## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 13th day of September, 2016, I caused to be served via the Nevada Supreme Court's electronic filing and service system, a true and correct copy of the above foregoing **APPELLANT'S EXHIBITS 1, 2, 3 AND 4 TO APPELLANTS DOCKETING STATEMENT** to the following:



| | |
|---|---|
| Robert E. Werbicky, Esq.<br>Deputy Attorney General<br>mflatley@ag.nv.gov<br>Adam Paul Laxalt, Esq.<br>Bureau of Business and State Services<br>Business and Taxation Division<br>100 North Carson Street<br>Carson, City, Nevada 89701<br>(775) 684-1218 (office)<br>(775) 684-1156 (facsimile)<br>*Attorneys for State of Nevada Office of the Labor Commissioner* | Richard G. McCracken, Esq.<br>rmccracken@dcbsf.com<br>Andrew J. Kahn, Esq.<br>ajk@dcbsf.com<br>McCracken, Stemerman & Holsberry<br>1630 South Commerce Street<br>Suite A-1<br>Las Vegas, Nevada 89102<br>(702) 386-5107 (office)<br>(702) 386-9848 (facsimile)<br>*Attorneys for The International Union of Elevator Constructors* |
| E. Lee Thompson, Esq.<br>e.thomson@clarkcountyda.com<br>Chief Deputy District Attorney<br>500 South Grand Central Parkway<br>5th Floor<br>Las Vegas, Nevada 89155<br>(702) 455-4761 (office)<br>(702) 455-4771 (facsimile)<br>*Attorneys for Clark County* | Ara H. Shirinian, Esq.<br>10651 Capesthorne Way<br>Las Vegas, Nevada 89135<br>*Supreme Court Settlement Judge* |

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

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Facsimile: (702) 921-2461

*Attorneys for Appellant*
*Bombardier Transportation (Holdings) USA, Inc.*

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

| | |
|---|---|
| BOMBARDIER TRANSPORATATION (HOLDINGS) INC.,<br><br>Appellant,<br><br>vs.<br><br>NEVADA LABOR COMMISSIONER; THE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS; and CLARK COUNTY,<br><br>Respondents. | Supreme Court No.: 71101<br><br>District Court No.: A-14-698764-J<br><br>**APPELLANT/PETITIONER'S DOCKETING STATEMENT CIVIL APPEALS** |

## GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement pursuant to NRAP 14(a). The purposes of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for *en banc*, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

## WARNING

This statement must be completed fully, accurately and on time pursuant to NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This Court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 240, 344, 810 P.2d 1217 (1991). Please use tab dividers to separate any attached documents.

1. **Judicial District**: Eighth Judicial District of the State of Nevada
   **Department**: 15
   **County**: Clark
   **Judge**: Joe Hardy
   **District Court Case No.**: A-14-698764-J

2. **Attorney(s) filing this docketing statement:**

**Attorney:** Paul T. Trimmer

**Telephone:** (702) 921-2460

**Firm:** Jackson Lewis P.C.

**Address:** 3800 Howard Hughes Parkway, Las Vegas, Nevada 89169

**Client(s):** Bombardier Transportation (Holdings) Inc.

3. **Attorney(s) representing respondents:**

**Attorney:** Robert E. Werbicky, Esq. and Adam Paul Laxalt, Esq.

**Telephone:** (775) 684-1218

**Firm:** Bureau of Business and State Services

**Address:** 100 North Carson Street, Carson City, Nevada 89701

**Client(s):** Nevada Office of the Labor Commissioner

**Attorney:** Richard G. McCracken, Esq. and Andrew J. Kahn, Esq.

**Telephone:** (702) 386-5107

**Firm:** McCracken, Stemerman & Holsberry

**Address:** 1630 South Commerce, Suite A-1, Las Vegas, Nevada 89102

**Client(s):** International Union of Elevator Constructors

**Attorney:** E. Lee Thompson, Esq.

**Telephone:** (702) 455-4761

**Firm:** Chief Deputy District Attorney

**Address:** 500 South Grand Central Parkway, 5th Floor, Las Vegas, Nevada 89155

**Client(s):** Clark County

4. **Nature of disposition below:**

Review of agency determination.

Petitioner's Petition for Judicial Review was Denied.

5. **Does this appeal raise issues concerning any of the following (Child custody, venue, termination of parental rights)?**
No.

6. **Pending and prior proceedings in this court:**

None.

7. **Pending and prior proceedings in other courts:**

None other than the proceeding which forms the basis of the instant appeal and identified in Section 1 of this Docketing Statement.

8. **Nature of the action:**

Petitioner sought judicial review of a final decision of the Nevada Labor Commissioner dated March 6, 2014, holding that the maintenance contract for the Automated Transit System at McCarran International Airport, (Contract identified as CBE-552), is a public works project subject to 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 upheld the Labor Commissioner's decision.

**9. Issues on appeal:**

a. Whether the Labor Commissioner's conclusion that the work performed pursuant to CBE-552 is a "project" within the meaning of NRS 338.010(16) should be vacated because it is contrary to the plain meaning of the statute and not supported by substantial evidence.

b. Whether the Labor Commissioner's conclusion that CBE-552 is not directly related to the normal operation of the Airport because it is possible for the Airport to "function" without the automated train system, and that NRS 338.011(1) therefore does not apply, should be vacated because it is both contrary to the plain meaning of the statute and not supported by substantial evidence.

c. Whether the Labor Commissioner's conclusion that CBE-552 is not directly related to the normal maintenance of the Airport, and that NRS 338.011(1) therefore does not apply, should be vacated because it is both contrary to the plain meaning of the statute and not supported by substantial evidence.

d. Whether the Labor Commissioner's determination that Bombardier is not a "railroad company" and therefore exempt under NRS 338.080, despite the fact that more than 50% of its revenue is derived from the manufacture, operation and/or sale of railroad vehicles and railroad equipment, should be vacated because it is contrary to the plain meaning of the statute and not supported by substantial evidence.

**10. Pending proceedings in this Court raising the same or similar issues:**

None.

**11. Constitutional issues:**

None.

**12. Other issues:**

a. A substantial issue of first impression; and

b. An issue of public policy.

**13. Assignment to the Court of Appeals or retention in the Supreme Court.**

Pursuant to NRAP 17(b)(4), this case is presumptively assigned to the Court of Appeals.

**14. Trial:**

N/A

**15. Judicial disqualification:**

Petitioner does not desire judicial disqualification.

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or Order appealed from:**

The District Court's Findings of Fact, Conclusions of Law and Order affirming the Labor Commissioner's March 6, 2014 Order was filed on dated July 11, 2016.

