No one is in a better position to describe the Airport's normal operations, and the ATS system's role in those operations, than Walker. As set forth in detail above, his testimony incontrovertibly established that the ATS system is an integral element of McCarran's daily operations and that the Contract is therefore directly related to those normal operations. The Airport's primary function is to facilitate travelers coming to and leaving Las Vegas. Moreover, to the extent the Airport functions as a business enterprise, the vast majority of its revenues are generated by the fees it collects from the airlines that use its gate areas, and its share of the revenues generated by travelers visiting concessionaires in the gate areas. Neither of these objectives can be accomplished without the continuing availability of the ATS system, and the ATS system could not function without the services provided pursuant to CBE-552.

The Airport site plans confirm what anyone who has traveled by air to Las Vegas already knows. The ATS system is the primary method for moving passengers to and from the "C" and "D" Concourses. The only way to access the "D" Concourse is by ATS train, and the only alternative method of accessing the gate is bussing passengers back and forth from Terminal 1, which would require an extraordinary commitment of personnel and equipment. Although the "C" Concourse has pedestrian access, the bulk of the "C" gates are a significant distance from the main terminal, and walking to those gates takes a considerable amount of time and effort on the part of the passengers. It is apparent that the Airport's normal operations require the ATS system to be available at all times in order to ensure that passengers can efficiently get to and from their

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been left alone because the character of its compensation system has been recognized for what it is - a bona fide commission system" by which employees are exempt. *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505 (7th Cir. 2007). This reasoning is applicable here. As noted above, Bombardier's pay rates were not questioned for more than two decades, and a series of contracts that omitted the requirements of NRS 338.020 were approved by the Clark County District Attorney. Further, as noted in Mr. Walker's testimony and Clark County's initial determinations, the County has consistently handled its maintenance contracts in this way, and there has never been an allegation of impropriety. As in *Yi*, this long history is evidence that the CBE-552 is exempt from Chapter 338's prevailing wage requirements.

flights. CBE-552, which governs the manner in which the ATS system is serviced and made available for passenger use, is therefore directly related to the airport's normal operations.

Although there are is no reported authority defining what constitutes the normal operation of an airport, in general, the Illinois Supreme Court has noted that a business' normal operations means "the standard, or regular operation of the employer's plant," *Travis v. Grabiec*, 52 Ill. 2d 175, 182 (Ill. 1972), and the Missouri Court of Appeals has noted that when a plant is operating at less than 100% capacity, it is "certainly" not engaged in normal operations. *See Laclede Gas Co. v. Labor & Industrial Relations Com.*, 657 S.W.2d 644, 653 (Mo. Ct. App. 1983) ("Normal operations would mean that (sic) conforming to the standard, or regular operation of the employer's plant. . . . To hold otherwise, would require this Court to say that the employer did not need the 2,070 employees, or need the existing facilities that were not being used, nor to maintain or replace its equipment."). Applying the same reasoning to this case requires the Labor Commissioner to find that CBE-552 is exempt. CBE-552 is directly related to the manner in which the ATS system is maintained and made available to McCarran Airport patrons. In fact, the DOA has no other rules or procedures that govern the availability of this vitally important system, and if passengers at McCarran are utilizing alternative methods of going to and from the "C" and "D" Concourses, the airport is "certainly" not engaged in normal operations. *Id.*

CBE-552's importance to the normal operation of the Airport is self-evident. The ATS trains are virtually the only way to travel back and forth from the "C" and "D" Concourses. They are obviously the only way to move large numbers of passengers from Terminal 1 to the "C" and "D" Concourses in a timely and efficient manner. Because Bombardier's performance of CBE-552 was the only way to ensure that the ATS system continues to operate in a reliable and appropriate manner, the Contract is directly related to the normal operation of the Airport and it is exempt.

b. The terms and conditions of CBE-552 establish that the Contract is directly related to the normal operation of the Airport.

The terms and conditions of CBE-552 further substantiate Walker's testimony and Bombardier's claim that the Contract is directly related to the normal operation of McCarran Airport. For example, Section 1.3.5, "Credits for System Availability," establishes that near perfect reliability – 99.65% – is required to satisfy the terms and conditions of the Contract. As noted above, such a provision is necessary because of the critical importance of the ATS system to the airport's ability to transport passengers and manage its daily business. Other provisions which mandate that Bombardier take special precaution to ensure performance under the Contract are in the same vein. For example, Section 1.10 requires Bombardier to employ only "careful and competent" workmen, and forbids the Company from substituting the agreed upon Superintendent without DOA approval. Section 1.21 mandates Bombardier's cooperation in the operation and maintenance of the ATS system and requires monthly meetings to review the performance of the trains and system. Section 2.1.1 requires Bombardier to have technical expertise on site at all times.

The Contract also includes provisions which speak directly to the impact Bombardier's maintenance work has on ATS system availability. Bombardier's fundamental obligation is to perform all work to "assure that [the ATS system] provides safe and reliable service for passengers," and further requires that maintenance activities take place

> in such a way that the interference with, or effect upon operation of the ATS system is minimized. To minimize operational impact, maintenance of equipment may necessarily have to be done at night, or in the off-peak periods. Maintenance practices or procedures that could compromise or degrade the operation must be approved by the [DOA] in advance.

Bombardier Exhibit 1 at Sections 2.1.2 and 2.1.5. Another section provides that any maintenance that **"necessitates a disruption to the normal scheduled operations will require written approval from the [DOA] and coordination with [the DOA] before it is performed."** Section

2.2.6.1 (emphasis added). Finally, the provisions of the Contract's Exhibit A support the same conclusion, particularly Sections A1.0 and A1.6, which tie financial payment under the Contract to dependable service and provide that the ATS System is "designed for 24 hours a day operation."

Based on these contractual provisions, there can be no doubt that CBE-552 is directly related to the normal operation of DOA's property, which is all that is required to secure application of the exemption found in NRS 338.011(1).

4. CBE-552 Is Directly Related To The Normal Maintenance of County Property.

a. Testimony and documents presented at the hearing demonstrate CBE-552's direct relationship with the Airport's normal maintenance.

There is also no question that the CBE-552 was "directly related to the normal maintenance" of McCarran Airport and the ATS system, both of which are County property. During the term of the Contract, Bombardier was the *exclusive* provider of maintenance services to the ATS system. If Bombardier did not do the work, no one else could. The "normal maintenance" of the ATS system and the Airport required CBE-552. Beginning with the Contract's initial statement of work, which states that work performed pursuant to CBE-552 is considered to be "maintenance," all of the Company's activities at the Airport were geared around maintenance, and during the life of the Contract, Bombardier's preventative maintenance to corrective maintenance ratio remained at approximately 90%/10%.

b. CBE-552's terms confirm that its direct relationship with the Airport's normal maintenance.

Each provision describing the work performed under the Contract refers to the work as "maintenance work," and there is a comprehensive schedule of required maintenance that Bombardier is obligated to perform to ensure that the ATS system remains in good working order.

See B-01 at Sections 2.0, 2.1, 2.2; *see also* Schedule A.[18] Further, as Kingston explained in the revised determination, the DOA's analysis of the work performed by Bombardier employees, as well as interviews with those individuals, confirmed that the employees' primary duties are maintenance tasks directly related to the normal upkeep and servicing of the ATS system and its components. If CBE-552 does not qualify as a contract which is directly related to the normal maintenance of county property, it is impossible to imagine what contract could satisfy NRS 338.011's requirements.

5. The DOA's Determination That CBE-552 Is Directly Related To The Normal Operation And Maintenance Of McCarran Airport Is Entitled To Deference.

As noted above, the Labor Commissioner does not have the authority to determine whether Clark County's approval of a contract complies with NRS Chapter 332. As a corollary, it is also clear that Clark County's assessment of such a contract, including its determination of the contract's purpose and whether it is "directly related to the normal operation of the public body or the normal maintenance of its property" is entitled to deference. The structure of Chapter 332, also called the Local Government Purchasing Act, and Chapter 338 make it apparent that this decision is to be left to the local government – in this case, Clark County – in order to ensure that the local government has freedom and predictability when it evaluates its labor costs and enters into certain contracts. *See, e.g., Sheriff, Clark County v. Luqman*, 101 Nev. 149, 153-154 (1985) (administrative agency authority limited to statutory delegation).

Chapter 332 is self-executing. Its provisions grant local governments' exclusive authority to determine when it is appropriate to enter into agreements under that Chapter's provisions. *See generally Citizens for a Pub. Train Trench Vote v. City of Reno*, 118 Nev. 574, 584 (2002) (the authority "to undertake public work projects has been legislatively delegated to local governments

[18] The Union's contention that some of the work is "heavy" maintenance or repair is discussed in more detail below. Although CBE-552 contains provisions requiring in-depth servicing at different intervals, it is inaccurate to describe that work as anything other than maintenance, and it certainly does not predominate over the other provisions in the Contract. It was less than 10% of work performed. *See* B 12, 13, 14 and 16.

by statute"); *see also* NRS 607.160(1) (the labor commissioner catchall provision does not apply because Chapter 332 is not a "labor law"). The implicit purpose of this delegation is readily apparent: a local government is in the best position to determine what constitutes normal operation or normal maintenance of its property. Granting a third party such as the Labor Commissioner the right to retroactively impose liability under NRS Chapter 338 through refusal to apply the exemption would frustrate the local government's right under Chapter 332 to opt out of public bidding for contractual relationships that are essential to its ability to deliver basic services. *Cf. Missouri v. City Utilities of Springfield*, 910 S.W.2d 737, 744 (1995) (overly restrictive application of prevailing wage exemptions is not justified). Contractors would be reluctant to enter into such contracts with local governments if they could face significant liability for unpaid prevailing wages simply because the local government made an error in judgment as to the applicability of NRS 338.011(1).

