

CLERK OF THE COURT

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Aug 23 2016 03:51 p.m.
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Clerk of Supreme Court

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Attorneys for Petitioner

Bombardier Transportation (Holdings) USA, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

BOMBARDIER TRANSPORTATION
(HOLDINGS) INC.,

Petitioner,

v.

NEVADA LABOR COMMISSIONER; THE
INTERNATIONAL UNION OF ELEVATOR
CONSTRUCTORS; and CLARK COUNTY,

Respondents.

Case No.: A-14-698764-J

Dept. No.: XV

NOTICE OF APPEAL

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1 NOTICE IS HEREBY GIVEN that BOMBARDIER TRANSPORTATION (HOLDINGS) INC.,
2 Petitioner above-named, hereby appeals to the Supreme Court of Nevada from the Findings of
3 Fact, Conclusions of Law and Order dated July 11, 2016, along with a Notice of Entry of Order
4 which was filed on July 19, 2016.

5 Dated this 16th day of August, 2016.

6 JACKSON LEWIS P.C.
7

8 /s/ Paul T. Trimmer
9 Gary C. Moss, Esq.
10 Bar Number 4340
11 Paul T. Trimmer, Esq.
12 Bar Number 9291
13 3800 Howard Hughes Parkway, Suite 600
14 Las Vegas, Nevada 89169
15 *Attorneys for Petitioner*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 16th day of August, 2016, I caused to be served via the Court's Wiznet electronic filing and service system, a true and correct copy of the above foregoing **PETITIONER'S NOTICE OF APPEAL, INITIAL APPEARANCE** and **PETITIONER'S CASE STATEMENT** properly addressed to the following:

Attorneys for State of Nevada Office of the Labor Commissioner

Melissa L. Flatley, Esq.
Deputy Attorney General
mflatley@ag.nv.gov
Adam Paul Laxalt, Esq.
Attorney General
Bureau of Business and State Services
Business and Taxation Division
100 North Carson Street
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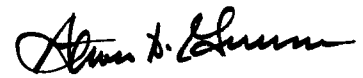
Attorneys for The International Union of Elevator Constructors

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Chief Deputy District Attorney
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Las Vegas, Nevada 89155

/s/ Evelyn Jackson
Employee of Jackson Lewis P.C.



CLERK OF THE COURT

ASTA

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Bombardier Transportation (Holdings) USA, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

BOMBARDIER TRANSPORTATION
(HOLDINGS) INC.,

Petitioner,

v.

NEVADA LABOR COMMISSIONER; THE
INTERNATIONAL UNION OF ELEVATOR
CONSTRUCTORS; and CLARK COUNTY,

Respondents.

Case No.: A-14-698764-J

Dept. No.: XV

CASE APPEAL STATEMENT

1. Name of appellants filing this case appeal statement: **Bombardier Transportation (Holdings) Inc.**

2. Identify the judge issuing the decision, judgment, or order appealed from:
Honorable Joe Hardy.

3. Identify each appellant and the name and address of counsel or each appellant:

Bombardier Transportation (Holdings) Inc.

Gary C. Moss, Esq.

moss@jacksonlewis.com

Paul T. Trimmer, Esq.

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3 (702) 921-2461 (facsimile)

4 4. Identify each respondent and the name and address of appellate counsel, if known,
5 for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as
6 much and provide the name and address of that respondent's trial counsel):

7 *State of Nevada Office of the Labor Commissioner*
8 Melissa L. Flatley, Esq.
9 Deputy Attorney General
10 mflatley@ag.nv.gov
11 Adam Paul Laxalt, Esq.
12 Attorney General
13 Bureau of Business and State Services
14 Business and Taxation Division
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19 *The International Union of Elevator Constructors*
20 Richard G. McCracken, Esq.
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5. Indicate whether any attorney identified above in responses to question 3 and 4 is
not licensed to practice law in Nevada and, if so, whether the district court granted that attorney
permission to appear under SCR 42: **Yes, all attorneys identified above are licensed to
practice law in the State of Nevada.**

6. Indicated whether appellant is represented by appointed or retained counsel in the district court: **Appellant is represented by retained counsel.**

7. Indicate whether appellant is represented by appointed or retained counsel on appeal: **Appellant is represented by retained counsel.**

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: **No such leave has been requested or granted.**

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information or petition was filed): **This case was before the Nevada Labor Commission as a result of a wage complaint filed by The International Union of Elevator Constructors on October 9, 2009. Subsequently, Bombardier's petition was filed with the district court under Case No.: A-14-698764 on April 4, 2014.**

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgement or order being appealed and the relief granted by the district court: **The matter was before the district court on a Petition for Judicial Review arising from the final decision of the Office of the Labor Commission dated March 6, 2014. The decision held that the maintenance contract for the Automated Transit System ("ATS") at McCarran International Airport, Contract CBE-552, is a public works project covered by NRS Chapter 338's prevailing wage requirements, and that certain work performed under its terms must be compensated at prevailing wage rates. The district court found that the Labor Commissioner's findings are based on substantial evidence and further found that the Labor Commissioner's conclusions were based upon the facts and must be upheld. The district court affirmed the Labor Commissioner's March 6, 2014 Order in its entirety.**

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding: **The case has not previously been the subject of an appeal to or original writ proceeding in the Supreme Court.**

12. Indicate whether this appeal involves child custody or visitation: **This appeal does not involve child custody or visitation.**

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement: **Although the Parties have had discussions throughout the litigation, they have been unable to reach an agreement to date.**

Dated this 16th day of August, 2016.

JACKSON LEWIS P.C.

/s/ Paul T. Trimmer
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 Paul T. Trimmer, Esq.
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Chief Deputy District Attorney
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5th Floor
Las Vegas, Nevada 89155

4829-1177-5798, v. 1

EXHIBIT A


CLERK OF THE COURT

1 **NEOJ**
2 ADAM PAUL LAXALT
3 Attorney General
4 MELISSA L. FLATLEY
5 Deputy Attorney General
6 Nevada Bar No. 12578
7 Bureau of Business and State Services
8 Business and Taxation Division
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11 Telephone: (775) 684-1218
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13 mflatley@ag.nv.gov
14 Attorneys for State of Nevada,
15 Office of the Labor Commissioner

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 BOMBARDIER TRANSPORTATION
13 (HOLDINGS) INC.,

14 Petitioner,

15 v.

16 NEVADA LABOR COMMISSIONER; THE
17 INTERNATIONAL UNION OF ELEVATOR
18 CONSTRUCTORS; and CLARK COUNTY,

19 Respondent.

Case No.: A-14-698764-J

Dept. No.: XXVI

20 **NOTICE OF ENTRY OF ORDER**

21 **TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

22 YOU AND EACH OF YOU, PLEASE TAKE NOTE that on July 11, 2016, the Court
23 entered its *Findings of Fact, Conclusions of Law and Order* in the above-referenced matter. A
24 copy of said *Findings* is attached hereto as Exhibit "1".

25 *///*

26 *///*

27 *///*

28 *///*

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned hereby affirms that the foregoing document *Notice of Entry of Order*, does not contain the personal information of any person.

Dated this 19th day of July 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Melissa L. Flatley
MELISSA L. FLATLEY
Deputy Attorney General
Nevada Bar No. 12578
Bureau of Business and State Services
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Facsimile: (775) 684-1156
*Attorneys for State of Nevada,
Office of the Labor Commissioner*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada Office of the Attorney General, and that on the 19th day of July 2016, I served the foregoing *Notice of Entry of Order* on all parties receiving service by electronic transmission through the Wiznet System in this action as follows:

Richard G. McCracken, Esq.
rmccracken@dcbsf.com
Andrew J. Kahn, Esq.
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Attorneys for Respondent IUEC

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Attorneys for Petitioner, Bombardier Transportation (Holdings) Inc.

/s/ Susan Dehnen
An Employee of the
Office of the Attorney General

INDEX OF EXHIBITS

Exhibit Number	Title/Description	Number of Pages
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EXHIBIT B

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

BOMBARDIER TRANSPORTATION
(HOLDINGS) USA INC.,

Petitioner,

v.

NEVADA LABOR COMMISSIONER; THE
INTERNATIONAL UNION OF ELEVATOR
CONSTRUCTORS; and CLARK COUNTY,

Respondent.

Case No.: A-14-698764-J

Dept. No.: XXVI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is before the court on a Petition for Judicial Review arising from the final decision of the Office of the Labor Commissioner dated March 6, 2014. The decision held that the maintenance contract for the Automated Transit System ("ATS") at McCarran International Airport, Contract CBE-552, is a public works project covered by NRS Chapter 338's prevailing wage requirements, and that certain work performed under its terms must be compensated at prevailing wage rates.

Although this Court may not have ruled as the Labor Commissioner did had this Court been the trier of fact, it is not within this Court's purview to substitute its judgment for those Labor Commissioner findings that are based on substantial evidence. This Court finds that the Labor Commissioner's findings are based on substantial evidence. This Court further finds that the Labor Commissioner's conclusions of law are based upon the facts, are not pure questions of law, and are not clearly erroneous, arbitrary, or capricious, and,

JUL 15 2016

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

<input type="checkbox"/> Jury	<input type="checkbox"/> Disposed After Trial Start
<input type="checkbox"/> Non-Jury	<input type="checkbox"/> Disposed After Trial Start
<input type="checkbox"/> Jury	<input type="checkbox"/> Disposed Before Trial
<input type="checkbox"/> Non-Jury	<input type="checkbox"/> Disposed Before Trial
<input type="checkbox"/> Jury	<input type="checkbox"/> Disposed Before Trial
<input type="checkbox"/> Non-Jury	<input type="checkbox"/> Disposed Before Trial

1 therefore, must be upheld. Likewise, the Labor Commissioner's interpretation of its governing
2 statutes and regulations, here NRS Chapter 338 and NAC Chapter 338, is within the statute's
3 and regulations' language and thus is entitled to deference. This Court's order also allows and
4 accounts for the Labor Commissioner's specialized knowledge, experience and expertise
5 when evaluating the evidence. To the extent questions of statutory construction would
6 generally be subject to a de novo review, the Labor Commissioner's interpretation is still
7 entitled to deference under the circumstances of this petition.

8 The Court affirms the Labor Commissioner's March 6, 2014, Order in its entirety, as set
9 forth below:

10 **I. Factual background**

11 In 2008 Clark County entered into Contract CBE-552 with Bombardier to service the
12 Automated Transit System ("ATS") at McCarran International Airport. The system uses
13 vehicles specially manufactured for the County's specifications which run on abnormally-large
14 rubber tires over a concrete guideway, and weigh over 40,000 pounds each ("ATS cars").
15 They were brought in using special cranes, required hundreds of man-hours to specially adapt
16 to their location, and they never leave McCarran except when the airport will no longer use
17 them at which time they are not put to use elsewhere, but instead their good parts stripped
18 and the rest sold for scrap.

19 Contract CBE-552 provided for payment by the County to the Company beginning at
20 \$2.7 million annually with 5% annual increases, and involved an anticipated term of 5 years.
21 Tasks done by the ATS technicians employed by Bombardier included replacing broken leaf
22 springs (basic part of the suspension, requiring 3-4 workers and more than 15 manhours),
23 replacing vehicle traction motors (usually taking 3-4 workers and over 12 manhours),
24 replacing the clamshells on the guideway installed there to protect the power lines, replacing
25 the Regional Automatic Train Control electronic circuit boards, and replacing the station doors'
26 autolocks, guides, rollers, controllers, motors, wiring and key switches. Most of the repair
27 work done by the ATS technicians here was done at night or during the daytime window while
28 the system was not operating.

II. Procedural history

1 The International Union of Elevator Constructors ("IUEC") filed a prevailing wage
2 complaint on October 9, 2009 against Bombardier. The complaint alleged that workers hired
3 by Bombardier under Contract CBE-552 to perform repair work on the ATS should have been
4 paid the prevailing wage, in accordance with NRS 338, but were not. Deputy Labor
5 Commissioner Keith Sakelhide issued a Complaint on October 13, 2009. He directed the
6 Clark County Department of Aviation ("DOA") to conduct an investigation into the Union's
7 allegations and determine what work was actually performed under the CBE-552 contract and
8 whether Bombardier had committed a violation. On November 24, 2009, the Department of
9 Aviation announced its determination that CBE-552 and the work performed thereunder is not
10 subject to prevailing wage under NRS Chapter 338 because it was a maintenance contract.
11 The Union objected to the Department of Aviation's findings, and the investigation was
12 returned to the Department of Aviation for further investigation.

13 The DOA issued a second Determination on March 30, 2010, affirming its Initial
14 Determination. The Union filed objections, and the Labor Commissioner directed the DOA to
15 investigate the objections and respond. The Labor Commissioner issued an Interim Order on
16 June 7, 2011. The Interim Order found that work on "fixed" portions of the ATS was subject to
17 NRS 338 but work on the ATS cars was not. The DOA issued a second revised
18 Determination on July 25, 2011, asking the complaint to be dismissed because none of the
19 work on the "fixed" portions of the ATS exceeded \$100,000 and was therefore exempt from
20 prevailing wage. Finally on July 25, 2011, the Department of Aviation issued a revised
21 determination, and the Union and Bombardier both objected.

22 The matter was set for hearing, and an administrative hearing was held over six days in
23 June and September, 2013. On March 6, 2014, the Labor Commissioner issued his Decision.
24 In his Decision, the Labor Commissioner found that 20% of the work performed by
25 Bombardier for the DOA was repair work on a public work and therefore not exempt from
26 prevailing wage law. The Commissioner found the proper job class to use was Elevator
27 Constructor, a class he had previously posted pursuant to a survey of employers pursuant to
28 NRS 338.010. He ordered that the repair work performed by ATS Technicians must be
compensated at the 2007-2008 prevailing wage rate for Elevator Constructors and that the

1 DOA shall calculate the amount due pursuant to the Decision. The Labor Commissioner
2 rejected Bombardier and Clark County's arguments that the work was exempt under NRS
3 338.011(1), finding that CBE-552 was not directly related to the normal operation of the Airport
4 because it was possible for the Airport to function without the ATS and that the estimated 20%
5 of the technicians' time spent doing "corrective maintenance" was repair work and not normal
6 maintenance. He also rejected their arguments that the work was exempt pursuant to NRS
7 338.080, the "railroad company" exemption. Bombardier then filed the instant Petition for
8 Judicial Review of the Labor Commissioner's order.

9 **III. Standard of Review**

10 The right to seek judicial review of a final agency decision is both created and
11 constrained by the Nevada Administrative Procedures Act ("APA"), NRS Chapter 233B. The
12 APA provides the exclusive means for a court to review an administrative decision. NRS
13 233B.130(6). Under the APA, a general standard of deference to the agency applies in a
14 judicial review proceeding.

15 The substantive controlling standards for conducting a judicial review are set forth in
16 NRS 233B.135(3). Under these standards the Court must presume the agency's decision to
17 be reasonable and lawful and may not substitute its judgment for that of the agency on factual
18 questions. NRS 233B.135(3). Bombardier, as the petitioner in this case, bears the burden of
19 proof in this petition to show that the Labor Commissioner's decision is tainted by one of the
20 errors listed in NRS 233B.135(3).

21 A court may not foreclose the exercise of an agency's independent judgment on
22 matters that are particularly within the agency's competence. *Nevada Tax Comm'n v. Hicks*,
23 73 Nev. 115, 310 P.2d 852 (1957). A decision that is based upon an agency's exercise of
24 judgment is subject to an abuse of discretion standard. *Wynn Las Vegas, L.L.C. v.*
25 *Baldonado*, 124 Nev. 951, 311 P.3d 1179, 1181 (2013) (conducting a review of the Labor
26 Commissioner's determination of whether a particular tip-pooling arrangement was unlawful).
27 Under this standard an agency's decision may only be reversed if it is clearly erroneous or
28 arbitrary and capricious. *Maxwell v. SIRS*, 109 Nev. 327, 331, 849 P.2d 267, 271 (1993).

The Court will not re-weigh the evidence to determine whether a view is supported by a

1 preponderance of evidence, and instead is limited to reviewing the decision under the
2 substantial evidence standard. *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. ____, 327
3 P.3d 487 (Adv. Op. 27, April 3, 2014); *Construction Indus. Workers' Comp. Grp. ex rel.*
4 *Mojave Elec. v. Chalue*, 119 Nev. 348, 74 P.3d 595, 598-99 (2003). Substantial evidence is
5 the quantity of evidence which a reasonable person could accept as adequate to support a
6 conclusion. *State Employment Security Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729
7 P.2d 497, 498-499, n.1 (1986). Further, the Court should also allow for the agency to use its
8 specialized knowledge, experience and expertise when evaluating the evidence before it.
9 NRS 233B.123(5).