**17. Date written Notice of entry of judgment or order was served:**

Notice of Entry of Order was served on July 19, 2016 via electronic service.

**18. If the time for filing of the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59):**

N/A.

**19. Date Notice of Appeal filed:**

District Court: August 16, 2016

Supreme Court: August 23, 2016

**20. Specify statute or rule governing the time limit for filing the Notice of Appeal, e.g., NRAP 4(a) or other:**

NRAP 4(a).

## SUBSTANTIVE APPEALABILITY

**21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

a. NRS 233B.150 and NRAP 3A(b)(1).

b. Explain how each authority provides a basis for appeal from the judgment or order:

1) NRS 233B.150 provides that an "[a]n aggrieved party may obtain a review of any final judgment of the district court by appeal to the appellate court of competent jurisdiction

pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution. The appeal shall be taken as in other civil cases."

2) To the extent that an order denying a Petition for Judicial Review is a "final judgment" as the term is used in NRAP 3A(b)(1), and not otherwise preempted by NRS 233B.150, NRAP3A(b)(1) also provides jurisdiction.

**22. List all parties involved in the action or consolidated actions in the District Court:**

a. Parties:

1) Petitioner:

i. Bombardier Transportation (Holdings) USA, Inc.

2) Respondents:

i. Nevada Labor Commissioner;

ii. The International Union of Elevator Constructors; and

iii. Clark County.

b. If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g. formally dismissed, not served, or other:

All parties in the district court are parties hereto.

**23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim:**

a. Petitioner: Review of Agency Determination

b. Respondents: None

**24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

Yes

**25. If you answer "No" to question 24, complete the following:**

N/A

**26. If you answered "No" to any part of question 25, please explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

N/A

**27. Attach file-stamped copies of the following documents:**

a. The latest-filed complaint, counterclaims, cross-claims, and third-party claims:

**Exhibit 1** - Petitioner's Petition for Judicial Review

b. Any tolling motion(s) and order(s) resolving tolling motion(s):

N/A

c. Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal:

N/A

d. Any other order challenged on appeal:

**Exhibit 2** – Findings of Fact, Conclusion of law and Order entered on July 11, 2016, Denying Petitioner's Petition for Judicial Review and upholding Respondent's Nevada Labor Commissioner's decision of March 6, 2014.

**Exhibit 3** – Office of the Labor Commissioner's Decision of March 6, 2014.

e. Notices of entry for each attached order:

**Exhibit 4** – Notice of Entry of Order filed July 19, 2016 – Findings of Fact, Conclusion of law and Order entered on July 11, 2016, Denying Petitioner's Petition for Judicial Review.

## VERIFICATION

I declare under penalty of perjury that I have read this Docketing statement, that the information provided in this Docketing Statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this Docketing Statement.

**Name of Appellant:** Bombardier Transportation (Holdings) USA, Inc.

**Date:** September 12, 2016

**State and County Where Signed:** Nevada, County of Clark

**Name of Counsel of Record:** Paul T. Trimmer

JACKSON LEWIS P.C.

GARY C. MOSS, ESQ.
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PAUL T. TRIMMER, ESQ.
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*Attorneys for*
*Appellants/Petitioner*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 12th day of September, 2016, I caused to be served via the Nevada Supreme Court's electronic filing and service system, a true and correct copy of the above foregoing **APPELLANT'S DOCKETING STATEMENT** to the following:

| | |
|---|---|
| Robert E. Werbicky, Esq.<br>Deputy Attorney General<br>mflatley@ag.nv.gov<br>Adam Paul Laxalt, Esq.<br>Bureau of Business and State Services<br>Business and Taxation Division<br>100 North Carson Street<br>Carson, City, Nevada 89701<br>(775) 684-1218 (office)<br>(775) 684-1156 (facsimile)<br>*Attorneys for State of Nevada Office of the Labor Commissioner* | Richard G. McCracken, Esq.<br>rmccracken@dcbsf.com<br>Andrew J. Kahn, Esq.<br>ajk@dcbsf.com<br>McCracken, Stemerman & Holsberry<br>1630 South Commerce Street<br>Suite A-1<br>Las Vegas, Nevada 89102<br>(702) 386-5107 (office)<br>(702) 386-9848 (facsimile)<br>*Attorneys for The International Union of Elevator Constructors* |
| E. Lee Thompson, Esq.<br>e.thomson@clarkcountyda.com<br>Chief Deputy District Attorney<br>500 South Grand Central Parkway<br>5th Floor<br>Las Vegas, Nevada 89155<br>(702) 455-4761 (office)<br>(702) 455-4771 (facsimile)<br>*Attorneys for Clark County* | Ara H. Shirinian, Esq.<br>10651 Capesthorne Way<br>Las Vegas, Nevada 89135<br>*Supreme Court Settlement Judge* |

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

# APPELLANT'S EXHIBIT 1

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CLERK OF THE COURT

**JUDR**
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mossg@jacksonlewis.com
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trimmerp@jacksonlewis.com
**JACKSON LEWIS P.C.**
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Attorneys for Petitioner
*Bombardier Transportation (Holdings) USA, Inc.*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.,

Petitioner,

v.

NEVADA LABOR COMMISSIONER; a Nevada Administrative Agency; THE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, an unincorporated association; CLARK COUNTY, a political subdivision of the State of Nevada,

Respondents.

Case No.: A-14-698764-J

Dept. No.: XXVI

**PETITION FOR JUDICIAL REVIEW**

**[EXEMPT FROM ARBITRATION]**

Bombardier Transportation (Holdings) USA, Inc. (hereinafter "Petitioner" or "Bombardier") petitions for relief from the Nevada Labor Commissioner's (hereinafter "Labor Commissioner") March 6, 2014 determination that Bombardier's maintenance contract with the Clark County Department of Aviation constitutes 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 Labor Commissioner's factual determinations – particularly his conclusion that the work required to ensure that McCarran International Airport's ("Airport") automated train system is consistently available to transport passengers is *not* directly

related to the normal operation of the Airport despite the fact that the train system is the *only* effective way for passengers to access the "D" concourse – are not supported by substantial evidence. His legal conclusions are contrary to law. They disregard the plain meaning of NRS 338.010, NRS 338.011 and NRS 338.080. Finally, the Labor Commissioner's assertion that maintenance of the automated train system is properly classified as *elevator constructor work* is clearly erroneous. It is also a substantial modification of an existing prevailing wage classification and therefore constitutes unlawful rulemaking in violation of the Nevada Administrative Procedure Act ("APA"), NRS Chapter 233B.