In this case, Clark County exercised this exclusive authority to determine that CBE-552 is directly related to the normal operation and normal maintenance of its property, and is therefore exempt from Chapter 338's requirements under NRS 338.011. Its determination, which considered its historical interpretation of the NRS 338.011 and its own intentions in agreeing to the Contract is entitled to significant deference unless the Union is able to produce convincing evidence that the exemption does not apply, which it did not. Clark County's power under Chapter 332 would be significantly compromised if the Labor Commissioner is given authority to review this decision.[19]

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[19] Mike Moran conducted the County's post-Complaint investigation. CC-02; CC-04. He has decades of experience in monitoring prevailing wage projects for both unions and employers. His inquiry included comprehensive employee interviews, a review of work tasks and tools and the terms of the Contract. At its conclusion, he determined that CBE-552 and all of the work performed under it provisions, were exempt from prevailing wage under NRS 338.011. Although the Union attempted to suggest that Moran did not actually embrace this determination – alleging that he admitted as much during a private conversation with Stanley – Moran rebutted those allegations. The Union was attempting to conflate Moran's position on Contract 2305, which involved the upgrade of the C and D legs, with his position on the Contract at issue. As Moran explained, to the extent he had any initial doubts about whether CBE-552 was exempt, those doubts proved baseless after he completed his factual

D. Bombardier Is A Railroad Company And Is Therefore Exempt Under NRS 338.080.

Chapter 338's prevailing wage requirements do not apply to "[a]ny work, construction, alteration, repair or other employment performed, undertaken or carried out, by or for any *railroad company* or any person 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). The Union's primary argument against this exemption has been derision and speculation about what the legislature intended.[20] It has asserted that the ATS system itself is not a traditional, steel-wheel railroad and therefore NRS 338.080(1) does not apply. This position is not supported by the statute's broad text, which applies to any work *by* or *for* a railroad company.

It is also not supported by the undisputed facts.[21] Bombardier is a subsidiary of Bombardier Transportation. 38:10 – 43:21. The Bombardier entity that is the Respondent in this case is the entity through which Bombardier Transportation conducts much of its U.S. business, including the manufacture of heavy rail equipment, signaling technology, locomotives, and "turnkey systems" which can include a complete railroad system. 42:24-43-21; Bombardier Ex. 10. Through its operations and maintenance division, Bombardier operates and maintains both light and heavy rail lines, as well as other ATS systems throughout the United States. 44:8-52:2; Bombardier Ex. 11. From 2009-2011, more than 41% of Bombardier's revenues were derived from the design, operation, manufacture and sale of steel-wheel railroad equipment – from

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investigation and reviewed the language of the statute. Considering Moran's expertise, his determination that CBE-552 is directly related to both the normal operation and normal maintenance of the ATS System and the Airport is persuasive evidence of how NRS 338.011 is understood by sophisticated members of the industry.

[20] The Union's only argument was based on hearsay: Stanley testified that Bechtel and the Washington Group had built a rail line as a joint venture in the past but had not been deemed exempt under Nevada law. 1061:19-1063:2. This hearsay is inadmissible. It also supports Bombardier's argument. Those companies are conglomerates that are completely different than Bombardier, a company in which every division and every sale involves, to one degree or another, rail equipment.

[21] The witness who discussed Bombardier's status as a railroad in the most detail was Michael Shaman. Consideration of his experience and prior work history, in and of itself, suggests that Bombardier is a railroad company. Before heading the Company's operations and maintenance division, he was the Chief Operating Officer of the Middle Asian National Railway. He was also the general manager of Virgin's British Railway contract, covering more than 350 diesel locomotives. 35:1-22.

propulsion systems to signaling technology – and its single largest revenue item, worth more than $200 million, was contracting for the manufacture and delivery of diesel locomotives to the New Jersey Transit Authority.[22] *Id.* It is one of the few, if not the only company, that had the capacity to manage the design process and deliver the trains and all related equipment for the proposed Desert Xpress high speed rail line between Nevada and Southern California.[23] 52:8-53:12. Finally, the ATS itself is a high volume rail transit system, transporting millions of passengers each year. 397:17-398:8.

A company's nature is defined by what it makes and how it generates revenue. In the case of Bombardier, 100% of its activities are dedicated to rail transit, including ATS systems like the one at issue in this case. Its largest operations and maintenance contract in the United States runs through JFK airport, and is a steel-wheel commuter line. It operates and maintains the Southern New Jersey Train line, which involves commuter trains operating on traditional heavy freight railways. In an average year, more than 40% of its revenue is derived from the manufacture, sale or distribution of traditional steel-wheel railway products. It is a railroad company in every sense of the word, and it is exempt from the Act's coverage based on the plain meaning of NRS 338.080.

VI. THE UNION'S ARGUMENTS HAVE NO MERIT

Virtually all of the Union's case was directed at establishing that CBE-552 required Bombardier Maintenance Technicians to perform some "repair" work. This argument had two presumptive purposes: (1) satisfying its obligation to prove a prima facie case by establishing that

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[22] All of the evidence presented in the hearing, including the description of Bombardier's railroad operations activities in New Jersey, Pennsylvania and New York, as well as its sale of railroad equipment like locomotives and other heavy rail products, was limited to the Respondent in this case.

[23] Although Desert Xpress has not, as yet, come to fruition, the fact that Bombardier was chosen to oversee the development of such a massive rail transit project speaks to its identity as a *railroad company.* In fact, it is important to note that the Federal Transportation Administration, which is a division of the Department of Transportation, has recently issued proposed administrative regulations that deem automated guideway systems, like the ATS at McCarran, to be rail transit that belongs in the same classification as traditional steel-wheel railroads for purposes of regulation and safety. *See Advance Notice of Proposed Rulemaking,* Federal Transit Administration, Docket No. FTA-2013-0030, RIN 2132-AB20; 2132-AB07 at 1 (identifying automated guideway systems as "rail transit").

the Contract was a "project for new construction, repair or reconstruction" of public works, and therefore covered, at least prior to the consideration of any exemptions, by the Act; and (2) refuting Bombardier's claim that the Contract is exempt because it is directly related to the Airport's normal operation *or* normal maintenance. Critically, however, whether the Contract required something more than incidental repair is irrelevant to whether the Contract is *directly related to the normal operation* of the Airport. That argument has been conceded. The Union submitted *no* evidence to contradict Bombardier's proof that CBE-552 is exempt under that section of NRS 338.011(1), and its only legal argument, that the presence of any repair precludes application of the exemption, would render the entire provision superfluous. Accordingly, although this brief responds to the Union's other arguments, the Union's failure to address this exemption leaves the Commissioner with no choice: The facts proving that the Contract is exempt are undisputed and the Complaint must be dismissed.

A. The Union's Contention That The Contract Contains An Element Of Repair Failed To Establish That Work Performed Under CBE-552 Is A Project *For* Repair As Required By NRS 338.010(16).

1. The Union failed to show that the Contract is a "project" within the meaning of NRS 338.010(16).

As set forth above, it is clear that CBE-552 and the work performed under its terms, is not a "project" as that term is used in Chapter 338. The Union's only attempt to answer this came in Bill Stanley's discussion of a number of what he described as "long term requirements contracts." *See* UX 27; UX 28. His essential claim was that because CBE-552 contained a five year commitment to provide whatever was required, it should be treated the same way. However, cross examination of Stanley demonstrated that he had no personal knowledge that supported his argument and had not actually reviewed all of the contracts he cited – or at least he could not identify which ones he had reviewed. 1028:4-1035:11. Moreover, a close review of the different contracts, such as the asphalt replacement contract, 1036:5-1038:22, street light replacement

contract, 1047:2-1050:24, and the flood channel rehabilitation contract, 1041:8-1043:14, demonstrates that those agreements are fundamentally different from CBE-552. Each contract contained substantial completion requirements, involved actual construction, like digging holes or pouring concrete, and strict time deadlines. In other words, they contained the essential elements of a contract for a construction project that are plainly absent from CBE-552.

As also shown at the hearing, the contracts that are most similar to CBE-552, such as the Kone Elevator Maintenance Contract, and Clark County's landscaping maintenance contract are *not* treated as prevailing wage contracts and have never been challenged as such. 994:18-996:6. Indeed, to the extent individual opinions should be given weight, the Commissioner should credit Moran and Walker. Moran has considerably more experience with Nevada's prevailing wage laws and enforcement scheme than Stanley, and he conducted a thorough investigation which concluded the contract is not covered. Walker testified about the public body's custom and interpretation, and he explained that so long as he was the Director of Aviation, more than twenty years, maintenance contracts like CBE-552 have not been considered subject to prevailing wage. In short, the Union failed to produce any competent evidence of custom or practice that would refute the textual analysis set forth above in Section V.