10 An agency charged with the duty of administering an act is impliedly clothed with
11 power to construe it as a necessary precedent to administrative action." *State v. State*
12 *Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citations omitted). Further,
13 "great deference should be given to the [administrative] agency's interpretation when it
14 is within the language of the statute." *Id.* (citations omitted). While the agency's
15 interpretation is not controlling, it is persuasive. *State Engineer v. Morris*, 107 Nev. 699,
16 701, 819 P.2d 203, 205 (1991).

17 *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 918 P.2d 697 (1996). See also
18 *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008) ("the Labor
19 Commissioner is charged with knowing and enforcing the labor laws; these responsibilities
20 acknowledge a special expertise as to those laws.").

21 A court may conduct an independent review of pure questions of law. *DMV v. Jones-*
22 *West Ford, Inc.*, 114 Nev. 766, 962 P.2d 624 (1998). However, an agency's legal conclusions
23 that are based upon the facts are not pure questions of law, and therefore are entitled to
24 deference. *Id.* Where statutory interpretation is concerned, a court may conduct an
25 independent review, but in doing so must still give consideration to the Labor Commissioner's
26 interpretation. *Office of Labor Commissioner v. Granite Const. Co.* 118 Nev. 83, 90, 40 P.3d
27 423, 428 (2002) (explaining that "[a]lthough we review questions of statutory construction *de*
28 *novo*, an administrative agency charged with the duty of administering an act is impliedly
clothed with the power to construe the relevant laws and the construction placed on a statute
by the agency charged with the duty of administering it is entitled to deference."); see also
Wynn Las Vegas, 311 P.3d at 1181-1182. While an agency's interpretation of a statute is not

1 necessarily controlling, it should be regarded as persuasive even in the context of an
2 independent review. *Nevada Power Co. v. Pub. Serv. Comm'n of Nevada*, 102 Nev. 1, 4, 711
3 P.2d 867, 869 (1986).

4 IV. Nevada's prevailing wage law

5 Nevada's prevailing wage statute, codified in NRS Chapter 338, requires that an
6 employee on a public work must be paid according to the prevailing wage schedule published
7 annually by the Nevada Labor Commissioner. NRS 338.020-.030. A public body sponsoring a
8 public work is responsible for ascertaining the proper prevailing wage rate from the Labor
9 Commissioner and ensuring that provisions for payment of prevailing wages are included in a
10 public works contract. NRS 338.020(1); NRS 338.030(1). The Nevada Labor Commissioner
11 is charged with ensuring compliance with these requirements and enforcing the prevailing
12 wage statutes. NRS 338.015. The Labor Commissioner is empowered to award back pay to
13 workers that have not been properly compensated and to assess fines and other penalties
14 against contractors that fail to comply with the prevailing wage laws. NRS 338.090(2); *see*
15 *also City Plan Dev., Inc. v. Office of Labor Commissioner*, 121 Nev. 419, 436, 117 P.3d 182,
16 193 (2005). Neither the Labor Commissioner's enforcement authority nor the workers' rights to
17 prevailing wages are constrained by the terms of a contract. NRS 338.050; NAC 338.008.

18 The actual wage rates for the recognized worker classifications are established
19 annually by a list published by the Labor Commissioner's office as mandated by NRS
20 338.030. These lists identify the job classifications that have been recognized for prevailing
21 wage purposes, provide a short description of those classifications, and specify the applicable
22 wage rate for each. *See Labor Com'r of State of Nevada v. Littlefield*, 123 Nev. 35, 40, 153
23 P.3d 26, 29 (2007).

24 Nevada's prevailing wage laws are derived from the federal Davis-Bacon Act. *Granite*
25 *Const. Co.*, 118 Nev. 83, 40 P.3d 423 (2002). Just like the federal act, Nevada's prevailing
26 wage laws are not intended to benefit employers or even the public body sponsoring a project;
27 the beneficiaries of prevailing wage laws are the workers themselves who benefit from
28 protections against substandard earnings when working on a public work. *United States v.*
Binghamton Const. Co., 347 U.S. 171, 178 (1954); *City of Reno v. Bldg. & Const. Trades*

1 *Council of N. Nevada*, 12 Nev. Adv. Op. 2, 251 P.3d 718, 721, n. 3 (2011).

2 Where the legislature adopts a law of this type that is intended to protect workers'
3 wages, the Nevada Supreme Court has recognized that such laws serve a remedial purpose
4 and "...should receive the most liberal construction to give full effect to its provisions."
5 *Alexander v. Archer*, 21 Nev. 22, 29, 24 P. 373, 375 (1890); see also *Terry v. Sapphire*
6 *Gentleman's Club*, 130 Nev. Adv. Op. 87 (Oct. 30, 2014). When construing such an act, the
7 Court's obligation is to do so in a way that will suppress the mischief and advance the remedy
8 contemplated by the legislature. *Archer*, 21 Nev. at 29, 24 P. at 375; *Int'l Game Tech., Inc. v.*
9 *Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 193, 201, 179 P.3d 556, 560-
10 61 (2008) (recognizing that "...remedial statutes... should be liberally construed to effectuate
11 the intended benefit .").

12 **V. The Labor Commissioner properly found that CBE-552 was a public works**
13 **contract**

14 Payment of prevailing wage is required for all public works contracts not otherwise
15 exempt. A "public work" is defined, in relevant part, as "any project for the new construction,
16 repair or reconstruction of...a project financed in whole or in part from public money for...public
17 buildings and all other publicly owned works or property." NRS 338.010(16) (emphasis
18 added). Bombardier does not contest the "public" nature of this work. CBE-552 concerned
19 repair work (including maintenance) on the publicly-owned ATS system at McCarran Airport.
20 The ATS is property of Clark County and was paid for with public funds.

21 Instead, Bombardier assigns error to the Commissioner's interpretation of "project".
22 Only publicly- financed "projects" require the payment of prevailing wage. NRS 338 does not
23 define "project" for purposes of interpreting its provisions. The Labor Commissioner took the
24 common-sense approach of applying dictionary definitions of the word. See, e.g., *Terry v.*
25 *Sapphire Gentleman's Club*, 130 Nev. Adv. Op. 87 (Oct. 30, 2014) (repeatedly looking to
26 dictionary definitions in order to ascertain the meaning of terms contained in Nevada's wage
27 and hour laws). The Labor Commissioner looked to two dictionary definitions that highlighted
28 advanced planning, a specific purpose, and work which extends over a considerable period of
time.

1 CBE-552 was a five-year contract with many complicated tasks to be performed over
2 that time, all with the central object of keeping the ATS running 99.65% of the time.
3 Bombardier argues this work was not a "project" because not every task was listed with a
4 deadline in the contract. However, CBE-552 spends 5 pages listing various maintenance and
5 repair tasks, and then also incorporates Preventative Maintenance Schedules, three single-
6 spaced sheets listing more than 50 scheduled inspections of different systems. The industry
7 standard from the American Society of Civil Engineers which Bombardier helped develop
8 requires a "comprehensive maintenance plan" which Bombardier cannot deny having.
9

10 The Labor Commissioner was not required to adopt Bombardier's preferred
11 interpretation of "project" as requiring prescheduling. It serves the purposes of the statute far
12 less well than the Labor Commissioner's interpretation. NRS 338 covers "repairs". It must
13 cover work that is not scheduled well in advance, because that is in the very nature of many (if
14 not most) repairs: one cannot readily predict when elevators, air conditioning or plumbing
15 systems are going to break down. Injecting a requirement that work be short-term or pre-
16 scheduled is an unrealistic narrowing of the meaning of "repair" that is inconsistent with
17 underlying purposes of prevailing wage law to protect workers and local contractors from low
18 wages.
19

20 Courts and agencies have broadly construed the term "project." See, e.g., *Arco*
21 *Materials, Inc. v. State, Taxation and Revenue Dept. Court of Appeals of New Mexico*, 878
22 *P.2d 330 (N.M. 1994)* (materials sold for unscheduled road maintenance and repair deemed
23 part of "construction project" where "construction" defined elsewhere in code as including
24 repairs); *People ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1323
25 (9th Cir. 1985) amended, 775 F.2d 998 (9th Cir. 1985) ("repairs to water-related structures are
26 'projects' within the meaning of the Compact.").
27
28

1 Bombardier's approach is also contrary to the holdings of courts and agencies that
2 unscheduled work in repairing construction equipment and delivering materials on site is
3 covered work. *State of Nevada Bus. & Ind. v. Granite Construction Co.*, 40 P.3d 423, 118
4 Nev. 83 (2002) (delivery drivers); *So. Nev. Operating Engineers v. Johnson*, 121 Nev. 523,
5 119 P.3d 720 (2005) (equipment greasers and repairmen); *Heller v. McLure & Sons*, 963
6 P.2d 923, 927 (Wash. App. 1998) (equipment maintenance and repair); *Griffith Co.*, 17 BNA
7 Wage & Hour Cases 49 (DOL WAB 1965) (same); *U.S. v. Sparks*, 939 F. Supp. 636 (C.D. Ill.
8 1996); *In re Vecello & Grogan, Inc.*, 1984 WL 161749 (DOL WAB 1984)(same); *In re*
9 *Dworshak Dam*, 1973 DOL Wage App. Bd. LEXIS 9 (1973)(same); *Chester Bross Const. Co.*
10 *v. Missouri Dept. of Labor and Indus.*, 111 S.W.3d 425, 427 (Mo.App. 2003)(same).

11
12 **VI. "Elevator Constructor" is the applicable classification for ATS repair work**

13 The Labor Commissioner's determination that "elevator constructors" was the
14 appropriate classification is supported by substantial evidence. Decisions about the
15 appropriate classification are specifically reserved to the Labor Commissioner. See *City Plan*,
16 *supra*; NRS 338.030; NRS 338.090. The Labor Commissioner clearly stated his rationale in
17 his order. The ATS was the same type of equipment that elevator constructors work on; many
18 of the same technical skills translate between elevator constructors and the ATS technicians.
19 Many of the same tools are also used by both elevator constructors and ATS technicians. An
20 elevator constructor who became an ATS tech testified to the overlap in skills and duties. The
21 Labor Commissioner looked to the Service Contract Act's definition of elevator repairer that
22 included automated people movers and to the statement of Dan Safbrom addressing the
23 similarities between elevator constructors and ATS technicians. Elevator Constructor is the
24 job class used by the U.S. Department of Labor for automated people mover ("APM") work.
25 IUEC labor agreements filed with the Commissioner's office expressly included APMs in their
26 scope of work. Published sources repeatedly refer to APMs as "horizontal elevators". The
27 Decision that repair work under CBE-552 should have been paid at the Elevator Constructor
28 rate of pay is amply supported in the record.

1 VII. The Decision did not constitute "rule making" under the Administrative
2 Procedures Act

3 The Labor Commissioner's decision that the repair work should be paid at the Elevator
4 Constructor rate did not violate the Administrative Procedures Act. The Labor Commissioner
5 does not engage in *ad hoc* rulemaking when he applies the job descriptions from the
6 prevailing wage list to determine the correct classification. The Nevada Supreme Court was
7 quite clear about this in *City Plan Development, Inc. v. Office of the Labor Commissioner*, 121
8 Nev. 419, 117 P.3d 182 (2005). Bombardier's reliance upon *Southern Nevada Operating*
9 *Engineers Contract Compliance Trust v. Johnson*, 121 Nev. 523, 530, 119 P.3d 720, 725
10 (2005) and *Labor Commissioner v. Littlefield*, 123 Nev. 35, 153 P.3d 26 (2007) to the contrary
11 is not justified. Each of those cases concerned the wholesale removal of a recognized
12 classification from the prevailing wages list, not the application of a job description to
13 determine the applicable classification. The Court in *Johnson* and *Littlefield* reaffirmed the
14 conclusion in *City Plan*. *Johnson* 121 Nev. at 530, 119 P.3d at 725 (stating that a scenario
15 where the Labor Commissioner makes recourse to predefined job classifications "...would not
16 have been subject to the rulemaking requirements of the APA."); *Littlefield* 123 Nev. at 43, 153
17 P.3d at 31 (stating "the APA's notice and hearing requirements do not apply to decisions that
18 merely set prevailing wage rates or place individual workers into specific classes.").

19 The absence of the specific duties performed by the Bombardier employees does not
20 affect this conclusion. The Commissioner's published job descriptions use the phrase
21 "includes but is not limited to" to make clear to everyone that the descriptions are not
22 exhaustive. The Commissioner's introduction to his descriptions instructs all parties not finding
23 some task expressly listed in the descriptions to contact the Commissioner's office for
24 guidance. The Decision did not add or delete any classifications but simply found the
25 classification applicable to the work in question and was therefore not rule making under the
26 APA.

27 VIII. Bombardier's repair work was not exempt as "normal operations" or "normal
28 maintenance"

NRS 338.011(1) creates an exemption for some types of work that would otherwise

1 satisfy the definition of a "public work" in NRS 338.010(16). By its very terms, the exemption
2 is both qualified and limited. The exemption only applies to a contract "...which is directly
3 related to the normal operation of the public body or the normal maintenance of its property."
4 The Labor Commissioner concluded that neither of these exceptions applied in this case. His
5 conclusion is supported by substantial evidence.

6 A. "Normal Operations"

7 In order for the NRS 338.011(1) operations exemption to apply, a contract must concern
8 operations that are "normal." NRS 338.011(1). The Labor Commissioner found that CBE-552
9 did not involve McCarran Airport's normal operations. He concluded that while the ATS is a
10 convenience to passengers, it does not affect the taking off and landing of airplanes and
11 getting passengers to their destinations, which is the normal operation of the airport. It is not
12 the exclusive means of transit from one part of the airport to another. He accepted that the
13 ATS was important to McCarran Airport but held that importance alone does not equate with
14 "normal operations." Importance in and of itself cannot satisfy this exemption as any
15 governmental expenditure is arguably important or it should not be made. He also pointed to
16 the fact that much of the work on the ATS is done at night when the system is not in use by
17 passengers. The repair work of the ATS technicians is not involved in the "normal operation"
18 even of the ATS itself let alone the airport.

19 Bombardier highlights that which it considers to be favorable evidence and requests the
20 Court to re-weigh the evidence, this time in Bombardier's favor. But this does not show
21 reversible error as an administrative agency does not err merely by preferring one view of the
22 evidence over another. *Langman v. Nevada Administrators, Inc.*, 114 Nev. 203, 210, 955
23 P.2d 188, 192 (1998); see also *Malecon Tobacco, LLC v. State ex rel. Dept. of Taxation*, 118
24 Nev. 837, 841, 59 P.3d 474, 477, n.15 (2002) (courts "...must respect the judgment of the
25 agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly
26 equal reason [might] be resolved one way rather than another.')" (internal citations omitted).

27 Bombardier's reliance on its interpretation of legislative history is unavailing. The
28 statute clearly commits the application of the "normal operations" exemption to the expertise
of the Labor Commissioner. NRS 338.011(1); NRS 338.090(2); NRS 233B.135(3). In

1 analogous situations where the Legislature has established a general standard and committed
2 the application of a statutory standard to an agency the Nevada Supreme Court has
3 recognized that the agency's decision should be afforded "great deference." *Clark Cnty. Sch.*
4 *Dist. v. Local Gov't Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974);
5 *Mirin*, 92 Nev. 503, 553 P.2d 966.

6 b. *Normal Maintenance*

7 The NRS 338.011(1) exemption also applies to a contract that is "directly related to ...
8 normal maintenance." Like the normal operations exemption, the application of this
9 exemption is committed the judgment of the Labor Commissioner. NRS 338.015; NRS
10 338.090(2)(a); *see also* NRS 607.205. The Labor Commissioner determined that some of the
11 work under CBE-552 did in fact contain normal maintenance work, but that "some of the
12 heavy or corrective maintenance tasks go beyond the normal maintenance that would be
13 exempt under NRS 338.011. Those tasks cross over into the realm of repair." It was only
14 these tasks that went beyond normal maintenance that were subject to the prevailing wage
15 requirement.

16 Consequently CBE-552 included some exempt normal maintenance work with some
17 non-exempt repair work. The Commissioner properly concluded that prevailing wage work
18 retains that character even when it is bundled with exempt work. The Labor Commissioner
19 reasoned that NRS 338.011(1) was not intended to be used as a tool to avoid paying
20 prevailing wages for work that would rightfully be subject to prevailing wages.

21 **IX. The "railroad" exemption does not apply to the ATS or to Bombardier**

22 NRS 338.080(1) exempts work that is "...carried out by or for any railroad company or
23 any person operating the same..." from the prevailing wage requirements. The Labor
24 Commissioner took this subdivision to mean that a railroad company under this provision of
25 Nevada law is one that operates a railroad within Nevada. His conclusion is supported by
26 substantial evidence and accords with legal precedent. *Westinghouse Elec. Corp. v. Williams*,
27 325 S.E.2d 460, 462 (Ga. Ct. App. 1984) (considering whether a similar system installed at
28 Atlanta's airport was a "railroad" and finding that it was not).