Pursuant to NRS 233B.135, Bombardier requests that the Court grant judicial review, vacate the Labor Commissioner's decision, and find that the work performed on McCarran's automated train system is exempt from NRS Chapter 338's prevailing wage requirements. A copy of the Labor Commissioner's Order is attached as Exhibit A.

**THE PARTIES**

1. Petitioner Bombardier is a Delaware corporation and it is registered and authorized to do business in Nevada. Its principal place of business is in Pittsburgh, Pennsylvania. Bombardier entered into a maintenance contract, CBE-552 (the "Agreement"), with the Clark County Department of Aviation (hereinafter "DOA"), on June 3, 2008. It maintained the trains connecting McCarran's International Airport's "C" and "D" Concourses to Terminal 1 in accordance with the Agreement from June 2008 through May 2012.

2. Respondent Labor Commissioner is an administrative agency created by the State of Nevada pursuant to NRS Chapter 607. The Labor Commissioner issued the Order from which Bombardier seeks relief.

3. Respondent International Union of Elevator Constructors (hereinafter the "Union" or "IUEC") is a labor organization within the meaning of Section 2(5) of the NLRA, 29 U.S.C. §

152(5). It purports to represent Bombardier's former employees and it initiated the underlying administrative action on their behalf by filing a complaint for allegedly unpaid prevailing wages with the Labor Commissioner on October 9, 2009.

4. Respondent Clark County, Nevada (hereinafter "Clark County") is a political subdivision of the State of Nevada. Through its Department of Aviation, it operates and maintains McCarran International Airport.

## JURISDICTION AND VENUE

5. The Court has jurisdiction to consider Bombardier's request for review under the provisions of NRS 233B.130 and NRS 607.215; and, this Petition has been filed within thirty days of the date on which the Order was issued.

6. The Eighth Judicial District is the proper venue for this action. Both the underlying administrative action and the Order concern work which was performed in Clark County; and, Clark County is party to the maintenance agreement, CBE-552, which authorized the work performed by Bombardier's former employees.

## PROCEDURAL HISTORY

7. On October 9, 2009, the IUEC initiated an administrative action against Bombardier by filing a claim with the Labor Commissioner for prevailing wage payments for work done under CBE-552 which were allegedly unpaid and due.

8. The Labor Commissioner issued an Administrative Complaint on October 13, 2009.

9. As required by NRS Chapter 338, Clark County conducted a review of the Administrative Complaint and issued a determination on November 24, 2009. The County concluded that the work performed by Bombardier's employees under CBE-552 was completely exempt from NRS Chapter 338's prevailing wage requirements and that no prevailing wage

premiums were due or owed.

10. The Union objected to this determination, and on March 30, 2010, Clark County issued a revised determination. Once again, it concluded that the work performed by Bombardier's employees was completely exempt from NRS Chapter 338's prevailing wage requirements, and once again, the Union objected to the determination.

11. The case ultimately came before the Labor Commissioner for hearing in 2013. The hearing lasted six days (June 25 through June 28, 2013 and September 9 through September 10, 2013). Bombardier, Clark County and the Union submitted post-hearing briefs on December 10, 2013.

12. In its post-hearing brief, both Bombardier and Clark County contended that work performed under CBE-552 was not covered by NRS Chapter 338's prevailing wage requirements. Specifically, Bombardier and Clark County asserted that the work performed under CBE-552 is (1) not performed pursuant to a "public works project" and is therefore beyond the statutory coverage of Chapter 338; (2) exempt because it is directly related to the normal operation of the Airport in accordance with NRS 338.011(1); and (3) exempt because it is directly related to the normal maintenance of the Airport in accordance with NRS 338.011(1). Bombardier independently asserted that it was exempt because it is a "railroad company" within the meaning of NRS 338.080.

13. Bombardier and Clark County also rebutted the Union's contention that the work performed on the automated train system should be classified as "Elevator Constructor" work.

14. The Labor Commissioner issued the Order on March 6, 2014. His purported "Findings of Fact" are not enumerated, and the findings of fact which relate to NRS 338.010, 338.011 and 338.080 do not contain any citations to the hearing transcript or exhibits.

15. The Order contains five purported "Conclusions of Law":

(a) CBE-552 is a public works project pursuant to NRS 338.010 and subject to payment of prevailing wage.

(b) CBE-552 is not exempt pursuant to NRS 338.011 as a contract awarded pursuant to NRS 332 or 332 as directly related to the normal operation or normal maintenance of a public body or its property.

(c) CBE-552 is not exempt pursuant to NRS 338.080 as Bombardier is not a recognized railroad company under Nevada law.

(d) ATS Technicians who performed work on the McCarran ATS pursuant to CBE-552 were not properly compensated. ATS Technicians should have been paid the 2007-2008 prevailing wage rate for Elevator Constructors, which is $56.15 per hour.

(e) Based on just and reasonable inference, 20% of the work performed by ATS Technicians on the McCarran ATS pursuant to CBE-552 must be paid at the 2007-2008 prevailing wage rate for Elevator Constructor.

16. The Order did not calculate the amount of back pay allegedly due. Instead, the Labor Commissioner ordered the Clark County Department of Aviation to "calculate the 20% due to the ATS Technicians who performed work on CBE-552" in a "manner consistent" with the Order.

17. Bombardier is entitled to relief from the Order in accordance with NRS 233B.135 and Nevada precedent. The Labor Commissioner's factual findings are not supported by substantial evidence. His legal conclusions are clearly wrong and are contrary to the plain meaning of the statutes.

## GROUNDS FOR RELIEF

18. This Petition should be granted because the Order is:

(a) in violation of constitutional or statutory provisions, including but not limited to NRS 338.010, 338.011, 338.080, and 233B.040;

(b) in excess of the Labor Commissioner's statutory authority;

(c) made upon unlawful procedure;

(d) affected by errors of law;

(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and,

(f) arbitrary and capricious and otherwise characterized by an abuse of discretion.

19. The Labor Commissioner's conclusion that CBE-552 is a "public works project" and that the work performed under the Agreement requires payment of prevailing wage is contrary to law and not supported by substantial evidence.

20. The Labor Commissioner's determination that the work performed under CBE-552 is not completely exempt from NRS Chapter 338's prevailing wage requirements pursuant to NRS 338.011(1) is contrary to law and not supported by substantial evidence.

