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No. 35767-8

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

In re: the Arbitration of

BARNES, INC.,

Appellant,

v.

MAINLINE ROCK & BALLAST, INC.,

Respondent.

BRIEF OF APPELLANT BARNES, INC.

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	1
(1) <u>Assignment of Error</u>	1
(2) <u>Issues Pertaining to the Assignment of Error</u>	1
C. STATEMENT OF THE CASE.....	2
D. SUMMARY OF ARGUMENT	7
E. ARGUMENT	8
(1) <u>Principles Applicable to Judicial Review of Arbitral Awards under RCW 7.04A</u>	8
(2) <u>The Award Should Be Vacated Because the Arbitrators Disregarded the Parties’ Controlling Agreement on Payment for Rock Blasted by Barnes</u>	10
(3) <u>The Arbitration Award Should Be Vacated Because the Arbitration Panel Made an Error of Law by Not Awarding Attorney Fees to Barnes, Even Though Barnes Was the Prevailing Party</u>	15
(4) <u>The Arbitration Panel Erred in Failing to Order a Late Fee/Interest on the Award in Barnes’s Favor</u>	20
(5) <u>Barnes Is Entitled to Fees in the Trial Court and on Appeal</u>	22
F. CONCLUSION.....	23
Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Agnew v. Lacey Co-Ply</i> , 33 Wn. App. 283, 654 P.2d 712 (1982), <i>review denied</i> , 99 Wn.2d 1006 (1983).....	19, 20
<i>Boyd v. Davis</i> , 127 Wn.2d 256, 897 P.2d 1239 (1995).....	9
<i>Broom v. Morgan Stanley DW Inc.</i> , 169 Wn.2d 231, 236 P.3d 182 (2010) (<i>quoting Davidson v. Hensen</i> , 135 Wn.2d 112, 954 P.2d 1327 (1998)).....	9
<i>Cummings v. Budget Tank Removal & Env't'l Servs., LLC</i> , 163 Wn. App. 379, 260 P.3d 220 (2011).....	9, 10, 14
<i>Dep't of Corrs. v. Fluor Daniel, Inc.</i> , 160 Wn.2d 786, 161 P.3d 372 (2007).....	21
<i>Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg</i> , 101 Wn. App. 119, 4 P.3d 844 (2000), <i>review denied</i> , 142 Wn.2d 1025 (2001).....	9
<i>Granite Equip. Leasing Corp. v. Hutton</i> , 84 Wn.2d 320, 525 P.2d 223 (1974).....	22
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	12
<i>Hertz v. Riebe</i> , 86 Wn. App. 102, 936 P.3d 24 (1997).....	17
<i>Lopez v. Reynoso</i> , 129 Wn. App. 165, 118 P.3d 398 (2005), <i>review denied</i> , 157 Wn.2d 1003 (2006).....	12
<i>M.A. Mortensen Co., Inc. v. Timberline Software Corp.</i> , 140 Wn.2d 568, 998 P.2d 305 (2000).....	12
<i>Marine Enterprises, Inc. v. Sec. Pac. Trading Corp.</i> , 50 Wn. App. 768, 750 P.2d 1290, <i>review denied</i> , 111 Wn.2d 1013 (1988).....	22
<i>Martinez v. City of Tacoma</i> , 81 Wn. App. 228, 914 P.2d 86, <i>review denied</i> , 130 Wn.2d 1010 (1996).....	18
<i>Newport Yacht Basin Ass'n v. Supreme Northwest, Inc.</i> , 168 Wn. App. 86, 285 P.3d 70, <i>review denied</i> , 175 Wn.2d 1015 (2012).....	16, 17
<i>Niccum v. Enquist</i> , 175 Wn.2d 441, 286 P.3d 699 (2012).....	17