Bombardier does not seriously challenge the Labor Commissioner's finding that the

1 ATS was not a railroad. Bombardier's APM system does not use a manned vehicle with steel
2 wheels running on metal rails past various properties and streets like a real railroad, but
3 instead is an unmanned car with rubber tires running over an elevated concrete guideway
4 inside a single facility. It is akin to a driverless bus. It does not run across any property lines,
5 not even leaving the property of a single public agency. For these reasons Bombardier's
6 predecessor (Westinghouse) successfully persuaded the courts that an airport APM is not a
7 "railroad" in *Westinghouse Elec. Corp.* NRS 705.690 exempts the Las Vegas Monorail from
8 Chapter 338. That exemption would have been unnecessary if any type of transit on a
9 guideway is somehow a "railroad".

10 Instead, Bombardier claims the railroad exemption based upon facts unrelated to this
11 project or even to this State. Bombardier points to the fact that it operates a railway system in
12 the east and also manufactures and sells railroad equipment elsewhere. The Commissioner
13 rejected this argument on the basis that there was no evidence to support a finding that
14 Bombardier was acting in the capacity of a railroad company within the State or in connection
15 with this project. He pointed out that Bombardier has not claimed to be a railroad under
16 Nevada law for any other purpose. Because of the public purpose served by a railroad
17 company, it is granted statutory powers that are not attached to other private corporations.
18 *Chicago Great W. Ry. Co.* at 59. It is the unique feature of operating railroad lines that
19 allowed states to single out railroad companies and treat them differently than other
20 corporations. *Missouri Pac. Ry Co. v. Mackey*, 127 U.S. 205 (1888) (considering an equal
21 protection challenge under the Fourteenth Amendment to state railroad-specific legislation).
22 The Nevada Constitution gives special treatment to railroad companies due to the public
23 interest provided by railroads. See Nev. Const. art. 8, § 10. Nevada statutes also afford
24 railroad companies special treatment on this same basis. See NRS 78.075-.085 (allowing for
25 specific organization of railroad companies and granting certain powers such as eminent
26 domain); NRS 705.010 (granting same railroad privileges to foreign railroad corporations
27 subject to the requirements of NRS Chapter 80). The record contains no evidence that
28 Bombardier was incorporated specifically as a railroad company. See *Randolph Cnty. v. Post*,
93 U.S. 502, 511 (1876) (looking to company charter to determine whether a company was a

1 railroad company). True railroads in Nevada pay fees to (and are regulated by) the Public
2 Utilities Commission of Nevada (NRS 704.309), which Bombardier has not paid.

3 The Labor Commissioner pointed out that extending the railroad company exemption to
4 companies with railroading activities elsewhere in the world would overextend the exemption
5 to permit a wide-scale avoidance of the prevailing wage obligations. The Labor
6 Commissioner's narrower application of the exemption to a company actually operating a
7 railroad is consistent with the remedial purpose of prevailing wage laws as well as the plain
8 language of NRS 338.080 that refers to "operating" a railroad company.

9 **X. The remedy ordered by the Labor Commissioner was within his authority**

10 The Labor Commissioner did not obligate Bombardier to pay prevailing wages on
11 exempt maintenance work. He ordered that the prevailing wage be paid for 20% of the hours
12 worked under CBE-552, which he estimated to be the amount of time spent on repair work
13 that went beyond normal maintenance. The contract itself attributes 20% of the work to be
14 performed to "corrective" work that the Labor Commissioner found to be repair work. Faced
15 with conflicting evidence from the parties that this type of work ranged anywhere from 10% to
16 40%, he settled the question by relying about what the contract itself provided. Bombardier, a
17 party to the contract, can hardly be heard to complain that it is inaccurate or that the Labor
18 Commissioner abused his discretion in relying upon it.

19 The Labor Commissioner's decision is in accordance with applicable law, which
20 specifies that the payment of prevailing wages is based upon the work actually being
21 performed. NAC 338.094(2)(a); *City Plan Dev., Inc.*, 121 Nev. at 433, 117 P.3d at 191
22 (upholding Labor Commissioner's prevailing wage determination that looked to the type of
23 work actually performed); see also *D.A. Elia Const. Corp. v. State*, 180 A.D.2d 881 (N.Y. App.
24 Div. 1992) (applying New York's prevailing wage law).

25 The "corrective maintenance" tasks at the outset of the contract were 60% of the work.
26 They dropped in percentage on Bombardier's records largely because the Bombardier
27 removed the codes used by workers to indicate repairs. Employers are or should be "in
28 position to know and to produce the most probative facts concerning the nature and amount of
work performed." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). *Mt.*

1 *Clemens Pottery* allows a fact-finder to make a just and reasonable inference to approximate
2 the amount of such compensable time in the absence of reliable records. *Mt Clemens Pottery*
3 at 687-88; see also *Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 820, (N.Y. App. Div.
4 1989) ("When an employer fails to keep accurate records as required by statute, the
5 Commissioner is permitted to calculate back wages due to employees by using the best
6 available evidence and to shift the burden of negating the reasonableness of the
7 Commissioner's calculations to the employer.") Bombardier argues that it was not aware of
8 its obligations to keep the payroll records required by the prevailing wage laws. See NRS
9 338.094. But this is immaterial as *Mt. Clemens Pottery* still applies even where there is a
10 *bona fide* mistake. *Mt. Clemens Pottery* at 687-88.

11 The recent U.S. Supreme Court case of *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036
12 (2016), demonstrates the continued vitality of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.
13 680 (1946). When employers such as Bombardier fail to keep proper records (as Bombardier
14 would have been required to do had the contract been properly awarded under NRS Chapter
15 338), and employees thereby have no way to establish with exactitude the time spent doing
16 uncompensated or undercompensated work, the remedial nature of Nevada's prevailing wage
17 statutory scheme, and the public policy which it embodies, militate against making the burden
18 of proving uncompensated or undercompensated work an impossible hurdle for the employee.
19 Instead of punishing the employee by denying him any recovery on the ground that he is
20 unable to prove the precise extent of uncompensated work, an employee has carried out his
21 burden if he proves that he has in fact performed work for which he was improperly
22 compensated and if he produces sufficient evidence to show the amount and extent of that
23 work as a matter of just and reasonable inferences. *Tyson Foods*, 136 S.Ct. at 1047, quoting
24 *Anderson*, 328 U.S., at 687. Under these circumstances, the burden then shifts to the
25 employer (Bombardier) to come forward with evidence of the precise amount of work
26 performed or with evidence to negative the reasonableness of the inference to be drawn from
the employee's evidence. *Id.*, quoting *Anderson*, 328 U.S., at 687-688.

27 In this case, as in *Tyson Foods*, it was proper for the Commissioner to consider
28 representative evidence to establish the amount of time the Bombardier employees spent, on

1 average, on prevailing wage work, because "each employee worked in the same facility, did
2 similar work, and was paid under the same policy." *Tyson Foods*, 136 S.Ct. at 1048. The
3 Commissioner properly considered the estimates of both Bombardier and its employees in
4 reaching his conclusion that the 20% figure in the contract probably was an accurate
5 prediction of the amount of time employees spent on "corrective" repair work.

6 **XI. IUEC's Motion to Strike**

7 The Court grants IUEC's Motion to Strike Exhibit A to Bombardier's Opening Brief for
8 the reasons set forth therein, and likewise declines to take notice of the "study done by the
9 University Reno Economics Department professors" referenced in IUEC's Motion to Strike.

10 **XII. ORDER**

11 Having reviewed and considered the Petition for Judicial Review, the numerous briefs
12 of the parties, the legal authorities contained therein, the administrative record and
13 supplement to the administrative record, the Court hereby affirms the Nevada Labor
14 Commissioner's March 6, 2014, Decision in its entirety, and remands the Decision to the
15 Labor Commissioner solely for supervision and jurisdiction by the Labor Commissioner over
16 the payment by Bombardier pursuant to calculation to be performed by the Clark County
17 Department of Aviation as ordered in conclusions 5 and 6 on pages 12 and 13 of the Decision.
18 This order and partial remand are made pursuant to NRS 233B.135(3).

19 IT IS SO ORDERED.

20 DATED this 6th day of July, 2016

21 
22 DISTRICT COURT JUDGE

23 ///

24 ///

25 ///

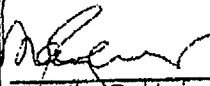
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1 Approved as to form:

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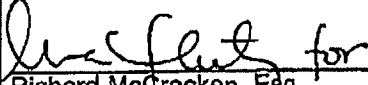
12 Approved as to form, but not as to content and substance¹:

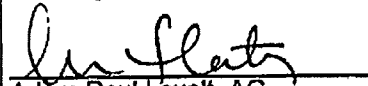
13 Paul Trimmer, Esq.
14 Attorney for Bombardier Transportation (Holdings) USA Inc.
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25 ¹ Petitioner Bombardier Transportation (Holdings) USA Inc. agrees that the form of the
26 Proposed Order is consistent with the District Court's instruction that the Proposed Order
27 adopt the arguments in the respective Respondents' Briefs. Petitioner, however, disagrees
28 with the Proposed Order's substance. Petitioner's position is that Proposed Order, including
its adopted contents, are not supported by the record. The Proposed Order, including its
adopted contents, contains reasoning and factual findings which are not present in the Labor
Commissioner's Administrative Decision.

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DEPARTMENT 15
CASE SUMMARY
CASE NO. A-14-698764-J

Bombardier Transportation Holdings USA Inc, Plaintiff
(s)
vs.
Nevada Labor Commissioner, Defendant(s)

§
§
§
§
§

Location: **Department 15**
Judicial Officer: **Hardy, Joe**
Filed on: **04/04/2014**
Case Number History:
Cross-Reference Case Number: **A698764**

CASE INFORMATION

Statistical Closures

07/11/2016 Judgment Reached (bench trial)

Case Type: **Civil Petition for Judicial Review**
Subtype: **Other Administrative Law**
Case Flags: **Appealed to Supreme Court**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	A-14-698764-J
Court	Department 15
Date Assigned	05/04/2015
Judicial Officer	Hardy, Joe

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DATE

EVENTS & ORDERS OF THE COURT

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04/04/2014



Petition for Judicial Review
Filed by: Plaintiff Bombardier Transportation Holdings USA Inc
Petition for Judicial Review

04/04/2014

Case Opened

04/08/2014



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Filed by: Defendant International Unoin of Elevator Constructors
Statement of Intent to Participate and Prayer for Relief

04/09/2014




Initial Appearance Fee Disclosure
Filed By: Defendant International Unoin of Elevator Constructors
Initial Appearance Fee Disclosure

04/10/2014



Statement











DEPARTMENT 15
CASE SUMMARY
CASE NO. A-14-698764-J

	Filed by: Defendant Nevada Labor Commissioner <i>Statement of Intent to Participate</i>
04/23/2014	 Statement Filed by: Defendant Clark County <i>Statement of Intent to Participate</i>
07/03/2014	 Administrative Record Party: Defendant Nevada Labor Commissioner <i>Administrative Record</i>
07/09/2014	 Notice Filed By: Defendant Nevada Labor Commissioner <i>Written Notice of Filing Administrative Record</i>
08/20/2014	 Order Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Petitioner Bombardier Trnasportation (Holdings) USA, Inc.'s Stipulation to Extend Time to File Memorandum of Points and Authorities in Support of Its Petition for Judicial Review and Stay of Further Administrative Proceedings</i>
08/20/2014	 Notice of Entry Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Notice of Entry of Order</i>
10/07/2014	 Motion Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Petitioner's Motion to Exceed Page Limits for Its Opening Brief in Support of Its Petition for Judicial Review</i>
10/07/2014	Brief Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Bombardier Transportation (Holdings) USA, Inc.'s Opening Brief in Support of Its Petition for Judicial Review</i>
10/14/2014	 Non Opposition Filed By: Defendant Nevada Labor Commissioner <i>Non-Opposition to Petitioner's Motion to Exceed Page Limits for it Opening Brief</i>
10/16/2014	 Consent to Service By Electronic Means Filed By: Defendant Clark County <i>Consent to Service by Electronic Means Through E-Filing Program</i>
10/17/2014	 Notice of Non Opposition Filed By: Defendant Clark County <i>Clark County's Notice of Non-Opposition to Petitioner's Motion to Exceed Page Limits for its Opening Brief</i>
10/21/2014	CANCELED Status Check (9:00 AM) (Judicial Officer: Sturman, Gloria) <i>Vacated</i>
11/03/2014	 Supplement Filed by: Defendant Nevada Labor Commissioner <i>Supplement to Administrative Record</i>
11/04/2014	









DEPARTMENT 15
CASE SUMMARY
CASE NO. A-14-698764-J

	 Stipulation and Order Filed by: Defendant Nevada Labor Commissioner <i>Stipulation and Order Extending Deadline for Respondents' Briefs</i>
11/05/2014	 Notice of Entry Filed By: Defendant Nevada Labor Commissioner <i>Notice of Entry of Stipulation and Order to Extend Deadline for Respondents' Briefs</i>
11/07/2014	 Notice of Entry of Order Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Notice of Entry of Order</i>
11/07/2014	 Order Granting Motion Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Order Granting Petitioner's Motion to Exceed Page Limits for Its Opening Brief in Support of Its Petition for Judicial Review</i>
11/12/2014	CANCELED Motion (9:00 AM) (Judicial Officer: Sturman, Gloria) <i>Vacated - per Order</i> <i>Petitioner's Motion to Exceed Page Limits for Its Opening Brief in Support of Its Petition for Judicial Review</i>
11/20/2014	 Motion to Strike Filed By: Defendant International Union of Elevator Constructors <i>IUEC's Motion to Strike Exhibit A to Bombardier Opening Brief</i>
11/20/2014	 Brief Filed By: Defendant International Union of Elevator Constructors <i>Brief of Respondent International Union of Elevator Constructors</i>
11/20/2014	 Motion Filed By: Defendant International Union of Elevator Constructors <i>Respondent's IUEC's Motion to Exceed Page Limits for Respondent's Answering Brief</i>
11/21/2014	 Memorandum of Points and Authorities Filed By: Defendant Clark County <i>Respondent Clark County's Memorandum of Points and Authorities</i>
11/21/2014	 Brief <i>Reply Brief of the State of Nevada Office of the Labor Commissioner</i>
12/19/2014	 Stipulation and Order Filed by: Plaintiff Bombardier Transportation Holdings USA Inc <i>Stipulation to Extend Deadlines</i>
12/19/2014	 Notice of Entry of Order Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Notice of Entry of Order</i>
01/05/2015	 Motion (3:00 PM) (Judicial Officer: Scotti, Richard F.) <i>Respondent's IUEC's Motion to Exceed Page Limits for Respondent's Answering Brief</i>
01/05/2015	Case Reassigned to Department 2 <i>District Court Case Reassignment 2015</i>

DEPARTMENT 15
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CASE NO. A-14-698764-J

01/07/2015	 Brief Filed By: Defendant International Union of Elevator Constructors <i>Brief of Respondent IUEC in Opposition to County Brief</i>
01/09/2015	 Motion for Order Extending Time Filed by: Plaintiff Bombardier Transportation Holdings USA Inc <i>Petitioner Bombardier Transportation (Holdings) USA, Inc.'s Motion to Modify the Court's December 18, 2014 Stipulated Order and Permit Bombardier to File a Consolidated Reply in Support of the Petition for Judicial Review and Opposition to Motion to Strike on January 26, 2015</i>
01/12/2015	 Brief Filed By: Defendant Nevada Labor Commissioner <i>Reply Brief of the State of Nevada Office of the Labor Commissioner to Clark County's Brief</i>
01/23/2015	 Notice of Non Opposition Filed By: Defendant International Union of Elevator Constructors <i>Respondent's IUEC's Notice of Non-Opposition to Petitioner's Motion to Modify Court's 12-18-14 Stipulated Order</i>
01/26/2015	 Reply Filed by: Defendant Clark County <i>Respondent Clark County's Reply Memorandum to Brief of Respondent IUEC in Opposition to County Brief and Reply Brief of the State of Nevada Office of the Labor Commissioner to Clark County's Brief</i>
01/26/2015	 Reply in Support Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Bombardier Transportation (Holdings) USA, Inc.'s Reply in Support Of its Petition for Judicial Review And Opposition To The Union's Motion to Strike</i>
02/10/2015	 Minute Order (3:00 PM) (Judicial Officer: Scotti, Richard F.)
02/25/2015	 Order Granting Motion Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Order Granting Plaintiff's Motion to Modify the Court's December 18, 2014 Stipulated Order</i>
03/02/2015	CANCELED Motion (3:00 AM) (Judicial Officer: Scotti, Richard F.) <i>Vacated - per Order</i> <i>Petitioner Bombardier Transportation (Holdings) USA, Inc.'s Motion to Modify the Court's December 18, 2014 Stipulated Order and Permit Bombardier to File a Consolidated Reply in Support of the Petition for Judicial Review and Opposition to Motion to Strike on January 26, 2015</i>
05/04/2015	Case Reassigned to Department 15 <i>Case reassigned from Judge Richard F Scotti Dept 2</i>
06/18/2015	 Order Scheduling Status Check <i>Order Setting Status Check</i>
06/30/2015	 Notice Filed By: Defendant International Union of Elevator Constructors <i>Notice that Matter Ready for Decision</i>
07/08/2015	 Status Check (9:00 AM) (Judicial Officer: Hardy, Joe) <i>Status Check: Setting Order</i>

