeal in Cause No. 35767-8, necessitates reversal of Division III's decision in Cause No. 35890-9, where Division III reversed the trial court's discretionary decision to deny Mainline attorney fees under RCW 7.04A.250(3).[22] That statute states that a "court *may* add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made." (emphasis added). However, such fees are only available to the "prevailing party" in an action to vacate, confirm, or modify an arbitration award. *Id.*

If the Court grants review and reverses Barnes's appeal in Cause No. 35767-8, Mainline will no longer be the prevailing party, and Division III's published opinion mandating that the trial court consider Mainline's fee request will be moot. Review of both cases, which should have been

[22] Barnes tried in several instances to prevent this procedural irregularity, first asking the trial court to stay its decision on statutory fees pending the outcome of Barnes's appeal – CP 145 – and later by joining Mainline's request to consolidate the two appeals in Division III. Both requests were denied.

consolidated in the first place, is necessary and appropriate to ensure a "fair and orderly review" of the case. RAP 7.3.[23]

F. CONCLUSION

Division III's published opinions are at odds with this Court's traditional interpretation of judicial review of arbitral awards. If allowed to stand, those decisions will give immunity to arbitrators from any judicial correction of manifest errors of law.

This Court should reverse the trial court's order and vacate the arbitral award. Costs on appeal, including reasonable attorney fees, should be awarded to Barnes.

[23] Division III's published decision on Mainline's fees also contains several legal errors and *dicta* which conflict with other authorities and warrant review by this Court. For example, without citation to any authority or civil rule, Division III dismisses Barnes's request for fees in its response to Mainline's fee request, imposing a formal cross-motion requirement which appears nowhere in the civil rules. *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 35890-9-III, 2019 WL 1612821 at *2 (2019) (holding without authority that "[a] fleeting statement in a response does not transform a request into a cross motion."). This formality conflicts with precedent from other courts. *See, e.g.*, *Colorado Nat. Bank of Denver v. Merlino*, 35 Wn. App. 610, 614, 668 P.2d 1304, *review denied*, 100 Wn.2d 1032 (1983) ("A court will measure the sufficiency of a motion not by its technical format or its language, but by its content."); *Matsushita Elec. Corp. of Am. v. Salopek*, 57 Wn. App. 242, 245, 787 P.2d 963, 964, *review denied*, 114 Wn.2d 1029 (1990) (complaining party must show "prejudice resulting from [opponent's] failure to comply with the technical requirements for the form of a motion").

DATED this 13th day of May, 2019.

Respectfully submitted,

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APPENDIX

RCW 7.04A.230:

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

(a) The award was procured by corruption, fraud, or other undue means;

(b) There was:

(i) Evident partiality by an arbitrator appointed as a neutral;

(ii) Corruption by an arbitrator; or

(iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(d) An arbitrator exceeded the arbitrator's powers;

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or

(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

FILED
APRIL 16, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MAINLINE ROCK & BALLAST, INC.,	)	
	)	No. 35767-8-III
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
BARNES, INC.,	)	
	)	
Appellant.	)	

FEARING, J. —

Jim wins. Complete letter ruling of beloved Benton-Franklin Counties Superior Court Judge Albert J. Yencopal.

Barnes, Inc., a blasting contractor, asked the superior court to vacate an arbitration award issued in a contract dispute between Barnes and a party hiring its services. The superior court instead confirmed the arbitration award. Because the award shows no facial error, we affirm.

FACTS

The arbitrated dispute arises from a commercial contract for the mining and

crushing of rock. The parties recite facts in their briefs despite the lack of a record from the arbitration hearing. Therefore, we are unable to confirm the accuracy of the facts. We recite some of those facts behind the dispute despite a conclusion that most of those facts lack relevance to this appeal. In the end, we consider only the arbitrator's award important.

Mainline Rock & Ballast, Inc. (Mainline Rock) develops and operates rock quarries to extract, crush, and sell ballast, rock material used as the footing or base for railroad tracks. Mainline Rock's principal place of business is Washington State. Between 2004 and 2017, Mainline Rock owned and operated a rock quarry in Torrance County, New Mexico, near Encino. Mainline Rock intended to sell ballast from the Torrance site to BNSF Railway.

In the process of generating ballast, the crushing operation creates by-product aggregate material and waste or reject material. Some by-product rock material may be sold for use in road construction and other infrastructure projects. The waste material, generally not commercially sellable, consists of dirt screened during the crushing process. Mainline Rock stockpiled the Torrance waste for later use in reclamation of the pit at the quarry.

Barnes, Inc. (Barnes) works as a drilling and blasting contractor with its principal place of business in Idaho. On July 27, 2004, through a cryptic letter of understanding (LOU), Mainline Rock retained Barnes to drill and blast solid rock at the Torrance, New

Mexico site. The LOU declared that Barnes would drill and blast material for railroad and retail sales at a rate of $0.78 per ton. The price included "anticipated rejects [waste material] of approximately 10 [percent] of the material blasted." Clerk's Papers (CP) at 20. This contract provision suggested Barnes would be paid a small amount for waste, but not an amount separate from the price paid for the other blasted material. The contract does not explicitly state that the waste will be separated from the ballast and by-product. Nevertheless, according to the LOU, Mainline Rock expected that BNSF Railway would purchase the waste produced during the first year of operation. We assume a railway occasionally needs fill dirt to shore up its rail lines, but still the record does not explain why BNSF Railway would purchase dirt from Mainline Rock. Under the LOU, if the waste amount proved to be higher than anticipated, Mainline Rock would renegotiate the price.

Under the 2004 LOU, Mainline Rock also agreed to pay Barnes a rate of $1.56 per solid cubic yard of material blasted for site development. The record does not clarify the need, nature, and extent of site development, but we assume site development entailed blasting commercially nonviable areas in order to gain access to the sellable ballast and by-product.

The parties operated under the 2004 LOU until 2008, when the parties executed a master blasting agreement (MBA) for all locations at which Barnes would perform services for Mainline Rock. The 2008 agreement outlined the basic terms and conditions

for the drilling and blasting to be performed by Barnes. The MBA did not include terms and conditions for services performed at a specific location, since the parties would include those details in work orders. The MBA read:

> Upon acceptance and agreement of a Work Order, Mainline hereby authorizes Barnes to occupy Mainline Locations to operate its Drilling and Blasting operations for Mainline in accordance with the Work Order and this Agreement.

CP at 22.

The MBA's term was three years, but the agreement could be renewed by the parties. The MBA stated that Mainline Rock would pay Barnes for blasted rock materials when Mainline Rock sold the rock to a third party:

> **9. Payment Terms**: Unless otherwise noted herein, Mainline agrees to pay for all materials *sold and invoiced*, in full, within 20 days at the end of the month in which the rock is *sold and invoiced*. A late fee computed by a periodic rate of 1.5% per month will be applied to any overdue balance. If Products are for resale, no sales tax will apply.

CP at 23 (bold print in original; italics added). Individual work orders would determine the rate of payment.

The 2008 MBA did not reference the 2004 LOU. The 2008 agreement contained an integration or merger clause that declared:

> **26. Entire Agreement**: This writing is intended by the parties to be the final, complete and exclusive statement of their Agreement relating to the matters covered herein. There are no other oral understandings, representations or warranties affecting it.

CP at 29. Paragraph 27 of the agreement read:

> **Governing Law:** This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Washington. Or as required by law to be in the state of a specific operation.

CP at 29. The MBA included an arbitration clause that read, in part:

> **25. Arbitration and Waiver of Jury Trial:** The parties hereby select binding arbitration as the exclusive method for resolving any dispute arising out of or otherwise relating to this Agreement, whether based on contract, tort, statute, or otherwise. To the extent not inconsistent herewith, arbitration shall be conducted in accordance with the Washington State Arbitration Act, RCW 7.04 et seq.

CP at 28. Finally, paragraph 29 of the MBA declared:

> **Attorney Fees**: If any action at law or in equity (including arbitration) is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees, court costs and out-of-pocket costs, in addition to any other relief to which the party may be entitled. The provisions of this section shall survive the termination or expiration of this Agreement.

CP at 29.

On June 1, 2008, Mainline Rock and Barnes entered a work order authorization for blasting work at the Torrance County location. The work order would be continued "as needed." CP at 31. The 2008 work order directed Mainline Rock to pay Barnes for its drilling and blasting services at $ 0.87 per ton. The work order further declared:

> **7.0 Special Terms and Conditions**. Quantity shall be measured and paid as sold. Barnes retains the Drilling and Blasting interest in by-products stockpiled on-site to be sold at a later date. Barnes['] interest in by-products survives the termination of the Master Drilling and Blasting contract for materials produced from Barnes blasted rock. This is a continuation of Blasting services at an ongoing quarry. The prices paid for blasting of ballast and by-product shall escalate (de-escalate) at the same

> percentage rate as applicable to Mainline's ballast supply agreement with BNSF. The value of the blasting interest in by-products or other carried materials shall be equal to the adjusted price at the time of sale. Inventories carried beyond the termination of the master agreement shall be purchased [sic] paid for within 5 years of termination by Mainline.

CP at 31. Neither the MBA nor the work authorization mentioned rejects or waste materials.

In 2016, the parties executed an amendment to the MBA and 2008 Work Order relating to the Torrance County site. The amendment created two different prices for materials. Mainline Rock would pay Barnes the amount of $1.20 per ton for a category of material labeled "Drilling and Blasting 2016 (includes non-rail by-product)." CP at 44. Mainline Rock would pay Barnes $1.00 per ton for a second category of material entitled "Commercial by-product by rail shipped to CSA and Vulcan." CP at 44. The amendment did not identify "CSA." The first category constituted ballast Mainline Rock could sell to BNSF and rock by-product that could be sold as commercial aggregate products for delivery by truck. The second category included rock by-product blasted by Barnes and sold by Mainline Rock as commercial aggregate products that could be sold and delivered in large volumes by rail car.

According to Mainline Rock, Barnes drilled and blasted for Mainline Rock, between 2004 and 2017, and Mainline Rock paid Barnes based on the blasted materials actually sold. During the thirteen years, Mainline Rock never paid Barnes for reject or

waste material, and Barnes never made a request for such payment. According to Barnes, it never requested payment for the waste because the waste had yet to be sold.