2. The evidence at the hearing confirmed that CBE-552 is a contract "for" maintenance, not a contract "for" repair.

a. The Union's evidence, including Union Exhibit 1, was completely unreliable.

The Union attempted to show that the Contract required repairs by introducing Union Exhibit 1 and the testimony of DePiero and McClain. It also sought to undermine Bombardier Exhibits 12, 13, 14 and 16 – the labor reporting introduced by Doug Nebeker – with anecdotal testimony that the data in the labor reports is inaccurate because (1) some Maintenance Technicians did not care about properly recording their time and/or were not properly trained; and,

(2) some Maintenance Technicians believed that the data may have been manipulated by Bombardier management.

The primary evidence through which the Union attempted to support its argument that "repair" work was performed pursuant to the Contract was Union Exhibit 1. Although the Labor Commissioner admitted that document as a summary, by the close of the hearing, it was obvious that Union Exhibit 1 was not a mere "summary" of documents exchanged in discovery. It was a summary of Vernon McClain and Ken DePiero's personal speculation regarding both the price used for each work task and the amount of time attributed to that task. 645:22-646:10. Indeed, DePiero conceded that his entries were based on subjective criteria and when DePiero was asked "so every hour that you have on this list is made up?" he replied "yes." *Id.*

DePiero's claim that the entries reflect "an honest, fair, conservative number" is meritless. 647:15. The entries in Union Exhibit 1 simply are not reliable. In a particularly revealing segment of testimony, McClain was confronted with work records completed by other technicians. 861:4 – 865:15. Although the technicians had signed reports saying that the work took only two hours to complete, Union Exhibit 1 *tripled* that amount, inflating it by four hours for each technician, despite the facts that McClain was not present when the event occurred and that the document provided no basis for doing so. Indeed, McClain and DePiero's decision to inflate this and other time records was intentional. As made clear by the citations in Union Exhibit 1, McClain reviewed the signed document stating that the task took two hours and then disregarded it, increasing it to six based on his judgment. *Id.* McClain then testified that he and DePiero applied such "judgment" to every single entry in Union Exhibit 1. *Id.* When asked which entries were padded in this way, McClain said "they all do." 885:19.

DePiero, when confronted from entries from the Maintenance Technicians' passdown log, admitted to similar defects. 665:6-668:25; *see also* CX 43. In entry after entry, he had

exaggerated the amount of time required to perform the work based on his belief that walking from the shop, walking back to the shop, forgetting parts, and completing paperwork should be included, even when the actual work performed involved nothing more than turning a key. 667:12-25; 743:7-744:17. In another example, DePiero claimed 45 hours of repair for "reboots" even though when that task is performed, by someone else, the technician is merely standing by while the computer is updated and despite the fact that the sum included work that had not been performed. 687:2-691:9. The record contains several other examples of inflated hours entries, including, as pointed out in the testimony of Joel Middleton, in entries related to the pass down log. *See, e.g.,* 882:5-17; CX 43.

More fundamentally, DePiero and McClain did not use a consistent definition of repair.[24] Although McClain and DePiero had completed at least 80% of the report before McClain created his April Declaration, Bombardier Exhibit 30, they had not, as of that time, discussed what constituted a "repair." 742:12-743:6; 888:10-892:17. DePiero stated: "we didn't really talk in that deep detail until after he already submitted [the declaration]." McClain explained: "We were so focused on the data that we just, we didn't really take the time to do the criteria." 896:12-15. Given that the two authors of the report both admit that they were speculating about the amount of hours required for each task, and given that they have admitted that they were not even speculating in the same way, the report cannot be taken seriously. *See, e.g.,* 704:6-705.

Finally, in addition to the above-referenced issues, Union Exhibit 1 fails even when considered on its own terms. As set forth in Bombardier Exhibits 131 and 132, 42% of the entries in the report do not conform with the Union's own stated criteria.

The Commissioner admitted Union Exhibit 1 into evidence before the introduction of Bombardier Exhibits 131 and 132. Given the state of the record, even under the somewhat relaxed

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[24] Notably, DePiero felt that standby time, simply standing around while another individual remotely reboots a computer, can constitute repair. 693:2-695:12.

evidentiary standards applicable to administrative proceedings, the document does not comply with NRS 52.275, which is the Nevada equivalent to Fed. R. Evid. 1006. That provision is designed to permit the introduction of "voluminous writings" when the writings themselves "cannot conveniently be examined in court." A precondition of using such a summary is making the original documents available for review. Here, as was argued during the hearing, the cross-examination of DePiero, McClain and Stanley established that virtually all of Union Exhibit 1's line item entries are based on what DePiero and McClain personally believed was "fair." In other words, the calculations are not based on data in the documents, and in many cases are contrary to that data. They are based on DePiero and McClain's ill-formed opinions and personal speculation, which cannot be made available for inspection in the manner required by NRS 52.275. The same reasoning applies to Union Exhibits 21, 22 and 24, which purport to be summaries of SIMS time entries, but are actually vehicles designed to enter into the record DePiero's opinion that approximately 30% of time coded as standby or "recovery" should be considered corrective maintenance.

In short, the exhibits are a transparent effort to bootstrap otherwise inadmissible speculation testimony into the record.[25] In *Jenifer v. Fleming, Ingram & Floyd, P.C.*, 2008 U.S. Dist. LEXIS 17740, 6-7 (S.D. Ga. Mar. 7, 2008), the U.S. District Court confronted a very similar situation in which a party attempted to introduce a summary of medical records that was based in large part on the preparer's opinion. It excluded the summary, in part because as a matter of law, the preparer's opinions could not be extracted from other documents, and therefore were not a proper subject for summary. *Id.*; *see also Powell v. Penhollow*, 260 Fed. Appx. 683, 687-688 (5th Cir. Tex. 2007) (excluding summary of allocated overhead); *Mishkin v. Ensminger (In re Adler, Coleman Clearing Corp)*, 1998 Bankr. LEXIS 404 (Bankr. S.D.N.Y. Apr. 3, 1998);

[25] As the County's counsel correctly noted, DePiero and McClain offered a significant amount of opinion testimony, but were never identified as experts, lay or otherwise. 614:2-4.

Pandelis Constr. Co. v. Jones-Viking Ass'n, 103 Nev. 129, 131 (1987) (citing federal decision interpreting Fed. R. Evid. 1006 as persuasive authority). Given that all of the Union's witnesses, including DePiero and McClain, conceded that they did not actually know how other Maintenance Technicians coded their time in SIMS, that they did not actually know the kinds of work performed by other technicians, that they did not personally work the same shifts as all other technicians, there is no basis for the introduction of the opinion testimony contained in Union Exhibits 1, 21 and 22.[26] They should be excluded. If they are not excluded, their legal insufficiency means that they should be given no weight.

b. The evidence established that the items that the Union claimed as repair, are actually part of a highly scheduled, detailed preventative and corrective maintenance plan.

Another significant aspect of the Union's case was its claim that replacement or rebuilding of parts constituted covered repair work.[27] As shown in the testimony given by Shaman, Ryan and Smith, this claim is false. Specifically, when the tasks claimed in Union Exhibit 1 and McClain's declaration, Bombardier Ex. 30, were compared with Bombardier's Maintenance Plan, it became obvious that the replacements and rebuilds were planned to avoid a component failure before the end of the component's life cycle. 1162:18-1181:22 (Smith discussing all of the PM codes in McClain's declaration); 1137:21-1139:25 (McGhee admitting that the primary maintenance window was 2.5 hours each week and was completed using computer generated worksheets). In many cases, even in the event of actual breakage – such as station doors – Bombardier would simply defer maintenance activities until the nightly maintenance window.

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[26] DePiero testified that Union Exhibits 21 and 22 were based on his personal "estimation." 620:6-7. He went on to assert that the most common repairs taking the most time involved leaf springs and bogies. The evidence showed that these items were repaired only a handful of times during the entire life of the Contract.

[27] It was notable that the individuals who were interviewed by the Union's expert, Kevin Murphy, generally downplayed the importance of "repair" in the worksheets that they completed for his review. If repair, rather than maintenance, was the predominant activity at the Airport, it would be reasonable to expect the technicians to say so. *See* Bombardier Ex. 18; *see also* 816:22-817:4 (Safbom trying to explain how he "overlooked" the repair component of his position).

c. The Union's contention that Bombardier's SIMS data is inaccurate and unreliable is meritless.

The Union contended that Bombardier Exhibits 12, 13, 14 and 16 were inaccurate because two or three employees – Nick Banas and Mark McGhee – had not coded their time properly and were attributing a disproportionate amount of time to "recovery." This argument is a red herring. Even assuming the truth of Banas and McGhee's testimony, that would merely put their recovery time closer into line with the other Maintenance Technicians, all of whom had remarkably consistent times for preventative maintenance, corrective maintenance, and recovery times throughout the life of the Contract. In other words, it would not have a material impact on the nature of the Contract. It would not show that the Contract was "for" repair, as opposed to "for the normal operation or maintenance of the Airport, and therefore would not establish that the Contract is covered by the Act and would not defeat application of the exemption.