<i>Nguyen-Aluskar v. Chicago Title Ins. Co.</i> , 193 Wn. App. 1005, 2016 WL 1133877 (2016).....	10
<i>Pegasus Const. Corp. v. Turner Const. Co.</i> , 84 Wn. App. 744, 929 P.2d 1200 (1997).....	9
<i>Phillips Bldg. Co. v. An</i> , 81 Wn. App. 696, 915 P.2d 1146 (1996).....	20
<i>Piepkorn v. Adams</i> , 102 Wn. App. 673, 10 P.3d 428 (2000).....	18
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669 (1997)	17
<i>Salewski v. Pilchuck Veterinary Hosp.</i> , 189 Wn. App. 898, 359 P.3d 884 (2015), <i>review denied</i> , 185 Wn.2d 1006 (2016).....	10
<i>Sardam v. Morford</i> , 51 Wn. App. 908, 756 P.2d 174 (1988)	15
<i>Silverdale Hotel Assocs. v. Lomas & Nettleton Co.</i> , 36 Wn. App. 762, 677 P.2d 773, <i>review denied</i> , 101 Wn.2d 1021 (1984)	18
<i>Singleton v. Frost</i> , 108 Wn.2d 723, 742 P.2d 1224 (1987)	20
<i>Tolson v. Allstate Ins. Co.</i> , 108 Wn. App. 495, 32 P.3d 289 (2001)	10
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980).....	20
<i>Wiley v. Rehak</i> , 143 Wn.2d 339, 20 P.3d 404 (2001).....	15

Statutes

RCW 4.84.330	15, 16
RCW 7.04A.230.....	1, 7, 9
RCW 7.04A.230(1)(d)	<i>passim</i>

Rules and Regulations

RAP 18.1	23
RAP 18.1(a)	23

Other Authorities

Coleman & Perillo, <i>Contracts</i> § 3.6 at 122 (6th ed. 2009).....	11
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A. INTRODUCTION

This case arises out of a commercial dispute over Mainline Rock & Ballast, Inc.'s ("Mainline") failure to pay Barnes, Inc. ("Barnes") for rock blasted by Barnes. Barnes asks this Court to reverse the trial court's order confirming the May 31, 2017 majority arbitration award in the parties' private arbitration where the arbitration panel made facial errors of law in its award. The panel reached beyond the scope of the parties' contract, and failed to award fees and interest on any award to Barnes as the prevailing party. Vacation of the award is merited. RCW 7.04A.230.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

1. The trial court erred in entering its December 19, 2017 order confirming the arbitral award and denying Barnes' motion to vacate that award.

(2) Issues Pertaining to the Assignment of Error

1. Should the award be vacated pursuant to RCW 7.04A.230(1)(d) where Barnes blasted millions of tons of rock for which it should have been paid, and was not, because the arbitration panel ignored the fact that the parties' controlling agreement was an integrated contract addressing Mainline's obligation to Barnes and instead relied on prior agreements? (Assignment of Error Number 1)

2. Should the award be 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?

(Assignment of Error Number 1)

3. Should the award be 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? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

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") Barnes was retained by Mainline to drill and blast solid rock at a new quarry development site in Torrance County, New Mexico. CP 20.

The site was a new operation for Mainline, requiring substantial investment and development. CP 4. Barnes first performed the drilling and blasting to open the site, and helped to construct the access roads, so that Mainline could build the railroad siding and similar developmental needs. *Id.* After the site development work was completed, Barnes drilled and blasted rock on site at the quarry for Mainline to sort, crush, screen, load, stockpile into a product which met the specifications of railroad entities and would be sold and delivered to their cars from the quarry's siding, and by-product meeting Mainline's specifications and 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 the railroad 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 at the time was \$0.78 per ton, and that price included anticipated "rejects" of approximately 10%. CP 20. 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.

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.

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.* While Mainline purchased property in Texas for the delivery, stockpiling, and selling of these materials, Mainline did not complete the infrastructure needed for the delivery of the blasted and crushed materials from Torrance to Texas. *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, which could be, and was, renewed at appropriate times; the MBA also called for periodic price adjustments, which also occurred several times. CP 22, 31-32, 78. It contains 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, only.¹ *Id.* The work order authorizations provided that Barnes retained the interest in by-product stockpiled on-site to be sold by Mainline at a later date. *See, e.g.*, CP 31. The parties operated under those agreements – the

¹ 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.