In December 2016, Mainline Rock notified Barnes of an anticipated sale of its Torrance County operation site. Mainline Rock disclosed that it planned to include in the sale stockpiled materials, which sale would trigger a payment to Barnes for the stored commercially sellable materials. Mainline Rock conducted three discrete drone surveys of the stockpiled materials, each which calculated a quantity of 2.8 million tons of material. Mainline Rock announced that, on closing of the sale, it would pay Barnes $2.8 million based on a rate of $1.00 per ton. In response, Barnes, based on pre-blast measurements, expressed its belief that Mainline Rock possessed 6 million tons of stockpiled materials. Barnes demanded to be paid based on a quantity of 6 million tons. According to Mainline Rock, Barnes unreasonably demanded payment for waste and reject materials.

On April 7, 2017, Mainline Rock sold its Torrance County operation site to Vulcan Materials Corporation. The sale included all stockpiled commercially sellable aggregate inventory. Barnes suggests the sale also included stockpiled waste, which makes sense since the waste probably sat on the sold real estate. Barnes further suggests that the waste had been separated from rock by the time of the sale. Nevertheless, neither party provides any evidence to show that the separated rejects or waste sat on the land at the time of sale. Barnes' contentions imply that the purchase price of the quarry reflected

a sum for the stockpiled waste, although neither party provides evidence as to whether or not the buyer paid a separate sum for waste material.

On May 17, 2017, Mainline Rock sent Barnes payment of $908,596. Mainline Rock lowered the sum from its anticipated payment of $2.8 million based on its unilateral determination that 1.9 million tons of stockpiled material was unsellable waste. Barnes responded that Mainline Rock owed it payment for 5.65 million tons of stockpiled material at $1.25 per ton because the unit price per ton increased to $1.25 in 2017. In short, Barnes demanded payment of $7,062,500. The parties differed in amount owed by $6,156,904.

Pursuant to their 2008 master blasting agreement, the parties submitted their dispute to arbitration before a three-member panel of arbitrators. A majority of the panel determined that Barnes was entitled to an additional payment of $354,839.50 beyond the $908,596.00 already tendered. The language of the majority's ruling looms critical for this appeal. The award reads:

> This matter having come before the arbitration panel for hearing on May 22-24, 2017, and the arbitration panel having considered the evidence presented by both Mainline Rock & Ballast, Inc., the Claimant, and Barnes, Inc., the Respondent, the arbitration panel presents its majority arbitration award as follows:
>
> 1. By-Product Inventory On-Hand (original): The panel awards Barnes Inc. the amount of $206,848.50 calculated (827,394 tons x $0.25/ton).
>
> 2. By-Product Inventory On-Hand (corrected): The panel awards Barnes, Inc. the amount of $78,872.50 calculated as follows: (65,158 tons by-product x $1.25 = $81,447.50) less ballast overpay calculated as: (2,060

tons x $1.25 = <$2,575.00>) for adjusted total calculated: ($81,447.50 - $2,575.00=$78,872.50).

3. By-Product Inventory Loose Under Jaw: $40,547.50 (32,438 tons x $1.25/ton).

4. Drilling Holes by Barnes: The panel awards Barnes, Inc. the amount of $28,571.00 for 109 drill holes drilled but not shot prior to the Vulcan sale calculated as follow: ($41,400.00 billed by Barnes, Inc. less $12,829.00 paid by Mainline = $28,571.00).

5. Attorneys Fees and Costs: Under the facts and circumstances, the arbitration panel determines that neither party is a prevailing party and, therefore awards no attorney's fees or costs to either party.

6. Total Majority Award to Barnes, Inc: **$354,839.50.**

A summary of the majority's award is as follows:

1. The majority concludes that the unit price negotiated between Mainline and Barnes in June 2008 was inclusive of anticipated reject material. This conclusion is supported by the parties' course of performance and treatment of reject material from the time the quarry was established in 2004 up through the sale to Vulcan in April 2017. In particular, by letter dated July 27, 2004, Barnes specifically noted that its negotiated unit price was inclusive of anticipated reject material. Barnes re-affirmed this understanding in its February 7, 2006 letter. Accordingly, the unit price Barnes negotiated and agreed to in June 1, 2008 Work Order Authorization (i.e., $0.87/ton) was inclusive of anticipated reject material. This was the purpose for having a unit price based on tons sold as opposed to a contract based on solid cubic yards blasted.

2. The majority concludes that Barnes was owed $1.25/ton for the rock by-product inventoried and on-hand. Although Mainline argued that the price should be $1.00/ton based on a volume sale to Vulcan, the majority finds that the unit price of $1.00/ton would only have applied had that by-product inventory been actually rail shipped to Vulcan (or CSA). As it was, the by-product remained stockpiled and inventoried at the quarry on the date of the Vulcan sale and, therefore, it was non-railed by-product to be paid at the unit price of $1.25/ton.

3. The majority concludes that any rock or by-product materials used as foundation fill beneath the jaw crusher should be included in the final inventory, with payment due to Barnes for the estimated 32,428 tons.

4. The majority concludes that Barnes' billed price of $41,400 was a reasonable charge for the time and expense incurred by Barnes to drill the

> 109 holes which were drilled but not blasted. The majority finds that $12,829.00 paid by Mainline would not fully compensate Barnes for the time and materials needed to drill the 109 holes.
>
> 5. With regard to both parties' request for an award of attorney's fees and costs, the majority concludes that, while both parties prevailed in part, neither party is the prevailing party for the purpose of awarding attorney's fees and costs. Therefore, the majority makes no award of attorney's fees and costs in favor of either party despite having made a monetary award to Barnes. Mainline and Barnes will share equally in the costs of the arbitration.
>
> 6. Any and all further claims or requests for relief of any type by either Mainline or Barnes in this arbitration are denied with prejudice.

CP at 80-82.

Barnes criticizes the majority award, at least in part, for not awarding a separate sum for waste, when the award stated that Barnes would be paid for the reject material. We do not know if Mainline Rock, in part, reads the award as including payment for the waste as part of the overall unit price per ton. Mainline Rock contends that Barnes was not entitled to separate payment for the waste as demonstrated by its failure during the previous thirteen years to demand payment. We note that the parties never agreed to pay a discrete sum per ton of waste material. Nor did any of the parties' agreements mention separating the waste material from the ballast and by-product for purposes of calculating a separate payment for the waste.

One arbitration panel member dissented. The dissenter wrote:

> Arbitrator H. Kent Magleby, P.E. dissents from the majority award as follows:
>
> 1. Total adjusted product and by-products stockpiled on-site.
>
> a. Ballast inventory = 52,638 Tons

b. By-product inventory recognized by Mainline Rock and Ballast Inc. (Mainline) = 892,552 Tons

c. By-Product inventory measured but not recognized by Mainline - 2,581,423 Tons (Averaged from 3 drone surveys)

d. Total product and by-product = 3,526,613 Tons

2. Adjusted price at the termination of the agreement.

a. $1.25 per Ton

3. Barnes, Inc. (Barnes) interest in products and by-products stockpiled on-site:

a. $4,408,266.25

4. Amount previously paid by Mainline

a. $908,596.00

5. Net amount still owed to Barnes

a. $3,499,670.25

6. There is insufficient information to determine that the by-products have all been sold, therefore, I recommend it be treated as inventory carried beyond the termination of the master agreement and paid for within 4 years in four equal yearly payments.

I offer the following in support of the above dissenting settlement amount:

1. Only the Master Blasting Agreement dated June 1, 2008, the work authorization dated June 1, 2008, and the Amendment dated June 1, 2016 apply to this dispute, previous letters of understanding or other correspondence are superseded by the agreement and are not relevant.

2. Based upon the testimony of the parties to the agreement, it is clear that the by-product in stockpile that was measured and excluded by Mainline was to be sold at a later date.

3. Mainline did not negotiate in good faith with Barnes when they determined that a portion of the by-product could not be sold at a later date, rather they measured it and completely excluded it. This is a violation of the agreement both written and as intended.

4. Mainline applied a unit price to the by product in stockpile that was associated with a specific sale that never materialized. This is a violation of the agreement both written and as intended.

5. There is no provision in the agreement for by-products not stockpiled on the site; therefore, Barnes cannot expect payment for them.

6. The multiple drone surveys are an accurate means of determining the amount of material in stockpile on the site.

7. The conversions from volume to weight utilized by Mainline

> failed to account for moisture in the stockpile; however, Barnes did not provide alternate conversions.
>
> 8. There is no provision in the agreement for drilling only; therefore, it is a separate dispute that should not be resolved the Arbitration Board.
>
> 9. Both parties failed to correctly interpret and apply the special terms and conditions of the agreement (Exhibit "A" Work Order Authorization Paragraph 7.0), therefore, neither party prevailed and there is no award of Attorney Fees (Master Blasting Agreement Paragraph 29).

CP at 83-84.

PROCEDURE

Barnes filed a motion with the superior court seeking vacation of the arbitration award. Barnes argued that the arbitration panel erroneously considered evidence as to the parties' contracting intent beyond the 2008 master blasting agreement and the work authorization. Barnes also argued that the arbitration panel committed error by failing to award it pre-award interest and reasonable attorney fees under the terms of the MBA. Mainline Rock opposed the motion and filed a motion to confirm the arbitration award. The trial court denied Barnes' motion to vacate the award and granted Mainline Rock's motion to confirm the award.

LAW AND ANALYSIS

On appeal, Barnes argues, pursuant to RCW 7.04A.230(1)(d), that the arbitration panel exceeded its powers when committing three errors. First, the panel erred by considering the 2004 LOU and the parties' course of performance when determining the parties' agreement. Second, the panel erred by not awarding reasonable attorney fees to

Barnes when it was the prevailing party and the MBA contained an attorney fees clause. Last, Barnes argues it was entitled to interest on the award in Barnes' favor since the agreement required payment of interest on past due sums at 18 percent per annum. For each claimed error, Barnes asserts the facial legal error doctrine. A similar analysis applies to each claimed error, but we address each argument separately.

Amount of Award

Because the parties engaged in interstate commerce, this appeal implicates the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Nevertheless, neither party cites federal law or asks for application of the Federal Arbitration Act. Washington law will not result in a different outcome. *Satomi Owners Association v. Satomi, LLC*, 167 Wn.2d 781, 803, 225 P.3d 213 (2009). Therefore, we rely on Washington arbitration principles.

Courts will only review an arbitration decision in limited circumstances. *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 434, 219 P.3d 675 (2009). Review of an arbitration award at the trial court and on appeal is limited to statutory grounds. *Barnett v. Hicks*, 119 Wn.2d 151, 153-54, 829 P.2d 1087 (1992).

RCW 7.04A.230 governs this appeal. The statute addresses confirmation or vacation of an arbitration award. The statute declares, in relevant part:

> (1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:
>
> . . . .
>
> (d) An arbitrator exceeded the arbitrator's powers;
>
> . . . .