On its own terms, the objection is meritless. As Doug Nebeker and Melvin Smith explained, Bombardier Maintenance Technicians are required to submit a breakdown of their work on a weekly basis in to the SIMS database. One would expect that an individual providing such information would do so accurately. Witnesses like McGhee, and Banas, who claimed that they either falsified their labor records for purposes of personal expediency, or that they did so out of carelessness, should not be considered to be credible. Banas had enough free time that he spent weeks devising and building a door testing device. All three individuals have a stake in this litigation, and they are essentially asking the Commissioner to disregard the actual SIMS times records that they submitted to Bombardier and take into consideration their uncorroborated claim that approximately 30% or more of their recovery time should be treated as "repair." This is another way of saying "I was lying before, but you can trust me now."[28]

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[28] Interestingly, DePiero repeatedly asserted that he would knowingly release what he believed to be inaccurate SIMS data. 705:1-706:13. There is no evidence that the data was inaccurate other than DePiero's belief. Even if true, considering that DePiero was primarily responsible for creating Union Exs. 1, 21, 22 and 24, his admitted willingness

The Union introduced Exhibit 24, which purported to compile a handful of anecdotal items where Maintenance Technicians had entered their time incorrectly. 584:21-589:21. That summary, however, was based on DePiero's personal belief that individual technicians had miscoded their time. *Id.* He did not participate in the work tasks himself. *Id.* He identified only one, Dave Ayers. 698:4:-701:7. He admitted that the amount of time he believed should be treated as repair was "made up." 705:1-706:13. The report was hearsay based on hearsay, because the "hours" that DePiero claimed had been miscoded were not set out in the original document. Like Union Exhibit 1, DePiero simply made them up. *Id.*; 589:15-591:9. DePiero and McClain admitted under cross-examination that they knew they were supposed to record their time accurately. 701:9-12 (DePiero). And, there is no dispute that Maintenance Technicians were formally trained in 2011. Bombardier Exhibits 28, 29; 247:3-258:8. If the witnesses' testimony were to be believed -- that Maintenance Technicians were not aware that SIMS data was supposed to be accurate -- then one would expect that the percentage of work coded as corrective maintenance or recovery from 2008 to 2010 would have increased after the 2011 training. It did not. In fact, the percentage of time that could be deemed corrective maintenance remained at approximately 10%. *See id.*

Finally, two Union witnesses also claimed that the SIMS time coding were subject to manipulation.[29] DePiero claimed that Sushil Jaitly, the former Site Director, told him on one occasion that accurate labor reporting was not important and to manipulate SIMS hours. 706:18-708:15. This claim was inherently not credible. DePiero claimed it happened once, but could not

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to take short cuts and submit false information should factor against his credibility. Certainly, it would be inequitable to permit him to capitalize on it in these proceedings.

[29] The Union also attempted to claim that the 2011 training purposefully misled employees regarding the coding of heavy maintenance. As Melvin Smith explained, this claim was nonsensical. 247:3-258:8; Bombardier exs. 28, 29. It was based on a single email that had been in effect for approximately one week before Mr. Smith had been trained himself and before he was able to conduct a full training session with the Maintenance Technicians. Given that the Union had been aware of the initial email and subsequent training, its attempt to introduce only the initial email without reference to the subsequent full-blown training session is disingenuous.

recall when or any of the other circumstances. *Id.* In any event, DePiero did not claim it happened again or that Jaitly asked others to the do the same. Similarly, Mark McGhee claimed that on one occasion, an administrative employee named Nancy Nelson told him to simply use a general SIMS code. 1133:20-1134:8. McGhee's time records belie his claim that he took her instruction to heart. As established in Bombardier Exhibits 12, 13, 14 and 16, McGhee frequently used both preventative and corrective maintenance codes.

3. Even If the Union's evidence were taken as true, it would not establish coverage under the Act.

NRS 338.010(16) sets forth a clear test for determining whether a project should be deemed a public works. A contract cannot be a public work unless it is (1) a project, and (2) for the purpose of new construction, repair or reconstruction. Bombardier established that the purpose of CBE-552 is to maintain McCarran's ATS system. Virtually every provision in contract, from its requirement that Bombardier create and comply with a maintenance plan, to its payment provisions which require the system to be available at least 99.65% of the time, are intended to ensure that the system remains in continuous operation.

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 as that term is used in Chapter 338. Indeed, all of the corrective maintenance that the Union contends is "repair" is work that is contemplated to occur and to be performed pursuant to the Contract. Furthermore, even if the Union's evidence is taken at face value, only approximately 20% of the work performed under the contract would be considered repair. That is not enough to show that CBE-552 is *for* – that its purpose is – repair.

B. The Union's Argument That The Contract Contains An Element Of Repair, Even If True, Cannot Defeat Application Of The Exemption Contained in NRS 338.011(1).

1. NRS 338.011(1)'s plain meaning renders the quantity of repair performed irrelevant. As long as the work performed under the contract, regardless of its character, is directly related to normal operation or normal maintenance of Clark County property, the work is exempt.

The Union's primary objection to the application of NRS 338.011(1) has been its contention that the Contract calls for repair, and because repair is covered by the definition of public work found in NRS 338.010, the exemption is inapplicable. There is absolutely no merit to this argument.[30]

It is not supported by the text of the statute. As noted above, NRS 338.011(1) is written in the disjunctive, and as such, the exemption applies so long as CBE-552 is directly related to *either* the normal operation *or* the normal maintenance of the McCarran Airport. *See Coast Hotels & Casinos*, 117 Nev. at 841 (rejecting attempt to read labor statute written in the disjunctive as conjunctive). Further, there is simply no basis for the Union's position that maintenance and repair are mutually exclusive terms.[31] *See Missouri*, 910 S.W.2d at 741-44. Application of the exemption requires only that the contract be directly related to maintenance. It does not, as the Union appears to argue, require that the contract be limited exclusively to maintenance.

Imposing such an artificial limitation on the scope of NRS 338.011(1), when the plain meaning of the statute provides otherwise, would improperly interfere with the legislature's intent

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[30] The Union has also argued that the exemption set forth in NRS 338.011 must be construed narrowly because the prevailing wage laws are remedial in nature. That presumption "has no application here, where the 'express text' of the statute is clear." *Leslie v. Cap Gemini America, Inc.*, 319 Fed. Appx. 689, 690-691 (9th Cir. 2009) (citing *Jenkins v. Palmer*, 66 P.3d 1119, 1121 (Wash. Ct. App. 2003); *see also Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 104 P.3d 699, 707 (Wash. Ct. App. 2005) ("While we acknowledge the remedial purposes of the prevailing wage statute and the liberal construction we must give such a statute, we cannot ignore the plain words of the regulation in effectuating the underlying purposes of the regulation."). Limiting the explicit language set forth in NRS 338.011 on the basis of a supposed remedial purpose is unacceptable. *See Coast Hotels*, 117 Nev. at 841 (statutes must be interpreted to give meaning to all provisions).

[31] As the Oxford English Dictionary notes, maintenance and repair are overlapping concepts. It defines maintenance as: "The action of keeping something in working order, in repair, etc.; the keeping up of a building, institution, body of troops, etc., by providing means for equipment, etc.; the state or fact of being so kept up; means or provision for upkeep." OXFORD ENGLISH DICTIONARY, *available online at: http://www.oed.com/view/Entry/112568?redirectedFrom=maintenance#eid* (last accessed March 27, 2013).

to provide local governments with freedom when contracting for services that are directly related to their normal operations or normal maintenance of their property. *See id.* (rejecting contention that supposed remedial purpose of the Act required broad coverage). Indeed, constricting the scope of the exemption "contradicts the statutory scheme and attempts to broaden the coverage of the Act. Where, as here, there is a direct conflict or inconsistency between a statute and a regulation, the statute must necessarily prevail." *Id.* The division between repair and maintenance proposed by the Union is unreasonable because such an interpretation would make NRS 338.011 meaningless. Every maintenance contract contains some "repair." If the presence of any repair defeats the application of NRS 338.011, the exemption would be rendered a nullity.

According to the Union's previous arguments, to determine whether NRS 338.011 applies, each particular task would have to be reviewed to determine if it were repair or maintenance. The Union has suggested this determination would depend on the length of time required to perform the work and the cost of different parts used in the maintenance task. Given its text, the Legislature obviously did not draft NRS 338.011 with such a requirement in mind. As noted above, NRS 338.011(1) facilitates local government flexibility in contracting for services that are necessary to its operations so that it can be assured that work will be performed in a timely, efficient and predictable fashion. The suggestion that local governments would be required to pay multiple wage rates to the same employees, and that the wage rate depends on the nature of particular maintenance tasks, which is inherently unpredictable, would frustrate local government discretion and nullify the exemption.