MBA and work orders – until April 2017, when Mainline sold the assets of the operation. CP 34, 53.

On April 7, 2017, Mainline sold the assets of its Torrance operation to Vulcan Materials Corporation (“Vulcan”). CP 53. The sale included inventory of all stockpiled material owned by Barnes that had accumulated onsite over the years including the so-called “reject materials, of which Barnes had blasted every ton. CP 6. Mainline was required to keep track of the total tonnage of rock stockpiled, but failed to do so. CP 5, 41, 53. Three drone surveys had to be performed to try and determine the amount of stockpiled inventory before the site was eventually sold. CP 35, 41.

On May 17, 2017, Mainline issued what it considered final payment to Barnes, excluding many tons of material owned by Barnes and stockpiled onsite that it suddenly claimed were unsellable “waste and reject materials” outside the scope of the parties’ agreement.² CP 5, 53. Mainline tendered Barnes \$905,596, and, according to Mainline, that was the appropriate amount owed to Barnes for (1) the railroad ballast inventory at the time of the sale, (2) commercially sellable rock by-product at the Torrance site at the time of the sale, and (3) drilling services that never ended up becoming

² The dissenting arbiter correctly found that “it is clear the by-product in stockpile that was measured and excluded by Mainline was to be sold at a later date.” CP 42.

blasting operations due to the Torrance site being sold to Vulcan. *Id.*

Based on the MBA, and at Mainline's direction under the work orders, Barnes drilled and blasted a total of more than 15.8 million tons of solid rock. *Id.* As of the arbitration hearing, Mainline had only paid Barnes for less than 10.1 million tons of work, thereby breaching the agreement by failing to pay Barnes for the remaining 5.65 million tons. *CP Id.* The unit price for the rock sold in 2017 was \$1.25 per ton, so that Barnes asserted that Mainline owed it more than an additional \$7 million (\$7,070,224.44). *CP Id.* Barnes demanded payment; Mainline refused and sought arbitration of the parties' dispute, CP 34-36. Specifically, the parties disputed the quantity of stockpiled materials on hand for which Barnes should be paid. *Id.*

The arbitration took place in Spokane, Washington before a three-person arbitration panel from May 22-24, 2017. CP 38. It was conducted under Washington's Uniform Arbitration Act, RCW 7.04A. Despite a showing that Mainline did not pay Barnes for the 5.65 million tons, the arbitration panel, by a vote of 2-1, only awarded Barnes a total amount of \$354,839.50 for other items, but did not award payment on the 5.65 million tons; the panel also did not award attorney fees or interest on the award to Barnes, 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 panel also failed to make a finding on the quantity of stockpiled materials, a central issue in the dispute. CP 38-42. 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 onsite but wrongfully excluded those materials from its payment to Barnes. CP 41-42.³

Barnes timely moved pursuant to RCW 7.04A.230 in Spokane County Superior Court to vacate the arbitration award. CP 1-2. Mainline moved pursuant to RCW 7.04A.220 to confirm the arbitration award. CP 45-46. The trial court granted Mainline's motion to confirm and denied Barnes's motion to vacate. CP 138-40.

D. SUMMARY OF ARGUMENT

The arbitration panel committed three errors on the face of its award, an award on which the panel was split.

³ Barnes maintains that it Mainline excluded 5.65 million tons of materials, based on the total amount of rock Barnes blasted. The drone surveys the dissenting arbiter relied on were less accurate of the total tonnage of stockpiled materials, but at least that arbiter made some determination as to the tonnage of stockpiled materials onsite for which Barnes deserved payment.