> (4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

Like other parties to arbitration who challenge the merits of a ruling of an arbitration panel, Barnes relies on RCW 7.04A.230(1)(d)'s language of "[a]n arbitrator exceeded the arbitrator's powers." We question whether this language should extend to the substance of arbitral rulings. In common and legal parlance, committing factual or legal error does not equate to the decisionmaker exceeding its power. Exceeding power goes more to jurisdiction of an arbitration panel rendering a decision on a dispute or issue never submitted to it. In *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995), an astute concurring opinion disagreed with the majority applying the facial legal error principle as being based on an earlier version of Washington's arbitration statute. The current language of the statute omits any reference to error of law.

We follow Washington Supreme Court precedent and proceed on the basis that a party may successfully challenge an arbitration award based on legal error. Nevertheless, a successful challenge lies only in very limited circumstances, and those circumstances do not apply to Barnes' challenge since Barnes fails to show legal error on the face of the award. Limiting the circumstances fulfills the policy and purposes behind arbitration.

Our litigious society encourages parties to voluntarily submit disputes to arbitration. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998); *Boyd v. Davis*, 127 Wn.2d at 262 (1995). Arbitration seeks to avoid the formalities, delay,

expense, and vexation of litigation in court. *Davidson v. Hensen*, 135 Wn.2d at 118. Arbitration is attractive because it is a more expeditious and final alternative to litigation. *Boyd v. Davis*, 127 Wn.2d at 262. Arbitration's desirable qualities would be heavily diluted, if not expunged, if a trial court reviewing an arbitration award were permitted to conduct a trial de novo. *Boyd v. Davis*, 127 Wn.2d at 263.

Arbitrators, when acting under the broad authority granted them by both the agreement of the parties and by statute, become the judges of both the law and the facts. *Northern State Construction Co. v. Banchero*, 63 Wn.2d 245, 249-50, 386 P.2d 625 (1963). In fact, the arbitration act does not require that the arbitration panel enter any findings of fact or conclusions of law. *Barnett v. Hicks*, 119 Wn.2d at 156 (1992).

Based on RCW 7.04A.230(1)(d), arbitrators are deemed to have exceeded their authority when the face of the arbitration award exhibits an erroneous rule of law. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239-40, 236 P.3d 182 (2010); *Davidson v. Hensen*, 135 Wn.2d at 118 (1998); *Boyd v. Davis*, 127 Wn.2d at 263 (1995); *Northern State Construction Co. v. Banchero*, 63 Wn.2d at 249-50. Conversely, unless the award on its face shows the adoption of an erroneous rule or mistake in applying the law, the award will not be vacated or modified. *Beroth v. Apollo College, Inc.*, 135 Wn. App. 551, 559, 145 P.3d 386 (2006); *Northern State Construction Co. v. Banchero*, 63 Wn.2d at 249-50 (1963). The facial legal error standard is a very narrow ground for vacating an arbitral award, and courts may not search the arbitral proceedings for any legal error.

Broom v. Morgan Stanley DW Inc., 169 Wn.2d at 239 (2010). The party seeking to vacate the award bears the burden of showing such grounds. *Cummings v. Budget Tank Removal & Environmental Services, LLC*, 163 Wn. App. 379, 388, 260 P.3d 220 (2011).

As of 2010, Washington courts had applied the facial legal error standard carefully, vacating an award based on such error in only four instances. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231 (2010). For example, facial error was present when the arbitrator identified a portion of an award as punitive damages in a jurisdiction that does not allow punitive damages. *Salewski v. Pilchuck Veterinary Hospital Inc.*, 189 Wn. App. 898, 904, 359 P.3d 884 (2015). In *Broom v. Morgan Stanley DW Inc.*, the Supreme Court vacated an arbitration award dismissing a claim under securities law for a broker's breach of fiduciary duty, because the award applied a state statute of limitations and, under Washington law, statutes of limitations do not apply in arbitration.

In *Federated Services Insurance Co. v. Personal Representative of the Estate of Norberg*, 101 Wn. App. 119, 124, 4 P.3d 844 (2000), this court vacated an award. The arbitration panel awarded an estate of one killed in a car accident damages for a loss of potential inheritance on the assumption he would survive his parents. The panel expressly invited the court to rule on its award and segregated the sum for the award from the awards for other damages.

Other principles important to our decision emanate from the facial legal error doctrine. Courts do not look to the merits of the case, and they do not reexamine evidence. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d at 239. An arbitration award shall not be vacated if the appellant's argument cannot be decided without delving into the substantive merits of the claim. *Davidson v. Hensen*, 135 Wn.2d at 121 (1998). The error must be recognizable from the language of the award. *Federated Services Insurance Co. v. Personal Representative of the Estate of Norberg*, 101 Wn. App. at 124 (2000). We do not address mistakes of law not found on the face of the award. *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d at 434-35 (2009). We do not reach the merits of the arbitrator's legal conclusions. *Clark County Public Utility District No. 1 v. International Brotherhood of Electrical Workers*, 150 Wn.2d 237, 239, 76 P.3d 248 (2003). We do not even review the arbitration decision under an arbitrary and capricious standard. *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 318, 237 P.3d 316 (2010).

Because we review only the arbitration award, we may not examine contract language relevant to the dispute. *Boyd v. Davis*, 127 Wn.2d at 260-61 (1995). We do not review an arbitrator's interpretation of a contract. *Cummings v. Budget Tank Removal & Environmental Services, LLC*, 163 Wn. App. at 389-90 (2011).

We note that in *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231 (2010) and *Boyd v. Davis*, 127 Wn.2d 256 (1995), the Supreme Court analyzed some of the language

in the underlying contracts, despite the latter decision declaring that the court should not review the contract. Still the review of the contract language did not lead to a vacation of the arbitration decision. In *Cummings v. Budget Tank Removal & Environmental Services, LLC*, 163 Wn. App. at 389-90 (2011), this court affirmed an arbitration award because the final award did not show on its face that the arbitrator misunderstood the law of contracts or adopted an erroneous rule.

We follow the rule that the court may not review contract language not quoted in the arbitration award. Analyzing the contract language goes beyond facial error, possibly entails an intricate review of the merits of the case, and conflicts with the goal of avoiding extensive and expensive litigation.

We note inconsistencies in Washington decisions as to whether a court may consider language in the arbitrator's decision beyond the arbitration's actual judgment in favor of one party when determining facial legal error. According to one line of cases, the arbitrator's reasons for the award are not part of the award itself. *Expert Drywall, Inc. v. Ellis-Don Construction, Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258 (1997); *Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990); *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 403, 766 P.2d 1146 (1989). In *Westmark Properties*, this court narrowed its review to two sentences of the arbitrator's three-page letter.

According to another line of decisions, when a final award sets forth the arbitrator's reasoning along with the actual dollar amounts awarded, any issue of law evident in the reasoning may also be considered as part of the face of the award. *Cummings v. Budget Tank Removal & Environmental Services, LLC*, 163 Wn. App. at 389 (2011); *Federated Services Insurance Co. v. Personal Representative of the Estate of Norberg*, 101 Wn. App. at 124-25 (2000); *Tolson v. Allstate Insurance Co.*, 108 Wn. App. 495, 32 P.3d 289 (2001). Other decisions go further and announce that the court may even review some paper delivered by the arbitrator with the award. *Boyd v. Davis*, 127 Wn.2d at 262 (1995); *School District No. 5 v. Sage*, 13 Wash. 352, 357, 43 P. 341 (1896); *Lent's, Inc. v. Santa Fe Engineers, Inc.*, 29 Wn. App. 257, 265, 628 P.2d 488 (1981); *Moen v. State*, 13 Wn. App. 142, 145, 533 P.2d 862 (1975). For purposes of argument sake, we review all three pages of the arbitration panel majority members' decision for legal error. We do not go beyond the three pages.

Barnes contends that the face of the award from its arbitration panel shows error because the award mentions an earlier letter. In fact, the award mentions two letters: a letter dated July 27, 2004, known as the LOU, and a February 7, 2006 letter, in which Barnes reaffirms some understanding. According to Barnes, mention of the letters establishes that the panel breached the master blasting agreement integration clause. Nevertheless, the integration clause is nowhere mentioned in the arbitration panel ruling. During oral argument, Barnes suggested that we include the dissenting arbitration panel

member's written decision as part of the "award," for purposes of determining a facial legal error. In *Keen v. IFG Leasing Co.*, 28 Wn. App. 167, 622 P.2d 861 (1980), the court in passing noted that it reviewed the dissenting arbitrator opinion when assessing whether the panel had addressed all disputes before it. We find no Washington or foreign decision that directly addresses this question, however. We doubt that the dissenting opinion should be considered, since the dissenter's conclusions had no influence on the award and the dissent could misstate or misconstrue the basis of the majority's ruling. Nevertheless, we need not decide this question, since, even if we consider the arbitration panel dissent's writing, our conclusion would not change.

Barnes contends that the language of the dissenting opinion confirms that the majority breached the integration clause. The dissenting arbitrator wrote that the master blasting agreement dated June 1, 2008, the work authorization dated June 1, 2008, and the amendment dated June 1, 2016, supersede and render irrelevant any previous letters of understanding or other correspondence. Nevertheless, we observe that a later agreement can supersede any earlier agreement or understanding simply by being a later agreement and without the later agreement containing an integration clause. We further note that the dissenter, in paragraphs 3 and 4 of his second page, implied that the contract lacks a merger clause because the writing refers to the parties' intent outside of the language of the MBA and the work authorization.

We also observe that Barnes relies on extrinsic evidence when promoting its reading of the MBA. In its opening brief, Barnes writes:

> At the time of the LOU, both parties intended that Barnes was to be paid for all of the rock blasted, including the so-called "reject" materials. CP 4, 20. This was the parties understanding because Mainline had promised Barnes that all such "reject" materials would be sold to the railroad or other entities which were located in Texas, due to a shortage of crushed materials there. Id. There was no intention to have any substantial stockpiles on site. CP 5.

Br. of Appellant at 3.

Finally, we note that the master blasting agreement integration paragraph reads that the agreement constituted the final, complete, and exclusive statement of the parties' agreement. We wonder how an arbitration panel resolves a dispute as to the parties' agreement, if the MBA in fact does not include language that resolves the dispute or if the agreement contains an ambiguity that cannot be resolved by other language in the agreement. The MBA integration clause does not expressly preclude the arbitration panel from considering other evidence.