Even if the Union's contention that CBE-552 constitutes "public work" because it includes elements of repair is taken on its own terms, it does not defeat application of the exception. A general definition, such as "public work," cannot trump a specific statutory exemption. *See, e.g., Stockmeier v. Nev. Dep't of Corr. Psych. Review Panel*, 183 P.3d 133, 136 (Nev. 2008) ("when a

specific statute is in conflict with a general one, the specific statute will take precedence."). The exemption contained in NRS 338.011(1) applies regardless of whether CBE-552 can be deemed public work within the meaning of NRS 338.010 and regardless of how much "repair" work is performed. CBE-552 is exempt so long as it satisfies one of the two alternative conditions of NRS 338.011, and that exemption supersedes the general obligation to pay prevailing wage rates, public work or not. *See Carson-Tahoe Hosp.*, 122 Nev. at 221 (finding work exempt and noting that "[a]pplying some of these provisions while ignoring others would result in the type of lawmaking that must be left to the Legislature."). The Union's interpretation would completely nullify the exception and is therefore unacceptable. *See Buckwalter*, 234 P.3d at 922.

2. The Union's Interpretation Is Not Supported By Legislative History.

The Union has also argued that NRS 338.011(1)'s legislative history suggests that the NRS 338.011's exemption should have limited application. There are three reasons this argument has no merit.

a. The Labor Commissioner cannot consider legislative history because the meaning of NRS 338.011(1) is plain.

First, regardless of what the legislative history suggests, it would contravene Nevada Supreme Court authority to take it into account. As set forth above, the meaning of NRS 338.011 is readily ascertainable, and therefore the Commissioner cannot consider legislative history. Courts and administrative agencies are not at liberty to amend or repeal a statute under a guise of construction. That is the function of the legislature. "We are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993). "The law as it passed is the will of the majority ... and the only mode in which that will is spoken is in the act itself." *Id.*

As the U.S. Supreme Court recently explained, when interpreting a statute, a court, or in this case, the Labor Commissioner,

> is not tasked with interpreting [the statute] in a way that it believes is consistent with the policy outcome intended by [the legislature]. Nor should this Court's approach to statutory construction be influenced by the supposition that "it is highly unlikely that [the legislature] intended" a given result. [The legislature's] intent is found in the words it has chosen to use. *See West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991) ("The best evidence of [the legislature's] purpose is the statutory text"). This Court's interpretive function requires it to identify and give effect to the best reading of the words in the provision at issue. Even if the proper interpretation of a statute upholds a "very bad policy," it "is not within our province to second-guess" the "wisdom of [the legislature's] action" by picking and choosing our preferred interpretation from among a range of potentially plausible, but likely inaccurate, interpretations of a statute. *Eldred v. Ashcroft*, 537 U.S. 186, 222, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003); *see also TVA v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute"). "Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989).

Harbison v. Bell, 129 S. Ct. 1481, 1493-1494 (U.S. 2009).

The Nevada Supreme Court has used the same reasoning in interpreting and applying both Chapter 338 and other provisions of the Labor Code. For example, in *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council*, 122 Nev. 218, 220 (2006), the Court explained that the limitations on what can constitute a public work are clearly defined in NRS 338.010, and it "cannot apply [the substantive wage requirements] of NRS 338.020 without the limitations" of that section. *Id.* "Applying some of these provisions while ignoring others would result in the type of lawmaking that must be left to the Legislature." *Id.*; *see also Coast Hotels v. State, Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001) (reversing Labor Commissioner for failing to account for the disjunctive meaning of "or"), a case which is discussed above.

To adopt the Union's reasoning, the Labor Commissioner would have to rewrite NRS 338.011(1) and impose a totally artificial, administratively created limitation that has no support in the statute and which is completely inconsistent with the words the Legislature chose to express its

intent. Such action would be contrary to law, especially in a case like this, where the Legislature could not have chosen clearer language.

b. Even if the Labor Commissioner considered legislative history, it supports Bombardier's position.

Strikingly, the legislative history actually supports Bombardier's position.[32] NRS 338.011(1) was inserted into Chapter 338 in 1981 due to concern that the prevailing wage laws were being interpreted too expansively and in a way that might frustrate the local government's right to opt-out of competitive bidding requirements when it best served the public interest.[33] The statements that legislators made in committee show that the purpose of Section 338.011 was to facilitate local government purchasing decisions and ensure that local government discretion was not hampered by the financial burdens and competitive bidding requirements imposed by the prevailing wage laws. It was adopted in reaction to an Attorney General opinion suggesting that maintenance contracts were subject to prevailing wage because they inherently included repair. The fact that the legislators discussed monetary limitations on the exemption, and chose not to adopt them, is incontrovertible proof that the exemption was intended to be construed broadly.

In fact, in 2003, the Legislature confirmed that it meant exactly what it said. That year, the Legislature enacted a comprehensive amendment of Chapter 338, including NRS 338.011.[34]

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[32] Relevant legislative history from the 1981 legislative session was attached to the Motion for Summary Judgment as Exhibit 17.

[33] In pre-hearing briefing, the Union attempted to bolster its argument by introducing testimony from John E. Jeffrey, a former legislator. The declaration purported to recount the intentions that he and his fellow legislators had thirty years earlier in 1981. Jeffrey, however, did not testify at the hearing, his declaration was not admitted as evidence, and if had been, it would be barred by NRS 51.025 (personal knowledge) and 51.035 (hearsay). Moreover, the Supreme Court of California has routinely prohibited the use of such post-enactment declarations. *See Ross v. RagingWire Telecommunications, Inc.*, 70 Cal. Rptr. 3d 382, 391 (Cal. 2008) ("In construing a statute, we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. Nor do we carve an exception to this principle simply because the legislator whose motives are proffered actually authored the bill in controversy; no guarantee can issue that those who supported his proposal shared his view of its compass.").

[34] 2003 Assembly Bill 425 contained several amendments to NRS 338.011. The relevant language is set forth below:

> **Sec. 3. NRS 338.011** is hereby amended to read as follows:
> 338.011 The requirements of this chapter do not apply to a contract ~~[awarded in compliance with chapter 332 or 333 of NRS which is:~~
> ~~1. Directly]~~ :

However, it made no change whatsoever to relevant language of subsection (1). It did not qualify or limit the exemption in any way. In doing so, it reaffirmed that the purpose of NRS 338.011 was to give local governments' broad discretion in managing their affairs and contracts which relate directly to their operations. As our Supreme Court has noted, when the legislature considers language in a subsequent amendment, it is presumed to be aware of how the language is being interpreted and applied, and the failure to modify the relevant language is confirmation that the language accurately expresses the legislature's intentions. *See, e.g., Castillo v. State*, 110 Nev. 535, 547 (1994).

VII. REMEDY

A. Issues Presented

If the Commissioner determines that the Union has established that CBE-552 was subject to prevailing wage requirements and also determines that none of the above-referenced exemptions are applicable, there are three additional issues to consider before he can order a remedy:

1. Because Nevada law prohibits a party from recovering if that party has failed to prove it suffered ascertainable damages, has the Union met its burden of both demonstrating which tasks constitute covered "repair" and establishing how much time was spent performing such work?

2. If the Union has established how much time should be counted as covered repair, can the Labor Commissioner consider the Union's contention that the employees are entitled to be compensated at the Elevator Constructor rate, or is he barred from doing so in the context of this contested case because it would require a substantial modification of the application of that wage classification?

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1. Awarded in compliance with chapter 332 or 333 of NRS which is directly related to the normal operation of the public body or the normal maintenance of its property.
2. Awarded to meet an emergency which results from a natural or man-made disaster and which threatens the health, safety or welfare of the public. ***If the public body or its authorized representative determines that an emergency exists, a contract or contracts necessary to contend with the emergency may be let without complying with the requirements of this chapter. If such emergency action was taken by the authorized representative, the authorized representative shall report the contract or contracts to the public body at the next regularly scheduled meeting of the public body.***
Available online at: http://www.leg.state.nv.us/Statutes/72nd/Stats200319.html#Stats200319page2414.

3. Finally, whether the Commissioner can consider the Elevator Constructor classification or not, what is the appropriate existing classification for the work performed?

B. The Union Has Failed To Prove Damages

Although the Union voluntarily limited its request for damages to hours during which repair was performed, that limitation did not absolve the Union of its burden to show not only what work actually constituted covered repair, but also how much of that work was performed because "the party seeking damages has the burden of proving both the fact of damages and the amount thereof." *Mort Wallin v. Comm. Cabinet Co.*, 784 P.2d 954, 955-956 (Nev. 1989) (reversing award and allowing only nominal damages because plaintiff did not introduce competent evidence supporting a calculation) (*citing Kelly Broadcasting v. Sovereign Broadcast*, 96 Nev. 188, 193-194 (1980). Mathematical exactitude is not required, "but there must be an evidentiary basis for determining a reasonably accurate amount of damages." *Id.*

The only so-called evidence in the record regarding the types and amounts of what the Union believes is covered repair is in Union Exhibit 1 and the testimony of a handful of Union witnesses. Anecdotal testimony from unreliable witnesses cannot establish the damages allegedly owed; and, as set forth above, Union Exhibit 1 carries no weight. Its authors, DePiero and McClain, repeatedly admitted that they did not use a consistent definition of repair, 848:16-851:20, that the hourly sums were inflated based on their "judgment" regardless of what the underlying documentation stated, 861:4 – 865:15. As established by Bombardier Exhibits 131 and 132, even assuming the truth of these inflated hourly entries, only 42% of the entries in Union Exhibit 1 satisfy the Union's own criteria. 1157:6-16.

