

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, in and for the COUNTY
OF CLARK; and THE HONORABLE
LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, IRSHAD
AHMED, MICHAEL SARGEANT
Individually and on behalf of others
similarly situated,

Real Parties in Interest.

Case No.: 69408

District Court Case No. A-14-707423-C

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Clerk of Supreme Court

**REPLY TO REAL PARTIES IN
INTEREST'S RESPONSE IN
OPPOSITION TO PETITIONER'S
MOTION FOR STAY**

Except for the merits of the "Fuel Costs" argument, Perera does not dispute anything in Petitioner's Motion for Stay. At p. 2 of his Response, Perera agrees his "request [for injunction] will also seek to have the district court impose suitable protocols, including possibly the appointment of a Special Master to be paid by the petitioner, to enforce such an injunction." Perera thus concedes that allowing the district court to appoint a special master to run Western Cab's business will interfere with Western Cab's lawful operation of its highly regulated business and

destroy its profitability. Except for the “Fuel Costs” issue, Perera agrees that Western Cab will likely prevail on the merits.

Perera argues at p. 3 of his Response that he needs an injunction to “put money in escrow.” That is ridiculous. Perera, Ahmed and Sargeant are **former employees** with no interest in Western Cab’s current operation. If they ultimately prevail, they will have a judgment for backpay – all they are really seeking.

Perera bears the burden of proof. His example at p. 4 of his Response is nonsense. Tips are not measured by hours. Western Cab pays its drivers by commission. To determine whether it has met its minimum wage obligation, the commissions paid are divided by the hours worked. Tips are **not** considered in that computation. Specifically, tips are not treated as an offset for minimum wage as (1) driver employees keep 100 percent of any and all tips they may receive; and (2) Western Cab does not in the employment relationship seek or request any split of the drivers’ tips whatsoever. When Western Cab drivers begin their shifts, their cabs have a full tank of gas. When the drivers bring their cabs back at the end of the shift, they must bring them back with a full tank of gas. The drivers use both reported and **unreported** tips and vendor’s fees to fill up their tanks. Many deduct this cost as an unreimbursed business expense on their income tax returns.

Comparing tipped employees to non-tipped employees at p. 4 of Petitioner's response is like comparing apples to oranges. While tips are part of the drivers' income, they are not part of "wages" as defined by the MWA.

Perera's argument that the drivers' payment for the fuel benefits the employer was specifically rejected in *Wynn Las Vegas L.L.C. v. Baldonado*, 129 Nev. Adv. Op. 78, 311 P.3d 1179, 1181-82 (2013), which held that such a test was unworkable because every tip-pooling policy directly benefits the employer in some manner. Similarly, any requirement of an employee, whether it is paying for fuel or anything else, directly benefits the employer in some manner.

Perera agrees that the MWA is silent on the issue of fuel costs and there is no specific Nevada statute or regulation addressing this issue. Response, p. 5. It is Perera's burden to prove that Western Cab has violated the MWA in requiring its drivers to pay for fuel from their tips and vendor fees. The MWA was intended to level the playing field between union and nonunion employers, specifically to favor union employees. App. at 664, 666-67.

In his February 26, 2016 Answer, at p. 3, Perera states that Western Cab's recounting of the Department of Labor's advice to Western Cab "involves multiple levels of hearsay." Then, as Exhibit A to his Response, he attaches a document he obtained from the Department of Labor which Western Cab had never seen before Perera's March 17, 2016 Response. Apparently, this document does not contain

hearsay. But, more importantly, Western Cab believes this document supports its position. First, Western Cab was never informed of the alleged back wage amount because as Exhibit A, p. 7, demonstrates, “The back wage amount was not disclosed at this meeting as compliance was not agreed.”

Second, Western Cab’s General Manager submitted in an affidavit in the district court, “The Department of Labor said that Western Cab’s payment of gasoline for the drivers could not be considered in determining whether the company complied with federal minimum wage requirements. Ms. Salazar said that only the amount shown on a payroll check could be considered for minimum wage compliance.” App. at 257, ¶ 9. According to Perera’s Exhibit A “Ms. Sarver stated she asked WHI how they could take credit for paying for the gas and asked if they would be allowed to have the drivers pay for their own gas. She stated WHI said, ‘If it is not on the payroll, it does not count.’” Exhibit A, p. 5.

Western Cab’s General Manager also said in her affidavit:

In August 2012 the U.S. Department of Labor contacted Western Cab. The Department asked to review all the drivers’ trip sheets to determine if Western Cab was in compliance with federal minimum wage requirements. Western Cab made available 44 boxes of trip sheets. The U.S. Department of Labor must have determined that Western Cab was in compliance with federal minimum wage requirements because it has not pursued Western Cab any further in regard to federal minimum wage compliance. The last contact Western Cab had with the U.S. Department of Labor was October 17, 2013.

App. at 258, ¶ 11. Exhibit A shows that the Department of Labor “agreed to allow time for the firm to review the publications and information provided at the meeting and inform the firm to notify when they were prepared to give their compliance status and their plans for coming into compliance.” Exhibit A, p. 6. The meeting referred to in Exhibit A was April 25, 2013. Exhibit A, p. 4. Western Cab’s last contact with the U.S. Department of Labor was October 17, 2013. App. at 258. The Department of Labor never pursued the August 2012 investigation.

Western Cab’s business interests will suffer irreparable or serious injury if a special master is appointed and the stay is denied. On the other hand, Perera, Ahmed and Sargeant will suffer no injury if the stay is granted. They are former employees and if they ultimately prevail, they will be paid backpay under the MWA pursuant to their Third Amended Complaint. Finally, Western Cab is likely to prevail on the merits of its Petition. Western Cab respectfully requests that this Court stay the proceedings in the district court pending the resolution of Western Cab’s Petition.

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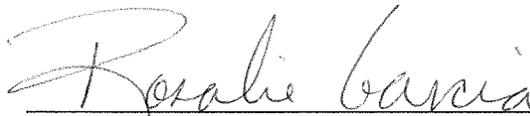
CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **REPLY TO REAL PARTIES IN INTEREST'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR STAY** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 22nd day of March, 2016, to the following:

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And a true and correct copy of the foregoing **REPLY TO REAL PARTIES IN INTEREST'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR STAY** was served via first class, postage-paid U.S. Mail on this 22nd day of March 2016, to the following:

The Honorable Linda Marie Bell
District Court Judge
Eighth Judicial District Court of Nevada
200 Lewis Avenue, #3B
Las Vegas, NV 89101



An Employee of Hejmanowski & McCrea LLC