

EXHIBIT 1

EXHIBIT 1

1 **BEFORE THE NEVADA STATE LABOR COMMISSIONER**

2 **LAS VEGAS, NEVADA**

FILED

JUN 27 2012

**NEVADA
LABOR COMMISSIONER -DC**

3 **IN THE MATTER OF:**

4 **INTERNATIONAL UNION OF ELEVATOR**
5 **CONSTRUCTORS,**
6 **Claimant,**

7 **vs.**

8 **BOMBARDIER TRANSPORTATION (HOLDINGS) USA,**
9 **INC.,**
10 **Respondent.**

11 **Clark County Department of Aviation Automated Transit**
12 **Systems Equipment – DOA Contract CBE-552**

SCHEDULING ORDER

13 This Scheduling Order is issued pursuant to Rule 16(b) of the Nevada Rules of Civil
14 Procedure ("NVCP").

15 On June 26, 2012, the Labor Commissioner held a pre-hearing conference at the Office
16 of the Labor Commissioner at 555 E. Washington Avenue, Suite 4100, Las Vegas, NV 89101
17 relating to a discovery and hearing schedule to be set by the Labor Commissioner in this
18 matter.

19 Appearances at the pre-hearing conference included Andrew J. Kahn, Esq.,
20 representing the International Union of Elevator Constructors ("IUEC"); Eldon Lee Thomson,
21 Esq., representing Clark County; and Gary C. Moss, Esq. and Paul T. Trimmer, Esq.,
22 representing Bombardier Transportation (Holdings) USA, Inc. ("Bombardier").

23 At the pre-hearing conference, counsel addressed the anticipated course of proceedings
24 in this action.

25 The following issues were identified as being the basis for the hearing:

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1 1. Is the contract, CBE 552 ("Contract"), a "public work" contract, as defined in
2 NRS 338.010 or is the Contract a normal maintenance (or normal maintenance and repair)
3 contract, for existing equipment or an existing system, awarded under NRS Chapter 332?

4 2. Was the work performed on the Automated Transit System ("ATS") vehicles a
5 "public work" under NRS 338.010(16)?

6 3. Applicability of NRS Chapter 338; Exemptions:

7 a. Was all or part of the work performed on the project at McCarran
8 International Airport normal maintenance work? If yes, which work?

9 b. Was all or part of the work performed on the project at McCarran
10 International Airport railroad work? NRS 338.080(1). If yes, which work?

11 c. Was the Contract a contract for a public work whose cost is less than
12 \$100,000.00? NRS 338.080(3).

13 d. What is the cost of the Contract?

14 e. For purposes of NRS 338.080(3), how is the cost of the Contract
15 calculated?

16 4. If work performed on the project at McCarran International Airport was subject to
17 NRS Chapter 338 prevailing wage laws, were the workers properly classified and paid the
18 proper prevailing wage rates?

19 5. If workers were misclassified and/or were not paid the proper prevailing wage
20 rate for work performed on the project at McCarran International Airport, what amount(s) of
21 additional wages is/are due to which worker(s)?

22 At the pre-hearing conference the parties agreed that these identified issues provided a
23 framework for the hearing. The parties agreed that the hearing may not be limited to only these
24 issues as sub-issues or additional issues may reasonably need to be argued. Also, these issues
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1 may be modified as new information is identified through discovery. No rights or responsibilities
2 of any party are limited by the listing of these issues.

3 **IT IS HEREBY ORDERED** that the discovery plan and scheduling order which the
4 parties jointly proposed to the Labor Commissioner at the pre-hearing conference are adopted
5 by the Labor Commissioner as his order, as follows:

- 6 1. **Witness Lists / Initial Disclosures.** Each party shall exchange and file its witness
7 list and initial disclosures by no later than August 1, 2012. NVCP 16.1(1). Disclosure
8 of expert witnesses will occur no later than September 1, 2012, with rebuttal expert
9 witness disclosure by October 1, 2012.
 - 10 2. **Completion of Initial Discovery.** Each party shall complete its initial discovery, and
11 disclose any additional witnesses or documents, by no later than October 1, 2012.
 - 12 3. **Completion of Supplemental / Rebuttal Discovery.** Each party shall complete its
13 supplemental / rebuttal discovery by no later than November 1, 2012. Depositions
14 shall be no longer than 8 hours in duration per deponent. The parties may propound
15 a maximum of (a) 40 interrogatories and (b) 40 requests for production of
16 documents to other parties.
 - 17 4. **Submissions of Motions.** By no later than December 1, 2012, the parties shall
18 serve and submit motions objecting to discovery. All dispositive motions must also
19 be served by this date. Responses and objections to filed motions must be filed by
20 December 17, 2012. In addition, the parties have agreed to not file reply briefs in
21 support of their respective motions.
 - 22 5. **Trial Brief.** Each party shall serve and file its trial brief no later than February 1,
23 2013. The trial brief will not exceed 30 pages.
- 24
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1 6. **Hearing.** The hearing on the Determinations issued by Clark County shall
2 commence at 9:00 a.m. on February 19, 2013, at a location to be determined, and
3 continue thereafter until completed.

4 7. **Status Reports and Status Conferences.** The Labor Commissioner may from time
5 to time, as the need arises, schedule status conferences and/or require the service
6 and filing of status reports in order to manage the progress of this action.

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8 Dated this 27th day of June, 2012.

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11 THORAN TOWLER
12 Labor Commissioner
13 State of Nevada
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CERTIFICATE OF MAILING

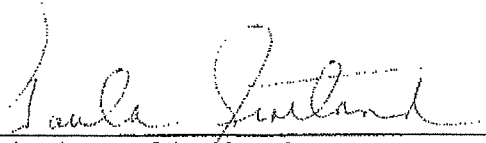
I HEREBY CERTIFY that on this date, I deposited into the U.S. Mail, postage prepaid thereon, a copy of the foregoing Scheduling Order to the persons listed below at their last known addresses:

Andrew J. Kahn, Esq.
McCracken, Stemerman & Holsberry
1630 S. Commerce Street
Suite A-1
Las Vegas, NV 89102

Gary C. Moss, Esq.
Paul T. Trimmer, Esq.
Jackson Lewis, LLP
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169

Eldon Lee Thomson, Esq.
Clark County District Attorney's Office
500 S. Grand Central Pkwy.
Suite 5075
Las Vegas, NV 89106

Dated this 27th day of June, 2012.