DEPARTMENT 15
CASE SUMMARY
CASE NO. A-14-698764-J

12/28/2015	 Notice of Appearance <i>Notice of Change of Lead Counsel</i>
04/25/2016	 Minute Order (3:00 AM) (Judicial Officer: Hardy, Joe)
06/03/2016	 Order Scheduling Status Check <i>Order Setting Status Check</i>
07/06/2016	 Status Check (9:00 AM) (Judicial Officer: Hardy, Joe)
07/11/2016	 Findings of Fact, Conclusions of Law and Order <i>Findings of Fact, Conclusions of Law and Order</i>
07/11/2016	Order Denying Judicial Review (Judicial Officer: Hardy, Joe) Debtors: Bombardier Transportation Holdings USA Inc (Plaintiff) Creditors: Nevada Labor Commissioner (Defendant), International Union of Elevator Constructors (Defendant), Clark County (Defendant) Judgment: 07/11/2016, Docketed: 07/12/2016
07/19/2016	 Notice of Entry of Order Filed By: Defendant Nevada Labor Commissioner <i>Notice of Entry of Order</i>
08/16/2016	 Notice of Appeal Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Notice of Appeal</i>
08/16/2016	 Case Appeal Statement Filed By: Plaintiff Bombardier Transportation Holdings USA Inc <i>Case Appeal Statement</i>

DATE	FINANCIAL INFORMATION
	Defendant International Union of Elevator Constructors Total Charges 223.00 Total Payments and Credits 223.00 Balance Due as of 8/19/2016 0.00
	Plaintiff Bombardier Transportation Holdings USA Inc Total Charges 343.00 Total Payments and Credits 343.00 Balance Due as of 8/19/2016 0.00
	Plaintiff Bombardier Transportation Holdings USA Inc Appeal Bond Balance as of 8/19/2016 500.00

CIVIL COVER SHEET A-14-698764-J

County, Nevada

XXVI

Case No. _____
(Assigned by Clerk's Office)**I. Party Information**

Plaintiff(s) (name/address/phone): Bombardier Transportation (Holdings) USA, Inc. Jackson Lewis P.C., 3800 Howard Hughes Pkwy. Suite 600 Las Vegas, NV 89169 (702) 921-2460	Defendant(s) (name/address/phone): Nevada Labor Commissioner, International Union of Elevator Constructors, and Clark County
Attorney (name/address/phone):	Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)☐ **Arbitration Requested****Civil Cases**

Real Property	Torts	
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> Negligence <input type="checkbox"/> Negligence - Auto <input type="checkbox"/> Negligence - Medical/Dental <input type="checkbox"/> Negligence - Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence - Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
Estimated Estate Value: _____ <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 49 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Civil Petition for Judicial Review <input type="checkbox"/> Foreclosure Mediation <input checked="" type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment - Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

<input type="checkbox"/> NRS Chapters 78-88 <input type="checkbox"/> Commodities (NRS 90) <input type="checkbox"/> Securities (NRS 90)	<input type="checkbox"/> Investments (NRS 104 Art. 8) <input type="checkbox"/> Deceptive Trade Practices (NRS 598) <input type="checkbox"/> Trademarks (NRS 690A)	<input type="checkbox"/> Enhanced Case Mgmt/Business <input type="checkbox"/> Other Business Court Matters
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4/3/2014

Date

Signature of initiating party or representative

See other side for family-related case filings.

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

BOMBARDIER TRANSPORTATION
(HOLDINGS) USA INC.,

Petitioner,

v.

NEVADA LABOR COMMISSIONER; THE
INTERNATIONAL UNION OF ELEVATOR
CONSTRUCTORS; and CLARK COUNTY,

Respondent.

Case No.: A-14-698764-J

Dept. No.: XXVI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is before the court on a Petition for Judicial Review arising from the final decision of the Office of the Labor Commissioner dated March 6, 2014. The decision held that the maintenance contract for the Automated Transit System ("ATS") at McCarran International Airport, Contract CBE-552, is a public works project covered by NRS Chapter 338's prevailing wage requirements, and that certain work performed under its terms must be compensated at prevailing wage rates.

Although this Court may not have ruled as the Labor Commissioner did had this Court been the trier of fact, it is not within this Court's purview to substitute its judgment for those Labor Commissioner findings that are based on substantial evidence. This Court finds that the Labor Commissioner's findings are based on substantial evidence. This Court further finds that the Labor Commissioner's conclusions of law are based upon the facts, are not pure questions of law, and are not clearly erroneous, arbitrary, or capricious, and,

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

<input type="checkbox"/> Jury	<input type="checkbox"/> Disposed After Trial Starts
<input type="checkbox"/> Jury	<input type="checkbox"/> Verdict Reached
<input type="checkbox"/> Jury	<input type="checkbox"/> Judgment Reached
<input type="checkbox"/> Transferred before Trial	

JUL 15 2016

1 therefore, must be upheld. Likewise, the Labor Commissioner's interpretation of its governing
2 statutes and regulations, here NRS Chapter 338 and NAC Chapter 338, is within the statute's
3 and regulations' language and thus is entitled to deference. This Court's order also allows and
4 accounts for the Labor Commissioner's specialized knowledge, experience and expertise
5 when evaluating the evidence. To the extent questions of statutory construction would
6 generally be subject to a de novo review, the Labor Commissioner's interpretation is still
7 entitled to deference under the circumstances of this petition.

8 The Court affirms the Labor Commissioner's March 6, 2014, Order in its entirety, as set
9 forth below:

10 **I. Factual background**

11 In 2008 Clark County entered into Contract CBE-552 with Bombardier to service the
12 Automated Transit System ("ATS") at McCarran International Airport. The system uses
13 vehicles specially manufactured for the County's specifications which run on abnormally-large
14 rubber tires over a concrete guideway, and weigh over 40,000 pounds each ("ATS cars").
15 They were brought in using special cranes, required hundreds of man-hours to specially adapt
16 to their location, and they never leave McCarran except when the airport will no longer use
17 them at which time they are not put to use elsewhere, but instead their good parts stripped
18 and the rest sold for scrap.

19 Contract CBE-552 provided for payment by the County to the Company beginning at
20 \$2.7 million annually with 5% annual increases, and involved an anticipated term of 5 years.
21 Tasks done by the ATS technicians employed by Bombardier included replacing broken leaf
22 springs (basic part of the suspension, requiring 3-4 workers and more than 15 manhours),
23 replacing vehicle traction motors (usually taking 3-4 workers and over 12 manhours),
24 replacing the clamshells on the guideway installed there to protect the power lines, replacing
25 the Regional Automatic Train Control electronic circuit boards, and replacing the station doors'
26 autolocks, guides, rollers, controllers, motors, wiring and key switches. Most of the repair
27 work done by the ATS technicians here was done at night or during the daytime window while
the system was not operating.

28 **II. Procedural history**

1 The International Union of Elevator Constructors ("IUEC") filed a prevailing wage
2 complaint on October 9, 2009 against Bombardier. The complaint alleged that workers hired
3 by Bombardier under Contract CBE-552 to perform repair work on the ATS should have been
4 paid the prevailing wage, in accordance with NRS 338, but were not. Deputy Labor
5 Commissioner Keith Sakelhide issued a Complaint on October 13, 2009. He directed the
6 Clark County Department of Aviation ("DOA") to conduct an investigation into the Union's
7 allegations and determine what work was actually performed under the CBE-552 contract and
8 whether Bombardier had committed a violation. On November 24, 2009, the Department of
9 Aviation announced its determination that CBE-552 and the work performed thereunder is not
10 subject to prevailing wage under NRS Chapter 338 because it was a maintenance contract.
11 The Union objected to the Department of Aviation's findings, and the investigation was
12 returned to the Department of Aviation for further investigation.

13 The DOA issued a second Determination on March 30, 2010, affirming its initial
14 Determination. The Union filed objections, and the Labor Commissioner directed the DOA to
15 investigate the objections and respond. The Labor Commissioner issued an Interim Order on
16 June 7, 2011. The Interim Order found that work on "fixed" portions of the ATS was subject to
17 NRS 338 but work on the ATS cars was not. The DOA issued a second revised
18 Determination on July 25, 2011, asking the complaint to be dismissed because none of the
19 work on the "fixed" portions of the ATS exceeded \$100,000 and was therefore exempt from
20 prevailing wage. Finally on July 25, 2011, the Department of Aviation issued a revised
21 determination, and the Union and Bombardier both objected.

22 The matter was set for hearing, and an administrative hearing was held over six days in
23 June and September, 2013. On March 6, 2014, the Labor Commissioner issued his Decision.
24 In his Decision, the Labor Commissioner found that 20% of the work performed by
25 Bombardier for the DOA was repair work on a public work and therefore not exempt from
26 prevailing wage law. The Commissioner found the proper job class to use was Elevator
27 Constructor, a class he had previously posted pursuant to a survey of employers pursuant to
28 NRS 338.010. He ordered that the repair work performed by ATS Technicians must be
compensated at the 2007-2008 prevailing wage rate for Elevator Constructors and that the

1 DOA shall calculate the amount due pursuant to the Decision. The Labor Commissioner
2 rejected Bombardier and Clark County's arguments that the work was exempt under NRS
3 338.011(1), finding that CBE-552 was not directly related to the normal operation of the Airport
4 because it was possible for the Airport to function without the ATS and that the estimated 20%
5 of the technicians' time spent doing "corrective maintenance" was repair work and not normal
6 maintenance. He also rejected their arguments that the work was exempt pursuant to NRS
7 338.080, the "railroad company" exemption. Bombardier then filed the instant Petition for
8 Judicial Review of the Labor Commissioner's order.

9 **III. Standard of Review**

10 The right to seek judicial review of a final agency decision is both created and
11 constrained by the Nevada Administrative Procedures Act ("APA"), NRS Chapter 233B. The
12 APA provides the exclusive means for a court to review an administrative decision. NRS
13 233B.130(6). Under the APA, a general standard of deference to the agency applies in a
14 judicial review proceeding.

15 The substantive controlling standards for conducting a judicial review are set forth in
16 NRS 233B.135(3). Under these standards the Court must presume the agency's decision to
17 be reasonable and lawful and may not substitute its judgment for that of the agency on factual
18 questions. NRS 233B.135(3). Bombardier, as the petitioner in this case, bears the burden of
19 proof in this petition to show that the Labor Commissioner's decision is tainted by one of the
20 errors listed in NRS 233B.135(3).

21 A court may not foreclose the exercise of an agency's independent judgment on
22 matters that are particularly within the agency's competence. *Nevada Tax Comm'n v. Hicks*,
23 73 Nev. 115, 310 P.2d 852 (1957). A decision that is based upon an agency's exercise of
24 judgment is subject to an abuse of discretion standard. *Wynn Las Vegas, L.L.C. v.*
25 *Baldonado*, 124 Nev. 951, 311 P.3d 1179, 1181 (2013) (conducting a review of the Labor
26 Commissioner's determination of whether a particular tip-pooling arrangement was unlawful).
27 Under this standard an agency's decision may only be reversed if it is clearly erroneous or
28 arbitrary and capricious. *Maxwell v. SIRS*, 109 Nev. 327, 331, 849 P.2d 267, 271 (1993).

The Court will not re-weigh the evidence to determine whether a view is supported by a

1 preponderance of evidence, and instead is limited to reviewing the decision under the
2 substantial evidence standard. *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. ____, 327
3 P.3d 487 (Adv. Op. 27, April 3, 2014); *Construction Indus. Workers' Comp. Grp. ex rel.*
4 *Mojave Elec. v. Chalue*, 119 Nev. 348, 74 P.3d 595, 598-99 (2003). Substantial evidence is
5 the quantity of evidence which a reasonable person could accept as adequate to support a
6 conclusion. *State Employment Security Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729
7 P.2d 497, 498-499, n.1 (1986). Further, the Court should also allow for the agency to use its
8 specialized knowledge, experience and expertise when evaluating the evidence before it.
9 NRS 233B.123(5).

10 An agency charged with the duty of administering an act is impliedly clothed with
11 power to construe it as a necessary precedent to administrative action." *State v. State*
12 *Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citations omitted). Further,
13 "great deference should be given to the [administrative] agency's interpretation when it
14 is within the language of the statute." *Id.* (citations omitted). While the agency's
15 interpretation is not controlling, it is persuasive. *State Engineer v. Morris*, 107 Nev. 699,
16 701, 819 P.2d 203, 205 (1991).
17 *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 918 P.2d 697 (1996). See also
18 *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008) ("the Labor
19 Commissioner is charged with knowing and enforcing the labor laws; these responsibilities
20 acknowledge a special expertise as to those laws.").

21 A court may conduct an independent review of pure questions of law. *DMV v. Jones-*
22 *West Ford, Inc.*, 114 Nev. 766, 962 P.2d 624 (1998). However, an agency's legal conclusions
23 that are based upon the facts are not pure questions of law, and therefore are entitled to
24 deference. *Id.* Where statutory interpretation is concerned, a court may conduct an
25 independent review, but in doing so must still give consideration to the Labor Commissioner's
26 interpretation. *Office of Labor Commissioner v. Granite Const. Co.* 118 Nev. 83, 90, 40 P.3d
27 423, 428 (2002) (explaining that "[a]lthough we review questions of statutory construction *de*
28 *novo*, an administrative agency charged with the duty of administering an act is impliedly
clothed with the power to construe the relevant laws and the construction placed on a statute
by the agency charged with the duty of administering it is entitled to deference."); see also
Wynn Las Vegas, 311 P.3d at 1181-1182. While an agency's interpretation of a statute is not

1 necessarily controlling, it should be regarded as persuasive even in the context of an
2 independent review. *Nevada Power Co. v. Pub. Serv. Comm'n of Nevada*, 102 Nev. 1, 4, 711
3 P.2d 867, 869 (1986).

4 **IV. Nevada's prevailing wage law**

5 Nevada's prevailing wage statute, codified in NRS Chapter 338, requires that an
6 employee on a public work must be paid according to the prevailing wage schedule published
7 annually by the Nevada Labor Commissioner. NRS 338.020-.030. A public body sponsoring a
8 public work is responsible for ascertaining the proper prevailing wage rate from the Labor
9 Commissioner and ensuring that provisions for payment of prevailing wages are included in a
10 public works contract. NRS 338.020(1); NRS 338.030(1). The Nevada Labor Commissioner
11 is charged with ensuring compliance with these requirements and enforcing the prevailing
12 wage statutes. NRS 338.015. The Labor Commissioner is empowered to award back pay to
13 workers that have not been properly compensated and to assess fines and other penalties
14 against contractors that fail to comply with the prevailing wage laws. NRS 338.090(2); see
15 also *City Plan Dev., Inc. v. Office of Labor Commissioner*, 121 Nev. 419, 436, 117 P.3d 182,
16 193 (2005). Neither the Labor Commissioner's enforcement authority nor the workers' rights to
17 prevailing wages are constrained by the terms of a contract. NRS 338.050; NAC 338.008.

18 The actual wage rates for the recognized worker classifications are established
19 annually by a list published by the Labor Commissioner's office as mandated by NRS
20 338.030. These lists identify the job classifications that have been recognized for prevailing
21 wage purposes, provide a short description of those classifications, and specify the applicable
22 wage rate for each. See *Labor Com'r of State of Nevada v. Littlefield*, 123 Nev. 35, 40, 153
23 P.3d 26, 29 (2007).

24 Nevada's prevailing wage laws are derived from the federal Davis-Bacon Act. *Granite*
25 *Const. Co.*, 118 Nev. 83, 40 P.3d 423 (2002). Just like the federal act, Nevada's prevailing
26 wage laws are not intended to benefit employers or even the public body sponsoring a project;
27 the beneficiaries of prevailing wage laws are the workers themselves who benefit from
28 protections against substandard earnings when working on a public work. *United States v.*
Binghamton Const. Co., 347 U.S. 171, 178 (1954); *City of Reno v. Bldg. & Const. Trades*

1 *Council of N. Nevada*, 12 Nev. Adv. Op. 2, 251 P.3d 718, 721, n. 3 (2011).

2 Where the legislature adopts a law of this type that is intended to protect workers'
3 wages, the Nevada Supreme Court has recognized that such laws serve a remedial purpose
4 and "...should receive the most liberal construction to give full effect to its provisions."
5 *Alexander v. Archer*, 21 Nev. 22, 29, 24 P. 373, 375 (1890); see also *Terry v. Sapphire*
6 *Gentleman's Club*, 130 Nev. Adv. Op. 87 (Oct. 30, 2014). When construing such an act, the
7 Court's obligation is to do so in a way that will suppress the mischief and advance the remedy
8 contemplated by the legislature. *Archer*, 21 Nev. at 29, 24 P. at 375; *Int'l Game Tech., Inc. v.*
9 *Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 193, 201, 179 P.3d 556, 560-
10 61 (2008) (recognizing that "...remedial statutes... should be liberally construed to effectuate
11 the intended benefit .").