The panel failed in its central obligation to identify the tonnage or rock blasted and owned by Barnes that Mainline stockpiled and later provided to Vulcan as part of the sale. The panel majority ignored the integration clause in the MBA and relied on the parties' LOUs to conclude, erroneously, that the price for rock sold by Mainline included the so-called "reject" materials.

The panel failed to understand that Barnes was the prevailing party in the arbitration under the MBA's fee provision, even though it did not recover as much as it sought at arbitration. A fee award was mandatory.

Similarly, Barnes was entitled to interest under the MBA's late fee provision where Mainline did not timely pay all sums due to Barnes. That provision, too, was mandatory and the panel erred in failing to award interest to Barnes on its recovery.

E. ARGUMENT

(1) Principles Applicable to Judicial Review of Arbitral Awards under RCW 7.04A

Washington's arbitration act, RCW 7.04A, governs the arbitration process and enforcement of arbitration awards in the state of Washington.⁴ On review, an appellate court sits in the same position as the trial court and

⁴ Washington adopted the Uniform Arbitration Act in RCW 7.04A in 2006. Washington's prior arbitration law, RCW 7.04, was interpreted in numerous cases. Those cases are often apt for the interpretation of RCW 7.04A.

is confined to confirmation of the arbitral award or vacation of the award based on any of the grounds set forth in RCW 7.04A.230. *Cummings v. Budget Tank Removal & Env't'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.

Barnes moved to vacate the award pursuant to RCW 7.04A.230(1)(d), a statutory ground for vacating an award when the arbitrator has “exceeded the arbitrator's 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, a court may overturn all or a portion of an arbitral award if the award contains patent errors “on its face.” *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). In actual practice, this means that this Court may review and consider facial legal errors in the arbitral award as a basis for its vacation. Our Supreme 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)).

Specifically, review under RCW 7.04A.230(1)(d) means that this Court can review errors recognizable from the language of the award. *Cummings*, 163 Wn. App. at 389 (noting example of an award including punitive damages although Washington law forecloses awards of such damages). “Where 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.” *Id.* *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 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). This Court may address the three issues raised by Barnes that involve errors on the face of the arbitral award.

(2) The Award Should Be Vacated Because the Arbitrators Disregarded the Parties’ Controlling Agreement on Payment for Rock Blasted by Barnes

Here, the panel exceeded its powers when it disregarded the law of contracts by relying 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 38-40.⁵ By this determination the panel ignored the express controlling terms of the MBA on payment for blasted materials. This clear error of law appeared on the face of the award, CP 39, and is reversible on review by this Court.

Mainline and Barnes entered into this MBA with the express intention of having this MBA be the final and complete statement of their agreement. 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. The MBA’s integration clause provided as follows:

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 29. Such an integration or merger clause barred the panel from relying on writings extrinsic to the MBA. The MBA constituted the complete and exclusive statement of the terms of the parties’ agreement. Coleman & Perillo, *Contracts* § 3.6 at 122 (6th ed. 2009). Washington interprets

⁵ The minority arbitrator, in his dissent, 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.

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 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).

The MBA was clear and controlling on the payment terms for the rock Barnes blasted. The award at ¶ 1 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 27, 2004 LOU. That was wrong. *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 maintained an interest in blasted rock whether sold immediately or stockpiled for sale at a later date. *Id.* at ¶ 7.0. The dissenting arbiter 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 sold those 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.⁶

Indeed, the panel’s award did not even 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

⁶ Through witness testimony, and records produced by Barnes, the amount of material that was stockpiled and stored exceeded 10% of the amount drilled and blasted. Mainline only paid for a little less than 10.1 million tons when it owed Barnes for more than 15.8 million tons. Mainline did not pay Barnes *for over 5.6 million tons of blasted rock*.

issue. 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."). 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 arbiter 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 arbiter made a ruling on the key question in the case. The fact that the dissenting arbiter 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 arbiters' reasoning is "considered as part of the face of the award."). The panel's award was erroneous on its face and should be reversed.