21. NRS 338.011(1) provides that Chapter 338's prevailing wage requirements "do not apply" to contracts which are "directly related to" the "normal operation" of a local government's property. The evidence established that Airport Concourses "C" and "D" were designed to use the automated train system as the principal means of transporting passengers between the boarding area and the baggage/ticketing areas, that 78% of the Airport's gates rely on the automated train system for access, that the Airport's "D" concourse cannot be accessed by the public during normal operations without the automated train system and during the hearing

McCarran's former Director of Aviation testified – without rebuttal – that the work performed pursuant to CBE-552 is directly related to the "normal operation" of the Airport:

> Without a very high efficiency rate for the trains – the contract requires 99-point some percent reliability – there would be significant operational problems for the Airport in terms of delivering our customers either from ticketing and the checkpoint to the gates, or getting people from gates to their baggage claim and transportation network.
>
> There is no alternative system that I'm aware of at any airport in the world that can move the volumes of passengers, particularly that we have from Terminal 1 and Terminal 3 to the D Gates, as efficiently as a train system[.] ... It would be impossible ... to properly manage that part of the airport without a train system.

Hearing Transcript 397:13-398:8. If the automated train system does not function at 99.65% reliability – a figure which can be achieved only through the work performed under the Agreement – the Airport cannot fulfill its "principal requirement." Hearing Transcript 398:12-17.

26. Despite these undisputed facts the Labor Commissioner substituted his own personal judgment. He asserted that it was possible to find that the Airport could still "function" without the automated train system and on that basis refused to apply the exemption. This conclusion is contrary to law and is not supported by substantial evidence.

27. The Labor Commissioner's determination that work performed pursuant to CBE-552 is not directly related to the "normal maintenance" of the Airport, and therefore not exempt pursuant to NRS 338.011(1) is contrary to law and not supported by substantial evidence.

28. The Labor Commissioner's determination that Bombardier is not a railroad company and that NRS 338.080 does not apply is contrary to law and not supported by substantial evidence.

29. The Labor Commissioner's determination that the work performed pursuant to CBE-552 should be classified as Elevator Constructor work is contrary to law and not supported by substantial evidence.

30. The Labor Commissioner's expansion of the Elevator Constructor job classification to include work on the automated train system in the context of a contested case violates the rulemaking requirements in the APA.

31. In reaching these erroneous conclusions and refusing to dismiss the Administrative Complaint, the Labor Commissioner has exceeded his statutory authority and has exceeded the jurisdiction granted to him by Nevada law.

32. In short, and as will be set forth in more detail in the brief in support of its petition, the Order must be vacated because it exceeds the statutory authority of the Labor Commissioner; its legal and factual determinations are erroneous in light of the record and prevailing law; and, because it is arbitrary, capricious and characterized by an abuse of discretion.

## PRAYER

Petitioner prays:

A. That the Court vacate the ruling of the Labor Commissioner and find that the work performed by Bombardier's employees on CBE-552 is completely exempt from NRS Chapter 338's prevailing wage requirements;

B. That the Court instruct the Labor Commissioner to dismiss the Administrative Complaint and take no further action or investigation regarding the allegations raised by the IUEC;

C. That the Court stay all administrative proceedings;

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D. That the Court award Petitioner its attorney's fees and costs; and,

E. That the Court order all other appropriate relief.

Dated this 3rd day of April, 2014.

Respectfully submitted,
JACKSON LEWIS P.C.

Gary C. Moss
Paul T. Trimmer
3800 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169
Attorneys for Petitioner
*Bombardier Transportation (Holdings) USA, Inc.*

## CERTIFICATE OF SERVICE

Pursuant to NRCP 5 and NRS Chapter 233B, I hereby certify that a copy of Bombardier Transportation (Holdings) USA, Inc.'s **Petition for Judicial Review** was served on the 3rd day of April, 2014 via U.S. mail to the following:

Commissioner Thoran Towler
Office of the Labor Commissioner
675 Fairview Drive
Suite 226
Carson City, Nevada 89701

Michael D. Wymer
Deputy Attorney General
Office of the Nevada Attorney General
555 East Washington Avenue
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Lee Thomson, Esq.
Clark County Chief Deputy District Attorney
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500 South Grant Central Parkway
Fifth Floor
Las Vegas, Nevada 89155

Roe J Christobal

An Employee of Jackson Lewis P.C.

# APPELLANT'S EXHIBIT 2

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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<br>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

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 statute's 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.

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

**I. Factual background**

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

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

**II. Procedural history**

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

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

The matter was set for hearing, and an administrative hearing was held over six days in June and September, 2013. On March 6, 2014, the Labor Commissioner issued his Decision. In his Decision, the Labor Commissioner found that 20% of the work performed by Bombardier for the DOA was repair work on a public work and therefore not exempt from prevailing wage law. The Commissioner found the proper job class to use was Elevator Constructor, a class he had previously posted pursuant to a survey of employers pursuant to 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

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

**III. Standard of Review**

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

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

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

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

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

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

A court may conduct an independent review of pure questions of law. *DMV v. Jones-West Ford, Inc.*, 114 Nev. 766, 962 P.2d 624 (1998). However, an agency's legal conclusions that are based upon the facts are not pure questions of law, and therefore are entitled to deference. *Id.* Where statutory interpretation is concerned, a court may conduct an independent review, but in doing so must still give consideration to the Labor Commissioner's interpretation. *Office of Labor Commissioner v. Granite Const. Co.* 118 Nev. 83, 90, 40 P.3d 423, 428 (2002) (explaining that "[a]lthough we review questions of statutory construction *de 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

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

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

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

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

Nevada's prevailing wage laws are derived from the federal Davis-Bacon Act. *Granite Const. Co.*, 118 Nev. 83, 40 P.3d 423 (2002). Just like the federal act, Nevada's prevailing wage laws are not intended to benefit employers or even the public body sponsoring a project; the beneficiaries of prevailing wage laws are the workers themselves who benefit from 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*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. *"Normal Operations"*

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

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

Bombardier's reliance on its interpretation of legislative history is unavailing. The 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



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

b. *Normal Maintenance*

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

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

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

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

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

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

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

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

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

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

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

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

The "corrective maintenance" tasks at the outset of the contract were 60% of the work. They dropped in percentage on Bombardier's records largely because the Bombardier removed the codes used by workers to indicate repairs. Employers are or should be "in 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.*

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

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). When employers such as Bombardier fail to keep proper records (as Bombardier would have been required to do had the contract 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. *Tyson Foods*, 136 S.Ct. at 1047, quoting *Anderson*, 328 U.S., at 687. 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.*, quoting *Anderson*, 328 U.S., at 687-688.

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

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

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

The Court grants IUEC's Motion to Strike Exhibit A to Bombardier's 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.

**XII. ORDER**

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 the administrative record, the Court hereby affirms the Nevada Labor Commissioner's March 6, 2014, 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 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).