12 **V. The Labor Commissioner properly found that CBE-552 was a public works**
13 **contract**

14 Payment of prevailing wage is required for all public works contracts not otherwise
15 exempt. A "public work" is defined, in relevant part, as "any project for the new construction,
16 repair or reconstruction of...a project financed in whole or in part from public money for...public
17 buildings and all other publicly owned works or property." NRS 338.010(16) (emphasis
18 added). Bombardier does not contest the "public" nature of this work. CBE-552 concerned
19 repair work (including maintenance) on the publicly-owned ATS system at McCarran Airport.
20 The ATS is property of Clark County and was paid for with public funds.

21 Instead, Bombardier assigns error to the Commissioner's interpretation of "project".
22 Only publicly- financed "projects" require the payment of prevailing wage. NRS 338 does not
23 define "project" for purposes of interpreting its provisions. The Labor Commissioner took the
24 common-sense approach of applying dictionary definitions of the word. See, e.g., *Terry v.*
25 *Sapphire Gentleman's Club*, 130 Nev. Adv. Op. 87 (Oct. 30, 2014) (repeatedly looking to
26 dictionary definitions in order to ascertain the meaning of terms contained in Nevada's wage
27 and hour laws). The Labor Commissioner looked to two dictionary definitions that highlighted
28 advanced planning, a specific purpose, and work which extends over a considerable period of
time.

1 CBE-552 was a five-year contract with many complicated tasks to be performed over
2 that time, all with the central object of keeping the ATS running 99.65% of the time.
3 Bombardier argues this work was not a "project" because not every task was listed with a
4 deadline in the contract. However, CBE-552 spends 5 pages listing various maintenance and
5 repair tasks, and then also incorporates Preventative Maintenance Schedules, three single-
6 spaced sheets listing more than 50 scheduled inspections of different systems. The industry
7 standard from the American Society of Civil Engineers which Bombardier helped develop
8 requires a "comprehensive maintenance plan" which Bombardier cannot deny having.
9

10 The Labor Commissioner was not required to adopt Bombardier's preferred
11 interpretation of "project" as requiring prescheduling. It serves the purposes of the statute far
12 less well than the Labor Commissioner's interpretation. NRS 338 covers "repairs". It must
13 cover work that is not scheduled well in advance, because that is in the very nature of many (if
14 not most) repairs: one cannot readily predict when elevators, air conditioning or plumbing
15 systems are going to break down. Injecting a requirement that work be short-term or pre-
16 scheduled is an unrealistic narrowing of the meaning of "repair" that is inconsistent with
17 underlying purposes of prevailing wage law to protect workers and local contractors from low
18 wages.
19

20 Courts and agencies have broadly construed the term "project." See, e.g., *Arco*
21 *Materials, Inc. v. State, Taxation and Revenue Dept. Court of Appeals of New Mexico*, 878
22 P.2d 330 (N.M. 1994) (materials sold for unscheduled road maintenance and repair deemed
23 part of "construction project" where "construction" defined elsewhere in code as including
24 repairs); *People ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1323
25 (9th Cir. 1985) amended, 775 F.2d 998 (9th Cir. 1985) ("repairs to water-related structures are
26 'projects' within the meaning of the Compact.").
27
28

1 Bombardier's approach is also contrary to the holdings of courts and agencies that
2 unscheduled work in repairing construction equipment and delivering materials on site is
3 covered work. *State of Nevada Bus. & Ind. v. Granite Construction Co.*, 40 P.3d 423, 118
4 Nev. 83 (2002) (delivery drivers); *So. Nev. Operating Engineers v. Johnson*, 121 Nev. 523,
5 119 P.3d 720 (2005) (equipment greasers and repairmen); *Heller v. McLure & Sons*, 963
6 P.2d 923, 927 (Wash. App. 1998) (equipment maintenance and repair); *Griffith Co.*, 17 BNA
7 Wage & Hour Cases 49 (DOL WAB 1965) (same); *U.S. v. Sparks*, 939 F. Supp. 636 (C.D. Ill.
8 1996); *In re Vecellio & Grogan, Inc.*, 1984 WL 161749 (DOL WAB 1984)(same); *In re*
9 *Dworshak Dam*, 1973 DOL Wage App. Bd. LEXIS 9 (1973)(same); *Chester Bross Const. Co.*
10 *v. Missouri Dept. of Labor and Indus.*, 111 S.W.3d 425, 427 (Mo.App. 2003)(same).

11
12
13 **VI. "Elevator Constructor" is the applicable classification for ATS repair work**

14 The Labor Commissioner's determination that "elevator constructors" was the
15 appropriate classification is supported by substantial evidence. Decisions about the
16 appropriate classification are specifically reserved to the Labor Commissioner. See *City Plan*,
17 *supra*; NRS 338.030; NRS 338.090. The Labor Commissioner clearly stated his rationale in
18 his order. The ATS was the same type of equipment that elevator constructors work on; many
19 of the same technical skills translate between elevator constructors and the ATS technicians.
20 Many of the same tools are also used by both elevator constructors and ATS technicians. An
21 elevator constructor who became an ATS tech testified to the overlap in skills and duties. The
22 Labor Commissioner looked to the Service Contract Act's definition of elevator repairer that
23 included automated people movers and to the statement of Dan Saftrom addressing the
24 similarities between elevator constructors and ATS technicians. Elevator Constructor is the
25 job class used by the U.S. Department of Labor for automated people mover ("APM") work.
26 IUEC labor agreements filed with the Commissioner's office expressly included APMs in their
27 scope of work. Published sources repeatedly refer to APMs as "horizontal elevators". The
28 Decision that repair work under CBE-552 should have been paid at the Elevator Constructor
 rate of pay is amply supported in the record.

1
2 **VII. The Decision did not constitute “rule making” under the Administrative Procedures Act**

3 The Labor Commissioner's decision that the repair work should be paid at the Elevator
4 Constructor rate did not violate the Administrative Procedures Act. The Labor Commissioner
5 does not engage in *ad hoc* rulemaking when he applies the job descriptions from the
6 prevailing wage list to determine the correct classification. The Nevada Supreme Court was
7 quite clear about this in *City Plan Development, Inc. v. Office of the Labor Commissioner*, 121
8 Nev. 419, 117 P.3d 182 (2005). Bombardier's reliance upon *Southern Nevada Operating*
9 *Engineers Contract Compliance Trust v. Johnson*, 121 Nev. 523, 530, 119 P.3d 720, 725
10 (2005) and *Labor Commissioner v. Littlefield*, 123 Nev. 35, 153 P.3d 26 (2007) to the contrary
11 is not justified. Each of those cases concerned the wholesale removal of a recognized
12 classification from the prevailing wages list, not the application of a job description to
13 determine the applicable classification. The Court in *Johnson* and *Littlefield* reaffirmed the
14 conclusion in *City Plan*. *Johnson* 121 Nev. at 530, 119 P.3d at 725 (stating that a scenario
15 where the Labor Commissioner makes recourse to predefined job classifications “...would not
16 have been subject to the rulemaking requirements of the APA.”); *Littlefield* 123 Nev. at 43, 153
17 P.3d at 31 (stating “the APA's notice and hearing requirements do not apply to decisions that
18 merely set prevailing wage rates or place individual workers into specific classes.”).

19 The absence of the specific duties performed by the Bombardier employees does not
20 affect this conclusion. The Commissioner's published job descriptions use the phrase
21 “includes but is not limited to” to make clear to everyone that the descriptions are not
22 exhaustive. The Commissioner's introduction to his descriptions instructs all parties not finding
23 some task expressly listed in the descriptions to contact the Commissioner's office for
24 guidance. The Decision did not add or delete any classifications but simply found the
25 classification applicable to the work in question and was therefore not rule making under the
26 APA.

27 **VIII. Bombardier's repair work was not exempt as “normal operations” or “normal maintenance”**

28 NRS 338.011(1) creates an exemption for some types of work that would otherwise

1 satisfy the definition of a "public work" in NRS 338.010(16). By its very terms, the exemption
2 is both qualified and limited. The exemption only applies to a contract "...which is directly
3 related to the normal operation of the public body or the normal maintenance of its property."
4 The Labor Commissioner concluded that neither of these exceptions applied in this case. His
5 conclusion is supported by substantial evidence.

6 A. "Normal Operations"

7 In order for the NRS 338.011(1) operations exemption to apply, a contract must concern
8 operations that are "normal." NRS 338.011(1). The Labor Commissioner found that CBE-552
9 did not involve McCarran Airport's normal operations. He concluded that while the ATS is a
10 convenience to passengers, it does not affect the taking off and landing of airplanes and
11 getting passengers to their destinations, which is the normal operation of the airport. It is not
12 the exclusive means of transit from one part of the airport to another. He accepted that the
13 ATS was important to McCarran Airport but held that importance alone does not equate with
14 "normal operations." Importance in and of itself cannot satisfy this exemption as any
15 governmental expenditure is arguably important or it should not be made. He also pointed to
16 the fact that much of the work on the ATS is done at night when the system is not in use by
17 passengers. The repair work of the ATS technicians is not involved in the "normal operation"
18 even of the ATS itself let alone the airport.

19 Bombardier highlights that which it considers to be favorable evidence and requests the
20 Court to re-weight the evidence, this time in Bombardier's favor. But this does not show
21 reversible error as an administrative agency does not err merely by preferring one view of the
22 evidence over another. *Langman v. Nevada Administrators, Inc.*, 114 Nev. 203, 210, 955
23 P.2d 188, 192 (1998); see also *Malecon Tobacco, LLC v. State ex rel. Dept. of Taxation*, 118
24 Nev. 837, 841, 59 P.3d 474, 477, n.15 (2002) (courts "...must respect the judgment of the
25 agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly
26 equal reason [might] be resolved one way rather than another.'") (internal citations omitted).

27 Bombardier's reliance on its interpretation of legislative history is unavailing. The
28 statute clearly commits the application of the "normal operations" exemption to the expertise
of the Labor Commissioner. NRS 338.011(1); NRS 338.090(2); NRS 233B.135(3). In

1 analogous situations where the Legislature has established a general standard and committed
2 the application of a statutory standard to an agency the Nevada Supreme Court has
3 recognized that the agency's decision should be afforded "great deference." *Clark Cnty. Sch.*
4 *Dist. v. Local Gov't Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974);
5 *Mirin*, 92 Nev. 503, 553 P.2d 966.

6 b. *Normal Maintenance*

7 The NRS 338.011(1) exemption also applies to a contract that is "directly related to ...
8 normal maintenance." Like the normal operations exemption, the application of this
9 exemption is committed the judgment of the Labor Commissioner. NRS 338.015; NRS
10 338.090(2)(a); see also NRS 607.205. The Labor Commissioner determined that some of the
11 work under CBE-552 did in fact contain normal maintenance work, but that "some of the
12 heavy or corrective maintenance tasks go beyond the normal maintenance that would be
13 exempt under NRS 338.011. Those tasks cross over into the realm of repair." It was only
14 these tasks that went beyond normal maintenance that were subject to the prevailing wage
15 requirement.

16 Consequently CBE-552 included some exempt normal maintenance work with some
17 non-exempt repair work. The Commissioner properly concluded that prevailing wage work
18 retains that character even when it is bundled with exempt work. The Labor Commissioner
19 reasoned that NRS 338.011(1) was not intended to be used as a tool to avoid paying
20 prevailing wages for work that would rightfully be subject to prevailing wages.

21 **IX. The "railroad" exemption does not apply to the ATS or to Bombardier**

22 NRS 338.080(1) exempts work that is "...carried out by or for any railroad company or
23 any person operating the same..." from the prevailing wage requirements. The Labor
24 Commissioner took this subdivision to mean that a railroad company under this provision of
25 Nevada law is one that operates a railroad within Nevada. His conclusion is supported by
26 substantial evidence and accords with legal precedent. *Westinghouse Elec. Corp. v. Williams*,
27 325 S.E.2d 460, 462 (Ga. Ct. App. 1984) (considering whether a similar system installed at
28 Atlanta's airport was a "railroad" and finding that it was not).

Bombardier does not seriously challenge the Labor Commissioner's finding that the

1 ATS was not a railroad. Bombardier's APM system does not use a manned vehicle with steel
2 wheels running on metal rails past various properties and streets like a real railroad, but
3 instead is an unmanned car with rubber tires running over an elevated concrete guideway
4 inside a single facility. It is akin to a driverless bus. It does not run across any property lines,
5 not even leaving the property of a single public agency. For these reasons Bombardier's
6 predecessor (Westinghouse) successfully persuaded the courts that an airport APM is not a
7 "railroad" in *Westinghouse Elec. Corp.* NRS 705.690 exempts the Las Vegas Monorail from
8 Chapter 338. That exemption would have been unnecessary if any type of transit on a
9 guideway is somehow a "railroad".

10 Instead, Bombardier claims the railroad exemption based upon facts unrelated to this
11 project or even to this State. Bombardier points to the fact that it operates a railway system in
12 the east and also manufactures and sells railroad equipment elsewhere. The Commissioner
13 rejected this argument on the basis that there was no evidence to support a finding that
14 Bombardier was acting in the capacity of a railroad company within the State or in connection
15 with this project. He pointed out that Bombardier has not claimed to be a railroad under
16 Nevada law for any other purpose. Because of the public purpose served by a railroad
17 company, it is granted statutory powers that are not attached to other private corporations.
18 *Chicago Great W. Ry. Co.* at 59. It is the unique feature of operating railroad lines that
19 allowed states to single out railroad companies and treat them differently than other
20 corporations. *Missouri Pac. Ry Co. v. Mackey*, 127 U.S. 205 (1888) (considering an equal
21 protection challenge under the Fourteenth Amendment to state railroad-specific legislation).
22 The Nevada Constitution gives special treatment to railroad companies due to the public
23 interest provided by railroads. See Nev. Const. art. 8, § 10. Nevada statutes also afford
24 railroad companies special treatment on this same basis. See NRS 78.075-.085 (allowing for
25 specific organization of railroad companies and granting certain powers such as eminent
26 domain); NRS 705.010 (granting same railroad privileges to foreign railroad corporations
27 subject to the requirements of NRS Chapter 80). The record contains no evidence that
28 Bombardier was incorporated specifically as a railroad company. See *Randolph Cnty. v. Post*,
93 U.S. 502, 511 (1876) (looking to company charter to determine whether a company was a

1 railroad company). True railroads in Nevada pay fees to (and are regulated by) the Public
2 Utilities Commission of Nevada (NRS 704.309), which Bombardier has not paid.

3 The Labor Commissioner pointed out that extending the railroad company exemption to
4 companies with railroading activities elsewhere in the world would overextend the exemption
5 to permit a wide-scale avoidance of the prevailing wage obligations. The Labor
6 Commissioner's narrower application of the exemption to a company actually operating a
7 railroad is consistent with the remedial purpose of prevailing wage laws as well as the plain
8 language of NRS 338.080 that refers to "operating" a railroad company.

9 **X. The remedy ordered by the Labor Commissioner was within his authority**

10 The Labor Commissioner did not obligate Bombardier to pay prevailing wages on
11 exempt maintenance work. He ordered that the prevailing wage be paid for 20% of the hours
12 worked under CBE-552, which he estimated to be the amount of time spent on repair work
13 that went beyond normal maintenance. The contract itself attributes 20% of the work to be
14 performed to "corrective" work that the Labor Commissioner found to be repair work. Faced
15 with conflicting evidence from the parties that this type of work ranged anywhere from 10% to
16 40%, he settled the question by relying about what the contract itself provided. Bombardier, a
17 party to the contract, can hardly be heard to complain that it is inaccurate or that the Labor
18 Commissioner abused his discretion in relying upon it.

19 The Labor Commissioner's decision is in accordance with applicable law, which
20 specifies that the payment of prevailing wages is based upon the work actually being
21 performed. NAC 338.094(2)(a); *City Plan Dev., Inc.*, 121 Nev. at 433, 117 P.3d at 191
22 (upholding Labor Commissioner's prevailing wage determination that looked to the type of
23 work actually performed); *see also D.A. Elia Const. Corp. v. State*, 180 A.D.2d 881 (N.Y. App.
24 Div. 1992) (applying New York's prevailing wage law).