An Employee of the Nevada
State Labor Commissioner

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1 **BEFORE THE NEVADA STATE LABOR COMMISSIONER**

2 **CARSON CITY, NEVADA**

3
4 **IN THE MATTER OF:**

5 **INTERNATIONAL UNION OF ELEVATOR**
6 **CONSTRUCTORS,**

7 **Claimant,**

8 **vs.**

9 **BOMBARDIER TRANSPORTATION (HOLDINGS) USA,**
10 **INC.,**

11 **Respondent.**

12 **Clark County Department of Aviation**
13 **Automated Transit Systems Equipment – DOA.**
14 **Contract CBE-552**

FILED

JAN 14 2013

NEVADA
LABOR COMMISSIONER - CC

15 **AMENDED SCHEDULING ORDER**

16 This Amended Scheduling Order is issued pursuant to Rule 16(b) of the Nevada Rules
17 of Civil Procedure ("NVCP") and is in response to the Stipulation to Continue Deadlines and
18 Hearing Date submitted by Bombardier Transportation (Holdings) USA, Inc., dated January 11,
19 2013, the Labor Commissioner HEREBY ORDERS that:

- 20 1. The discovery cutoff date be extended to Monday, February 18, 2013.
- 21 2. Motions for Summary Judgment currently set for January 4, 2013, be extended to
22 Monday, March 18, 2013.
- 23 3. The prehearing/trial briefs be extended to Monday, May 6, 2013.

24 **///**

25 **///**

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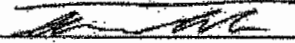
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1 4. The hearing on the Determinations issued by Clark County shall commence at 9:00 a.m.
2 on Tuesday, June 25, 2013, in the Roadrunner Room at the Clark County District
3 Attorney's Office located at 500 S. Grand Central Parkway, Las Vegas, Nevada, and
4 continue thereafter until completed.

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6 DATED THIS 14 DAY OF January, 2013

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9 THORAN TOWLER
Labor Commissioner
State of Nevada
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EXHIBIT 2

EXHIBIT 2

1 **DECLARATION OF PAUL T. TRIMMER IN**
2 **SUPPORT OF APPELLANT'S OPPOSITION TO MOTION TO DISMISS**

3 I, Paul T. Trimmer, declare and state as follows:

4 1. I am over the age of 18 and competent to testify. The following facts
5 are based on my personal knowledge. If called as a witness, I am competent to
6 testify as to these facts. I submit this declaration in support of Appellant
7 Bombardier Transportation (Holdings) Inc.'s Opposition to Respondent Nevada
8 Labor Commissioner's Motion to Dismiss the Appeal.

9 2. I am an attorney at Jackson Lewis P.C. in Las Vegas, Nevada. I
10 currently represent Bombardier Transportation (Holdings) USA, Inc.
11 ("Bombardier") in the appeal filed with the Nevada Supreme Court (Case No.
12 71101). Additionally, I represented Bombardier in the proceedings conducted
13 before the Nevada Labor Commissioner and the Eighth Judicial District Court that
14 underlie this appeal.

15 3. On March 6, 2014, the Nevada Labor Commissioner issued an order
16 (the "2014 Order") related to Contract CBE-552 between Bombardier and the Clark
17 County Department of Aviation ("Clark County"). On April 4, 2014, Bombardier
18 filed a petition for judicial review in the Eighth Judicial District Court for Clark
19 County, Nevada (Case No. A-14-698764-J) seeking judicial review of the 2014
20 Order (the "PJR Matter").

21 4. In June 2014 and May 2014, I had conversations with the attorneys
22 involved in the PJR Matter, who were also involved in the underlying matters
23 before the Labor Commissioner. Deputy Attorney General Scott Davis represented
24 the Nevada Labor Commissioner. E. Lee Thomson represented Clark County and
25 Andrew Kahn represented the International Union of Elevator Constructors. We
26 discussed whether the 2014 Order was final and, therefore, could be appealed to the
27 district court pursuant to NRS 233B.130(1).
28

5. Following these conversations in June 2014 and May 2014, no parties involved in the PJR Matter moved to dismiss the PJR Matter on the grounds that the 2014 Order was not final or contested the ripeness of the PJR Matter before the District Court. After Bombardier submitted its opening brief in the PJR Matter, the Labor Commissioner submitted a response brief and did not contend that the 2014 Order was not final or argue that the matter was not properly before the District Court.

6. The Labor Commissioner first raised a concern about the finality of the 2014 Order in February 2017 when his counsel contacted the undersigned.

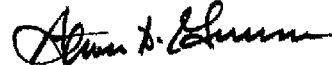
I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 20th day of April, 2017.

/s/ Paul T. Trimmer
Paul T. Trimmer

EXHIBIT 3

EXHIBIT 3



CLERK OF THE COURT

CATHERINE CORTEZ MASTO
Attorney General
Scott Davis, #10019
Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
(702) 486-3894
(702) 486-3416 (fax)
sdavis@ag.nv.gov
Attorneys for Respondent State Agency

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY

BOMBARDIER TRANSPORTATION
(HOLDINGS) USA, INC.,

Petitioner,

vs.

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. 26

ADMINISTRATIVE RECORD

Pursuant to NRS 233B.140, the STATE OF NEVADA, OFFICE OF THE LABOR
COMMISSIONER now files the entire record of the proceedings under review by this Court as a
result of the Petition for Judicial Review pursuant to NRS 233B.130 filed by BOMBARDIER
TRANSPORTATION (HOLDINGS) USA, INC.:

| | <u>Document</u> | <u>Bates No.</u> |
|----|---|------------------|
| 1. | International Union of Elevator Constructors Prevailing Wage Complaint, filed October 12, 2009. | 00001-00002 |
| 2. | Determination of Clark County Department of Aviation, filed November 25, 2009. | 00003-00005 |
| 3. | Revised Determination of the Clark County Department of Aviation, filed March 30, 2010. | 00006-00008 |
| 4. | Interim Order, filed June 7, 2011. | 00009-00017 |