(3) The Arbitration Award Should Be Vacated Because the Arbitration Panel Made an Error of Law by Not Awarding Attorney Fees to Barnes, Even Though Barnes Was the Prevailing Party

Barnes was entitled to attorney fees under the MBA, but the panel erred in refusing to award it fees. This issue represents an error on the face of the award, given the panel's ruling that Barnes was entitled to recover at least \$354,839.50. 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). Clearly, Barnes was the prevailing party in this case where it was forced to arbitrate to recover monies owed under the contract for work performed.

In Washington, attorney fees may be recovered only when authorized by statute, a recognized ground of equity, or an agreement of the parties. *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001).⁷ The MBA provides:

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

⁷ RCW 4.84.330 provides:

In any action on a contract or lease...where such contract or lease specifically provides that attorney fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified to the contract or lease or not, shall be entitled to reasonable attorney fees in addition to costs and necessary disbursements.

entitled to reasonable attorney fees, court costs and out-of-pocket costs, in addition to any other relief which the party may be entitled. The provisions of this section shall survive the termination or expiration of this Agreement.

CP 29. Thus, this is not a case in which there is a question about whether a fee shift must occur. Both Barnes and Mainline agreed to a contractual fee provision in 2008 as a part of the MBA. The panel ruled in Barnes's favor, awarding it the amount of \$354,839.50, but refused to award it fees, stating:

With regard to both parties' request for 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

CP 81. At its core, the panel misperceived the concept of a prevailing party within the meaning of ¶ 29 of the MBA, thus committing an error in law that must be reversed by this Court.⁸

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. In addition to this statutory definition,

⁸ The issue of whether a party prevails is a mixed question of law and fact, but is reviewed generally by the courts as an error of law. *Newport*, 168 Wn. App. at 98. Thus, this Court can consider the issue from the face of the arbitral award, as noted *supra*.

Washington case law makes 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 699 (2012). *See also, Newport Yacht Basin Ass’n 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. Plainly, Barnes was the prevailing party, given this significant judgment in its favor.

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.3d 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.

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. *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);⁹ *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).

To ignore the attorney fees provision would frustrate the policies behind contracts that provide for attorney fees and the arbitration of disputes. Attorney fee provisions encourage performance of contracts and ensure that a wronged party will not suffer for having to enforce the terms

⁹ In *Martinez*, the trial court had rejected the plaintiff’s request for \$80,737 in attorney’s 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. Division II held that the trial court had committed reversible error.

of a binding agreement. By refusing to enforce the attorney fee provision, the arbitration panel and trial court incentivize parties like Mainline to underpay on their obligations. Writing while at Division I, former Chief Justice Barbra Durham discussed the importance of enforcing attorney fee provisions in arbitration:

Certainty and confidence in contract law and commercial relations demand that legal agreements be binding. In Washington, arbitration is a highly favored method of dispute resolution. The policy which encourages arbitration would be undermined if contracting parties perceived that lawful contractual provisions, negotiated and expressly agreed upon, could be ignored by the arbitration tribunal.

Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 289-90, 654 P.2d 712, 715 (1982), *review denied*, 99 Wn.2d 1006 (1983) (citation omitted).

Agnew is on point. That case also involved an arbitration panel's refusal to award attorney fees. The court interpreted a 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.* The court found that in refusing to award attorney fees the panel ignored the

express language of the contract, something that courts (and arbitration panels) may not do. *Id.* (citing *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980)); *see also*, *Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987) (fee award is mandatory under contractual provision authorizing fees to prevailing party).

Washington courts have consistently found that ignoring a mandatory attorney fee provision is a patent error of law appearing on the face of the arbitration award. *Agnew, supra*; *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 701, 915 P.2d 1146, 1149 (1996) (arbitrators exceed their authority by failing to award attorney fees to the prevailing party under an arbitration agreement when the parties' contract provides for fee awards). The arbitration panel here had no authority to decide whether the arbitration award should include attorney fees or not.

The arbitration panel exceeded their 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 panel's award erred on its face by failing to award fees to Barnes as the prevailing party.