25 The "corrective maintenance" tasks at the outset of the contract were 60% of the work.
26 They dropped in percentage on Bombardier's records largely because the Bombardier
27 removed the codes used by workers to indicate repairs. Employers are or should be "in
28 position to know and to produce the most probative facts concerning the nature and amount of
work performed." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). *Mt.*

1 *Clemens Pottery* allows a fact-finder to make a just and reasonable inference to approximate
2 the amount of such compensable time in the absence of reliable records. *Mt Clemens Pottery*
3 at 687-88; see also *Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 820, (N.Y. App. Div.
4 1989) ("When an employer fails to keep accurate records as required by statute, the
5 Commissioner is permitted to calculate back wages due to employees by using the best
6 available evidence and to shift the burden of negating the reasonableness of the
7 Commissioner's calculations to the employer.") Bombardier argues that it was not aware of
8 its obligations to keep the payroll records required by the prevailing wage laws. See NRS
9 338.094. But this is immaterial as *Mt. Clemens Pottery* still applies even where there is a
10 *bona fide* mistake. *Mt. Clemens Pottery* at 687-88.

11 The recent U.S. Supreme Court case of *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036
12 (2016), demonstrates the continued vitality of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.
13 680 (1946). When employers such as Bombardier fail to keep proper records (as Bombardier
14 would have been required to do had the contract been properly awarded under NRS Chapter
15 338), and employees thereby have no way to establish with exactitude the time spent doing
16 uncompensated or undercompensated work, the remedial nature of Nevada's prevailing wage
17 statutory scheme, and the public policy which it embodies, militate against making the burden
18 of proving uncompensated or undercompensated work an impossible hurdle for the employee.
19 Instead of punishing the employee by denying him any recovery on the ground that he is
20 unable to prove the precise extent of uncompensated work, an employee has carried out his
21 burden if he proves that he has in fact performed work for which he was improperly
22 compensated and if he produces sufficient evidence to show the amount and extent of that
23 work as a matter of just and reasonable inferences. *Tyson Foods*, 136 S.Ct. at 1047, quoting
24 *Anderson*, 328 U.S., at 687. Under these circumstances, the burden then shifts to the
25 employer (Bombardier) to come forward with evidence of the precise amount of work
26 performed or with evidence to negative the reasonableness of the inference to be drawn from
the employee's evidence. *Id.*, quoting *Anderson*, 328 U.S., at 687-688.

27 In this case, as in *Tyson Foods*, it was proper for the Commissioner to consider
28 representative evidence to establish the amount of time the Bombardier employees spent, on

1 average, on prevailing wage work, because "each employee worked in the same facility, did
2 similar work, and was paid under the same policy." *Tyson Foods*, 136 S.Ct. at 1048. The
3 Commissioner properly considered the estimates of both Bombardier and its employees in
4 reaching his conclusion that the 20% figure in the contract probably was an accurate
5 prediction of the amount of time employees spent on "corrective" repair work.

6 **XI. IUEC's Motion to Strike**


7 The Court grants IUEC's Motion to Strike Exhibit A to Bombardier's Opening Brief for
8 the reasons set forth therein, and likewise declines to take notice of the "study done by the
9 University Reno Economics Department professors" referenced in IUEC's Motion to Strike.

10 **XII. ORDER**

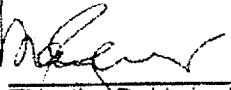
11 Having reviewed and considered the Petition for Judicial Review, the numerous briefs
12 of the parties, the legal authorities contained therein, the administrative record and
13 supplement to the administrative record, the Court hereby affirms the Nevada Labor
14 Commissioner's March 6, 2014, Decision in its entirety, and remands the Decision to the
15 Labor Commissioner solely for supervision and jurisdiction by the Labor Commissioner over
16 the payment by Bombardier pursuant to calculation to be performed by the Clark County
17 Department of Aviation as ordered in conclusions 5 and 6 on pages 12 and 13 of the Decision.
18 This order and partial remand are made pursuant to NRS 233B.135(3).

19 IT IS SO ORDERED.

20 DATED this 6th day of July, 2016.

21 
22 DISTRICT COURT JUDGE
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1 Approved as to form:

2  NSB 1419
3 Timothy Baldwin, DDA
4 Attorney for Clark County

5
6 Richard McCracken, Esq.
7 Attorney for IUEC

8
9 Adam Paul Laxalt, AG
10 Melissa L. Flatley, Deputy AG
11 Attorneys for Office of the Labor Commissioner

12 Approved as to form, but not as to content and substance¹:

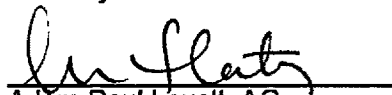
13 Paul Trimmer, Esq.
14 Attorney for Bombardier Transportation (Holdings) USA Inc.
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25 ¹ Petitioner Bombardier Transportation (Holdings) USA Inc. agrees that the form of the
26 Proposed Order is consistent with the District Court's instruction that the Proposed Order
27 adopt the arguments in the respective Respondents' Briefs. Petitioner, however, disagrees
28 with the Proposed Order's substance. Petitioner's position is that Proposed Order, including
its adopted contents, are not supported by the record. The Proposed Order, including its
adopted contents, contains reasoning and factual findings which are not present in the Labor
Commissioner's Administrative Decision.

1 Approved as to form:

2
3 Timothy Baldwin, DDA
4 Attorney for Clark County

5  for
6 Richard McCracken, Esq.
7 Attorney for IUEC

8 
9 Adam Paul Laxalt, AG
10 Melissa L. Flatley, Deputy AG
11 Attorneys for Office of the Labor Commissioner

12 Approved as to form, but not as to content and substance¹:

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14 Paul Trimmer, Esq.
15 Attorney for Bombardier Transportation (Holdings) USA Inc.

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adopted contents, contains reasoning and factual findings which are not present in the Labor
Commissioner's Administrative Decision.


CLERK OF THE COURT

1 **NEOJ**
2 ADAM PAUL LAXALT
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14 Attorneys for State of Nevada,
15 Office of the Labor Commissioner

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 BOMBARDIER TRANSPORTATION
13 (HOLDINGS) INC.,

14 Petitioner,

15 v.

16 NEVADA LABOR COMMISSIONER; THE
17 INTERNATIONAL UNION OF ELEVATOR
18 CONSTRUCTORS; and CLARK COUNTY,

19 Respondent.

Case No.: A-14-698764-J

Dept. No.: XXVI

20 **NOTICE OF ENTRY OF ORDER**

21 **TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

22 YOU AND EACH OF YOU, PLEASE TAKE NOTE that on July 11, 2016, the Court
23 entered its *Findings of Fact, Conclusions of Law and Order* in the above-referenced matter. A
24 copy of said *Findings* is attached hereto as Exhibit "1".

25 ///

26 ///

27 ///

28 ///

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned hereby affirms that the foregoing document *Notice of Entry of Order*, does not contain the personal information of any person.

Dated this 19th day of July 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Melissa L. Flatley
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*Attorneys for State of Nevada,
Office of the Labor Commissioner*

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada Office of the Attorney General, and that on the 19th day of July 2016, I served the foregoing *Notice of Entry of Order* on all parties receiving service by electronic transmission through the Wiznet System in this action as follows:

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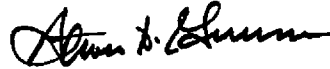
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/s/ Susan Dehnen
An Employee of the
Office of the Attorney General

INDEX OF EXHIBITS

Exhibit Number	Title/Description	Number of Pages
1	Findings of Fact, Conclusions of Law and Order	18



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

BOMBARDIER TRANSPORTATION
(HOLDINGS) USA INC.,

Petitioner,

v.

NEVADA LABOR COMMISSIONER; THE
INTERNATIONAL UNION OF ELEVATOR
CONSTRUCTORS; and CLARK COUNTY,

Respondent.

Case No.: A-14-698764-J

Dept. No.: XXVI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is before the court on a Petition for Judicial Review arising from the final decision of the Office of the Labor Commissioner dated March 6, 2014. The decision held that the maintenance contract for the Automated Transit System ("ATS") at McCarran International Airport, Contract CBE-552, is a public works project covered by NRS Chapter 338's prevailing wage requirements, and that certain work performed under its terms must be compensated at prevailing wage rates.

Although this Court may not have ruled as the Labor Commissioner did had this Court been the trier of fact, it is not within this Court's purview to substitute its judgment for those Labor Commissioner findings that are based on substantial evidence. This Court finds that the Labor Commissioner's findings are based on substantial evidence. This Court further finds that the Labor Commissioner's conclusions of law are based upon the facts, are not pure questions of law, and are not clearly erroneous, arbitrary, or capricious, and,

Nevada Office of the Attorney General
100 North Carson Street
Carson City, NV 89701-4717

<input type="checkbox"/> Non-jury Disposed After Trial Start	<input type="checkbox"/> Jury Dismissed After Trial Start
<input type="checkbox"/> Non-jury Judgment Entered Before Trial	<input type="checkbox"/> Jury Verdict Reached
<input type="checkbox"/> Non-jury Trial Before Trial	<input type="checkbox"/> Jury Other

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1 therefore, must be upheld. Likewise, the Labor Commissioner's interpretation of its governing
2 statutes and regulations, here NRS Chapter 338 and NAC Chapter 338, is within the statute's
3 and regulations' language and thus is entitled to deference. This Court's order also allows and
4 accounts for the Labor Commissioner's specialized knowledge, experience and expertise
5 when evaluating the evidence. To the extent questions of statutory construction would
6 generally be subject to a de novo review, the Labor Commissioner's interpretation is still
7 entitled to deference under the circumstances of this petition.

8 The Court affirms the Labor Commissioner's March 6, 2014, Order in its entirety, as set
9 forth below:

10 **I. Factual background**

11 In 2008 Clark County entered into Contract CBE-552 with Bombardier to service the
12 Automated Transit System ("ATS") at McCarran International Airport. The system uses
13 vehicles specially manufactured for the County's specifications which run on abnormally-large
14 rubber tires over a concrete guideway, and weigh over 40,000 pounds each ("ATS cars").
15 They were brought in using special cranes, required hundreds of man-hours to specially adapt
16 to their location, and they never leave McCarran except when the airport will no longer use
17 them at which time they are not put to use elsewhere, but instead their good parts stripped
18 and the rest sold for scrap.

19 Contract CBE-552 provided for payment by the County to the Company beginning at
20 \$2.7 million annually with 5% annual increases, and involved an anticipated term of 5 years.
21 Tasks done by the ATS technicians employed by Bombardier included replacing broken leaf
22 springs (basic part of the suspension, requiring 3-4 workers and more than 15 manhours),
23 replacing vehicle traction motors (usually taking 3-4 workers and over 12 manhours),
24 replacing the clamshells on the guideway installed there to protect the power lines, replacing
25 the Regional Automatic Train Control electronic circuit boards, and replacing the station doors'
26 autolocks, guides, rollers, controllers, motors, wiring and key switches. Most of the repair
27 work done by the ATS technicians here was done at night or during the daytime window while
28 the system was not operating.

II. Procedural history

1 The International Union of Elevator Constructors ("IUEC") filed a prevailing wage
2 complaint on October 9, 2009 against Bombardier. The complaint alleged that workers hired
3 by Bombardier under Contract CBE-552 to perform repair work on the ATS should have been
4 paid the prevailing wage, in accordance with NRS 338, but were not. Deputy Labor
5 Commissioner Keith Sakelhide issued a Complaint on October 13, 2009. He directed the
6 Clark County Department of Aviation ("DOA") to conduct an investigation into the Union's
7 allegations and determine what work was actually performed under the CBE-552 contract and
8 whether Bombardier had committed a violation. On November 24, 2009, the Department of
9 Aviation announced its determination that CBE-552 and the work performed thereunder is not
10 subject to prevailing wage under NRS Chapter 338 because it was a maintenance contract.
11 The Union objected to the Department of Aviation's findings, and the investigation was
12 returned to the Department of Aviation for further investigation.

13 The DOA issued a second Determination on March 30, 2010, affirming its initial
14 Determination. The Union filed objections, and the Labor Commissioner directed the DOA to
15 investigate the objections and respond. The Labor Commissioner issued an Interim Order on
16 June 7, 2011. The Interim Order found that work on "fixed" portions of the ATS was subject to
17 NRS 338 but work on the ATS cars was not. The DOA issued a second revised
18 Determination on July 25, 2011, asking the complaint to be dismissed because none of the
19 work on the "fixed" portions of the ATS exceeded \$100,000 and was therefore exempt from
20 prevailing wage. Finally on July 25, 2011, the Department of Aviation issued a revised
21 determination, and the Union and Bombardier both objected.

22 The matter was set for hearing, and an administrative hearing was held over six days in
23 June and September, 2013. On March 6, 2014, the Labor Commissioner issued his Decision.
24 In his Decision, the Labor Commissioner found that 20% of the work performed by
25 Bombardier for the DOA was repair work on a public work and therefore not exempt from
26 prevailing wage law. The Commissioner found the proper job class to use was Elevator
27 Constructor, a class he had previously posted pursuant to a survey of employers pursuant to
28 NRS 338.010. He ordered that the repair work performed by ATS Technicians must be
compensated at the 2007-2008 prevailing wage rate for Elevator Constructors and that the

1 DOA shall calculate the amount due pursuant to the Decision. The Labor Commissioner
2 rejected Bombardier and Clark County's arguments that the work was exempt under NRS
3 338.011(1), finding that CBE-552 was not directly related to the normal operation of the Airport
4 because it was possible for the Airport to function without the ATS and that the estimated 20%
5 of the technicians' time spent doing "corrective maintenance" was repair work and not normal
6 maintenance. He also rejected their arguments that the work was exempt pursuant to NRS
7 338.080, the "railroad company" exemption. Bombardier then filed the instant Petition for
8 Judicial Review of the Labor Commissioner's order.

9 **III. Standard of Review**

10 The right to seek judicial review of a final agency decision is both created and
11 constrained by the Nevada Administrative Procedures Act ("APA"), NRS Chapter 233B. The
12 APA provides the exclusive means for a court to review an administrative decision. NRS
13 233B.130(6). Under the APA, a general standard of deference to the agency applies in a
14 judicial review proceeding.

15 The substantive controlling standards for conducting a judicial review are set forth in
16 NRS 233B.135(3). Under these standards the Court must presume the agency's decision to
17 be reasonable and lawful and may not substitute its judgment for that of the agency on factual
18 questions. NRS 233B.135(3). Bombardier, as the petitioner in this case, bears the burden of
19 proof in this petition to show that the Labor Commissioner's decision is tainted by one of the
20 errors listed in NRS 233B.135(3).

21 A court may not foreclose the exercise of an agency's independent judgment on
22 matters that are particularly within the agency's competence. *Nevada Tax Comm'n v. Hicks*,
23 73 Nev. 115, 310 P.2d 852 (1957). A decision that is based upon an agency's exercise of
24 judgment is subject to an abuse of discretion standard. *Wynn Las Vegas, L.L.C. v.*
25 *Baldonado*, 124 Nev. 951, 311 P.3d 1179, 1181 (2013) (conducting a review of the Labor
26 Commissioner's determination of whether a particular tip-pooling arrangement was unlawful).
27 Under this standard an agency's decision may only be reversed if it is clearly erroneous or
28 arbitrary and capricious. *Maxwell v. SIRS*, 109 Nev. 327, 331, 849 P.2d 267, 271 (1993).

The Court will not re-weigh the evidence to determine whether a view is supported by a

1 preponderance of evidence, and instead is limited to reviewing the decision under the
2 substantial evidence standard. *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. ____, 327
3 P.3d 487 (Adv. Op. 27, April 3, 2014); *Construction Indus. Workers' Comp. Grp. ex rel.*
4 *Mojave Elec. v. Chalue*, 119 Nev. 348, 74 P.3d 595, 598-99 (2003). Substantial evidence is
5 the quantity of evidence which a reasonable person could accept as adequate to support a
6 conclusion. *State Employment Security Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729
7 P.2d 497, 498-499, n.1 (1986). Further, the Court should also allow for the agency to use its
8 specialized knowledge, experience and expertise when evaluating the evidence before it.
9 NRS 233B.123(5).

10 An agency charged with the duty of administering an act is impliedly clothed with
11 power to construe it as a necessary precedent to administrative action." *State v. State*
12 *Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citations omitted). Further,
13 "great deference should be given to the [administrative] agency's interpretation when it
14 is within the language of the statute." *Id.* (citations omitted). While the agency's
15 interpretation is not controlling, it is persuasive. *State Engineer v. Morris*, 107 Nev. 699,
16 701, 819 P.2d 203, 205 (1991).

17 *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 918 P.2d 697 (1996). See also
18 *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008) ("the Labor
19 Commissioner is charged with knowing and enforcing the labor laws; these responsibilities
20 acknowledge a special expertise as to those laws.").