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|----|-----|--|-------------|
| 1 | 5. | Clark County Department of Aviation Revised Determination, filed July 27, 2011. | 00018-00036 |
| 2 | | | |
| 3 | 6. | Notice of Entry of Order, filed August 10, 2011. | 00037-00039 |
| 4 | 7. | International Union of Elevator Constructors Objection to Revised Determination, filed August 19, 2011. | 00040-00044 |
| 5 | 8. | Notice of Pre-Hearing Conference, filed May 17, 2012. | 00045-00054 |
| 6 | | | |
| 7 | 9. | Order on International Union of Elevator Constructors' Petition for Reconsideration, filed May 18, 2012. | 00055-00067 |
| 8 | 10. | International Union of Elevator Constructors Pre-Hearing Conference Memorandum, filed June 18, 2012. | 00068-00075 |
| 9 | | | |
| 10 | 11. | Scheduling Order, filed June 27, 2012. | 00076-00080 |
| 11 | 12. | Stipulated Protective Order, signed by the Labor Commissioner on November 17, 2012. | 00081-00090 |
| 12 | | | |
| 13 | 13. | Amended Scheduling Order, filed January 14, 2013. | 00091-00093 |
| 14 | 14. | Bombardier Transportation (Holdings) USA, Inc. Motion for Summary Judgment, filed April 8, 2013. | 00094-00418 |
| 15 | 15. | Clark County Department of Aviation Response to Motion for Summary Judgment, filed April 15, 2013. | 00419-00549 |
| 16 | | | |
| 17 | 16. | International Union of Elevator Constructors Opposition to Motion for Summary Judgment, filed April 16, 2013. | 00550-00674 |
| 18 | 17. | Bombardier Transportation (Holdings) USA, Inc. Reply in Support of Motion for Summary Judgment, filed April 24, 2013. | 00675-00765 |
| 19 | | | |
| 20 | 18. | International Union of Elevator Constructors Pre-Trial Brief, filed May 31, 2013. | 00766-00794 |
| 21 | 19. | Order Denying Motion for Summary Judgment, filed June 3, 2013. | 00795-00799 |
| 22 | | | |
| 23 | 20. | Clark County Department of Aviation Pre-Hearing Brief, filed June 3, 2013. | 00800-00832 |
| 24 | 21. | Clark County Department of Aviation Witness List, filed June 3, 2013. | 00833-00836 |
| 25 | | | |
| 26 | 22. | Clark County Department of Aviation List of Documents, filed June 3, 2013. | 00837-00840 |
| 27 | 23. | Bombardier Transportation (Holdings) USA, Inc. Pre-Hearing Brief, List of Witnesses, and List of Exhibits, filed June 3, 2013. | 00841-01294 |
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| 1 | 24. | Bombardier Transportation (Holdings) USA, Inc. Unopposed Motion to Seal, filed June 17, 2013. | 01295-01310 |
| 2 | | | |
| 3 | 25. | Bombardier Transportation (Holdings) USA, Inc. Supplement to Unopposed Motion to Seal, filed June 17, 2013. | 01311-01319 |
| 4 | 26. | Clark County Department of Aviation Post-Hearing Brief, filed December 10, 2013. | 01320-01365 |
| 5 | | | |
| 6 | 27. | International Union of Elevator Constructors Post-Hearing Brief, filed December 11, 2013. | 01366-01405 |
| 7 | 28. | Bombardier Transportation (Holdings) USA, Inc. Post-Hearing Brief, filed December 13, 2013. | 01406-01467 |
| 8 | | | |
| 9 | 29. | Hearing Transcript (Volume 1) | 01406-01467 |
| 10 | 30. | Hearing Transcript (Volume 2) | 01468-01555 |
| 11 | 31. | Hearing Transcript (Volume 3) | 01556-01660 |
| 12 | | | |
| 13 | 32. | Hearing Transcript (Volume 4) | 01661-01774 |
| 14 | 33. | Hearing Transcript (Volume 5) | 01775-01810 |
| 15 | 34. | Hearing Transcript (Volume 6) | 01811-01884 |
| 16 | | | |
| 17 | 35. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 1. | 01929-01974 |
| 18 | 36. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 2. | 01975-01981 |
| 19 | 37. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 3. | 01982-01988 |
| 20 | | | |
| 21 | 38. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 4. | 01989-01990 |
| 22 | 39. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 5. | 01991-01992 |
| 23 | 40. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 7. | 01993-02055 |
| 24 | 41. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 8. | 02056-02109 |
| 25 | | | |
| 26 | 42. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 9. | 02110-01226 |
| 27 | 43. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 10. | 02167-02226 |
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| 1 | 44. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 11. | 02227-02230 |
| 2 | 45. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 12. | 02231-02240 |
| 3 | 46. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 13. | 02241-02246 |
| 4 | 47. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 14. | 02247-02249 |
| 5 | 48. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 15. | 02250-02253 |
| 6 | 49. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 16. | 02254-02461 |
| 7 | 50. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 17. | 02462-02467 |
| 8 | 51. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 18. | 02468-02516 |
| 9 | 52. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 21. | 02517-02561 |
| 10 | 53. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 22. | 02562-02570 |
| 11 | 54. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 23. | 02571-02580 |
| 12 | 55. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 24. | 02581-02583 |
| 13 | 56. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 25. | 02584 |
| 14 | 57. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 26. | 02585-02598 |
| 15 | 58. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 27. | 02599-02602 |
| 16 | 59. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 28. | 02603-02606 |
| 17 | 60. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 29. | 03607-02620 |
| 18 | 61. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 30. | 02621-02625 |
| 19 | 62. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 131. | 02626-02808 |
| 20 | 63. | Bombardier Transportation (Holdings) USA, Inc. Exhibit 132. | 02809 |
| 21 | 64. | Clark County Department of Aviation Exhibit 1. | 02810 |