- (4) The Arbitration Panel Erred in Failing to Order a Late Fee/Interest on the Award in Barnes's Favor

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. This contractual direction that interest must be paid on late payments is *mandatory*, not discretionary.¹⁰ 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 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.¹¹

¹⁰ 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) (recognizing that arbitration agreement may control on interest).

¹¹ 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

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 provision. Ignoring such a provision also creates a perverse incentive for parties like Mainline to underpay on their contractual obligations.¹² 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.

(5) Barnes Is Entitled to Fees in the Trial Court and on Appeal

Subject to the terms of their agreement, Barnes is entitled to attorney fees from the proceedings in the trial court and on appeal. “A provision in a contract providing for the payment of attorneys’ fees in an action to collect any payment due under the contract includes both fees necessary for trial and those incurred on appeal as well.” *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 327, 525 P.2d 223, 227 (1974). *See also, Marine Enterprises, Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 774, 750

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.

¹² Mainline paid no price for underpaying on the contract – in fact, it received a windfall. By underpaying and forcing Barnes to arbitrate, Mainline essentially enjoyed an interest-free loan of \$354,839.50 that it could make use of until the arbitrators rendered their judgment. Attorney fee and interest provisions must be enforced to prevent this behavior.

P.2d 1290, *review denied*, 111 Wn.2d 1013 (1988) (appellate fees appropriate on appeal from an arbitration proceeding); RAP 18.1 (fees on appeal generally).

For the reasons set forth above, Barnes was the prevailing party and has been denied fees in violation of the plain terms of the parties' contract. The arbitration panel majority and trial court also erroneously awarded damages based on the LOU, ignored the plain terms of the MBA, and refused to rule on the quantity of stockpiled materials for which Barnes was owed payment. Should any of those errors be corrected on appeal, Barnes is entitled to attorney fees. RAP 18.1(a).

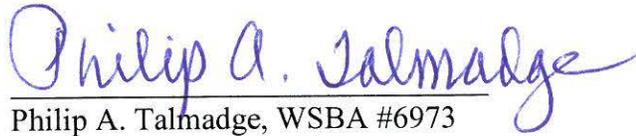
F. CONCLUSION

The trial court should have vacated the panel's award in the arbitration between Barnes and Mainline. RCW 7.04A.230(1)(d). The arbitrators clearly failed to apply the MBA, an integrated contract and relied instead on the LOU. Moreover, the panel had a duty to follow the contract terms on fees and interest and to award Barnes attorney fees and a late fee/interest; they simply did not perform that duty.

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.

DATED this 21st day of May, 2018.

Respectfully submitted,



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Attorneys for Appellant Barnes, Inc.

APPENDIX

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 of 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 8 th 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.

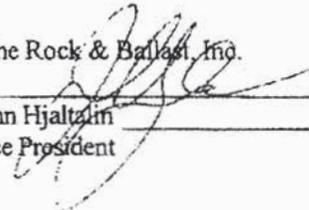
30. **Assignment:** Either party may assign its rights and obligations under this Agreement to an affiliated or related entity without the express written consent of the other. The assignment by either party of its rights and obligations under this Agreement to an entity that is unrelated or not affiliated 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, 2008

Mainline Rock & Ballast, Inc.

By: 
Its: Vice President

Barnes, Inc.

By: Barry Barnes
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 within 2 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:
 Pnt 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*				

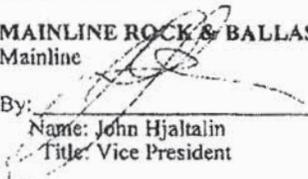
*Quantity/Total may be estimated where payment is based on actual field measured quantities for crushing work performed or for actual time where compensation is based on hourly or other time measured rates.