21 A court may conduct an independent review of pure questions of law. *DMV v. Jones-*
22 *West Ford, Inc.*, 114 Nev. 766, 962 P.2d 624 (1998). However, an agency's legal conclusions
23 that are based upon the facts are not pure questions of law, and therefore are entitled to
24 deference. *Id.* Where statutory interpretation is concerned, a court may conduct an
25 independent review, but in doing so must still give consideration to the Labor Commissioner's
26 interpretation. *Office of Labor Commissioner v. Granite Const. Co.* 118 Nev. 83, 90, 40 P.3d
27 423, 428 (2002) (explaining that "[a]lthough we review questions of statutory construction *de*
28 *novo*, an administrative agency charged with the duty of administering an act is impliedly
clothed with the power to construe the relevant laws and the construction placed on a statute
by the agency charged with the duty of administering it is entitled to deference."); see also
Wynn Las Vegas, 311 P.3d at 1181-1182. While an agency's interpretation of a statute is not

1 necessarily controlling, it should be regarded as persuasive even in the context of an
2 independent review. *Nevada Power Co. v. Pub. Serv. Comm'n of Nevada*, 102 Nev. 1, 4, 711
3 P.2d 867, 869 (1986).

4 **IV. Nevada's prevailing wage law**

5 Nevada's prevailing wage statute, codified in NRS Chapter 338, requires that an
6 employee on a public work must be paid according to the prevailing wage schedule published
7 annually by the Nevada Labor Commissioner. NRS 338.020-.030. A public body sponsoring a
8 public work is responsible for ascertaining the proper prevailing wage rate from the Labor
9 Commissioner and ensuring that provisions for payment of prevailing wages are included in a
10 public works contract. NRS 338.020(1); NRS 338.030(1). The Nevada Labor Commissioner
11 is charged with ensuring compliance with these requirements and enforcing the prevailing
12 wage statutes. NRS 338.015. The Labor Commissioner is empowered to award back pay to
13 workers that have not been properly compensated and to assess fines and other penalties
14 against contractors that fail to comply with the prevailing wage laws. NRS 338.090(2); see
15 also *City Plan Dev., Inc. v. Office of Labor Commissioner*, 121 Nev. 419, 436, 117 P.3d 182,
16 193 (2005). Neither the Labor Commissioner's enforcement authority nor the workers' rights to
17 prevailing wages are constrained by the terms of a contract. NRS 338.050; NAC 338.008.

18 The actual wage rates for the recognized worker classifications are established
19 annually by a list published by the Labor Commissioner's office as mandated by NRS
20 338.030. These lists identify the job classifications that have been recognized for prevailing
21 wage purposes, provide a short description of those classifications, and specify the applicable
22 wage rate for each. See *Labor Com'r of State of Nevada v. Littlefield*, 123 Nev. 35, 40, 153
23 P.3d 26, 29 (2007).

24 Nevada's prevailing wage laws are derived from the federal Davis-Bacon Act. *Granite*
25 *Const. Co.*, 118 Nev. 83, 40 P.3d 423 (2002). Just like the federal act, Nevada's prevailing
26 wage laws are not intended to benefit employers or even the public body sponsoring a project;
27 the beneficiaries of prevailing wage laws are the workers themselves who benefit from
28 protections against substandard earnings when working on a public work. *United States v.*
Binghamton Const. Co., 347 U.S. 171, 178 (1954); *City of Reno v. Bldg. & Const. Trades*

1 *Council of N. Nevada*, 12 Nev. Adv. Op. 2, 251 P.3d 718, 721, n. 3 (2011).

2 Where the legislature adopts a law of this type that is intended to protect workers'
3 wages, the Nevada Supreme Court has recognized that such laws serve a remedial purpose
4 and "...should receive the most liberal construction to give full effect to its provisions."
5 *Alexander v. Archer*, 21 Nev. 22, 29, 24 P. 373, 375 (1890); see also *Terry v. Sapphire*
6 *Gentleman's Club*, 130 Nev. Adv. Op. 87 (Oct. 30, 2014). When construing such an act, the
7 Court's obligation is to do so in a way that will suppress the mischief and advance the remedy
8 contemplated by the legislature. *Archer*, 21 Nev. at 29, 24 P. at 375; *Int'l Game Tech., Inc. v.*
9 *Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 193, 201, 179 P.3d 556, 560-
10 61 (2008) (recognizing that "...remedial statutes... should be liberally construed to effectuate
11 the intended benefit .").

12 **V. The Labor Commissioner properly found that CBE-552 was a public works**
13 **contract**

14 Payment of prevailing wage is required for all public works contracts not otherwise
15 exempt. A "public work" is defined, in relevant part, as "any project for the new construction,
16 repair or reconstruction of...a project financed in whole or in part from public money for...public
17 buildings and all other publicly owned works or property." NRS 338.010(16) (emphasis
18 added). Bombardier does not contest the "public" nature of this work. CBE-552 concerned
19 repair work (including maintenance) on the publicly-owned ATS system at McCarran Airport.
20 The ATS is property of Clark County and was paid for with public funds.

21 Instead, Bombardier assigns error to the Commissioner's interpretation of "project".
22 Only publicly- financed "projects" require the payment of prevailing wage. NRS 338 does not
23 define "project" for purposes of interpreting its provisions. The Labor Commissioner took the
24 common-sense approach of applying dictionary definitions of the word. See, e.g., *Terry v.*
25 *Sapphire Gentleman's Club*, 130 Nev. Adv. Op. 87 (Oct. 30, 2014) (repeatedly looking to
26 dictionary definitions in order to ascertain the meaning of terms contained in Nevada's wage
27 and hour laws). The Labor Commissioner looked to two dictionary definitions that highlighted
28 advanced planning, a specific purpose, and work which extends over a considerable period of
time.

1 CBE-552 was a five-year contract with many complicated tasks to be performed over
2 that time, all with the central object of keeping the ATS running 99.65% of the time.
3 Bombardier argues this work was not a "project" because not every task was listed with a
4 deadline in the contract. However, CBE-552 spends 5 pages listing various maintenance and
5 repair tasks, and then also incorporates Preventative Maintenance Schedules, three single-
6 spaced sheets listing more than 50 scheduled inspections of different systems. The industry
7 standard from the American Society of Civil Engineers which Bombardier helped develop
8 requires a "comprehensive maintenance plan" which Bombardier cannot deny having.
9

10 The Labor Commissioner was not required to adopt Bombardier's preferred
11 interpretation of "project" as requiring prescheduling. It serves the purposes of the statute far
12 less well than the Labor Commissioner's interpretation. NRS 338 covers "repairs". It must
13 cover work that is not scheduled well in advance, because that is in the very nature of many (if
14 not most) repairs: one cannot readily predict when elevators, air conditioning or plumbing
15 systems are going to break down. Injecting a requirement that work be short-term or pre-
16 scheduled is an unrealistic narrowing of the meaning of "repair" that is inconsistent with
17 underlying purposes of prevailing wage law to protect workers and local contractors from low
18 wages.
19

20 Courts and agencies have broadly construed the term "project." See, e.g., *Arco*
21 *Materials, Inc. v. State, Taxation and Revenue Dept. Court of Appeals of New Mexico*, 878
22 *P.2d 330 (N.M. 1994)* (materials sold for unscheduled road maintenance and repair deemed
23 part of "construction project" where "construction" defined elsewhere in code as including
24 repairs); *People ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1323
25 (9th Cir. 1985) amended, 775 F.2d 998 (9th Cir. 1985) ("repairs to water-related structures are
26 'projects' within the meaning of the Compact.").
27
28

1 Bombardier's approach is also contrary to the holdings of courts and agencies that
2 unscheduled work in repairing construction equipment and delivering materials on site is
3 covered work. *State of Nevada Bus. & Ind. v. Granite Construction Co.*, 40 P.3d 423, 118
4 Nev. 83 (2002) (delivery drivers); *So. Nev. Operating Engineers v. Johnson*, 121 Nev. 523,
5 119 P.3d 720 (2005) (equipment greasers and repairmen); *Heller v. McLure & Sons*, 963
6 P.2d 923, 927 (Wash. App. 1998) (equipment maintenance and repair); *Griffith Co.*, 17 BNA
7 Wage & Hour Cases 49 (DOL WAB 1965) (same); *U.S. v. Sparks*, 939 F. Supp. 636 (C.D. Ill.
8 1996); *In re Vecellio & Grogan, Inc.*, 1984 WL 161749 (DOL WAB 1984)(same); *In re*
9 *Dworshak Dam*, 1973 DOL Wage App. Bd. LEXIS 9 (1973)(same); *Chester Bross Const. Co.*
10 *v. Missouri Dept. of Labor and Indus.*, 111 S.W.3d 425, 427 (Mo.App. 2003)(same).

11
12 **VI. "Elevator Constructor" is the applicable classification for ATS repair work**

13 The Labor Commissioner's determination that "elevator constructors" was the
14 appropriate classification is supported by substantial evidence. Decisions about the
15 appropriate classification are specifically reserved to the Labor Commissioner. See *City Plan*,
16 *supra*; NRS 338.030; NRS 338.090. The Labor Commissioner clearly stated his rationale in
17 his order. The ATS was the same type of equipment that elevator constructors work on; many
18 of the same technical skills translate between elevator constructors and the ATS technicians.
19 Many of the same tools are also used by both elevator constructors and ATS technicians. An
20 elevator constructor who became an ATS tech testified to the overlap in skills and duties. The
21 Labor Commissioner looked to the Service Contract Act's definition of elevator repairer that
22 included automated people movers and to the statement of Dan Safbrom addressing the
23 similarities between elevator constructors and ATS technicians. Elevator Constructor is the
24 job class used by the U.S. Department of Labor for automated people mover ("APM") work.
25 IUEC labor agreements filed with the Commissioner's office expressly included APMs in their
26 scope of work. Published sources repeatedly refer to APMs as "horizontal elevators". The
27 Decision that repair work under CBE-552 should have been paid at the Elevator Constructor
28 rate of pay is amply supported in the record.

1 **VII. The Decision did not constitute "rule making" under the Administrative**
2 **Procedures Act**

3 The Labor Commissioner's decision that the repair work should be paid at the Elevator
4 Constructor rate did not violate the Administrative Procedures Act. The Labor Commissioner
5 does not engage in *ad hoc* rulemaking when he applies the job descriptions from the
6 prevailing wage list to determine the correct classification. The Nevada Supreme Court was
7 quite clear about this in *City Plan Development, Inc. v. Office of the Labor Commissioner*, 121
8 Nev. 419, 117 P.3d 182 (2005). Bombardier's reliance upon *Southern Nevada Operating*
9 *Engineers Contract Compliance Trust v. Johnson*, 121 Nev. 523, 530, 119 P.3d 720, 725
10 (2005) and *Labor Commissioner v. Littlefield*, 123 Nev. 35, 153 P.3d 26 (2007) to the contrary
11 is not justified. Each of those cases concerned the wholesale removal of a recognized
12 classification from the prevailing wages list, not the application of a job description to
13 determine the applicable classification. The Court in *Johnson* and *Littlefield* reaffirmed the
14 conclusion in *City Plan*. *Johnson* 121 Nev. at 530, 119 P.3d at 725 (stating that a scenario
15 where the Labor Commissioner makes recourse to predefined job classifications "...would not
16 have been subject to the rulemaking requirements of the APA."); *Littlefield* 123 Nev. at 43, 153
17 P.3d at 31 (stating "the APA's notice and hearing requirements do not apply to decisions that
18 merely set prevailing wage rates or place individual workers into specific classes.").

19 The absence of the specific duties performed by the Bombardier employees does not
20 affect this conclusion. The Commissioner's published job descriptions use the phrase
21 "includes but is not limited to" to make clear to everyone that the descriptions are not
22 exhaustive. The Commissioner's introduction to his descriptions instructs all parties not finding
23 some task expressly listed in the descriptions to contact the Commissioner's office for
24 guidance. The Decision did not add or delete any classifications but simply found the
25 classification applicable to the work in question and was therefore not rule making under the
26 APA.

27 **VIII. Bombardier's repair work was not exempt as "normal operations" or "normal**
28 **maintenance"**

NRS 338.011(1) creates an exemption for some types of work that would otherwise

1 satisfy the definition of a "public work" in NRS 338.010(16). By its very terms, the exemption
2 is both qualified and limited. The exemption only applies to a contract "...which is directly
3 related to the normal operation of the public body or the normal maintenance of its property."
4 The Labor Commissioner concluded that neither of these exceptions applied in this case. His
5 conclusion is supported by substantial evidence.

6 A. "Normal Operations"

7 In order for the NRS 338.011(1) operations exemption to apply, a contract must concern
8 operations that are "normal." NRS 338.011(1). The Labor Commissioner found that CBE-552
9 did not involve McCarran Airport's normal operations. He concluded that while the ATS is a
10 convenience to passengers, it does not affect the taking off and landing of airplanes and
11 getting passengers to their destinations, which is the normal operation of the airport. It is not
12 the exclusive means of transit from one part of the airport to another. He accepted that the
13 ATS was important to McCarran Airport but held that importance alone does not equate with
14 "normal operations." Importance in and of itself cannot satisfy this exemption as any
15 governmental expenditure is arguably important or it should not be made. He also pointed to
16 the fact that much of the work on the ATS is done at night when the system is not in use by
17 passengers. The repair work of the ATS technicians is not involved in the "normal operation"
18 even of the ATS itself let alone the airport.

19 Bombardier highlights that which it considers to be favorable evidence and requests the
20 Court to re-weigh the evidence, this time in Bombardier's favor. But this does not show
21 reversible error as an administrative agency does not err merely by preferring one view of the
22 evidence over another. *Langman v. Nevada Administrators, Inc.*, 114 Nev. 203, 210, 955
23 P.2d 188, 192 (1998); *see also Malecon Tobacco, LLC v. State ex rel. Dept. of Taxation*, 118
24 Nev. 837, 841, 59 P.3d 474, 477, n.15 (2002) (courts "...must respect the judgment of the
25 agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly
26 equal reason [might] be resolved one way rather than another.')" (internal citations omitted).

27 Bombardier's reliance on its interpretation of legislative history is unavailing. The
28 statute clearly commits the application of the "normal operations" exemption to the expertise
of the Labor Commissioner. NRS 338.011(1); NRS 338.090(2); NRS 233B.135(3). In

1 analogous situations where the Legislature has established a general standard and committed
2 the application of a statutory standard to an agency the Nevada Supreme Court has
3 recognized that the agency's decision should be afforded "great deference." *Clark Cnty. Sch.*
4 *Dist. v. Local Gov't Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974);
5 *Mirin*, 92 Nev. 503, 553 P.2d 966.

6 b. *Normal Maintenance*

7 The NRS 338.011(1) exemption also applies to a contract that is "directly related to ...
8 normal maintenance." Like the normal operations exemption, the application of this
9 exemption is committed the judgment of the Labor Commissioner. NRS 338.015; NRS
10 338.090(2)(a); *see also* NRS 607.205. The Labor Commissioner determined that some of the
11 work under CBE-552 did in fact contain normal maintenance work, but that "some of the
12 heavy or corrective maintenance tasks go beyond the normal maintenance that would be
13 exempt under NRS 338.011. Those tasks cross over into the realm of repair." It was only
14 these tasks that went beyond normal maintenance that were subject to the prevailing wage
15 requirement.

16 Consequently CBE-552 included some exempt normal maintenance work with some
17 non-exempt repair work. The Commissioner properly concluded that prevailing wage work
18 retains that character even when it is bundled with exempt work. The Labor Commissioner
19 reasoned that NRS 338.011(1) was not intended to be used as a tool to avoid paying
20 prevailing wages for work that would rightfully be subject to prevailing wages.

21 **IX. The "railroad" exemption does not apply to the ATS or to Bombardier**

22 NRS 338.080(1) exempts work that is "...carried out by or for any railroad company or
23 any person operating the same..." from the prevailing wage requirements. The Labor
24 Commissioner took this subdivision to mean that a railroad company under this provision of
25 Nevada law is one that operates a railroad within Nevada. His conclusion is supported by
26 substantial evidence and accords with legal precedent. *Westinghouse Elec. Corp. v. Williams*,
27 325 S.E.2d 460, 462 (Ga. Ct. App. 1984) (considering whether a similar system installed at
28 Atlanta's airport was a "railroad" and finding that it was not).

Bombardier does not seriously challenge the Labor Commissioner's finding that the

1 ATS was not a railroad. Bombardier's APM system does not use a manned vehicle with steel
2 wheels running on metal rails past various properties and streets like a real railroad, but
3 instead is an unmanned car with rubber tires running over an elevated concrete guideway
4 inside a single facility. It is akin to a driverless bus. It does not run across any property lines,
5 not even leaving the property of a single public agency. For these reasons Bombardier's
6 predecessor (Westinghouse) successfully persuaded the courts that an airport APM is not a
7 "railroad" in *Westinghouse Elec. Corp.* NRS 705.690 exempts the Las Vegas Monorail from
8 Chapter 338. That exemption would have been unnecessary if any type of transit on a
9 guideway is somehow a "railroad".