IT IS SO ORDERED.

DATED this 6th day of July, 2016.

DISTRICT COURT JUDGE

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Approved as to form:

NSB 1419
Timothy Baldwin, DDA
Attorney for Clark County

Richard McCracken, Esq.
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Attorneys for Office of the Labor Commissioner

Approved as to form, but not as to content and substance[1]:

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

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[1] Petitioner Bombardier Transportation (Holdings) USA Inc. agrees that the form of the Proposed Order is consistent with the District Court's instruction that the Proposed Order 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.

Approved as to form:

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Attorney for Clark County

for
Richard McCracken, Esq.
Attorney for IUEC

Adam Paul Laxalt, AG
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Paul Trimmer, Esq.
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Nevada Office of the Attorney General
100 North Carson Street
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[1] Petitioner Bombardier Transportation (Holdings) USA Inc. agrees that the form of the Proposed Order is consistent with the District Court's instruction that the Proposed Order 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.

# APPELLANT'S EXHIBIT 3

BEFORE THE NEVADA STATE LABOR COMMISSIONER

CARSON CITY, NEVADA

FILED

MAR 06 2014

NEVADA
LABOR COMMISSIONER - CC

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Complainant,

v.

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.,

Respondent.

Contract CBE-552

**ORDER**

Bombardier Transportation (Holdings) USA, Inc. ("Bombardier") installed the original Automated Transit System ("ATS") at McCarran International Airport in 1985. With the growth of McCarran Airport, the ATS and its progeny became important to ensuring the efficient movement of travelers to and from their destinations. In June 2008, Bombardier and Clark County entered into a contract (CBE-552) for the preventative and corrective maintenance of the ATS at McCarran Airport. Work under the contract began on July 1, 2008 and was to continue for a period of 5 years, ending June 30, 2013.

On October 9, 2009, the International Union of Elevator Constructors ("IUEC") filed a prevailing wage complaint against Bombardier. IUEC alleged that workers hired under Bombardier's contract with the Clark County Department of Aviation ("DOA") to perform repair work on the ATS at McCarran International Airport were not paid the prevailing wage in accordance with NRS 338. The Office of the Labor Commissioner sent the complaint to the DOA for investigation on October 13, 2009.

The DOA issued its Determination on November 24, 2009 finding that CBE-552 was a contract for maintenance entered into pursuant to NRS 332 and was not subject to the prevailing wage requirements of NRS 338. IUEC filed an objection to the DOA Determination on December 17, 2009. Deputy Labor Commissioner Keith Sakelhide sent IUEC's objection to the DOA on December 31, 2009 with a recommendation that a more thorough investigation be done to determine what work was

actually performed under the CBE-552 contract. On March 30, 2010, the DOA issued its first revised Determination. After a review of the work performed under CBE-552, the DOA affirmed its prior Determination.

Former Labor Commissioner Michael Tanchek issued an Interim Order on June 7, 2011 finding that work on the "fixed works" (guide ways, stations, automatic train control systems, etc.) was subject to NRS 338, but the work on the ATS cars was not.[1] Additionally, the former Labor Commissioner stated that, according to how his office interprets NRS 338, any work done under a maintenance contract that exceeds $100,000 would be considered a repair and subject to prevailing wage law. The Interim Order advised the DOA to assess the work done on the contract in a manner consistent with the order.

On July 25, 2011, the DOA issued a second revised Determination asking again that the complaint be dismissed because all work done under CBE-552 was minor, never amounting to more than $100,000, and therefore, exempt from prevailing wage under NRS 338. Bombardier and IUEC filed objections to the second revised Determination. The matter was set for hearing beginning June 25, 2013.

## FINDINGS OF FACT

An administrative hearing in the above-entitled matter was held over six days in June and September 2013. Based on testimony and evidence submitted at that hearing, the Labor Commissioner finds that CBE-552 is a public work subject to payment of prevailing wage and not exempt pursuant to NRS 338.011 as "directly related to normal operation or normal maintenance of a public body or its property" or pursuant to NRS 338.080, the "railroad company" exemption. The Labor Commissioner further finds that the ATS Technicians who worked on the McCarran ATS pursuant to CBE-552 were not properly compensated; the ATS Technicians should have been paid as Elevator Constructors for all work that would rightfully be classified as repair, regardless of the label used by Bombardier and the Clark County Department of Aviation.

[1] For that reason, the former Labor Commissioner reasoned that some of the work under the contract would be subject to prevailing wage, some of it would not.

**A. Contact CBE-552 concerns a public work pursuant to NRS 338.010 and therefore subject to the payment of prevailing wage.**

Payment of prevailing wage is required for all public works contracts not otherwise exempt. A "public work" is defined, in relevant part, as "any project for the new construction, repair or reconstruction of ... a project financed in whole or in part from public money for ... public buildings ... and all other publicly owned works or property." NRS 338.010(16). Not every publicly financed work will fit this definition. Only publicly financed "projects" require the payment of prevailing wage.

NRS 338 does not define "project" for purposes of interpreting its provisions. Therefore, the Labor Commissioner must look to other sources to establish its meaning. Dictionaries provide differing definitions for "project," but generally provide a framework for understanding its meaning. Merriam-Webster defines "project" as "a planned piece of work that have a specific purpose ... and that usually requires a lot of time." MERRIAM-WEBSTER DICTIONARY, *available online at http://www.merriam-webster.com/dictionary/project* (accessed January 6, 2014). Bombardier Post-Hearing Brief at 15. Further, the Cambridge University Dictionary defines "project" as "a piece of planned work or activity that is completed over a period of time and intended to achieve a particular aim." CAMBRIDGE UNIVERSITY ACADEMIC CONTENT DICTIONARY, *available online at http://dictionary.cambridge.org/us/dictionary/american-english/project_1* (accessed January 6, 2014). *Id.* CBE-552 is a "project" within the meaning of either of these definitions.

CBE-552 called for routine preventative and corrective maintenance of the ATS to ensure no less than 99.65% reliability in service to McCarran Airport for the duration of the contract, a period of five years. Much of the work under the contract was performed outside of McCarran Airport's normal operating hours during the night or PM shift.[2] Service on the McCarran ATS was done pursuant to a defined and comprehensive schedule outlined in the contract. All of which was done to ensure minimal to no interruption in service as was the purpose of the contract. Based on these facts, there is no question that CBE-552 is a "project" under the given dictionary definitions. Therefore, CBE-552 is a "public work" pursuant to NRS 338.010(16) requiring the payment of prevailing wage.