Barnes also argues that the panel did not decide the critical question of the total tonnage of commercially sellable by-product materials contained within the stockpiles at the Torrance site. The arbitration award, however, lists tonnage of by-product inventory on hand and multiplies that number by a rate to conclude how much money Mainline Rock owed Barnes. The dissenting arbitrator also lists the number of tons of various inventory such as ballast and by-product.

Barnes contends that the sale of reject material to Vulcan belies the arbitration panel's apparent belief that the waste was commercially unsellable. We see no language in the arbitration panel award that the majority deemed waste unsellable.

We note a hazard in Washington law. An arbitration panel improves its chances of court confirmation of the award by providing no reasoning or analysis behind its award. For example, the Mainline Rock-Barnes arbitration panel could have, in the path of Judge Albert Yencopal, simply wrote: "We award Barnes $354,839.50." Nevertheless, the parties may benefit by knowing the reasoning applied by the panel when reaching its decision. Still, the parties surrender some rights to a thorough decision and thorough appellate review when agreeing to expedite resolution through arbitration. The parties could insert in their arbitration clause a requirement that the arbitrator or arbitration panel provide a detailed and reasoned decision.

In addition to vacating an arbitration award based on facial legal error, Washington courts will remand an arbitration award to the arbitrator when an ambiguity needs clarification. *Tolson v. Allstate Insurance Co.*, 108 Wn. App. 495 (2001); *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wn. App. at 816 (1990). Barnes claims no ambiguity in the arbitration panel's award.

Interest

Barnes next contends that the arbitration panel erred by not granting it pre-award interest. Barnes cites to the master blasting agreement clause granting it interest on

unpaid amounts. For the same reason that we refuse to vacate the award of damages, we decline to remand for an award of interest. The arbitration panel award does not mention the contract provision.

Westmark Properties, Inc. v. McGuire, 53 Wn. App. 400 (1989) and *Cummings v. Budget Tank Removal & Environmental Services, LLC*, 163 Wn. App. at 390 (2011) control. In *Westmark Properties*, this court narrowed its review to two sentences of the arbitrator's three-page letter. The two sentences read:

> . . . I find that the plaintiff is entitled to judgment against the defendants in the sum of $24,789.92, by way of reimbursement.
> . . . I am finding that the balance due the plaintiff for management fees is offset by shortfall in rentals.

53 Wn. App. at 403. On review before the superior court, the court added prejudgment interest to the award. This court reversed. We observed that the superior court went behind the face of the award to discern a basis for awarding interest. The superior court had entered forbidden territory.

In *Cummings v. Budget Tank Removal & Environmental Services, LLC*, the defending party complained in court that the arbitrator erroneously awarded prejudgment interest. Since entitlement to the award depended on the evidence, this court refused to disturb the award because no error appeared on the face of the award.

Attorney Fees

Barnes next contends the arbitration panel committed facial legal error by failing to award it reasonable attorney fees and costs incurred during the arbitration proceeding. Barnes sought fees under the master blasting agreement provision that afforded the prevailing party an award of reasonable attorney fees. It claims it prevailed because it received an award of $354,839.50. Barnes cites to decisions outside the arbitration context that hold that the plaintiff is the prevailing party for purposes of an award of fees if the plaintiff recovers a judgment, no matter the sum.

For the same reason that we refuse to vacate the amount of the arbitration award, we decline to remand for an award of attorney fees incurred during the arbitration process. In accordance with case law, the arbitrators found neither party to be the prevailing party and declined to award attorney fees. In addition, the arbitration award nowhere mentions any contract provision demanding that the prevailing party be awarded reasonable attorney fees and costs.

Barnes contends that, because the majority discussed who prevailed for purposes of an award of fees, this court must assume that the master blasting agreement contained a mandatory provision for an award of reasonable attorney fees. We disagree. Sometimes attorney fees clauses leave to the arbitrator or the court discretion in awarding fees. For example, the parties in *Beroth v. Apollo College, Inc.*, 135 Wn. App. at 563 (2006), entered an agreement that provided the arbitrator authority to award "'attorney

fees and such other equitable relief as *may* to the arbitrator be just.'" (Emphasis added.)

Phillips Building Co. v. An, 81 Wn. App. 696, 915 P.2d 1146 (1996) and *Morrell v. Wedbush Morgan Securities, Inc.*, 143 Wn. App. 473, 178 P.3d 387 (2008) govern the question of attorney fees. In *Phillips Building Co. v. An*, the Ans argued that the arbitrators exceeded their authority by failing to award them attorney fees under the parties' contract since they were the prevailing party. The arbitrators wrote: "'Each party shall bear its own attorney fees and costs incurred in relation to this arbitration.'" 81 Wn. App. at 700. The court, contrary to the rule that we do not look to the underlying contract unless cited in the award, noted that arbitrators may exceed their authority by failing to award attorney fees to the prevailing party under an arbitration agreement. The court also recognized the principle that, if both parties prevail on major issues, there may be no prevailing party. The court affirmed the denial of the award because the court would need to go outside the face of the award to assess who prevailed. Although the arbitrators awarded the Ans some damages, the amount deceeded the amount claimed.

The court in *Phillips Building Co. v. An* distinguished *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 654 P.2d 712 (1982), on which Barnes relies. In the latter decision, this court modified an arbitration award because the arbitrators failed to award the prevailing party, Agnew, reasonable attorney fees and costs. Lacey Co-Ply demanded $1.6 million in arbitration from Agnew, who purchased an industrial furnace from Agnew. The arbitrators granted Lacey Co-Ply nothing. The court held that the arbitrators exceeded

their powers when they ignored the express language of the contract between the parties that afforded an award of fees. The court thereby violated the principle that it may not review the parties' contract when the award does not mention the terms of the contract.

This court in *Phillips Building Co. v. An* differentiated *Agnew v. Lacey Co-Ply* because the face of the award in favor of Agnew necessarily declared Agnew to have prevailed on all issues. Both parties in *Phillips Building Co. v. An* prevailed on issues. We question the validity of this court's decision in *Agnew v. Lacey Co-Ply*, but we need not ponder its correctness. The same distinction from *Agnew* lies with Barnes' arbitration panel award.

In *Morrell v. Wedbush Morgan Securities, Inc.*, 143 Wn. App. 473 (2008), the court, as we do, questioned the analysis in *Agnew*. The arbitrator denied the Morrells reasonable attorney fees and costs despite their prevailing at arbitration. The superior court, based on a contract clause, granted the Morrells fees, despite no reference to the attorney fees clause in the arbitration award. This court deemed *Agnew* wrong because the court went behind the arbitration award and engaged in contract analysis. As Barnes does, the Morrells asked the court to apply the facial legal error doctrine because the award analyzed who constituted the prevailing party. The arbitration concluded that since both parties prevailed on such issues, neither party should be awarded fees. This court reversed the superior court's grant of fees to the Morrells.

One might contend that this court acts like an ostrich by refusing to consider a contract provision that affords the prevailing party reasonable attorney fees and costs. But again, the Supreme Court teaches that our role is not to reach the merits, but to only consider the face of the award. This rule promotes efficiency in arbitration.

Fees on Appeal

Mainline Rock asks for an award of reasonable attorney fees and costs incurred on appeal. We grant this request provided Mainline Rock complies with RAP 18.1.

On appeal, Mainline Rock prevails on all issues. RCW 7.04A.250(3) provides for an award of attorney fees and litigation expenses in favor of the prevailing party for postaward proceedings. The statute declares:

> On application of a prevailing party to a contested judicial proceeding under . . . 7.04A.230 [vacation of arbitration award] . . ., the court may add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made.

We note that Barnes cites to one unpublished opinion in its brief and two unpublished opinions in its statement of additional authorities. We direct Barnes' attention to GR 14.1 and this court's direction in *Crosswhite v. Department of Social & Health Services*, 197 Wn. App. 539, 544, 389 P.3d 731, *review denied*, 188 Wn.2d 1009, 394 P.3d 1016 (2017), which Barnes did not follow.

CONCLUSION

We affirm the trial court's confirmation of the arbitration panel award. We award Mainline Rock reasonable attorney fees and costs on appeal.

Fearing, J.

Fearing, J.

WE CONCUR:

Siddoway, J.

Siddoway, J.

No. 35767-8-III

LAWRENCE-BERREY, C.J. (concurring) — I agree with the lead opinion but write separately to encourage future litigants to argue that RCW 7.04A.230(1)(d) should be construed more narrowly than courts have construed former RCW 7.04.160(4) (1943).

Nearly one century ago, arbitration awards could be vacated if the court found that the arbitrator committed "an error in fact or law." Rem. Comp. Stat. § 424(2) (1922). In 1943, Washington adopted the "Uniform Arbitration Act," and codified it at chapter 7.04 RCW. Former RCW 7.04.160(4) permitted a court to vacate an arbitration award if "[1] the arbitrators exceeded their powers, or [2] so imperfectly executed them that a final and definite award upon the subject matter submitted was not made."

In *Boyd v. Davis*, 127 Wn.2d 256, 267, 897 P.2d 1239 (1995) (Utter, J., concurring), our high court held that a party seeking to vacate an award under former RCW 7.04.160(4) must establish an error of law on the face of the award. Four justices signed the concurring opinion that argued against the majority's standard. The concurring opinion argued that the majority's standard improperly retained a relic of the prior law and did not give the statutory language its full meaning. *Id.* at 266-70.

Because the original act did not address many important questions, it was revised in 2005. Washington adopted the revised act effective January 1, 2006, and codified it at chapter 7.04A RCW.

The National Conference of Commissioners on Uniform State Laws authored a lengthy Prefatory Note to the revised act. The note states in relevant part:

> There are a number of principles that the Drafting Committee agreed upon at the outset of its consideration of a revision to the UAA. . . . [T]he underlying reason many parties choose arbitration is the relative speed, lower cost, and greater efficiency of the process. The law should take these factors, where applicable, into account.

Prefatory Note to chapter 7.04A RCW, ¶ 3.

RCW 7.04A.230(1)(d) is the updated version of former RCW 7.04.160(4). RCW 7.04A.230(1)(d) permits a court to vacate an arbitration award if the "arbitrator exceeded the arbitrator's powers." One notes that the second phrase of former RCW 7.04.160(4) has been entirely omitted. This omission is intentional and serves to further narrow the ability of a court to vacate an arbitration award. Surprisingly, no appellate court has determined what effect this intentional omission has on *Boyd*'s construction of former RCW 7.04.160(4).

As evidenced by this case, arbitration is not final in those cases where the arbitrators assume the burden of explaining their awards to the parties. Explaining an award is a good thing. It allows the nonprevailing party to know that he or she has been heard and that the arbitrators carefully considered facts and arguments. Explaining an award is essential for instilling confidence in the arbitration process. We should not adopt a standard for vacating arbitration awards that discourages arbitrators from explaining their awards. But that is exactly what our courts have done. Although

RCW 7.04A.230(1)(d) is intended to be narrow, it is narrow only when an arbitrator narrowly explains the award.