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| 1 | 65. | Clark County Department of Aviation Exhibit 2. | 02811 |
| 2 | 66. | Clark County Department of Aviation Exhibit 3. | 02812-02814 |
| 3 | 67. | Clark County Department of Aviation Exhibit 4. | 02815-02817 |
| 4 | 68. | Clark County Department of Aviation Exhibit 5. | 02818-02822 |
| 5 | 69. | Clark County Department of Aviation Exhibit 13. | 02823-02999 |
| 6 | 70. | Clark County Department of Aviation Exhibit 14. | 03000-03026 |
| 7 | 71. | Clark County Department of Aviation Exhibit 16. | 03027-03030 |
| 8 | 72. | Clark County Department of Aviation Exhibit 17. | 03031 |
| 9 | 73. | Clark County Department of Aviation Exhibit 18. | 03032-03034 |
| 10 | 74. | Clark County Department of Aviation Exhibit 19. | 03035-03041 |
| 11 | 75. | Clark County Department of Aviation Exhibit 20. | 03042-03044 |
| 12 | 76. | Clark County Department of Aviation Exhibit 20A. | 03045-03046 |
| 13 | 77. | Clark County Department of Aviation Exhibit 20B. | 03047-03050 |
| 14 | 78. | Clark County Department of Aviation Exhibit 22. | 03051-03115 |
| 15 | 79. | Clark County Department of Aviation Exhibit 23. | 03116-03134 |
| 16 | 80. | Clark County Department of Aviation Exhibit 25. | 03135-03208 |
| 17 | 81. | Clark County Department of Aviation Exhibit 26. | 03209-03286 |
| 18 | 82. | Clark County Department of Aviation Exhibit 27. | 03287-03343 |
| 19 | 83. | Clark County Department of Aviation Exhibit 30. | 03344-03391 |
| 20 | 84. | Clark County Department of Aviation Exhibit 32. | 03392-03453 |
| 21 | 85. | Clark County Department of Aviation Exhibit 33. | 03454-03456 |

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| 1 | 86. | Clark County Department of Aviation Exhibit 34. | 03457-03459 |
| 2 | 87. | Clark County Department of Aviation Exhibit 35. | 03460-03463 |
| 3 | 88. | Clark County Department of Aviation Exhibit 36. | 03464-03466 |
| 4 | 89. | Clark County Department of Aviation Exhibit 37. | 03467-03469 |
| 5 | 90. | Clark County Department of Aviation Exhibit 38. | 03470-03472 |
| 6 | 91. | Clark County Department of Aviation Exhibit 39. | 03473-03507 |
| 7 | 92. | Clark County Department of Aviation Exhibit 40. | 03508-03511 |
| 8 | 93. | Clark County Department of Aviation Exhibit 41. | 03512-03524 |
| 9 | 94. | Clark County Department of Aviation Exhibit 42. | 03525-03526 |
| 10 | 95. | Clark County Department of Aviation Exhibit 43. | 03527-03532 |
| 11 | 96. | Clark County Department of Aviation Exhibit 44. | 03533-03534 |
| 12 | 97. | Clark County Department of Aviation Exhibit 141. | 03535-03539 |
| 13 | 98. | International Union of Elevator Constructors Exhibit 1. | 03540-03722 |
| 14 | 99. | International Union of Elevator Constructors Exhibit 2. | 03723-03725 |
| 15 | 100. | International Union of Elevator Constructors Exhibit 3. | 03726-03727 |
| 16 | 101. | International Union of Elevator Constructors Exhibit 4. | 03728-03751 |
| 17 | 102. | International Union of Elevator Constructors Exhibit 5. | 03752-03753 |
| 18 | 103. | International Union of Elevator Constructors Exhibit 7. | 03754-03760 |
| 19 | 104. | International Union of Elevator Constructors Exhibit 8. | 03761-03770 |
| 20 | 105. | International Union of Elevator Constructors Exhibit 9. | 03771-03802 |
| 21 | 106. | International Union of Elevator Constructors Exhibit 10. | 03803-03810 |

1 107. International Union of Elevator Constructors Exhibit 13. 03811-03823
2 108. International Union of Elevator Constructors Exhibit 17. 03824
3
4 109. International Union of Elevator Constructors Exhibit 18. 03825-03829
5 110. International Union of Elevator Constructors Exhibit 19. 03830-03838
6 111. International Union of Elevator Constructors Exhibit 21. 03839-03840
7 112. International Union of Elevator Constructors Exhibit 22. 03841-03843
8 113. International Union of Elevator Constructors Exhibit 23. 03844
9 114. International Union of Elevator Constructors Exhibit 24. 03845-03846
10 115. International Union of Elevator Constructors Exhibit 25. 03847-03860
11 116. International Union of Elevator Constructors Exhibit 27. 03861-03870
12 117. International Union of Elevator Constructors Exhibit 28. 03871-03938
13 118. Final Order, filed March 6, 2014. 03939-03952
14
15
16
17

18 DATED this 27th day of June, 2014.

19 CATHERINE CORTEZ MASTO
20 ATTORNEY GENERAL

21 BY: /s/ Scott Davis
22 SCOTT DAVIS, #10019
23 Deputy Attorney General
24 555 E. Washington Avenue, Suite 3900
25 Las Vegas, NV 89101
26 Attorneys for STATE OF NEVADA
27 OFFICE OF THE LABOR
28 COMMISSIONER

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BOMBARDIER TRANSPORTATION
(HOLDINGS) USA INC.,

Appellant,

vs.

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

Respondents.

Supreme Court No. 71101 Electronically Filed
Jul 17 2017 09:00 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**APPELLANT’S OPPOSITION TO MOTION
TO DISMISS THE APPEAL**

Bombardier Transportation (Holdings) USA Inc. (“Bombardier” or “Appellant”), by and through its counsel, Jackson Lewis P.C., hereby submits its Opposition to the Labor Commissioner’s (“Labor Commissioner” or “Respondent”) Motion to Dismiss the Appeal for lack of subject matter jurisdiction. In the event the Court were to conclude that the underlying administrative order is not “final,” Bombardier requests, in the alternative, that the Court treat Bombardier’s appeal and this Opposition as a Petition for Writ of Mandamus. Doing so would cure the alleged jurisdictional defect, is within the Court’s discretion, would be in the interest of judicial economy and justice given that the litigation is now almost **eight years old**, and is particularly appropriate given both the Labor Commissioner’s knowing and voluntary decision to refrain from contesting the finality of its decision before the

District Court and its complete failure to offer any justification for its delay. This Opposition is made and based upon the following memorandum of points and authorities and exhibits thereto, the pleadings and papers on file herein, and any oral argument the Court may allow.