[2] There were occasions when work had to be performed on the ATS outside of the schedule delineated in the contract for unexpected or unplanned events. However, those few occasions do not remove CBE-552 from being a "project" subject to prevailing wage under NRS 338.010.

B. **CBE-552 is not exempt from prevailing wage pursuant to NRS 338.011 because it is not directly related to the normal operation or normal maintenance of a public body or its property.**

The requirement to pay prevailing wage does not apply, pursuant to NRS 338.011(1), to a contract "awarded in compliance with [NRS 332 or 333] which is directly related to the normal operation of the public body or the normal maintenance of its property." The test is disjunctive; a contract need only be directly related to normal operation or normal maintenance to be exempt from prevailing wage, not both.

1. Directly Related to Normal Operations

All parties agree that McCarran Airport is property owned and operated by Clark County, a public body. Further, no one disputes that the ATS is important to McCarran Airport, and in certain circumstances, makes transporting passengers around the airport property more efficient. However, just because something is important or efficient does not translate to it being a part of normal operations. Certainly, McCarran Airport could, and has, operated as an airport without a fully functioning ATS. The ATS is not dispositive as to whether McCarran is operating as an airport.

McCarran Airport would still be engaged in normal operations of an airport if the ATS did not exist or was out of service for a period of time. Planes would take off and land; passengers would make it to their destinations. While the ATS may be the primary method of transporting passengers around the airport property, it is not the only method. There are alternatives for transporting passengers to and from the gate areas; for example, passengers could walk or be bused. In some instances these alternative methods would be more efficient than taking the ATS.[3] These alternative methods may require more personnel and may result in additional costs, but would by no stretch of the imagination prevent McCarran Airport from operating as an airport.

2. Directly Related to Normal Maintenance

The exemption provided by NRS 338.011(1) for contracts directly related to normal maintenance is intended to allow local governments the freedom to enter into certain contracts without

[3] As IUEC points out, with the change in the security gates for Terminal C, use of the ATS is actually less efficient than simply walking to the gate area. IUEC's Post-Hearing Brief at 15.

the usual requirements of NRS 338. However, the exemption is not a tool to be used to avoid paying prevailing wage for work that rightfully falls within the purview of NRS 338.

CBE-552 called for preventative and corrective maintenance to be performed on the ATS at McCarran Airport for a term of five years. While CBE-552 certainly does contain maintenance work, it is clear that some of the heavy or corrective maintenance tasks go beyond the normal maintenance that would be exempt under NRS 338.011.[4] Those tasks cross over into the realm of repair. Repair work requires the payment of prevailing wage.

The presence of maintenance tasks does not cause repairs to disappear, a fact Bombardier acknowledges.[5] If that were the case it would be easy to avoid paying prevailing wage simply by including maintenance tasks in a contract or by calling it a maintenance contract. The Labor Commissioner sees nothing to suggest that the legislature intended the exemption to be used in that way. Therefore, those tasks properly classified as maintenance are exempt and those tasks properly classified as repair would be subject to the payment of prevailing wage.

3. Awarded in Compliance with NRS 332 or NRS 333

The issue of compliance with NRS 332 or NRS 333 is not relevant here because the Labor Commissioner does not find that CBE-552 is directly related to the normal operation or normal maintenance of a public body or its property. The issue of compliance would only be relevant if one or both or the remaining prongs were met.[6]

**C. CBE-552 is not exempt from prevailing wage pursuant to NRS 338.080 because Bombardier is not a railroad company within the meaning of the statute.**

The requirements of NRS 338 do not apply to "any work, construction, alteration, repair or other employment performed, undertaken or carried out, by or for any railroad company or any person

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[4] "Normal maintenance" generally means work that does not require a lot of skill or training (i.e. janitorial services), not work that requires training and technical skills.

[5] Bombardier argues in its post-hearing brief: "Just like the presence of chocolate in Neapolitan ice cream does not make the other two flavors – vanilla and strawberry – disappear, the fact that CBE-552 may from time to time call for the performance of corrective maintenance and/or repair, does not transform the Contract into a contract for the purpose of repair." at 37. The same is true for maintenance. Calling something a maintenance contract or having maintenance tasks in the contract does not make repair tasks disappear.

[6] However, the Labor Commissioner is not persuaded by the argument that "the County and other public agencies have consistently interpreted NRS 338.011 the same way for years, with no dire consequences." Clark County's Post-Hearing Brief at 34. Being in violation of the law for years without incident is not an excuse to be in violation of the law.

operating the same, whether such work, construction, alteration or repair is incident to or in conjunction with a contract to which a public body is a party, or otherwise." NRS 338.080(1). Like with project, NRS 338 does not define "railroad company" for purposes of interpreting its provisions.

Clearly McCarran Airport's ATS is not a traditional railroad. It is not "a road laid with parallel steel rails upon which cars, carrying passengers or freight, and equipped with wheels adapted to run upon the rails, are drawn by locomotive." *Westinghouse Electric Corp. v. Williams*, 173 Ga. App. 118, 121 (Ga. Ct. App. 1984).[7] The DOA acknowledges that the ATS is more akin to driverless buses given that the ATS is made up of large rubber-tired passenger vehicles.[8] Therefore, there is nothing about the ATS itself that would allow Bombardier to avail itself of the exemption provided by NRS 338.080.

Nevertheless, a portion of Bombardier's revenues come from the design, operation, manufacture and sale of traditional railroad equipment as well as other ATS systems throughout the country. However, none of Bombardier's "traditional railroad revenues" appear to come out of Nevada.[9] Additionally, there is no evidence that Bombardier claims to be a railroad company in any other context or to any other entity in Nevada. It is unreasonable for Bombardier to call itself a railroad company when in no other circumstances it is acting as a railroad company within the state. Bombardier cannot be a railroad company only when it is most convenient.

The exemption provided by NRS 338.080 is intended to exempt a company acting in the capacity of a railroad company in the state of Nevada, not a company that has railroad holdings somewhere outside of the state. To read this exemption otherwise would allow companies to acquire railroad subsidiaries elsewhere and call themselves railroad companies to avoid Nevada's prevailing wage law. The Labor Commissioner sees nothing to suggest that the legislature intended such a result.

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[7] Bombardier is bound by this definition as it is a successor to Westinghouse, the proponent of this definition.

[8] Further, the DOA does not join Bombardier in the characterization of the ATS as a railroad or any of the work on the railroad as railroad work. Clark County's Post-Hearing Brief at 40.