A solid argument can be made that *Boyd*'s construction of former RCW 7.04.160(4) does not survive the intentionally narrower language of RCW 7.04A.230(1)(d). In my view, an arbitrator exceeds its powers only when the arbitrator has decided an issue not properly before it. Should courts eventually adopt this or a similar narrowed standard, RCW 7.04A.230(1)(d) would not permit endless litigation of well-explained arbitration awards.

Lawrence-Berrey, C.J.

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APRIL 16, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MAINLINE ROCK & BALLAST, INC.,	)	
	)	No. 35890-9-III
Appellant,	)	
	)	
v.	)	
	)	
BARNES, INC.,	)	PUBLISHED OPINION
	)	
Respondent.	)	

FEARING, J. — Mainline Rock, a party to an arbitration proceeding, appeals the superior court's denial of an award of reasonable attorney fees and costs pursuant to RCW 7.04A.250 in the superior court proceeding to confirm the arbitration award. We hold that the trial court abused its discretion when denying Mainline Rock's application for fees because the trial court misread the law and failed to exercise its discretion under the statute.

FACTS

Mainline Rock & Ballast, Inc. (Mainline Rock) develops and operates rock quarries to extract, crush, and sell ballast, a rock material used as the footing or base for railroad tracks. Between 2004 and 2017, Mainline Rock owned and operated a rock quarry in Torrance County, New Mexico, near Encino. Mainline Rock intended to sell ballast from the Torrance site to BNSF Railway.

Barnes, Inc. (Barnes) works as a drilling and blasting contractor. In 2008, Barnes and Mainline Rock entered a master blasting agreement, under which Barnes would perform blasting services for maintenance at numerous locations, including the Torrance County site. Pursuant to the parties' agreement, Mainline Rock would pay Barnes for blasted rock materials when Mainline sold the rock to a third party. Individual work orders would determine the rate of payment. The master blasting agreement included an arbitration clause. Paragraph 29 of the master blasting agreement declared:

> **29. Attorney Fees**: If any action at law or in equity (including arbitration) is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees, court costs and out-of-pocket costs, in addition to any other relief to which the party may be entitled. The provisions of this section shall survive the termination or expiration of this Agreement.

Clerk's Papers (CP) at 29.

On June 1, 2016, Mainline Rock and Barnes entered into a work order authorization amendment for blasting work at the Torrance location. On April 7, 2017,

Mainline sold the assets of the Torrance operation site to Vulcan Materials Corporation. The purchase included all stockpiled commercially sellable aggregate inventory. Mainline Rock then became liable to Barnes for work performed. The parties could not agree to the sum owed Barnes.

Because of the parties' differences, they entered arbitration pursuant to the master blasting agreement. The arbitration occurred in Spokane before a three-person arbitration panel. A majority of the panel determined that Barnes was entitled to a payment higher than the amount tendered by Mainline Rock but lesser than the amount Barnes requested. Both parties sought an award of reasonable attorney fees and costs, under the master blasting agreement, as the prevailing party. The panel ruled that, since it did not accept either party's position, neither party prevailed. The panel denied each party an award of reasonable attorney fees and costs.

PROCEDURE

Barnes, pursuant to RCW 7.04A.230(1)(d), filed a motion with the superior court to vacate the arbitration award. In return, Mainline Rock, pursuant to RCW 7.04A.230(4), filed a motion to confirm the award. The trial court denied Barnes' motion to vacate and granted Mainline Rock's motion to confirm.

Thereafter Mainline Rock, pursuant to RCW 7.04A.250, filed a motion for an award of reasonable attorney fees and litigation expenses incurred in the superior court proceeding. The trial court denied Mainline Rock's application for fees and costs. The

order reads:

> . . . .
>
> Both parties cross moved the court for: orders granting attornies [sic] fees. The parties requested that the court rule on the pleadings and both parties waived oral argument.
>
> II. FINDINGS
>
> After reviewing the case record to date, and the basis for the motion, the court finds that: the arbitration award was a split decision, both parties prevailed in part and the arbitration denied attornies [sic] fees. The court reviewed both parties['] pleadings.
>
> III. ORDER
>
> IT IS ORDERED that:
>
> Both parties['] request for attorney's fees are denied and each side will bare [sic] their own costs.

CP at 153-54. We are unaware of any cross motion by Barnes, before the superior court, for an award of reasonable attorney fees and costs pursuant to the arbitration statute.

LAW AND ANALYSIS

Reasonable Attorney Fees Before Superior Court

Mainline Rock appeals the superior court's denial of its motion for an award of reasonable attorney fees. RCW 7.04A.250(3) controls. The statute reads:

> The court *may* add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made.

(Emphasis added.) The word "may" denotes the trial court holds discretion when deciding whether to award a party reasonable attorney fees and costs. *Strenge v. Clarke*, 89 Wn.2d 23, 28, 569 P.2d 60 (1977).

We review discretionary decisions for abuse of discretion. *Jewell v. City of Kirkland*, 50 Wn. App. 813, 818, 750 P.2d 1307 (1988). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). The superior court abuses its discretion when it applies the wrong legal standard to the issue. *Dave Johnson Insurance Inc. v. Wright*, 167 Wn. App. 758, 775, 275 P.3d 339 (2012). The failure to exercise discretion is an abuse of discretion. *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999).

Mainline Rock argues that the trial court misunderstood its motion for attorney fees incurred during the post-arbitration proceeding in superior court as a motion seeking attorney fees from the arbitration proceeding itself. Mainline Rock emphasizes the court's mischaracterization of Mainline's motion as one whereby "[b]oth parties cross moved the court for: orders granting attornies [sic] fees." CP at 153. Nevertheless, Barnes, in its briefing before the superior court, expressed the desire for attorney fees incurred before the arbitration panel pursuant to the parties' contract. In contrast, Mainline Rock's motion did not reference the parties' master blasting agreement and did not seek an award for fees incurred during the underlying arbitration.

Barnes responds that the superior court's characterization of the requests as cross motions raises no concern because Barnes requested attorney fees in its response to Mainline Rock's motion for fees. We disagree. A fleeting statement in a response does

not transform a request into a cross motion. Barnes never filed a motion for fees at the arbitration level, never submitted evidence in support of a motion for fees, and never submitted any argument to support such a motion.

Other language in the superior court's order confirms the court's mistake as to the nature of Mainline Rock's request. The court order observes that the court found "the arbitration award was a split decision, both parties prevailed in part and the arbitration denied attornies [sic] fees. . . . Both parties request for attorney's fees are denied and each side will bare [sic] their own costs." CP at 153-54. This language reflects an assumption by the superior court that Mainline Rock seeks an award of fees incurred during arbitration, not during the superior court proceeding to vacate or confirm the arbitration award. Since the superior court assumed Mainline Rock sought fees from the arbitration proceedings, the court failed to exercise its discretion under RCW 7.04A.250(3).

Mainline Rock seeks alternative relief. Mainline Rock asks that this court remand to the trial court for a determination, under the correct legal standard, of whether it was the prevailing party before the superior court. In the alternative, Mainline Rock asks that this court reach the merits of the issue, confirm that Mainline Rock was the prevailing party, and either enter judgment in its favor or direct the superior court to enter judgment in its favor. Since RCW 7.04A.250(3) assumes that the superior court holds the discretion to award fees, we remand to the superior court to exercise its discretion.

Reasonable Attorney Fees on Appeal

Mainline Rock also requests reasonable attorney fees and costs on appeal pursuant to RAP 18.1. Under RAP 18.1, a party may recover fees on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses. . . ." In turn, Mainline Rock relies on the attorney fees provision of the master blasting agreement and again relies on RCW 7.04A.250(3). We address each alternative ground.

Paragraph 29 of the master blasting agreement read, in part: "If any action at law or in equity (including arbitration) is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees, court costs and out-of-pocket costs." CP at 29. Mainline Rock's motion before the superior court to confirm the arbitration award and its opposition to Barnes' motion to vacate the award did not seek to enforce the blasting agreement or interpret its terms. Therefore, we deny any award of fees under the parties' contract.

RCW 7.04A.250(3) grants the superior court discretion to add to a party's judgment the amount of reasonable attorney fees and costs incurred in confirming an arbitration award. As with the fees incurred by Mainline Rock at the superior court level, we remand to the superior court to exercise its discretion in whether to award Mainline Rock fees incurred in this appeal and the amount of any award.

CONCLUSION

We remand for the trial court to exercise its discretion under RCW 7.04A.250(3) to award or deny Mainline Rock reasonable attorney fees and costs incurred during the proceeding to vacate or confirm the arbitration award. The trial court should also exercise its discretion in awarding or denying reasonable attorney fees and costs by Mainline Rock in this appeal.

Fearing, J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, C.J.

MASTER BLASTING AGREEMENT

THIS MASTER BLASTING AGREEMENT ("Agreement") is entered into this 1st day of June, 2008, by and between MAINLINE ROCK & BALLAST, INC., a Washington Corporation, with its principal located at 4418 East 8th Avenue , Spokane Valley, Washington (hereinafter referred to as "Mainline") and BARNES, INC., an Idaho corporation, with its principal office located at P.O. Box 263., Lewiston ID, (hereinafter referred to as "Barnes").

In consideration of the agreements and covenants contained herein and for such other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Barnes and Mainline agree as follows:

1. **Purpose and Permitted Uses:**

a. Purpose, Drilling, Blasting and Other Services. Subject to the terms and conditions as hereinafter provided, Barnes agrees to provide Drilling and Blasting services to Mainline on a non-exclusive basis, at Mainline Locations (hereafter "Mainline Locations" or "Locations"). Barnes agrees to provide all equipment, tools, and labor to provide Drilling and Blasting of certain rock products. Specific quantities and prices will be negotiated on an individual work order basis ("Work Order"). A sample Work Order is attached hereto as Exhibit "A".

b. Barnes' Permitted Uses. Upon acceptance and agreement of a Work Order, Mainline hereby authorizes Barnes to occupy Mainline Locations to operate its Drilling and Blasting operations for Mainline in accordance with the Work Order and this Agreement.

Barnes Permitted uses may be further restricted by individual or underlying leases or land use restrictions. Barnes agrees not to interfere with any of Mainline's negotiations or relationships regarding lease renewals or extensions.