10 Instead, Bombardier claims the railroad exemption based upon facts unrelated to this
11 project or even to this State. Bombardier points to the fact that it operates a railway system in
12 the east and also manufactures and sells railroad equipment elsewhere. The Commissioner
13 rejected this argument on the basis that there was no evidence to support a finding that
14 Bombardier was acting in the capacity of a railroad company within the State or in connection
15 with this project. He pointed out that Bombardier has not claimed to be a railroad under
16 Nevada law for any other purpose. Because of the public purpose served by a railroad
17 company, it is granted statutory powers that are not attached to other private corporations.
18 *Chicago Great W. Ry. Co.* at 59. It is the unique feature of operating railroad lines that
19 allowed states to single out railroad companies and treat them differently than other
20 corporations. *Missouri Pac. Ry Co. v. Mackey*, 127 U.S. 205 (1888) (considering an equal
21 protection challenge under the Fourteenth Amendment to state railroad-specific legislation).
22 The Nevada Constitution gives special treatment to railroad companies due to the public
23 interest provided by railroads. See Nev. Const. art. 8, § 10. Nevada statutes also afford
24 railroad companies special treatment on this same basis. See NRS 78.075-.085 (allowing for
25 specific organization of railroad companies and granting certain powers such as eminent
26 domain); NRS 705.010 (granting same railroad privileges to foreign railroad corporations
27 subject to the requirements of NRS Chapter 80). The record contains no evidence that
28 Bombardier was incorporated specifically as a railroad company. See *Randolph Cnty. v. Post*,
93 U.S. 502, 511 (1876) (looking to company charter to determine whether a company was a

1 railroad company). True railroads in Nevada pay fees to (and are regulated by) the Public
2 Utilities Commission of Nevada (NRS 704.309), which Bombardier has not paid.

3 The Labor Commissioner pointed out that extending the railroad company exemption to
4 companies with railroading activities elsewhere in the world would overextend the exemption
5 to permit a wide-scale avoidance of the prevailing wage obligations. The Labor
6 Commissioner's narrower application of the exemption to a company actually operating a
7 railroad is consistent with the remedial purpose of prevailing wage laws as well as the plain
8 language of NRS 338.080 that refers to "operating" a railroad company.

9 **X. The remedy ordered by the Labor Commissioner was within his authority**

10 The Labor Commissioner did not obligate Bombardier to pay prevailing wages on
11 exempt maintenance work. He ordered that the prevailing wage be paid for 20% of the hours
12 worked under CBE-552, which he estimated to be the amount of time spent on repair work
13 that went beyond normal maintenance. The contract itself attributes 20% of the work to be
14 performed to "corrective" work that the Labor Commissioner found to be repair work. Faced
15 with conflicting evidence from the parties that this type of work ranged anywhere from 10% to
16 40%, he settled the question by relying about what the contract itself provided. Bombardier, a
17 party to the contract, can hardly be heard to complain that it is inaccurate or that the Labor
18 Commissioner abused his discretion in relying upon it.

19 The Labor Commissioner's decision is in accordance with applicable law, which
20 specifies that the payment of prevailing wages is based upon the work actually being
21 performed. NAC 338.094(2)(a); *City Plan Dev., Inc.*, 121 Nev. at 433, 117 P.3d at 191
22 (upholding Labor Commissioner's prevailing wage determination that looked to the type of
23 work actually performed); *see also D.A. Elia Const. Corp. v. State*, 180 A.D.2d 881 (N.Y. App.
24 Div. 1992) (applying New York's prevailing wage law).

25 The "corrective maintenance" tasks at the outset of the contract were 60% of the work.
26 They dropped in percentage on Bombardier's records largely because the Bombardier
27 removed the codes used by workers to indicate repairs. Employers are or should be "in
28 position to know and to produce the most probative facts concerning the nature and amount of
work performed." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). *Mt.*

1 *Clemens Pottery* allows a fact-finder to make a just and reasonable inference to approximate
2 the amount of such compensable time in the absence of reliable records. *Mt Clemens Pottery*
3 at 687-88; see also *Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 820, (N.Y. App. Div.
4 1989) ("When an employer fails to keep accurate records as required by statute, the
5 Commissioner is permitted to calculate back wages due to employees by using the best
6 available evidence and to shift the burden of negating the reasonableness of the
7 Commissioner's calculations to the employer.") Bombardier argues that it was not aware of
8 its obligations to keep the payroll records required by the prevailing wage laws. See NRS
9 338.094. But this is immaterial as *Mt. Clemens Pottery* still applies even where there is a
10 *bona fide* mistake. *Mt. Clemens Pottery* at 687-88.

11 The recent U.S. Supreme Court case of *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036
12 (2016), demonstrates the continued vitality of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.
13 680 (1946). When employers such as Bombardier fail to keep proper records (as Bombardier
14 would have been required to do had the contract been properly awarded under NRS Chapter
15 338), and employees thereby have no way to establish with exactitude the time spent doing
16 uncompensated or undercompensated work, the remedial nature of Nevada's prevailing wage
17 statutory scheme, and the public policy which it embodies, militate against making the burden
18 of proving uncompensated or undercompensated work an impossible hurdle for the employee.
19 Instead of punishing the employee by denying him any recovery on the ground that he is
20 unable to prove the precise extent of uncompensated work, an employee has carried out his
21 burden if he proves that he has in fact performed work for which he was improperly
22 compensated and if he produces sufficient evidence to show the amount and extent of that
23 work as a matter of just and reasonable inferences. *Tyson Foods*, 136 S.Ct. at 1047, quoting
24 *Anderson*, 328 U.S., at 687. Under these circumstances, the burden then shifts to the
25 employer (Bombardier) to come forward with evidence of the precise amount of work
26 performed or with evidence to negative the reasonableness of the inference to be drawn from
27 the employee's evidence. *Id.*, quoting *Anderson*, 328 U.S., at 687-688.

28 In this case, as in *Tyson Foods*, it was proper for the Commissioner to consider
representative evidence to establish the amount of time the Bombardier employees spent, on

1 average, on prevailing wage work, because "each employee worked in the same facility, did
2 similar work, and was paid under the same policy." *Tyson Foods*, 136 S.Ct. at 1048. The
3 Commissioner properly considered the estimates of both Bombardier and its employees in
4 reaching his conclusion that the 20% figure in the contract probably was an accurate
5 prediction of the amount of time employees spent on "corrective" repair work.

6 **XI. IUEC's Motion to Strike**

7 The Court grants IUEC's Motion to Strike Exhibit A to Bombardier's Opening Brief for
8 the reasons set forth therein, and likewise declines to take notice of the "study done by the
9 University Reno Economics Department professors" referenced in IUEC's Motion to Strike.

10 **XII. ORDER**

11 Having reviewed and considered the Petition for Judicial Review, the numerous briefs
12 of the parties, the legal authorities contained therein, the administrative record and
13 supplement to the administrative record, the Court hereby affirms the Nevada Labor
14 Commissioner's March 6, 2014, Decision in its entirety, and remands the Decision to the
15 Labor Commissioner solely for supervision and jurisdiction by the Labor Commissioner over
16 the payment by Bombardier pursuant to calculation to be performed by the Clark County
17 Department of Aviation as ordered in conclusions 5 and 6 on pages 12 and 13 of the Decision.
18 This order and partial remand are made pursuant to NRS 233B.135(3).

19 IT IS SO ORDERED.

20 DATED this 6th day of July, 2016.

21 
22 DISTRICT COURT JUDGE

23 ///

24 ///

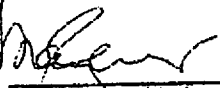
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1 Approved as to form:

2  NSB 1419
3 Timothy Baldwin, DDA
4 Attorney for Clark County

5
6 Richard McCracken, Esq.
7 Attorney for IUEC

8
9 Adam Paul Laxalt, AG
10 Melissa L. Flatley, Deputy AG
11 Attorneys for Office of the Labor Commissioner

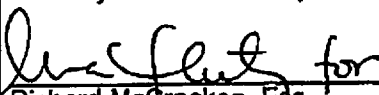
12 Approved as to form, but not as to content and substance¹:

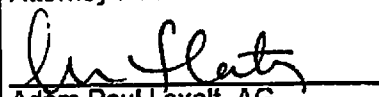
13 Paul Trimmer, Esq.
14 Attorney for Bombardier Transportation (Holdings) USA Inc.

25
26 ¹ Petitioner Bombardier Transportation (Holdings) USA Inc. agrees that the form of the
27 Proposed Order is consistent with the District Court's instruction that the Proposed Order
28 adopt the arguments in the respective Respondents' Briefs. Petitioner, however, disagrees
with the Proposed Order's substance. Petitioner's position is that Proposed Order, including
its adopted contents, are not supported by the record. The Proposed Order, including its
adopted contents, contains reasoning and factual findings which are not present in the Labor
Commissioner's Administrative Decision.

1 Approved as to form:

2
3 Timothy Baldwin, DDA
4 Attorney for Clark County

5  for
6 Richard McCracken, Esq.
Attorney for IUEC

7  for
8 Adam Paul Laxalt, AG
9 Melissa L. Flatley, Deputy AG
Attorneys for Office of the Labor Commissioner

10
11 Approved as to form, but not as to content and substance¹:

12 
13 Paul Trimmer, Esq.
14 Attorney for Bombardier Transportation (Holdings) USA Inc.

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adopted contents, contains reasoning and factual findings which are not present in the Labor
Commissioner's Administrative Decision.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

**Civil Petition for Judicial
Review**

COURT MINUTES

January 05, 2015

A-14-698764-J Bombardier Transportation Holdings USA Inc, Plaintiff(s)
vs.
Nevada Labor Commissioner, Defendant(s)

**January 05, 2015 3:00 PM Motion Respondent's IUEC's
Motion to Exceed
Page Limits for
Respondent's
Answering Brief**

HEARD BY: Scotti, Richard F. **COURTROOM:** Phoenix Building Courtroom -
11th Floor

COURT CLERK: Sharon Chun

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- COURT ORDERED, MOTION GRANTED as unopposed pursuant to EDCR 2.20.

CLERK'S NOTE: A copy of this minute order has been distributed to:

Andrew J. Kahn, Esq. (McCracken, Stemerma 7 Holsberry) - Email: ajk@dcbsf.com

Paul T. Trimmer (Jackson Lewis P.C.) - Email: trimmerp@jacksonlewis.com

Scott Davis, Deputy Attorney General, 555 E. Washington Ave., Suite 3900, Las Vegas, NV 89101 -
via Email: sdavis@ag.nv.gov

E. Lee Thomson, Deputy District Attorney - Email: E.Thomson@ClarkCountyDA.com

**DISTRICT COURT
CLARK COUNTY, NEVADA**

**Civil Petition for Judicial
Review**

COURT MINUTES

February 10, 2015

A-14-698764-J Bombardier Transportation Holdings USA Inc, Plaintiff(s)
vs.
Nevada Labor Commissioner, Defendant(s)

February 10, 2015 3:00 PM Minute Order

HEARD BY: Scotti, Richard F. **COURTROOM:** Phoenix Building Courtroom -
11th Floor

COURT CLERK:

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- As a non-opposition was filed by Defendant IUEC and no timely opposition being filed by Defendant Nevada Labor Commissioner or Defendant Clark County, the Court hereby GRANTS Plaintiff s Motion to Modify the Court s 12/18/14 Stipulated Order as unopposed pursuant to EDCR 2.20. As such, the hearing set for this matter on 03/02/15 in chambers is hereby VACATED.

Mr. Trimmer to prepare the order and submit to chambers for signature within 10 days of this minute order.

CLERK'S NOTE: Minute order distributed 2/10/15, via e-mail as follows:
trimmerp@jacksonlewis.com

**DISTRICT COURT
CLARK COUNTY, NEVADA**

**Civil Petition for Judicial
Review**

COURT MINUTES

April 25, 2016

A-14-698764-J Bombardier Transportation Holdings USA Inc, Plaintiff(s)
vs.
Nevada Labor Commissioner, Defendant(s)

April 25, 2016 3:00 AM Minute Order

HEARD BY: Hardy, Joe **COURTROOM:** Chambers

COURT CLERK: Kristin Duncan

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Having reviewed and considered the Petition for Judicial Review, the numerous briefs of the parties, the legal authorities contained therein, the administrative record and supplement to administrative record, the Court hereby affirms the Nevada Labor Commissioner s (Labor Commissioner) March 6, 2014 Order (the Decision) in its entirety and remands the Decision to the Labor Commissioner solely for supervision and jurisdiction by the Labor Commissioner over the payment by Bombardier pursuant to the calculation to be performed by the Clark County Department of Aviation as ordered in conclusions 5 and 6 on pages 12 and 13 of the Decision. This order and partial remand are made pursuant to NRS 233B.135(3).

The Court directs counsel for Respondents Labor Commissioner and The International Union of Elevator Constructors (IUEC) to prepare a formal order and submit the same for review and approval to counsel for Petitioner Bombardier Transportation (Holdings) USA, Inc. (Bombardier) and Respondent Clark County within 10 days of this minute order. The formal order must contain a detailed procedural history of the administrative action, facts as found by the Labor Commissioner, and legal reasons and conclusions for the affirmance, all as set forth in Respondents briefs. The exception being that from the Court s review of the law and the briefs, the Court finds that Respondent Clark County s briefs were timely and properly filed and served, so the Court does not

adopt that particular argument by Respondents and has, therefore, considered and evaluated Clark County's briefs on their merits. Should the parties be unable to agree on the Order, the parties may submit competing orders.

Although this Court may not have ruled as the Labor Commissioner did had this Court been the trier of fact, it is not within this Court's purview to substitute its judgment for those Labor Commissioner's findings that are based on substantial evidence. This Court finds that the Labor Commissioner's findings are based on substantial evidence. This Court further finds that the Labor Commissioner's conclusions of law are based upon the facts, are not pure questions of law, and are not clearly erroneous, arbitrary, or capricious, and, therefore, must be upheld. Likewise, the Labor Commissioner's interpretation of its governing statutes and regulations, here NRS Chapter 338 and NAC Chapter 338, is within the statutes' and regulations' language and thus is entitled to deference. This Court's order also allows and accounts for the Labor Commissioner's specialized knowledge, experience, and expertise when evaluating the evidence. To the extent questions of statutory construction would generally be subject to a de novo review, the Labor Commissioner's interpretation is still entitled to deference under the circumstances of this petition.

In addition to the law and arguments set forth in Respondents' briefs which the Court adopts as its legal conclusions and are to be included in the formal Order, the recent U.S. Supreme Court case of *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016), demonstrates the continued vitality of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) and is to be included in the formal order. This Court finds and concludes that when employers such as Bombardier fail to keep proper records (as Bombardier would have been required to do had the contract (CBE-552) been properly awarded under NRS Chapter 338), and employees thereby have no way to establish with exactitude the time spent doing uncompensated or undercompensated work, the remedial nature of Nevada's prevailing wage statutory scheme, and the public policy which it embodies militate against making the burden of proving uncompensated or undercompensated work an impossible hurdle for the employee. Instead of punishing the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work, an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inferences. Under these circumstances, the burden then shifts to the employer (Bombardier) to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *Id.*

Here, the Labor Commissioner properly applied the facts to the law as set forth in the *Mt. Clemens* case and now confirmed in *Tyson Foods*. To ensure compliance by with the Labor Commissioner's order in parts 5 and 6 of the Decision, the Court remands this matter as set forth above.

Finally, for the reasons set forth in the briefs, the Court additionally grants IUEC's Motion to Strike Exhibit A to Bombardier Opening Brief for the reasons set forth therein and likewise declines to take notice of the study done by the University Reno Economics Department professors referenced in

IUEC s Motion to Strike. These rulings are to be included in the formal order.

CLERK'S NOTE: A copy of this minute order was e-mailed to: Melissa Flatley, Deputy AG [mflatley@ag.nv.gov], Richard G. McCracken, Esq. [rmccracken@dcbsf.com], Andrew J. Kahn, Esq. [ajk@dcbsf.com], Paul T. Trimmer, Esq. [trimmerp@jacksonlewis.com], Lee Thomson, Chief DDA [e.thomson@clarkcountyda.com]. (KD 4/25/16)



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

GARY C. MOSS
3800 HOWARD HUGHES PARKWAY, SUITE 600
LAS VEGAS, NV 89169

DATE: August 19, 2016
CASE: A-14-698764-J

RE CASE: BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC. vs. NEVADA
LABOR COMMISSIONER; THE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS;
CLARK COUNTY

NOTICE OF APPEAL FILED: August 16, 2016

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT** TRANSMITTED HAVE BEEN MARKED:

- ☒ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☐ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance. You must reapply for in Forma Pauperis status.**

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT
DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER; NOTICE OF ENTRY OF ORDER; DISTRICT COURT MINUTES; NOTICE OF
DEFICIENCY

BOMBARDIER TRANSPORTATION
(HOLDINGS) USA, INC,

Plaintiff(s),

vs.

NEVADA LABOR COMMISSIONER; THE
INTERNATIONAL UNION OF ELEVATOR
CONSTRUCTORS; CLARK COUNTY,

Defendant(s),

Case No: A-14-698764-J

Dept No: XV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 19 day of August 2016.

Steven D. Grierson, Clerk of the Court

Chaunte Pleasant

Chaunte Pleasant, Deputy Clerk