In reality, the Union's case was so thoroughly compromised during the hearing that it is impossible to determine the damages that the Union believes it is entitled to with any certainty; and, it has completely failed to set forth any methodology that could be used to ascertain those

damages with a reasonable degree of confidence. If the Commissioner finds that Bombardier has liability, the only realistic option is further administrative proceedings, including another hearing – a fact which, in its own right, suggests that the Complaint should be dismissed.

C. If The Commissioner Awards A Remedy, It Should Be Calculated Using The Electronic Communication Installer / Technician Rate.

1. The existing Clark County prevailing wage classification that is most comparable to the Maintenance Technician is Electronic Communication Installer / Technician.

Alan Moss, who is the former Chief of Labor Market Information and Director of Wage Determinations at the U.S. Department of Labor conducted an in depth analysis of the Maintenance Technician position and comparable Nevada classifications. 261:4-296:13; Bombardier Ex. 9. Using his considerable experience and a methodology utilized by the U.S. Department of Labor, he determined that the appropriate *existing* Nevada prevailing wage classification is Electronic Communication Installer / Technician. *Id.* Dr. Moss was a credible witness. He prepared a careful report that, by virtue of its methodology, ensured that every possible job classification was considered.[35] If the Commissioner finds in the Union's favor as to liability, he should still find in Bombardier's favor as to the proper classification.[36]

2. The Union's effort to have Maintenance Technicians classified as Elevator Constructors is barred by the Administrative Procedure Act.

The Union has repeatedly insisted that the Labor Commissioner should classify Bombardier's maintenance employees as "Elevator Constructors." The current elevator constructor job classification does not cover the work performed by maintenance employees

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[35] The Union appeared to claim that that the Service Contract Act deems automated people movers to be conveyances covered by the Elevator Constructor classification. When Stanley was cross-examined on this issue, it was clear that the Department of Labor's definitions were inconsistent. CC:141; 1112:5-1114:22. As Dr. Moss also explained, the Service Contract Act definition was not adopted in the regular way – subjected to comment through the "cross walk." 283:20-285:12. Finally, the actual text of the SCA definition does not prove anything. The term "automated people mover" or APM is used in conjunction with elevators and dumbwaiters. The absence of any reference to train systems like the McCarran ATS is conspicuous in its absence.

[36] Importantly, Moran also did not utilize the Elevator Constructor rate in the 2011 revised determination. He interviewed the employees and conducted an investigation; and, he determined that the Elevator rate was inapplicable. Moran's findings support Moss' opinion and are persuasive here.

pursuant to CBE-552. *See* Bombardier Exhibit 9; 263:1-283:6. It does not contain a sufficient basis for including that kind of computer and electrical training in its classification, particularly since the types of vehicles involved are categorically different. As such, granting the relief requested by the Union would require the Labor Commissioner to modify the Elevator Constructor job description. However, the Nevada Supreme Court has held that the Labor Commissioner cannot do so in the context of a contested case. *See So. Nev. Operating Engineers Contract Compliance v. Johnson*, 121 Nev. 523 (2005); *Labor Commissioner v. Littlefield*, 123 Nev. 35 (2007); *see also* NAC 338.040.

3. Kevin Murphy's opinions should not be considered, and if they are, they should be given no weight.

The Union retained an expert witness, Kevin Murphy, to bolster its position that Maintenance Technicians should be classified as Elevator Constructors. Before he testified, Bombardier objected to his testimony. 527:16-528:13. Under Nevada law, expert testimony is admissible only so long as the expert: (1) is qualified, (2) has testimony that will assist the trier of fact, and (3) testimony is limited to the scope of his opinions. *Hallmark v. Eldridge*, 124 Nev. 492, 498 (2008). The assistance requirement asks whether the proposed expert's testimony is relevant and the product of reliable methodology. *Id.* at 500. In determining whether the testimony is a product of reliable methodology, one considers whether the opinion is "(1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community . . . ; and (5) based more on particularized facts rather than assumption, conjecture, or generalization." *Id.* at 500-01. Although evidentiary standards are often somewhat relaxed in administrative proceedings, that approach should not apply to expert witness testimony. It is hearsay, and because it goes to a legal issue in the case, has the potential to be more prejudicial than probative if the testimony is not reliable.

Bombardier objected to Murphy's testimony on two grounds. The first was based on relevance and prejudice. Although Murphy's expert report and deposition were limited to a single federal O-net classification – Elevator Constructor – during the hearing, Murphy obliquely suggested that he had reviewed Nevada classifications since his deposition and that they did not change his opinion. It is not clear if this testimony was intended to show that Murphy was offering an opinion regarding the proper classification under Nevada law. If it was, it should be stricken because, as noted above, an expert's opinions should be limited to the opinions expressed in his report. *Id.* Allowing an expert to offer opinions about matters outside the report is inappropriate because it deprives the opposing party of a meaningful opportunity to depose the expert about the opinion and determine if both the opinion and the methodology used to reach it are sound. *Id.* If the testimony was not intended for that purpose, it confirms that Murphy's testimony is irrelevant.

Bombardier's second objection pertained to Murphy's methodology, because it was compromised by several problems that other courts have found to be sufficient to require exclusion of an expert's testimony. First, Murphy claims to have relied on employee interviews to reach his conclusions, but those interviews were conducted in group sessions, and the individuals who were interviewed were selected personally by the Claimants' representative, Stanley. In *Alvarado v. Shipley Donut Flour & Supply Co.*, 2007 U.S. Dist. LEXIS 92853, at *23-24 (S.D. Tex. Dec. 18, 2007), a federal district court concluded that group interviews are not reliable, and used it as one of the reasons an expert's opinions were excluded. As Dr. Moss explained, such an interviewing methodology introduces bias and misinformation into the report.

Second, even assuming the use of such a sample was appropriate, by Murphy's own admission, 25% of his interviewees did not meet the minimum qualifications. Instead of providing an individual with more than five years of ATS experience, the Union had selected

Safbom, a new hire who had spent the previous twenty-one years working as an Elevator Constructor. Yet Murphy did not ask for an additional interviewee or follow-up on the inadequate experience. 541:1-544:10; *see also* Bombardier Ex. 18.

Third, the questions that Murphy used to gather his information were phrased in a way that guaranteed he would receive responses that would support the opinion he was hired to reach. For example, one of the questions asked was if Maintenance Technicians assemble, install, repair or maintain "people-moving" equipment. 545:5-18; Bombardier Exhibit 18. By including all of these options in a single question, Murphy ensured that the interview subjects would claim to do at least one of these things, thereby ensuring that the work would be considered similar. *See* 808:11-12 (Safbom testifying that he was asked questions about the elevator industry). This is not surprising. In contrast to Dr. Moss' report, which drilled down into the job descriptions and worksite, used accepted Department of Labor methods to first come up with a list of task performed by Maintenance Technicians, and then select the most appropriate classification, Murphy admitted that he never considered any classification other than Elevator Constructor. It is not surprising that his conclusion matched his hypothesis when his methodology ensured that no competing theories would be considered. 539:20-540:24.

Finally, it is important to note that Murphy is not a credible witness. One of his central claims is that he personally observed the work taking place at the Airport. To that end, he repeatedly testified that he toured the site for "several hours." 536:17-538:24. Joel Middleton, the individual who escorted Murphy, testified however that based on security records, Murphy's entire time onsite was less than an hour. 1183:4-1192:16. Murphy's shading of the truth on this issue is material because it is inextricably tied to the basis for his opinions.

4. The remaining evidence does not support classifying the Maintenance Technicians as Elevator Constructors.

The Union's evidence regarding the classification issue was actually quite thin. It compared Maintenance Technician and Elevator Constructor tool lists, which was, as set forth in the testimony of Daniel Safbom, inconclusive at best, because most of the overlap was limited to common hand tools. 807:1-6. It also claimed that Elevator Constructors were adept at acquiring Maintenance Technician job duties, but that fact, true or false, is meaningless. A review of the County and Bombardier job descriptions reveals that Elevator Constructor skills are not a prerequisite for the position. As Melvin Smith testified, the critical skill for Maintenance Technicians is initiative: he had hired a bricklayer who had no difficulty getting up to speed.

Indeed, unlike elevators, the trains at McCarran are large, operate on a running surface with large, bus-sized pneumatic tires, are self-propelled and can negotiate tracks with both changes in elevation and curvature. In recognition of these differences, the technical design and safety requirements are totally different and are administered by different bodies. The American Society of Civil Engineers treats APM's and Elevators distinctly, and Clark County has adopted its standards. The American Society of Mechanical Engineers, which pushes for inclusion of APM's in the Model Elevator Code, in contrast has been widely rebuked and has not gained acceptance within the APM industry.