2. **Term:** The base term of this Agreement shall be for a period of three (3) years, commencing on the Effective Date unless sooner terminated as provided in this Agreement ("Base Term"). The terms of this agreement may be extended upon mutual agreement of the parties.

3. **Location of Production:** Mainline and Barnes agree that all Drilling and Blasting activities are to be performed on Mainline's Property unless otherwise arranged and agreed to. Mainline has in place, and will have in place throughout Drilling and Blasting operations, all required permits that pertain to Mining and/or Rock Crushing in Mainline's Locations. Mainline is responsible for final reclamation of the site(s).

4. **Hours of Operation:** Drilling Operation hours will be stated in each Work Order. Standard drilling hours are from 5:00 A.M. to 11:30 P.M. Drilling and Blasting prices at a particular site may reflect and incorporate the lost production costs at sites that do not allow these standard operating hours.

5. **Quality Control:** Barnes agrees to provide seismic monitoring of Blasting Events, with access, as well as copies of all results, to Mainline. All Drilling and Blasting specifications required to be met, must be attached to or included in the applicable Work Order and, as such, Barnes is responsible for performing to these specifications. Drilling and Blasting meeting Work Order specifications may not be rejected by Mainline for failure to meet other specifications not disclosed in the Work Order.

6. **Production Records & Scaling:** Mainline agrees to provide Barnes with a monthly record of Tonnage sold each month of operation. Mainline agrees to provide industry standard scales for weighing of all materials sold.

7. **Barnes Status:** Unless otherwise specifically agreed to, Barnes is not considered a subcontractor to Mainline on jobs and projects upon which Mainline is performing work. Barnes shall be bound by the terms of this Agreement and not subject to the terms of a project specific subcontract unless specifically reviewed, accepted, and included or referenced in the Work Order or separately agreed to by written agreement between the parties.

8. **Confidentiality:** Both parties agree to keep all bidding and/or pricing from others, agreeing to total non-disclosure regarding this agreement. Confidentiality also applies to production, techniques and equipment, etc.

9. **Payment Terms:** Unless otherwise noted herein, Mainline agrees to pay for all materials sold and invoiced, in full, within 20 days of the end of the month in which the rock is sold and invoiced. A late fee computed by a periodic rate of 1.5% per month will be applied to any overdue balance. If Products are for resale, no sales tax will apply.

10. **Other Payments:** Each party shall timely pay: (i) all real property taxes, general and special assessments, ad valorem or improvement levies levied on or assessed against its Location in which it has an ownership interest; (ii) any taxes on its own personal property; (iii) any leasehold tax required by local, state and federal laws, as amended, for any and leasehold interest received from the owner of a leased property; (iv) all mining permit fees, reclamation bonds, reclamation costs, and other costs or expenses incurred in acquiring or maintaining the mining permits for the Locations will be paid by the Location owner; and, (v) Operational permit fees (i.e. air permits, utilities, water discharge) shall be paid by the operator of the applicable facility or plant.

11. **Barnes Representations and Warranties:** Barnes makes the following representations and warranties in connection with this Agreement:

a. Organization and Qualification. *Barnes is licensed in each state in which it* conducts business and has all the requisite power and authority to enter into this Agreement and to carry on the business contemplated hereby.

b. No Conflicts. This Agreement does not conflict with any agreement or obligation by which Barnes is bound.

c. Appropriate Permits and Authorizations. Barnes warrants to the best of its knowledge, that it has appropriate permits and authorizations to operate its Drilling units and perform blasting services. Barnes further warrants that to the best of its knowledge, all of said permits and operating authorizations are presently in good standing, and that there are presently no known or claimed violations of any such permits or operating authorizations.

d. Product Grade and Quality. Whenever Barnes is required by the terms of this Agreement or the applicable Work Order to produce Quarry Run materials to specifications provided by Mainline and agreed to by Barnes, Barnes warrants that such products produced will comply with those specifications.

e. No Conflict. To the best of Barnes knowledge, neither the execution, delivery or performance of this Agreement by Barnes, nor compliance with the terms and provisions hereof by Barnes, shall (a) conflict with or result in a breach or violation of any order, writ, injunction or decree of any court or governmental authority against Barnes; (b) violate any provision of applicable law.

12. **Mainline Representations and Warranties:** Mainline makes the following representations and warranties in connection with this Agreement:

a. Organization and Qualification. Mainline is duly licensed in each state in which it conducts business and has all the requisite power and authority to enter into this Agreement and to carry on the business contemplated hereby.

b. No Conflicts. This Agreement does not conflict with any agreement or obligation by which Mainline is bound.

c. Appropriate Permits and Authorizations. Mainline warrants to the best of its knowledge, that it has appropriate permits and authorizations to remove material and to mine material from the pits at the Mainline Locations that are the subject matter hereof. Mainline further warrants that to the best of its knowledge, all of said permits and operating authorizations are presently in good standing, and that there are presently no known or claimed violations of any such permits or operating authorizations.

d. Title and Authority Generally. On any real property that Barnes performs crushing operations pursuant to this Agreement or any Work Order, Mainline warrants that it (i) owns title to the Mainline Location free and clear of all liens, claims and encumbrances; (ii) has a lease agreement or other written authorization with the owner of the Location under the terms of which Mainline is allowed to perform or caused to be performed crushing operations. Mainline has the full power and authority to make this Agreement, and the making of this Agreement does not constitute a default under, or result in the imposition of, any lien or encumbrance on any Mainline Location under any agreement or other instrument to which Mainline is a party or by which Mainline might be bound.

e. Pending Matters. Mainline has no knowledge of any pending or threatened proceedings which do or will affect the Mainline Locations. Mainline has no knowledge of any liens to be assessed against the Mainline Location. There is no litigation or proceeding pending or, to Mainline's knowledge, threatened against or relating to the Mainline Location or any part thereof, nor does Mainline know or have reason to know any basis for any such action. To the best of Mainline's knowledge, there is no material adverse fact or condition relating to any Mainline Location that adversely affects the Drilling and Blasting services to be provided by Barnes under this Agreement.

f. Compliance with Laws. To the best of Mainline's knowledge, any Mainline Location and the use and occupancy thereof are, and at all times have been, in material compliance with all laws, judgments and other legal requirements and Mainline has received no notice, citation or other claim alleging any violation of any laws, judgments or other legal requirements that may preclude or prohibit the Drilling and Blasting services to be performed by Barnes under this Agreement. Without limiting the foregoing, to the best of Mainline's knowledge, as of the Effective Date, no Hazardous Materials have been brought upon, stored, used, generated, released into the environment or disposed of on, in, under or about the Mainline Location.

g. No Conflict. To the best of Mainline's knowledge, neither the execution, delivery or performance of this Agreement by Mainline, nor compliance with the terms and provisions hereof by Granite, shall (a) conflict with or result in a breach or violation of any order, writ, injunction or decree of any court or governmental authority against Mainline; (b) violate any provision of applicable law; (c) conflict with, result in a breach, violation or default under, cause the termination of, or cause an acceleration in the obligations under any lien, lease, indenture, mortgage, deed of trust, security agreement, or other agreement, instrument or restriction to which Mainline is a party or by which any Mainline Location are bound; (d) result in the creation of any lien, charge or encumbrance upon any of the Mainline Locations or (e) require the consent, authorization or approval of any third party.

13. **Disclaimer of Warranties:** The parties acknowledge that with respect to the Drilling and Blasting services to be performed by Barnes under this Agreement, there is no warranty of any kind, except as noted in paragraphs 11(d) and 12(d). ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ARE EXCLUDED AND DISCLAIMED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND OF FITNESS FOR A PARTICULAR PURPOSE. Some states do not allow limitations on implied warranties, so the above limitations may not apply to you.

14. **Reclamation of Locations:** Mainline will be responsible for performing all reclamation obligations at the Mainline Locations. Mainline agrees to indemnify, defend and hold the other harmless from any and all expenses arising out of such obligations.

15. **Compliance with Existing Law, Severability:** The parties are entering into this Agreement in reliance on the regulations, laws and arrangements with governmental instrumentalities (hereinafter called "regulations") in effect on the date of execution of this Agreement. In the event of any change in any regulation, enactment of any new regulation or other change in the law that makes any section, sentence, paragraph, clause or combination of same in violation of the law, such sentences, paragraphs, clauses or combinations of same shall be inoperative and the remainder of this Agreement shall remain binding upon the parties hereto unless enforcing the Agreement as modified would, in the affected party's good faith judgment. (a) have a material adverse effect upon the party; or (b) substantially increases the risk to the party of performance under this Agreement. In the event or either (a) or (b), the affected party may request renegotiation of the terms of this Agreement to be completed within sixty (60) days of written request therefore, failing which the affected party shall have the right to terminate this Agreement upon ten (10) days written notice after the end of the 60-day period.

16. **Conduct of Operations:** Barnes will conduct operations on the Mainline Locations in compliance with all federal, state and local, statutes, laws, rules regulations and ordinances applicable to Barnes' operations including safety, employment and environmental laws.

17. **Insurance:** Without limiting the liabilities or any other obligations of Granite or DeAtley, the parties will, prior to conducting any operations at the Locations, procure insurance, at a minimum, of the type and in the amounts as follows:

18. **Comprehensive/General Liability, Automobile, and Workers Compensation Insurance:** Mainline and Barnes shall each carry Commercial General Liability and Automobile Liability (including owned, non-owned, and hired vehicles) insurance to include, but not be limited to, coverage for their respective operations and Locations related to this agreement.

The commercial general liability insurance and automobile liability insurance policies shall include provisions or endorsements (i) naming the other including its affiliates and their officers, directors, employees and agents as additional insured's, (ii) provide that such insurance shall be primary insurance without qualification with respect to each parties operations or locations, (iii) provide that any other insurance maintained by the other is excess and not contributory insurance with the insurance required hereunder; (iv)contain a cross liability and severability of interest clause; and (v) that such policies shall not be cancelled or their limits of liability reduced without thirty (30) days prior written notice to the other party. The limits of liability shall not be less than two million dollars ($2,000,000.00) single limit and the insured's will be deemed to be self-insured in favor of the other to the limit of any applicable deductible or retention in the policy. Barnes and Mainline shall also carry Workers Compensation insurance with statutory limits and Employer Liability insurance with limits of $100,000 each accident, $500,000 disease, and $100,000 disease - each employee. Barnes and Mainline shall provide a satisfactory certificate to each other prior to Barnes performing work under this agreement. Exchange of certificates is for convenience and failure to demand or participate in exchange does not waive insurance requirement.