I. FACTUAL AND PROCEDURAL BACKGROUND¹

This case arises out of the International Union of Elevator Constructors' (the "Union") claim that Bombardier's Maintenance Technicians are entitled to prevailing wage rates for work performed under Clark County Department of Aviation's ("Clark County") contract with Bombardier for the maintenance of the automated train system ("ATS") at McCarran International Airport ("Airport"). **TR00001-2.** That contract, which is designated CBE-552, was executed in June 2008, but it was merely a continuation of the maintenance work that Bombardier had been performing since 1982 when the ATS system was first installed as the *only* means of transport to the Airport's "C" Gates.² **TR00198-242.** Like the County's other maintenance contracts, including those contracts for the maintenance of its

¹ The following factual and procedural background covers matters not described in the Labor Commissioner's Motion in order to provide this Court with additional detail about this pending appellate matter. Transcript citations refer to the administrative record filed with the District Court at the time Bombardier submitted its petition for judicial review.

² The land bridge connecting the C Gates with Terminal 1 was built several years after the number of C Gates was expanded.

buses and elevator systems, CBE-552 had never been considered a public works project requiring the payment of prevailing wages under NRS Chapter 338. Indeed, the approach went unquestioned until 2009 – more than 25 years – when the Union initiated the litigation giving rise to this appeal.

As the Court is aware, prevailing wage cases begin with an investigation conducted by the awarding body. In this prevailing wage case, Clark County, the awarding body, denied the Union’s claims twice, first in 2009 and again in 2010. **TR00003-8**. On both occasions, Clark County concluded that the work performed under the auspices of the CBE-552 maintenance contract was “maintenance” work which was exempt from the prevailing wage requirements in NRS Chapter 338. *See id.*

The Union objected to Clark County’s findings and requested a hearing. Subsequent proceedings led then-Labor Commissioner Michael Tanchek to issue a decision explicitly identified as an “Interim Order” on June 7, 2011. **TR00009-16**. Both Bombardier and the Union appealed the Interim Order to the Eighth Judicial District Court. Those appeals were dismissed after the parties, including the Labor Commissioner, stipulated (1) that the Interim Order did not constitute a final decision, and (2) that when this matter returned for hearing before the Labor Commissioner the Interim Order would not limit any party “from asserting arguments or presenting evidence” in any way. **TR00045-54**.

Clark County issued a Revised Determination on July 25, 2011, once again dismissing the Union's claims. **TR02818-02822**. Both parties filed objections, and after a prehearing conference and several months of formal discovery which included the exchange of more than 30,000 pages of documents, expert witness reports, expert witness depositions, fact witness depositions, and a denied motion for summary judgment, the Labor Commissioner conducted a hearing pursuant to NAC 338.112(1)(d) and NRS 607.207. *See Exhibit 1 - Scheduling Order and Revised Scheduling Order*. The hearing lasted a total of six days in June and September 2013. During that hearing, the Labor Commissioner heard testimony from sixteen witnesses, made evidentiary rulings, and received thousands of pages of exhibits into the record. **TR01468-3938**.

At the close of the hearing, the Labor Commissioner noted its obligation to issue a written decision within thirty days as provided in NRS 607.215(1), but asked the parties to agree that additional time was warranted in light of the size of the record and the complexity of the issues at hand.³ The Labor Commissioner ultimately issued an order on March 6, 2014 (the "2014 Order") that purported to resolve all of the contested issues in the case and, which unlike the earlier decision

³ Labor Commissioner Thoran Towler, who issued the decision, was replaced by the current Labor Commissioner Shannon Chambers. This brief therefore refers to the Labor Commissioner using neutral pronouns such as "it."

issued in June 2011, was not identified as an “interim order.” Specifically, it found 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 [sic] 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.

See Exhibit A to Respondent’s Motion at 12:16-13:3.

Bombardier filed a Petition for Judicial Review in the Eighth Judicial District Court on April 4, 2014. After the petition was filed, counsel of record for the parties participated in several conversations in May and June 2014 to discuss procedural issues, including whether the Labor Commissioner’s 2014 Order was final for purposes of appeal. **Exhibit 2 – Declaration of Paul Trimmer at ¶ 4.** Deputy

Attorney General Scott Davis represented the Labor Commissioner in those discussions. The undersigned, Paul Trimmer, represented Bombardier. E. Lee Thomson represented Clark County, and Andrew Kahn represented the Union. *Id.*

The Labor Commissioner did not move to dismiss the petition for judicial review on the grounds that the 2014 Order was not final, or otherwise contest the petition's ripeness before the District Court. *Id.* at ¶ 5. Indeed, Bombardier submitted its opening brief shortly thereafter and, in its response, the Labor Commissioner neither contended that its 2014 Order was not final nor otherwise argued that the matter was not properly before the District Court. *Id.*

Eighth Judicial District Court Judge Joe Hardy denied Bombardier's petition for judicial review on July 11, 2016 (the "2016 Order"). Judge Hardy noted that he may have ruled differently had he heard the case in the first instance, but (in Bombardier's view, wrongfully) found that the Labor Commissioner's 2014 Order was entitled to deference and affirmed "the Nevada Labor Commissioner's March 6, 2014 Decision in its entirety[.]" Consistent with the 2014 Order, he instructed that the case return to Clark County to liquidate the amount of back wages allegedly due "as ordered in conclusions 5 and 6 of the [Labor Commissioner's March 6, 2014] Decision." *See Exhibit C to Respondent's Motion at 16:12-17.* In other words, the District Court simply affirmed the Labor Commissioner's Decision. The 2016

Order did not remand the matter to the Labor Commissioner because the record was incomplete or the matter was incapable of review at that time.

Bombardier filed its Notice of Appeal with this Court on August 16, 2016. The case was referred to the Court's mandatory settlement program. At no time until just before the instant motion to dismiss was filed did the Labor Commissioner claim its 2014 Order was not final or that Bombardier's petition for judicial review was procedurally defective.

II. LEGAL ARGUMENT

A. The Court Has Subject Matter Jurisdiction Because The 2014 Order Is Final And Subject To Judicial Review Within The Meaning of NRS 607.215, NAC 338.112(6) and NRS 233B.130.