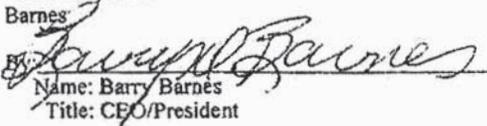
6.0 Schedule - Start Date: 06/01/2008 **Completion Date:** AS NEEDED

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 8 years of termination by Mainline. June 1, 2008 adjustment included above. 25% OF PRODUCTION WILL BE IN FLOOR (WET)

MAINLINE ROCK & BALLAST, INC.
 Mainline

BARNES, INC.
 Barnes

By: 
 Name: John Hjaltalin
 Title: Vice President

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.

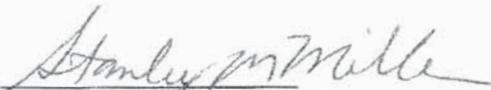
3. The majority concludes that any rock or by-product materials used as foundation fill beneath the jaw crusher should be included in the final inventory, with payment due to Barnes for the estimated 32,428 tons.

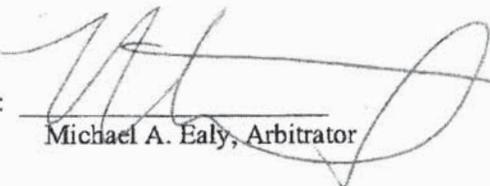
4. The majority concludes that Barnes' billed price of \$41,400 was a reasonable charge for the time and expense incurred by Barnes to drill the 109 holes which were drilled but not blasted. The majority finds that \$12,829.00 paid by Mainline would not fully compensate Barnes for the time and materials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

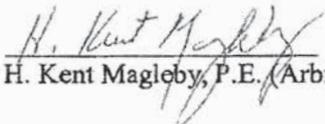
By: 
Michael A. Ealy, Arbitrator

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, 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).

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

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FILED
DEC 20 2017
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

MAINLINE ROCK AND BALLAST, INC., a
Washington corporation,

Claimant,

vs.

BARNES, INC., an Idaho corporation,

Respondent.

Case No. 17-2-03345-1

ORDER:
(1) DENYING BARNES, INC.'S MOTION
TO VACATE ARBITRATION AWARD;
AND
(2) GRANTING MAINLINE ROCK AND
BALLAST, INC.'S MOTION TO CONFIRM
ARBITRATION AWARD

THIS MATTER came on for hearing on December 1, 2017 on two separate motions: (1) a motion by Respondent, Barnes, Inc. ("Barnes"), for an order vacating the arbitration award issued May 31, 2017, pursuant to RCW 7.04A.230; and (1) a motion by Claimant, Mainline Rock and Ballast, Inc. ("Mainline"), for an order confirming the arbitration award issued May 31, 2017, pursuant to RCW 7.04A.230(4).

The Court having considered the motions, the briefs and declarations filed in support and in opposition to the motions, the argument of counsel, and the records and file herein,

ORDER: (1) DENYING BARNES, INC. 'S MOTION TO VACATE ARBITRATION AWARD; AND (2) GRANTING MAINLINE ROCK AND BALLAST, INC. 'S MOTION TO CONFIRM ARBITRATION AWARD - 1

LAW OFFICE OF JOHN H. GUIN, PLLC
421 W. RIVERSIDE AVE., SUITE 461
SPOKANE, WA 99201
(509) 747-5250

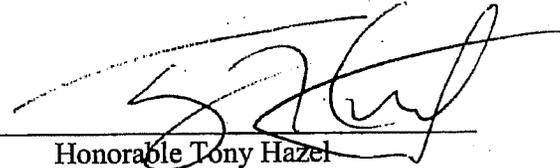
1 IT IS HEREBY ORDRED:

2 (1) Barnes' motion to vacate the arbitration award issued May 31, 2017 is DENIED;

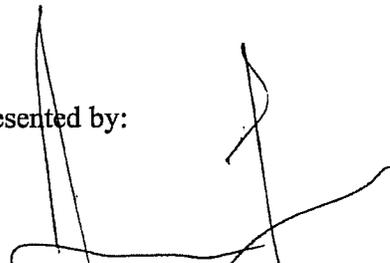
3 and

4 (2) Mainline's motion to confirm the arbitration award issued May 31, 2017 is
5 GRANTED.