19. **Fire and Casualty Insurance:** Each party will be solely responsible for securing and maintaining any insurance for all buildings and structures and other improvements related to their respective operations against loss or damage by fire or other casualty, if any. Mainline nor its Location owner assume any liability or responsibility for any buildings, structures, or other improvements constructed or used by Barnes in their operations on any Mainline Location.

20. **Nature of Relationship and Modification of Agreement:**

a. Nature of the Relationship. The parties to this Agreement acknowledge that as to each other, they are independent contractors only. No joint venture or partnership or other form business relationship is contemplated by this Agreement. Neither party may act on behalf of the other nor may either party hold itself out or represent to any third party that it is the agent, partner or joint venture of the other party.

b. Modification of Agreement. This Agreement may be modified only by writing, signed by all of the parties or their duly authorized agents.

21. **Indemnification:** Mainline and Barnes hereby agree to indemnify, defend, and hold harmless the other, including its directors, officers, employees and agents (collectively referred to as Indemnities) from any and all claims, demands, suits, losses, costs and damages of every kind and description, including attorneys fees, brought or made against or incurred by any of the Indemnities, resulting from any actions in federal, state, or local courts or administrative actions, to the extent which may arise or result from the indemnifying party's negligent acts or omissions in connection with its operations.

Mainline shall indemnify and defend Barnes against all liability, claims, suits, actions, damages, and causes of action arising out of any hazardous materials contamination of the Locations or groundwater to the extent caused by Mainline or its employees, contractors or agents. Barnes shall indemnify and defend Mainline against all liability, claims, suits, actions, damages, and causes of action arising out of any hazardous materials contamination of the Locations or groundwater to the extent caused by Barnes or its employees, contractors or agents.

Neither Mainline or Barnes shall be responsible for any consequential, indirect or special damages , including damages for economic loss (such as business interruption or loss of profits), however the same may be caused, including, without limitation, the fault, breach of contract, tort (including the concurrent or sole and exclusive negligence), strict liability or otherwise of either party.

22. **Events of Default:** The following shall constitute events of default of this Agreement:

a. Breach of Agreement. A breach by either party hereto of any covenant, condition or representation of this Agreement and the failure to cure such breach within 30 days after receipt of written notice from the other party, or, if not reasonably susceptible to cure within such 30 day period, the failure to commence cure within such 30 day period, to diligently prosecute completion of cure and to complete the cure within 180 days after said notice; or

b. Bankruptcy. Any dissolution, bankruptcy, insolvency, liquidation, or similar event affecting either party whether voluntarily or involuntarily commenced.

c. Other Agreements. Failure for either party to perform any condition established by any other Agreement between the parties.

23. **Consequences of Default:** If any event of default shall occur under Paragraph 22. and be continuing after notice and the period for cure (if applicable) has expired, the non-defaulting party, at its election, may terminate this Agreement by providing written notice of its intent to do so to the defaulting party. This Agreement will be deemed terminated upon such notice being properly given to such defaulting party as provided in Section 28 herein. Termination of this Agreement for any reason will not relieve either party of its obligations under paragraphs 21, 24, 25 and 29 herein and those provisions shall remain in full force and effect nor shall it relieve the defaulting party from any damages incurred by the non-defaulting party prior to the default.

24. **Joint and Several Liability:** To the extent Mainline assigns its rights and obligations hereunder in accordance with paragraph 30 herein, Mainline shall remain jointly and severally liable for all payment and other Mainline obligations under this Agreement. To the extent Barnes assigns its rights and obligations under this Agreement in accordance with paragraph 30 herein, Barnes will remain jointly and severally liable for all payment and other Barnes obligations under this Agreement.

25. **Arbitration and Waiver of Jury Trial:** The parties hereby select binding arbitration as the exclusive method for resolving any dispute arising out of or otherwise relating to this Agreement, whether based on contract, tort, statute or otherwise. To the extent not inconsistent herewith, arbitration shall be conducted in accordance with the Washington State Arbitration Act, RCW 7.04 et seq. Demand for arbitration shall be in writing served on the other party personally or by registered mail and shall state that unless within 20 days after service of the notice, the party served therewith shall serve a notice of motion to stay the arbitration, that party shall thereafter be barred from putting in issue the existence or validity of the agreement to arbitrate. The demand shall also set forth the issues that the party seeking arbitration wishes to have resolved. Demand shall be made within the time period applicable for bringing such claims in court. A panel of three arbitrators will hear the dispute. The party making demand shall include the name of one arbitrator with its demand. Within 20 days after receiving the demand, the other party will identify the arbitrator it has selected to the demanding party. Thereafter, the two arbitrators will confer and select a third arbitrator. The arbitration hearing shall be held no later than 90 days following the initial demand unless the time for hearing is extended for good cause shown. Arbitration shall be held in Whitman County or close proximity to Pullman, Washington. By agreeing to binding arbitration, the parties irrevocably waive any right they may have otherwise had to trial by jury for any claim or dispute.

Neither party is required to submit claims for indemnification under this Agreement or claims for temporary injunctive relief to arbitration.

26. **Entire Agreement:** This writing is intended by the parties to be the final, complete and exclusive statement of their Agreement relating to the matters covered herein. There are no other oral understandings, representations or warranties affecting it.

27. **Governing Law:** This Agreement shall be governed by, construed. and enforced in accordance with the laws of the State of Washington. Or as required by law to be in the state of a specific operation.

28. **Notices:** All notices to be given with respect to this Agreement shall be in writing. Unless another method of delivery of notice is specified elsewhere herein, any notice required or permitted hereunder shall be deemed to have been properly given when delivered personally to the party for whom it is intended, or three (3) business days after deposit in the U.S. mail (certified and return receipt requested) of an original or conforming copy, or one (1) business day after the entrustment of the notice to a professional overnight courier service, or upon receipt of transmission by facsimile to the party for whom it is intended as follows:

If to Barnes:	
Name	Barnes, Inc.
Address	P.O. Box 263 Lewiston, ID
Phone	(208) 746-0184
Fax	(208) 746-6143

If to Mainline:	
Name	Mainline Rock & Ballast, Inc. John Hjaltalin
Address	4418 East 8th Avenue Spokane Valley, WA 99212-0292
Phone	509-443-1623
Fax	509-443-1699

Each party may change the foregoing notice designees by providing written notice of their intent to do so in accordance with the provisions of this paragraph.

29. **Attorney Fees:** If an action at law or in equity (including arbitration) is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees, court costs and out-of-pocket costs, in addition to any other relief to which the party may be entitled. The provisions of this section shall survive the termination or expiration of this Agreement.

30. **Assignment:** Either party may assign its rights and obligations under this Agreement to an affiliated or related entity without the express written consent of the other. The assignment by either party of its rights and obligations under this Agreement to an entity that is unrelated or not affiliated with the party requires written consent which shall not be unreasonably withheld. Stock sales in which controlling interest in the entity changes to another person or entity shall be considered an "assignment" under this paragraph. For those Locations governed by a third-party lease agreement, assignment of the rights and obligations as to that Location may require further consent of the third-party Lessor. Notwithstanding the foregoing, any assignment shall not relieve the assigning party of its obligations hereunder to the other party.

31. **Force Majeure:** Any prevention, delay, nonperformance or stoppage due to any of the following causes shall excuse nonperformance for a period equal to any such prevention, delay, nonperformance, or stoppage. The causes referred to above are:

Failure of power, irresistible superhuman cause, acts of public enemies of this state or of the United States, terrorist acts, riots, insurrections, civil commotion, governmental restrictions or regulations or controls (except those reasonably foreseeable in connection with Mainline or Barnes operations), casualties not contemplated by insurance provisions of this Agreement, strikes, work stoppages or threatened work stoppages, or other causes beyond the reasonable control of the party obligated to perform.

EFFECTIVE this 1 day of JUNE, 20 02

Mainline Rock & Ballast, Inc.	Barnes, Inc.
By: John Hjaltalin	By: Barry Barnes
Its: Vice President	Its: President

EXHIBIT "A"
WORK ORDER AUTHORIZATION
TORRANCE, NM

This Work Order Authorization (hereafter "WOA") is issued effective 06/01/2008 to Barnes, Inc (hereafter "Barnes") by Mainline Rock & Ballast, Inc, Inc., (hereafter "Mainline"). Mainline and Barnes may collectively be referred to herein as "Parties" and individually as "Party".

1.0 **Terms & Conditions:** This WOA is issued pursuant to that certain Master Drilling and Blasting Agreement (hereafter "Master Agreement") previously entered into between the Parties dated 06/01/2008. The Master Agreement is incorporated herein by reference as though fully set forth herein. Mainline issues this WOA to Barnes pursuant to the terms of the Master Agreement. The Parties agree to be bound by the terms and conditions of the Master Agreement and this WOA with respect to the obligations of the Parties and the services to be performed under this WOA.

2.0 **Parties:** The phone number and address of the Parties and their designated representatives for the crushing work to be performed under this WOA are:

For Mainline:
Aaron Fitting:
505-400-1664.

For Barnes:
Jerry Anderson:
208-746-0184.

3.0 **Location of Production:**
Torrance Quarry Encino, NM

4.0 **Hours of Operation:**

5.0 **Compensation/Work To Be Performed.** The work to be performed by Barnes under this WOA and the compensation to be paid Barnes for the performance of such work shall be as follows:

ITEM NO.	COST CODE	DESCRIPTION/SCOPE OF SERVICES	QUANTITY (EST.)*	UM	UNIT PRICE	TOTAL*
1		Drilling and Blasting 2008	800,000	Tons	$0.87	$696,000.00
		ADJUSTMENT DATE AT TORRANCE IS JANUARY 1				
TOTAL*						

*Quantity/Total may be estimated where payment is based on actual field measured quantities for crushing work performed or for actual time where compensation is based on hourly or other time measured rates.

6.0 **Schedule - Start Date:** 06/01/2008 **Completion Date:** AS NEEDED

7.0 **Special Terms and Conditions.** Quantity shall be measured and paid as sold. Barnes retains the Drilling and Blasting interest in by-products stockpiled on-site to be sold at a later date. Barnes interest in by-products survives the termination of the Master Drilling and Blasting contract for materials produced from Barnes blasted rock. This is a continuation of Blasting services at an ongoing quarry. The prices paid for blasting of ballast and by-product shall escalate (de-escalate) at the same percentage rate as applicable to Mainline's ballast supply agreement with BNSF. The value of the blasting interest in by-products or other carried materials shall be equal to the adjusted price at the time of sale. Inventories carried beyond the termination of the master agreement shall be purchased paid for with in 5 years of termination by Mainline.