The Court has jurisdiction over Bombardier's petition for judicial review and this appeal provided that it has a statutory basis for hearing the matter. *See Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416, 418 (2000); *see also Bally's Grand Hotel v. Reeves*, 112 Nev. 1487, 1489, 929 P.2d 936, 937 (1996). Labels do not matter. *Bally's Grand Hotel*, 112 Nev. at 1489. The critical issues are whether the case and the lower tribunal's decision are at a juncture which ensures that the proceedings can be thoughtfully considered and that hearing the case does not create the "specter" of inefficient, piecemeal appellate review. *See id.* The 2014 Order satisfies these requirements.

The statutory basis for review is clear. While not cited by the Labor Commissioner in its Motion, NRS Chapter 607, the Labor Commissioner's enabling statute, contains a specific provision governing the finality of Labor Commissioner decisions issued after evidentiary hearings and the petition for judicial review process. NRS 607.215 provides:

NRS 607.215 Decision of Labor Commissioner or designee after hearing: Issuance; enforceability; judicial review.

1. Within 30 days after the conclusion of the hearing provided for in NRS 607.207, the Labor Commissioner or a person designated by the Labor Commissioner shall issue a written decision, setting forth findings of fact and conclusions of law developed at the hearing.

2. The decision, together with the findings of fact and conclusions of law, must be mailed to each of the parties to whom the notice of the hearing was mailed and to any other persons who may have requested notice of the hearing. **The decision becomes enforceable 10 days after the mailing.**

3. **Upon a petition for judicial review, the court may order trial de novo.**

4. **A decision issued pursuant to this section is binding on all parties and has the force of law.**

NRS 607.215 (emphasis added); *see also* NAC 607.525 (restating the requirement that the Labor Commissioner enter a decision after holding a hearing).

As noted above, the 2013 administrative hearing was conducted pursuant to NRS 607.207 and it occurred after full-blown discovery and motion practice which went well beyond normal prehearing practice before the Labor Commissioner. At the conclusion of the hearing, the Labor Commissioner stated by implication that it

was issuing an order pursuant to NRS 607.215 when it referenced the thirty day deadline for its decision. Moreover, the 2014 Order resolved all material issues in the case.

It is inconceivable that an order issued under NRS 607.215, after a hearing in accordance with NRS 607.207, which is fully enforceable ten days after mailing (NRS 607.215(2)) and which is “**binding on all parties and has the force of law**” under NRS 607.215(4) is not a “final” order for purposes of judicial review, particularly when NRS 607.215(3) specifically references the filing of a petition for judicial review after entry of such an order. Indeed, the Labor Commissioner’s newfound position that its 2014 Order is not “final” ignores the text of its own governing statute and would render NRS 607.215(3) meaningless.

Further support for Bombardier’s position is found in the regulations the Labor Commissioner issued to administer prevailing wage disputes under NRS Chapter 338. The Nevada Legislature did not prescribe the manner in which such disputes will be resolved. It instructed the Labor Commissioner to do so in NRS 338.012, and the Labor Commissioner did exactly that when it promulgated NAC 338.112.

The Labor Commissioner conducted the hearing in June and September 2013 in accordance with its authority under NAC 338.112 and NRS 607.207. NRS 607.207 is discussed above and NAC 338.112(6) provides:

If, after holding a hearing on a determination issued by an awarding body or a modified determination, the Labor Commissioner finds that a contractor or subcontractor violated a provision [of the prevailing wage statutes and regulations], the Labor Commissioner will issue a written decision, which will include, without limitation, the relevant facts and applicable laws on which the decision was based. . . . **A decision issued by the Labor Commissioner pursuant to this subsection is deemed to be the final order of the Labor Commissioner on the matter.**

NAC 338.112(6)(emphasis added).

Without reiterating the facts and analysis set forth above, it is clear that the 2014 Order is a “final” order within the meaning of NAC 338.112(6). The 2014 Order was a detailed document that contained findings of fact, conclusions of law, and resolved all issues addressed at the hearing except for a ministerial calculation that Clark County was bound to conduct in a manner consistent with the Order. *See Exhibit A to Motion at 12:16-13:3*. Because the 2014 Order was “issued by the Labor Commissioner pursuant to [NAC 338.112(6)] [it] is deemed to be the final order of the Labor Commissioner on the matter.” NAC 338.112(6).

In addition to the fact that the above-referenced provisions establish an independent basis for this Court’s jurisdiction under NRS 607.215, they also confirm that the 2014 Order is “final” for purposes of the Nevada Administrative Procedure Act (“APA”).

Under NRS 233B.1301(1), any party aggrieved by a “final” decision in a contested administrative proceeding “is entitled to judicial review of the decision.” NRS 233B.130(1)(a)-(b). The APA does not define what constitutes a “final decision,” but as set forth above, the Labor Commissioner has done so with respect to both NRS 607.215 and NRS Chapter 338, the prevailing wage statutory scheme that governs the outcome of this case. The fact that the 2014 Order is a “final decision” under both of the above referenced provisions confirms that the order is final for purpose of NRS 233B.130.

As this Court has long held, statutes must be read in conjunction with each other, particularly when one statute or regulation is clearly intended to give meaning to another. *See, e.g., State Employees Ass’n, Inc. v. Lau*, 110 Nev. 715, 877 P.2d 531, 534 (1994) (considering the meaning of the word “year” and explaining that when a statutory term is undefined and multiple provisions relate to it, “it is necessary to use canons of construction, and give effect to all controlling legal provisions in pari materia.”). Further, “it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally.” *See, e.g., Sierra Life Ins. Co. v. Rottman*, 95 Nev. 654, 656, 601 P.2d 56, 57 (1979).

The Labor Commissioner's Motion contains no analysis of NRS 607 or NAC 338. Nor does it focus on the true import of the 2014 Order which on its face clearly resolves the case with finality. Instead, it focuses on Court decisions considering the finality of judgments in completely different contexts and argues that the damage calculation to be conducted by Clark County means that the 2014 Order is not yet final. The Labor Commissioner goes on to contend that it is somehow more efficient to send the case back to the Labor Commissioner and Clark County and have the matter reheard in its entirety by the District Court before final review with the Supreme Court.