[9] While the Las Vegas Monorail is a Bombardier project, monorails cannot be classified as traditional railroads for many of the same reasons that the McCarran Airport ATS cannot be classified as a traditional railroad. Additionally, monorails are distinct from the McCarran Airport ATS as monorails do not include "a system to transport passengers between two end points with no intermediate stops." NRS 705.650(2).

**D. ATS Technicians were not properly compensated for work performed under CBE-552.**

Prevailing wage must be paid on all public works projects not otherwise exempted. As has already been stated, CBE-552 is a public works project pursuant to NRS 338.010(16) and not otherwise exempt. Therefore, payment of prevailing wage is required.

Pursuant to NRS 338.020(1)(a), the hourly and daily rate of wage must "not be less than the rate of such wages then prevailing in the county in which the public work is located." Further, NAC 338.0095(1) provides that "a workman employed on a public work must be paid the applicable prevailing wage for the type of work that the workman actually performs on the public work and in accordance with the recognized class of workman." CBE-552 was awarded by the Clark County Board of Commissioners in 2008 and all work done under the contract took place in Clark County. Therefore, the proper wage would be the wage then prevailing in Clark County for 2008 for the type of work actually performed.

According to all evidence presented, ATS Technicians were paid, on average, $23.30 per hour for work on the McCarran ATS under CBE-552. IUEC Exhibit 18. That rate of pay is well below that of most of the posted 2007-2008 job classifications.[10] Therefore, it is clear that ATS Technicians were not properly compensated for the work performed under CBE-552.

1. The proper job classification for work performed under CBE-552 is Elevator Constructor

According to the 2008 job descriptions for workmen on public works projects for Clark County posted by the Labor Commissioner's Office, Elevator Constructor *includes but is not limited to*:

1. Assembling, installing, repairing and maintaining electric and hydraulic freight and passenger elevators, escalators and dumbwaiters;
2. Cutting pre-fabricated sections of framework, rails and other elevator components to specified dimensions, using acetylene torch, power saw, and disc grinder;
3. Installing cables, counterweights, pumps, motor foundations, escalator drives, guide rails, elevator cars, and control panels, using hand tools (emphasis added);

Additionally, the Department of Labor recognizes that Elevator Constructors (labeled as "Elevator Repairer") repair and maintain "Automated People Movers" and like named devices used in the transportation of people and materials *including, but not limited to* elevator, escalators, dumbwaiters, and moving walkways (emphasis added). IUEC Exhibit 3.

[10] The only job classifications with a rate of pay less than $23.30 per hour were Fence Erector, Highway Striper, and Well Driller; none of which match the work performed by ATS Technicians under CBE-552.

It is apparent that being an Elevator Constructor encompasses more than just work on traditional elevators. It includes working on other automated modes of transportation—including "Automated People Movers." This is clear from the inclusion of the wording "includes but it not limited to" in the job descriptions used by both the State of Nevada Labor Commissioner and the U.S. Department of Labor. By the plain meaning of that phrase, Elevator Constructor isn't limited to the tasks and tools specifically delineated in the job description. The job description is intended to give guidance to the types of tasks and tools of that job classification. The job description should never be read to limit a job classification to just those tasks and tools.[11] It would be nearly impossible to create an exhaustive list of tasks performed and tools used for each job classification on a public works project. Moreover, there is no requirement to do so.

There is no question that the McCarran ATS is an "Automated People Mover." Any one of the approximately 40 million travelers that utilize McCarran Airport and the McCarran Airport ATS each year would be able to discern that fact. Therefore, the McCarran ATS would be the type of equipment that Elevator Repairers under the Department of Labor definition and Elevator Constructors under the State of Nevada definition work on. Further, many of the same technical skills utilized by the ATS Technicians on the McCarran ATS are the skills used by Elevator Constructors. For example, ATS Technicians hired to work on the McCarran ATS under CBE-552 were expected to have knowledge of and perform electrical, mechanical, electro-mechanical and pneumatic work. IUEC Exhibit 14. Many of the tools used by Elevator Constructors are also tools used by ATS Technicians on the McCarran ATS. Bombardier Exhibit 17; IUEC Exhibit 13.

While much has been argued regarding the difference between Elevator Constructors and ATS Technicians, it is a distinction without a difference. Therefore, the proper classification for repair work under CBE-552 is Elevator Constructor.

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[11] As IUEC points out, the Carpenter job description does not include "hammer," but no one would argue that a hammer is not a tool of the carpentry trade. IUEC's Post-Hearing Brief at 29.

2. Work identified as "corrective maintenance," "major maintenance," "heavy maintenance and overhaul," "repair," or "replacement" must be paid at the prevailing wage for Elevator Constructor

As previously noted, CBE-552 called for preventative and corrective maintenance to be performed on the ATS at McCarran Airport for a term of five years. However, the maintenance label is a misnomer as many of the tasks could more accurately be described as repairs. Those repair tasks must be paid the prevailing wage rate for Elevator Constructor, which pursuant to the rates in effect at the time of the contract is $56.15 per hour.

A review of CBE-552 makes it clear what tasks are more properly classified as repairs and should be paid at the Elevator Constructor rate. Under paragraph 2.2.1.2 Scheduled Vehicle Maintenance – Major Maintenance, the following tasks are listed: Replacing major repairable units; Performing major repairs; Rebuilding and overhauling major components; and Repairing spare equipment. Bombardier Exhibit 1. Under paragraph 2.2.3.2 Scheduled Station Equipment Maintenance – Minor Maintenance, repairs of station doors, graphics, and occupancy detectors are provided for. *Id.* Under paragraph 2.2.4.2 Scheduled Power Distribution Maintenance – Minor Maintenance calls for the repair and replacement of contactors and isolation switches. *Id.* Under the same paragraph, Major Maintenance includes the repair or replacement of failed equipment or components. *Id.* The same is true for paragraph 2.2.5.2 Scheduled Maintenance of Automatic Train Control Equipment – Major Maintenance. *Id.*

Further, work performed under CBE-552 was intended to be at a ratio of 80% preventative maintenance, 20% corrective maintenance. Hearing Transcript, 60:12-21; 61:2-6; 67:4-8; 130:6-8. However, Bombardier contends that in reality performance exceeded that ratio with 90% of the tasks being preventative maintenance and 10% corrective maintenance.[12] IUEC maintains that a much more considerable percentage (40%) of the maintenance tasks were repairs subject to NRS 338. IUEC Post-Hearing Brief at 10. Testimony at the hearing established a range of 10% to 40% repair work versus maintenance work. Hearing Transcript, 61:6; 177:6-7,14-15; 589:12; 619:5,12; 670:2,8-9,22; 719:6,10; 757:19; 796:19; 797:17; 1099:3,11-12; 1100:1-2,9. Nevertheless, it is apparent that some

[12] Bombardier makes this contention with the understanding that "corrective maintenance" under CBE-552 might be categorized as repair. Bombardier Post-Hearing Brief at 12.

percentage of the maintenance tasks that ATS Technicians were required to perform pursuant to CBE-552 involved repair, replacement, rebuilding or modifying of McCarran ATS components. Bombardier Exhibits 15 & 16. Therefore, those tasks must be paid at the appropriate prevailing wage.