MAINLINE ROCK & BALLAST, INC.
Mainline

By: _____
Name: John Hjaltalin
Title: Vice President

BARNES, INC.
Barnes

By: _____
Name: Barry Barnes
Title: CEO/President

EXHIBIT "A"
WORK ORDER AUTHORIZATION
SPRAGUE, WA

This Work Order Authorization (hereafter "WOA") is issued effective 06/01/2008 to Barnes, Inc (hereafter "Barnes") by Mainline Rock & Ballast. Inc, Inc., (hereafter "Mainline"). Mainline and Barnes may collectively be referred to herein as "Parties" and individually as "Party".

1.0 Terms & Conditions: This WOA is issued pursuant to that certain Master Drilling and Blasting Agreement (hereafter "Master Agreement") previously entered into between the Parties dated 06/01/2008. The Master Agreement is incorporated herein by reference as though fully set forth herein. Mainline issues this WOA to Barnes pursuant to the terms of the Master Agreement. The Parties agree to be bound by the terms and conditions of the Master Agreement and this WOA with respect to the obligations of the Parties and the services to be performed under this WOA.

2.0 Parties: The phone number and address of the Parties and their designated representatives for the crushing work to be performed under this WOA are:

For Mainline:
Pat Seubert:
509-990-2321.

For Barnes:
Jerry Anderson:
208-746-0184.

3.0 Location of Production:
Sprague Quarry, Sprague WA

4.0 Hours of Operation:

5.0 Compensation/Work To Be Performed. The work to be performed by Barnes under this WOA and the compensation to be paid Barnes for the performance of such work shall be as follows:

ITEM NO.	COST CODE	DESCRIPTION/SCOPE OF SERVICES	QUANTITY (EST.)*	UM	UNIT PRICE	TOTAL*
1		Drilling and Blasting 2008/09	250,000	TONS	$0.80	$200,000.00
2		BY PRODUCT(S)	50,000	TONS	$.25	12,500.00
	NOTE:	BY PRODUCTS ADJUSTMENT WILL BE 3 TIMES BALLAST ADJUSTMENT UNTIL BY-PRODUCT REACHES 50% OF BALLAST. ADJUSTMENT DATE: JULY 1				
		TOTAL*				

*Quantity/Total may be estimated where payment is based on actual field measured quantities for crushing work performed or for actual time where compensation is based on hourly or other time measured rates.

6.0 Schedule - Start Date: 06/01/2008 **Completion Date:** AS NEEDED

7.0 Special Terms and Conditions Quantity shall be measured and paid as sold. Barnes retains the Drilling and Blasting interest in by-products stockpiled on-site to be sold at a later date. Barnes interest in by-products survives the termination of the Master Drilling and Blasting contract for materials produced from Barnes blasted rock. This is a continuation of Blasting services at an ongoing quarry. The prices paid for blasting of ballast and by-product shall escalate (de-escalate) at the same percentage rate as applicable to Mainline's ballast supply agreement with BNSF. The value of the blasting interest in by-products or other carried materials shall be equal to the adjusted price at the time of sale. Inventories carried beyond the termination of the master agreement shall be purchased paid for with in 5 years of termination by Mainline. June 1, 2008 adjustment included above. 25% OF PRODUCTION WILL BE ON FLOOR (WET)

MAINLINE ROCK & BALLAST, INC.
Mainline

By: _____
Name: John Hjaltalin
Title: Vice President

BARNES, INC.
Barnes

By: _____
Name: Barry Barnes
Title: CEO/President

IN THE PRIVATE ARBITRATION BETWEEN

MAINLINE ROCK & BALLAST, INC. Claimant, and BARNES, INC. Respondent.	**ARBITRATION AWARD**

This matter having come before the arbitration panel for hearing on May 22-24, 2017, and the arbitration panel having considered the evidence presented by both Mainline Rock & Ballast, Inc., the Claimant, and Barnes, Inc., the Respondent, the arbitration panel presents its majority arbitration award as follows:

1. By-Product Inventory On-Hand (original): The panel awards Barnes Inc. the amount of $206,848.50 calculated (827,394 tons x $0.25/ton).
2. By-Product Inventory On-Hand (corrected): The panel awards Barnes, Inc. the amount of $78,872.50 calculated as follows: (65,158 tons by-product x $1.25 = $81,447.50) less ballast overpay calculated as: (2,060 tons x $1.25 = <$2,575.00>) for adjusted total calculated: ($81,447.50 - $2,575.00=$78,872.50).
3. By-Product Inventory Loose Under Jaw: $40,547.50 (32,438 tons x $1.25/ton).
4. Drilling Holes by Barnes: The panel awards Barnes, Inc. the amount of $28,571.00 for 109 drill holes drilled but not shot prior to the Vulcan sale calculated as follow: ($41,400.00 billed by Barnes, Inc. less $12,829.00 paid by Mainline = $28,571.00).
5. Attorneys Fees and Costs: Under the facts and circumstances, the arbitration panel determines that neither party is a prevailing party and, therefore awards no attorney's fees or costs to either party.
6. Total Majority Award to Barnes, Inc: **$354,839.50.**

A summary of the majority's award is as follows:

1. The majority concludes that the unit price negotiated between Mainline and Barnes in June 2008 was inclusive of anticipated reject material. This conclusion is supported by the parties' course of performance and treatment of reject material from the time the quarry was established in 2004 up through the sale to Vulcan in April 2017. In particular, by letter dated July 27, 2004, Barnes specifically noted that its negotiated unit price was inclusive of anticipated reject material. Barnes re-affirmed this understanding in its February 7, 2006 letter. Accordingly, the unit price Barnes negotiated and agreed to in June 1, 2008 Work Order Authorization (i.e., $0.87/ton) was inclusive of anticipated reject material. This was the purpose for having a unit price based on tons sold as opposed to a contract based on solid cubic yards blasted.

2. The majority concludes that Barnes was owed $1.25/ton for the rock by-product inventoried and on-hand. Although Mainline argued that the price should be $1.00/ton based on a volume sale to Vulcan, the majority finds that the unit price of $1.00/ton would only have applied had that by-product inventory been actually rail shipped to Vulcan (or CSA). As it was, the by-product remained stockpiled and inventoried at the quarry on the date of the Vulcan sale and, therefore, it was non-railed by-product to be paid at the unit price of $1.25/ton.

3. The majority concludes that any rock or by-product materials used as foundation fill beneath the jaw crusher should be included in the final inventory, with payment due to Barnes for the estimated 32,428 tons.

4. The majority concludes that Barnes' billed price of $41,400 was a reasonable charge for the time and expense incurred by Barnes to drill the 109 holes which were drilled but not blasted. The majority finds that $12,829.00 paid by Mainline would not fully compensate Barnes for the time and materials needed to drill the 109 holes.

5. With regard to both parties' request for an award of attorney's fees and costs, the majority concludes that, while both parties prevailed in part, neither party is the prevailing party for the purpose of awarding attorney's fees and costs. Therefore, the majority makes no award of attorney's fees and costs in favor of either party despite having made a monetary award to Barnes. Mainline and Barnes will share equally in the costs of the arbitration.

6. *Any and all further claims or requests for relief of any type by either Mainline or Barnes in this arbitration are denied with prejudice.*

DATED this 31 day of May, 2017

By: _____
Stanley M. Miller, Arbitrator

By: _____
Michael A. Ealy, Arbitrator

Arbitrator H. Kent Magleby, P.E. dissents from the majority award as follows:

1. Total adjusted product and by-products stockpiled on-site.
    a. *Ballast inventory* = 52,638 Tons
    b. By-product inventory recognized by Mainline Rock and Ballast Inc. *(Mainline)* = 892,552 Tons
    c. By-Product inventory measured but not recognized by Mainline = 2,581,423 Tons *(Averaged from 3 drone surveys)*
    d. Total product and by-product = 3,526,613 Tons
2. Adjusted price at the termination of the agreement.
    a. $1.25 per Ton
3. Barnes, Inc. (Barnes) interest in products and by-products stockpiled on-site:
    a. $4,408,266.25.
4. Amount previously paid by Mainline
    a. $908,596.00
5. Net amount still owed to Barnes
    a. $3,499,670.25
6. There is insufficient information to determine that the by-products have all been sold, therefore, I recommend it be treated as inventory carried beyond the termination of the master agreement and paid for within 4 years in four equal yearly payments.

I offer the following in support of the above dissenting settlement amount:

1. Only the Master Blasting Agreement dated June 1, 2008, the work authorization dated June 1, 2008, and the Amendment dated June 1, 2016 apply to this dispute, previous letters of understanding or other correspondence are superseded by the agreement and are not relevant.
2. Based upon the testimony of the parties to the agreement, it is clear that the by-product in stockpile that was measured and excluded by Mainline was to be sold at a later date.
3. Mainline did not negotiate in good faith with Barnes when they determined that a portion of the by-product could not be sold at a later date, rather they measured it and completely excluded it. This is a violation of the agreement both written and as intended.
4. Mainline applied a unit price to the by product in stockpile that was associated with a specific sale that never materialized. This is a violation of the agreement both written and as intended.
5. There is no provision in the agreement for by-products not stockpiled on the site; therefore, Barnes cannot expect payment for them.
6. The multiple drone surveys are an accurate means of determining the amount of material in stockpile on the site.
7. The conversions from volume to weight utilized by Mainline failed to account for moisture in the stockpile; however, Barns did not provide alternate conversions.
8. There is no provision in the agreement for drilling only; therefore, it is a separate dispute that should not be resolved the Arbitration Board.
9. Both parties failed to correctly interpret and apply the special terms and conditions of the agreement (Exhibit "A" Work Order Authorization Paragraph 7.0), therefore, neither party prevailed and there is no award of Attorney Fees (Master Blasting Agreement Paragraph 29).

By: H. Kent Magleby

H. Kent Magleby, P.E. (Arbitrator)

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division III Cause No. 35767-8-III to the following:

Robert H. Crick Jr.
Robert Crick Law Firm, PLLC
421 West Riverside Avenue #1560
Spokane, WA 99201

John H. Guin
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Original e-Filed with:
Court of Appeals, Division III
Clerk's Office
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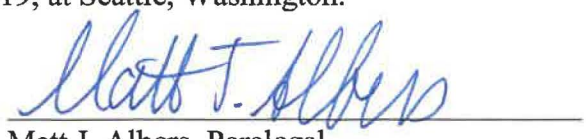
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 13, 2019, at Seattle, Washington.



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May 13, 2019 - 9:38 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35767-8
Appellate Court Case Title:	Mainline Rock & Ballast, Inc. v. Barnes, Inc.
Superior Court Case Number:	17-2-03345-1

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