Moreover, this Court has considered other cases where an administrative agency's order resolved all pertinent matters, including liability, but did not liquidate the amount of damages owed and concluded that such an issue did not preclude the exercise of jurisdiction over the appeal. The Court, in *Bally's Grand Hotel*, adopted a practical view, explaining:

The mere statement that the matter be remanded for calculation of benefits does not render non-final the otherwise final determination that those benefits are owed. The district court's order reversing the appeals officer's decision that [respondent] was entitled to benefits cannot be altered by any decision on remand calculating benefits. Therefore, the order appealed from in this case is final and appealable.

112 Nev. at 1489.

Further, the Labor Commissioner has a revisionist version of the case's history. It is already almost eight years old. The Labor Commissioner entered an "Interim Order" in 2010, but did not do so in 2014. When Bombardier filed its petition for judicial review, the parties discussed the finality of the 2014 Order and the Labor Commissioner did not contest it, which is convincing evidence that the Labor Commissioner considered the 2014 Order to be dispositive under NRS 607 and NAC 338. *See Exhibit 2 at ¶¶ 4-5.*

The Nevada Supreme Court, while acknowledging the general rule that a subject matter "jurisdictional question may be raised at any time," has also held that a failure to dispute subject matter jurisdiction can constitute waiver under appropriate circumstances, explaining that:

it is also settled in this court that a party may, by his conduct, become estopped to raise such a question. A party in an appellate court who has treated the judgment as final and asked that the same be affirmed . . . will not be heard afterwards . . . to contend that the judgment was not final and the court therefore without jurisdiction to determine the questions presented on the appeal.

Chadbourne v. Hanchett, 35 Nev. 319, 323, 133 P. 936, 937 (1917).

In sum, the Labor Commissioner's position is not legally or practically correct. Remanding the case would result in additional years of administrative and appellate proceedings related to a ministerial damages calculation. Remand in that context will not enhance this Court's review, especially when those proceedings

would not be necessary if the Court concludes that Bombardier is not liable under NRS Chapter 338.

B. The 2016 Order from the District Court Is Appealable

In addition to asserting that the 2014 Order is not final, Respondent argues that the 2016 Order is not appealable because the 2016 Order, which affirmed the Labor Commissioner's decision and denied the petition for judicial review, found that the Labor Commissioner should proceed with overseeing Clark County's calculation of the compensation allegedly due the ATS Technicians under CBE-552.

Again, the Labor Commissioner's argument is based on an incomplete understanding of the applicable legal standard. First, the case law and reasoning on which the Labor Commissioner relies do not involve an appeal in this case's context where there is specific statutory language confirming the finality of the 2014 Order. Moreover, contrary to the contentions in the Motion, this Court does not maintain a bright line rule whereby any District Court order which involves a remand cannot be appealed. To the contrary, the rule is that "an order by a district court remanding a matter to an administrative agency is not an appealable order **unless the order constitutes a final judgment.**" *Ayala v. Caesars Palace*, 119 Nev. 232, 71 P.3d 490, 492 (2003) (emphasis added) citing *State Taxicab Authority v. Greenspun*, 109 Nev. 1022, 1024-25, 862 P.2d 423, 424-25 (1993).

For the reasons set forth above, there can be no doubt that the 2014 Order is a “final decision” under NRS Chapter 607, NAC 338 and NRS Chapter 233B because it fully resolves all liability issues and also establishes a formula whereby the allegedly due prevailing wage differential can be calculated and paid. The mere fact that the District Court order included the term “remand” in the 2016 Order did not undermine the finality of the court’s decision because the order merely sent the case to the administrative agency for a calculation of the amount due. *See Bally’s Grand Hotel & Casino v. Reeves*, 112 Nev. 1487, 929 P.2d 936 (1996). Given the limited purpose of the remand outlined in the 2016 Order, Respondent’s argument that it is not a final and appealable judgment lacks merit.

The Labor Commissioner’s contention that *Bally’s Grand Hotel* is distinguishable is wrong. In that case, the Court ordered an appellant to show cause why its appeal should not be dismissed for lack of jurisdiction. *Bally’s Grand Hotel*, 112 Nev. at 1488. Bally’s had appealed a district court’s decision that had overturned an appeals officer’s decision upholding Bally’s denial of an industrial accident claim and remanded the claim to Bally’s self-insured administrator for further action. *Id.* Bally’s argued “that the use of the word ‘remand’ or ‘remanded’ . . . should not automatically compel a conclusion that the order of the district court is not a final, appealable judgment.” *Id.*

This Court agreed with Bally’s argument and stated that it “has consistently looked past labels in interpreting NRAP 3A(b)(1), and has instead taken a functional view of finality, which seeks to further the rule’s main objective: promoting judicial economy by avoiding the specter of piecemeal appellate review.” *Id.* at 1488-89 citing *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 733 (1994).

When that reasoning is applied here, the outcome should be clear. The District Court’s 2016 Order affirmed the Labor Commissioner’s 2014 Order in its entirety, including the remedial instructions requiring Clark County to determine the amount allegedly due to the ATS Technicians. The essential findings in the 2014 Order cannot be changed on remand, including the underlying findings of liability and the Labor Commissioner’s conclusion that 20% of the work performed should be deemed compensable repair. Therefore, similar to the order appealed from in the

Bally's Grand Hotel case, the 2016 Order appealed from in this case is final and appealable.⁴

C. Alternatively, This Court Has The Authority To Hear This Matter as a Writ of Mandamus

In the event the Court concludes that the 2014 Order is not final, it should still not dismiss the appeal. Rather, the Court should exercise its discretion to treat Bombardier's petition for judicial review as a petition for writ of mandamus over which it has original jurisdiction pursuant to NRS 34.160. *See Howell v. Ricci*, 124 Nev. ----, 197 P.3d 1044, 1049 (2008); *see also Clark County Liquor Board*, 730

⁴ The Labor Commissioner's attempt to distinguish *Bally's* is unpersuasive. Both of the cases it contends are controlling -- the *Clark County Licensing Board* case from 1986 and the *Greenspun* case from 1993 -- are readily distinguished from the facts presented in this appeal. In both *Clark County Liquor Board* and *Greenspun*, the Court affirmed decisions by district courts to remand matters to administrative agencies because the agencies had not conducted full and complete hearings and therefore could not have rendered final judgments. *See Clark County Liquor Board*, 730 P.2d at 446; *see Greenspun*, 862 P.2d at 425 ("the district court did not finally resolve the suitability question, nor did it review the merits of the [NTA's] decision").