3. Based on a just and reasonable inference from testimony and evidence submitted, 20% of the "maintenance" performed by ATS Technicians under CBE-552 were repairs subject to payment of prevailing wage

Both Bombardier and IUEC provided evidence of what tasks and hours they believed might be rightfully classified as repairs.[13] However, it is readily apparent that the information is incomplete and overly cumbersome at best. The United States Supreme Court makes it clear that in such situations the employees, who have performed work for which they have not been properly compensated, should not be penalized for the employer's failure to keep accurate records as required by law. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946):

> where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation [...] In such a situation we hold that *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 inference.* The burden then shifts to the employer 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. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate. (omitted citation)
>
> The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [law]. And even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances.

Bombardier argues that the ATS Technicians should be denied any recovery because IUEC has been unable to prove what work and how much of that work actually constituted repair with a degree of certainty. Bombardier Post-Hearing Brief at 44. However, it is clear that any uncertainty in the number

[13] IUEC Exhibit 1; Bombardier Exhibit 131. Clark County DOA did not offer any evidence regarding classification, appropriate compensation, or what tasks may be properly classified as repairs. Instead, it maintained its position that CBE-552 is not subject to NRS 338 and all workers were properly compensated.

of hours or in the type of work was the fault of the employer, not the employees. While ATS Technicians were mandated to ensure that every hour of work was accounted for, they were not encouraged to do so accurately. Hearing Transcript, 753:17-757:22; 1128:4-1129:8. Furthermore, many times, the hours and tasks were entered or adjusted by someone other than the worker; by someone who had no personal knowledge of what work the ATS Technician actually performed. *Id.* Therefore, Bombardier cannot now complain of any inaccuracy in determining what hours and tasks were rightfully classified as repairs subject to payment of prevailing wage.

Based on the testimony and evidence presented, the amount of repair work performed by ATS Technicians on CBE-552 was between 10% and 40%. Hearing Transcript, 61:6; 177:6-7,14-15; 589:12; 619:5,12; 670:2,8-9,22; 719:6,10; 757:19; 796:19; 797:17; 1099:3,11-12; 1100:1-2,9; IUEC Post-Hearing Brief at 10; Bombardier Post-Hearing Brief at 12. While the Labor Commissioner understands the parties arguments in favor of their respective positions on this issue, it is apparent that 10% understates and 40% overstates the amount of repair work performed on CBE-552. However, it is not unreasonable to find that the amount of repair work actually performed by ATS Technicians is within that range. CBE-552 called for a ratio of 80% preventative maintenance, 20% corrective maintenance to be performed on the ATS at McCarran Airport.[14] By all accounts, Bombardier met this ratio. There is nothing in the record to indicate that the DOA complained that ATS Technicians were performing more than 20% corrective maintenance or were otherwise spending a significant amount of time working on the ATS to lower availability below the 99.65% threshold outlined in CBE-552.

Based on testimony at the hearing and evidence presented by all parties, the Labor Commissioner finds sufficient evidence for a just and reasonable inference that 20% of the work performed by the ATS Technicians on CBE-552 was corrective maintenance, major maintenance, heavy maintenance and overhaul, repair, or replacement subject to the payment of prevailing wage pursuant to NRS 338. Bombardier, having to use the same inaccurate records, was not able to prove

[14] As previously noted, the "corrective maintenance" label is misleading. Testimony at the hearing made it clear that work performed as corrective maintenance would be more properly classified as repairs subject to the payment of prevailing wage.

the precise amount of work the ATS Technicians performed or submit evidence that would negate the reasonableness of this inference. Therefore, even though the amount is only approximate, the Labor Commissioner finds that 20% of the work performed by ATS Technicians on CBE-552 is subject to payment of prevailing wage.

## CONCLUSIONS OF LAW

Based upon the foregoing, it is apparent that CBE-552 is a public works project not otherwise exempt due to being awarded pursuant to NRS 332 as directly related to normal operation or normal maintenance of a public body or its property or under the railroad company exception. Therefore, the ATS Technicians who performed work under CBE-552 were not properly compensated at the then-prevailing rate of pay for work done on the project. The ATS Technicians should have been paid at the Elevator Constructor rate then prevailing in Clark County for all repair tasks performed pursuant to CBE-552. Further, based on the evidence presented, 20% of work performed under CBE-552 was repair work subject to the payment of prevailing wage at the Elevator Constructor rate.

IT IS HEREBY ORDERED that:

1. CBE-552 is a public works project pursuant to NRS 338.010 and subject to payment of prevailing wage.
2. CBE-552 is not exempt pursuant to NRS 338.011 as a contract awarded pursuant to NRS 332 or 332 as directly related to the normal operation or normal maintenance of a public body or its property.
3. CBE-552 is not exempt pursuant to NRS 338.080 as Bombardier is not a recognized railroad company under Nevada law.
4. ATS Technicians who performed work on the McCarran ATS pursuant to CBE-552 were not properly compensated. ATS Technicians should have been paid the 2007-2008 prevailing wage rate for Elevator Constructors, which is $56.15 per hour.
5. Based on just and reasonable inference, 20% of the work performed by ATS Technicians on the McCarran ATS pursuant to CBE-552 must be paid at the 2007-2008 prevailing wage rate for Elevator Constructor.

6. Clark County Department of Aviation shall, in a manner consistent with this Order, calculate the 20% due to the ATS Technicians who performed work on CBE-552 and provide that calculation no later than 30 days from the date of this Order.

DATED this 6th day of March, 2014

Thoran Towler
Labor Commissioner
State of Nevada

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this date, I deposited into the U.S. Mail, postage prepaid thereon, a copy of the foregoing ORDER to the persons listed below at their last known addresses:

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Counsel for Awarding Body
Clark County Department of Aviation

DATED this 10 day of March, 2014

An Employee of the Nevada State Labor Commissioner

# APPELLANT'S EXHIBIT 4

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CLERK OF THE COURT

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

BOMBARDIER TRANSPORTATION (HOLDINGS) 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

**NOTICE OF ENTRY OF ORDER**

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

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

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## 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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## 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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