The Union's effort to show that elevators and Automated People Movers involve comparable technology and are part of the same industry merely highlighted the complete lack of similarity between the two modes of transport and the skills required to maintain them. It claims that the scope of work provision in its national collective bargaining agreement with a handful of elevator companies that are not in the ATS industry, which includes Automated People Movers, is persuasive, but the Union's current collective bargaining agreement with Clark County for ATS work, which is a first contract, underscores all of the above-referenced distinctions. Bombardier

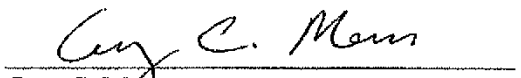
Ex. 21. Under the Union's CBA with the County, Maintenance Technicians are not considered Elevator Constructors and do not receive wage rates that are paid to Elevator Constructors. The Commissioner should not award back pay based on an hourly wage that more than doubles the actual market rate for Maintenance Technician work, especially when there is no factual basis for doing so. McCarran's ATS system is not a "horizontalator." Bombardier Ex. 23. It is a sophisticated form of automated rail transit that requires different skills, different tools and a totally different worksite environment than the construction installation environment on which the elevator rate is based.

VIII. CONCLUSION

For the reasons set forth above, the Union's Complaint is meritless and based on a fundamentally defective interpretation of Chapter 338. The Complaint should be dismissed.

Dated this 10th day of December, 2013.

JACKSON LEWIS P.C.



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I hereby certify that a copy of Bombardier Transportation (Holdings) USA, Inc.'s Post-hearing bref was submitted via Federal Express on December 10, 2013 to the following:

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Condensed Transcript of the Testimony of

Hearing Proceedings

Volume I

Date: June 25, 2013

International Union of Elevator Constructors v. Bombardier Transportation (Holdings) USA, Inc.
Case No. CBE-552

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BEFORE THE NEVADA LABOR COMMISSIONER

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Complainant,

vs.

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.,

Respondent.

CONTRACT CBE-552

HEARING BEFORE THORAN TOWLER
STATE LABOR COMMISSIONER
Volume I, Pages 1 - 237
Taken on Tuesday, June 25, 2013
At 9:18 a.m.
At Government Center, Coyote Room
500 South Grand Central Parkway
Las Vegas, Nevada

REPORTED BY: KEVIN WM. DANIEL, FAPR, RDR, CRR, CCR 711
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BOMBARDIER

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COMMISSIONER TOWLER: My name is Thoran Towler. I'm the Nevada Labor Commissioner. Today is June 25, 2013. I'm the hearing officer in case of the International Union of Elevator Constructors, Complainant, versus Bombardier Transportation (Holdings) USA, Inc., Respondent, Contract CBE-552.

I'll now, take the appearance of the parties. First of all, I'll say Scott Davis, Deputy Attorney General's here, and my Chief Assistant Audra is here, so if everybody could state their name and who they represent.

MR. KAHN: Andrew Kahn for the Claimant, IUEC. I'm joined by the party representative William Stanley.

MR. THOMSON: Lee Thomson on behalf of the District Attorney's office and Clark County and its Department of Aviation. I have with me Mr. Mike Moran, and I guess right now I might as well bring it up. Mr. Moran is listed as a witness. He's the expert who prepared our determinations that were submitted. It would be my preference to keep him in the room during the hearing.

COMMISSIONER TOWLER: Is there any objection

to Mr. Moran being in the room during this hearing?

MR. KAHN: None. I also plan to have Mr. Stanley testify as well.

MR. MOSS: We don't object.

COMMISSIONER TOWLER: Okay.

MR. TRIMMER: Paul Trimmer for Bombardier.

MR. MOSS: Gary C. Moss and Paul and I are with Jackson Lewis, LLP and we represent Bombardier Transportation, and Kathy Kimball is with us as the company representative.

COMMISSIONER TOWLER: I believe that's everybody.

Some preliminary issues -- there's someone in the back, I don't think, did we get your name?

MR. LEE: My name's Charles Lee. I'm the summer law clerk at Jackson Lewis.

COMMISSIONER TOWLER: All right. Well, welcome.

I think just a fast preliminary issue, the parties had requested that as this case is scheduled for the convenience of witnesses that Bombardier would present their case first. When they are able to do that, I think they had one or two witnesses for tomorrow, but most are here today.

After Bombardier presents their case, the

Awarding Body will present their case or arguments, followed by that, which I think would be scheduled for Thursday, would be the Union's arguments and case. Does everybody agree that's the procedure for this case?

MR. MOSS: Yes.

MR. KAHN: We do.

MR. THOMSON: Yes.

COMMISSIONER TOWLER: So I think there was, before we started, some discussion of a possible motion in limine. Is this an appropriate time to discuss that, or should we -- do you have a preference to go to the -- we have a pending, unopposed motion to seal the record.

MR. KAHN: You want to take the easy stuff first? We don't oppose sealing the record.

COMMISSIONER TOWLER: You think that's the easy one? That's good. I'd hate to hear the motion in limine.

So let's talk about the sealing of the record. I believe Mr. Trimmer submitted that on behalf of Bombardier. As we said, it was unopposed, but if I could hear your arguments for sealing, anybody would like to make this?

MR. TRIMMER: Sure. Well, as you know, we

revised our exhibit list after we submitted the motion to seal. At this point the motion to seal would apply specifically to proposed exhibit, Bombardier proposed Exhibits 11, 12, 13, 14 and 16. It would also apply to Union proposed Exhibits 20, 21 and 22. And I believe that is it.

But primarily, at this point it may apply to other things that come up in the hearing, but the point is that -- this is set forth in our papers -- we have concerns that the disclosure of the manner in which the work is performed, both in terms of some isolated documents, but mostly in terms of presenting the whole maintenance approach that Bombardier takes to this contract, getting that all into the record and making it available to a competitor would make, would really compromise Bombardier's competitive position. We think the Labor Commissioner has the authority to do, to seal the record to protect Bombardier's competitive confidential proprietary information, and that's set forth in the motion. I don't need to belabor the record.

COMMISSIONER TOWLER: No, that's fine. I've seen the motion. Does the Union have any, anything -- so there are documents the Union has also that you would like deemed confidential?

MR. TRIMMER: If I may add, I apologize. As I said, we submitted a revised exhibit list. Bombardier's formally withdrawing all of the prior exhibits that were submitted on May 28th or 31st, and in particular we're withdrawing the CD that contained electronic information. We're asking that that be not part of the record. It contains confidential proprietary information. It's nothing that the Labor Commissioner would need to rely on. We don't think -- we'd ask that it be returned or destroyed.

COMMISSIONER TOWLER: And we have the CD, I believe it's in front of me. It's Bombardier hearing exhibits dated 5-31-13. I'm assuming that would be the CD. I think the best thing, I don't know, I don't believe I have authority to destroy it because we do have retention schedules, so I can give that back to you at this time if you want to take that back. And we didn't make a copy of it, so that's what we have.

MR. TRIMMER: Thank you.

COMMISSIONER TOWLER: All right. So if the Union has any other --

MR. KAHN: We don't concede that this is proprietary information, but we're simply not interested in getting in a fight about it, and we've

told Bombardier that sealing or unsealing, we're not going to rely on the record here for any purpose other than this litigation. But, you know, I understand their concern that it becomes a public record, so we don't oppose the motion.

COMMISSIONER TOWLER: My concern, having experience in this, is that we have been told by Nevada state courts that nothing we have is not a public record. Everything we have is open for the public inspection. That's a case that we've argued, like I said, through District Court, where we've said, we've had a lot of arguments for confidentiality based on, you know, necessity, but the way it was told to us through the court is that if we don't have a specific regulation or statute deeming it confidential, then we do not have confidential information.

I know in the briefs it was argued that there are places in the, our applicable regulations and statutes in NAC 607 that reference some documents are specifically not confidential, or specifically not confidential. But, and so the argument's made that some things can be confidential, and I don't believe that argument would be successful.

So my concern would be if I were to grant the motion to deem the record sealed, the law that I saw in

the motion is law applicable to, primarily to District Courts in Nevada.

MR. TRIMMER: If I could speak to that. The original motion did speak primarily to the District Court's authority to do that, because in general we believe that these hearings are run according to the Nevada Rules of Civil Procedure.

But the supplemental points and authorities that we filed contain both Supreme Court authority and a multiple list of Attorney General opinions applying a three-part standard to the granting, saying that agencies have the authority, all Nevada agencies have the authority to seal records in appropriate situations.

COMMISSIONER TOWLER: Then, two things: It's my understanding that the procedures I'm under are generally the NRS 233(b), which is the Administrative Procedure Act in Nevada, and specifically NAC 607, which gives some specific instruction. So I have never been in a position that the Nevada District Court rules apply, even though there have been situations where I'd like to hold people in contempt under those rules, I haven't been able to do that.