In contrast, in this matter, the Labor Commissioner conducted a complete and exhaustive hearing. Prior to the hearing, the parties conducted extensive written discovery and depositions. Over the course of four days of hearings in June 2013 and two days of hearings in September 2013, the parties called sixteen different witnesses to testify. The Labor Commissioner's administrative record that was submitted to the District Court for the petition for judicial review was 3,952 pages long. *See Exhibit 3 – Administrative Record Document List.*

P.2d at 447 (citing *State ex rel. Department of Transportation v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983)).

A writ of mandamus may be issued by this Court to compel the performance of an act of an inferior state court, board, or agency. *See* NRS 34.160⁵; *see also Howell v. Ricci*, 124 Nev. ----, 197 P.3d 1044, 1049 (2008). Mandamus “is an extraordinary remedy,” *Clark County Liquor Board*, 730 P.2d at 447, but the Court can exercise its discretion “to consider writ petitions despite the existence of an otherwise adequate legal remedy when an important issue of law needs clarification, and this court’s review would serve considerations of public policy, sound judicial economy, and administration.” *City of N. Las Vegas v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 122 Nev. 1197, 1204, 147 P.3d 1109, 1114 (2006).

The case satisfies all of the conditions necessary if the Court were to consider hearing the matter pursuant to a petition for writ of mandamus. First, under the circumstances at bar, Bombardier lacks an adequate remedy to challenge the Labor Commissioner’s action. The administrative proceedings in this case were incredibly comprehensive: full blown discovery, expert witness reports and depositions, and tens of thousands of pages of documents were disclosed. Requiring Bombardier

⁵ It is appropriate for the Court to consider the request for a writ in the first instance. An application to the lower court is not necessary; and, the Court has used a similar analysis before when it exercised subject matter jurisdiction in *Clark County Liquor & Licensing Bd.*, 102 Nev. at 658-59.

(and the claimants for that matter) to expend resources on a second equally substantial administrative action when the outcome of the instant appeal could render such proceedings moot is illogical and punitive, particularly in this matter, where the administrative proceedings terminated more than three years ago.

Second, the case involves several novel issues of statutory interpretation which are of critical importance to Clark County and the public works statutory scheme such as: 1) whether normal contracts for ongoing operations and maintenance support for critical county infrastructure (like the ATS at the Airport) constitute public works projects under NRS 338.010; and 2) whether such contracts, even if they constitute “projects” are nonetheless exempt from prevailing wage requirements because they are “directly related to the to the normal operation of [Clark County] or the normal maintenance of its property.” NRS 338.011(1).

Third, requiring the parties to suffer through several additional years of delay while the matter percolates back through the administrative process – solely because the Labor Commissioner purposefully elected not to challenge the appealability of the 2014 Order at the time the petition for judicial review was filed – is unconscionable. This matter stretches back to October 2009 when the IUEC filed a prevailing wage complaint with the Labor Commissioner in connection with CBE-552. The Labor Commissioner did not conduct a hearing until 2013. Following the hearing and the issuance of the 2014 Order, Bombardier sought judicial review in

district court. The judicial review process lasted for more than two years. At no point during the judicial review process did the Labor Commissioner argue that its order was not final. In fact, when the issue was discussed by the parties involved in the petition for judicial review process, the issue was dropped and no motion was filed challenging the finality of the 2014 Order. **Exhibit 2 at ¶¶ 4-5.**

Dismissing this appeal at this stage would not serve considerations of sound judicial economy and administration. While it would allow for Clark County and the Labor Commissioner to calculate the compensation allegedly due the ATS Technicians, that process – which according to the Labor Commissioner would be time consuming and costly – is not necessary and would not aid the Court in considering the matters of first impression raised by Bombardier’s petition for judicial review. The record for this matter is already fully developed. There is no need for further delay. Further delay would harm Bombardier by not allowing its timely appeal to be heard. Delay would harm Clark County because its contracting practices would remain subject to challenge. And delay could potentially prejudice the claimants who will have to wait several additional years before this already eight year old case is resolved.

Finally, at least one prior decision of the Court supports taking such an approach. In *Clark County Liquor Board*, the Liquor Board appealed a District Court order requiring it to grant a private citizen discovery during an administrative

enforcement action. 730 P.2d at 447. The Court concluded that a District Court decision remanding an administrative matter because the administrative agency violated a respondent's due process rights by denying discovery was not final and appealable. *Id.* Nevertheless, the Court exercised jurisdiction over the appeal by recasting the matter as a request for writ of mandamus and invoking its authority to hear the case under NRS 34.160. The Court concluded that doing so was appropriate for equitable reasons because the Court had previously issued an order denying a petition for writ of mandamus on the ground that the petitioner had the right to file an appeal. *Id.*

This case does not involve a prior writ petition denied by the Court. However, because the finality of the 2014 Order depends on how the Labor Commissioner treated it under NRS 607.215(2) and (4), as well as NRS 338.012 and NAC 338.112(6), the equitable basis for considering the appeal as a request for mandamus is equally compelling. As set forth above, the Labor Commissioner consciously and intentionally refrained from contending that its 2014 Order was not final and appealable. It has provided no explanation for changing its position now, more than three years later – a fact which cannot be overlooked in a case where the underlying merits of the appeal turn in part on whether the Labor Commissioner's decision was arbitrary and capricious. Indeed, under the facts of this case, the Labor Commissioner's contention that dismissing the appeal is necessary to ensure

complete review and promote efficiency is illogical. If what the Labor Commissioner contends is accurate – that the damages calculation will likely take substantial administrative proceedings, including an additional hearing – the most efficient course of action is to hear the case now. If the Court grants Bombardier’s appeal, further administrative proceedings will not be necessary.

III. CONCLUSION

For the reasons set forth above, Respondent’s Motion to Dismiss the Appeal should be denied. In the alternative, if this Court concludes the 2014 Order is not final, this Court should exercise its discretion to hear the appeal as a writ of mandamus.

Dated this 20th day of April, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Jackson Lewis P.C., and that on this 20th day of April, 2017, 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 OPPOSITION TO MOTION TO DISMISS THE APPEAL** to the following:

| | |
|---|---|
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