6
7 DONE this 19th day of December, 2017.

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10 
Honorable Tony Hazel

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12 Presented by:

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15 
16 JOHN H. GUIN, WSBA NO. 26794
17 LAW OFFICE OF JOHN H. GUIN, PLLC
Attorneys for Mainline Rock and Ballast, Inc.

18
19 Approved as to form only;
20 Notice of presentment waived:

21
22 See attached 
23 PHILIP A. TALMADGE, WSBA NO. 6973
TALMADGE/FITZPATRICK/TRIBE

24 ROBERT H. CRICK, JR., WSBA NO. 26306
25 ROBERT CRICK LAW FIRM, PLLC
Attorneys for Barnes, Inc.

26
ORDER: (1) DENYING BARNES, INC.'S MOTION TO
VACATE ARBITRATION AWARD; AND (2) GRANTING
MAINLINE ROCK AND BALLAST, INC.'S MOTION TO
CONFIRM ARBITRATION AWARD - 2

LAW OFFICE OF JOHN H. GUIN, PLLC
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(509) 747-5250

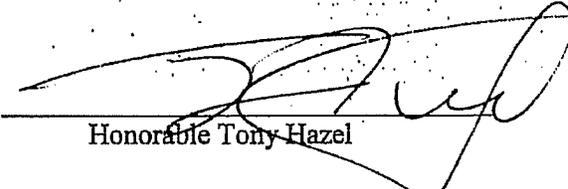
1 IT IS HEREBY ORDRED:

2 (1) Barnes' motion to vacate the arbitration award issued May 31, 2017 is DENIED;

3 and

4 (2) Mainline's motion to confirm the arbitration award issued May 31, 2017 is
5 GRANTED.

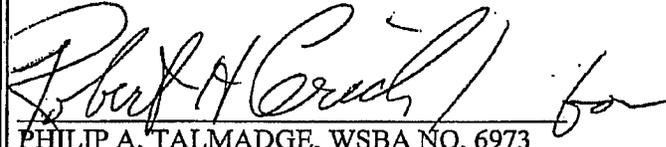
6 DONE this 19th day of December, 2017.

7
8 
9
10 Honorable Tony Hazel

11
12 Presented by:

13
14
15 _____
16 JOHN H. GUIN, WSBA NO. 26794
17 LAW OFFICE OF JOHN H. GUIN, PLLC
18 *Attorneys for Mainline Rock and Ballast, Inc.*

19 Approved as to form only;
20 Notice of presentment waived:

21 
22 _____
23 PHILIP A. TALMADGE, WSBA NO. 6973
24 TALMADGE/FITZPATRICK/TRIBE

25 ROBERT H. CRICK, JR., WSBA NO. 26306
26 ROBERT CRICK LAW FIRM, PLLC
Attorneys for Barnes, Inc.

ORDER: (1) DENYING BARNES, INC.'S MOTION TO
VACATE ARBITRATION AWARD; AND (2) GRANTING
MAINLINE ROCK AND BALLAST, INC.'S MOTION TO
CONFIRM ARBITRATION AWARD - 2

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SPOKANE, WA 99201
(509) 747-5250

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Brief of Appellant Barnes, Inc. 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
Law Office of John H. Guin, PLLC
421 West Riverside Avenue #461
Spokane, WA 99201-0402

Original e-Filed with:
Court of Appeals, Division III
Clerk's Office
500 N Cedar Street
Spokane, WA 99201

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 21, 2018, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

May 21, 2018 - 12:11 PM

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

The following documents have been uploaded:

- 357678_Briefs_20180521120950D3309576_4325.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- aaron@tal-fitzlaw.com
- admin@guinlaw.com
- john@guinlaw.com
- matt@tal-fitzlaw.com
- rob@cricklawnfirm.com

Comments:

Brief of Appellant Barnes, Inc.

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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