As far as being able to seal the record under what you're saying, under the state agency sealing a

record, are deemed something confidential because of the balancing test you referenced in your motion. That is similar to what we've argued in the past as a balancing test, and it's been -- you did cite the most recent case, Gibbons case, but it's my experience and actual experience by trying to not give out this information, and experience in reading these cases is that there isn't an authority to do that in most situations, unless there was a very big need. And you know, that, I guess that's the argument that would be made, but I don't feel like I could guarantee that I can seal it, because that's what I see the motion as being. Of course there's an argument we could make if somebody asked for these records. The agency could make an argument under the balancing test. That would be the appropriate argument. We would argue things that you had mentioned that, you know, there's the trade secret issues. But at the end of the day, if the court says no, as they've told us before -- and that's all they've told me is no, it's got to come out -- what would happen? What would the State's position be, because I'm not in a position to open up the State to liability or make false promises to the parties here.

MR. TRIMMER: Well, we understand that you have concerns about that. We ask that you enter an

order sealing the record as we've requested, and if that's reviewable, then Bombardier will defend that action in District Court, if it's necessary. And we're also comfortable that -- we're comfortable with the revised list of exhibits that, although we believe that they're confidential, we're willing to proceed.

COMMISSIONER TOWLER: All right. Is there -- I'm just wondering if there's a way we could go about this without sealing the record. We do have procedures under NAC 607 about stipulations. It's NAC 607.420. It says that any stipulation -- that any of the parties can stipulate to the introduction of evidence and that the Commissioner may command proof requiring the evidence, but if I don't demand proof, then it will just be stipulated facts. Would that be a way to get past the admitting the confidential information?

MR. TRIMMER: Well, if I could add one more thing. In terms of Exhibit 11, the copy that we've submitted that's revised is completely redacted, except for percentages. One of the ways we intended to handle that was Mr. Kahn has a copy of the document, these unredacted, subject to the confidential, the stipulated protective order.

We were going to circulate an unredacted copy as a demonstrative aid so people could see it during

the hearing, but in terms of allowing that actual document which contains a list of our customers, the things that have been sold to them, and the price that it was sold for, we believe that's highly confidential material. We can't defend one of our contentions without that information. It would be highly prejudicial to require us to put it into the record in order to defend the case. So that's one approach that we intend to take with respect to Exhibit 11.

COMMISSIONER TOWLER: By using the redacted version or just to --

MR. TRIMMER: For the record and then allowing everyone to see the document here?

COMMISSIONER TOWLER: Without entering it?

MR. TRIMMER: Yes.

With respect to the other documents, Mr. Kahn and I have discussed them in detail. We've agreed that the typical foundational types of evidence that you'd submit to sustain these kind of charts we'll, without necessarily agreeing to the way that we've done these charts of ours, we've agreed the basic information, the electronic database information isn't necessary to get those into the record. But in terms of not using these charts, there's no way to do the case without them.

COMMISSIONER TOWLER: It's my understanding

that you would be able to use those, the unredacted version, to, you know, aid in your case as long as I don't view them, and they won't be, and they won't be -- as long as they are not entered into the record and as long as I don't view them, they're not part of the record and wouldn't be subject to any public information. So there would be nothing there that anybody could ask for.

So I think that would be a positive solution to this issue because, like I said, I have made that argument before, that we do have stuff, documents in my office that are confidential. We've only lost that argument. You know, we did have a lot of good arguments and a good fight and we had good representation, but the court said no, that we're going to give it all out, and we have, to great cost to both our customers and to the office.

So I'm all for being flexible with the parties and trying to use whatever creative method we can to not enter in any confidential information. If you can use a redacted version for the official record and then make sure I don't see the unredacted, and then the parties can look at the unredacted and show the witnesses, I believe, if they need to.

That's I think a better solution and also, if

there is an introduction of evidence or a motion to introduce evidence that is confidential, there could be arguments that could be made by the parties regarding the necessity of the documentation and how relevant it is, or if there's another option to get the same facts in. And like I said, stipulations are fine, too. Under my reading of 607.420, you can stipulate to the evidence that you want entered and I can demand to see it, but if I don't demand to see it, it doesn't have to be a part of the official record.

MR. TRIMMER: Well, I guess our position is that the documents we've submitted, 11, 12, 13, 14 and 16, we believe that we're going to have to submit them to defend the case. We believe, because they reveal the total labor cost and amount of labor that is involved in doing one of these contracts, it's confidential and proprietary information. Disclosing that, making it available to third parties would injure our competitive position.

We believe that it constitutes a trade secret under Nevada law that we have a statutory privilege not to disclose that trade secret, that you would have the authority to sustain in these proceedings. And so we're going to submit those documents. We ask that you seal them.

Do you have a citation to the case that you're referencing regarding the Labor Commissioner's authority?

COMMISSIONER TOWLER: Oh, the recent case we lost?

MR. TRIMMER: Yes.

COMMISSIONER TOWLER: That was a District Court case. It was, if I recall right, Thierman versus Thoran Towler, Nevada Labor Commissioner.

MR. KAHN: I wonder who that is.

COMMISSIONER TOWLER: Yes. If you need spelling help on that, come see me later.

MR. TRIMMER: So we ask on that basis, we submit our motion and ask for a ruling on sealing the exhibits that I've identified.

COMMISSIONER TOWLER: Does anybody have any arguments, other arguments?

Well, like I've said, I don't disagree personally, but I do have arguments, I have things I have to follow. I have to follow what my experience is in the law, my understanding of the law, and my understanding that we're under the Administrative Procedure Act in Nevada, and then specifically under NAC607, 608, NRS 607, 608 and 338. And I believe that I don't have the authority to seal the record, absent

any direct statutory or regulatory authority.

So for that reason, I'm going to deny that motion. I will say that anything we can do to try to have the parties stipulate and not enter any confidential information is something that I definitely will support, and as you've mentioned, if there's an opportunity to enter redacted documents, I definitely support that, too.

MR. TRIMMER: Could I ask that the Labor Commissioner enter an order requiring notification of Bombardier if the request for the transcript and record is made so that we can seek relief in District Court if that's appropriate?

MR. DAVIS: Are you asking that the Labor Commissioner's office notify you in the event someone requests the record?

MR. TRIMMER: Yes.

COMMISSIONER TOWLER: Yes, that's -- I will grant that motion. I'll explain to you the procedure. What we would do is mark all the documents and boxes, or the containers we have these documents in as contact, we'll just say "Contact all the parties when and if there is a public records request." We do have a retention schedule, and so those documents are destroyed for hearing, I believe three years, but I can

review that, three years after the hearing. That's what I believe it says. But whatever the retention schedule is. I don't personally shred it. I do have staff who has those dates memorized, I assure you.

So I do grant that motion, and I would make sure that the documents do have notification to notify the parties. Of course, if you do change the contact information, you need to notify us of that. We can put that on the boxes, and then once it's shredded, it won't be subject to public records requests.

MR. TRIMMER: Thank you, Commissioner.

COMMISSIONER TOWLER: So with that, do we have any other preliminary motions?

MR. KAHN: Evidentiary. Motion in limine.

COMMISSIONER TOWLER: Okay.

MR. KAHN: The Bombardier Exhibit 21 is a copy of the recently negotiated, new Collective Bargaining Agreement between Clark County and IUEC. And it's my understanding that the purpose for Bombardier to rely on this evidence is to suggest that the proper wage rate is something closer to what the County and IUEC agreed to, rather than the posted prevailing wage rate for elevator constructors.

And my understanding of NRS is that the legally-required wages are determined by a survey of

contractors, not a survey of public agencies as to what they pay. And if this evidence comes in, it necessitates I spend much more time presenting evidence on my side explaining the realities of bargaining over County pay, the differences in compensation systems, the inability of the right to strike. It prolongs my presentation of evidence, and that's why I bring it up now as a motion in limine, and I prepared a written motion on that. I don't expect a ruling while we sit here this morning, but I would like to head off having to present a lot of background evidence about negotiations between the County and the IUEC, and about the County's payroll and personnel system.

COMMISSIONER TOWLER: And I assume Bombardier has arguments regarding this?

MR. TRIMMER: Yes. I haven't read the motion, obviously. Mr. Kahn's arguments go to weight. It would seem highly relevant that the County, having just agreed -- this is the first contract. These gentlemen just went, just became public employees. It was freely negotiated.

It's no different than most of the evidence that Mr. Kahn, or the Union's expert has relied on. We were going to introduce it as an exhibit through our expert. He can discuss how much weight the Labor

Commissioner should give it. Mr. Kahn can put on that evidence as well. And we don't think that's a reason for excluding it from the record.

COMMISSIONER TOWLER: All right. Well, this is something that I believe we could address later after we've had a chance to review it, so we'll do that.

MR. KAHN: Very good.

COMMISSIONER TOWLER: So I'll hold off on a ruling on that at this time.

So with that, if there's no other introductory motions or preliminary motions or evidentiary motions or issues?

MR. TRIMMER: We have some concerns about their exhibits, but we'll bring them up as the case goes along.

COMMISSIONER TOWLER: Right. Would the parties prefer to give opening statements, or just opening statements before they present their case?

We could do two ways: Option A, everybody goes through now and does a brief opening statement, if you want to. Or we can just jump into Bombardier beginning their case and they can begin with an opening statement if they'd like to.

MR. MOSS: We're prepared to make one,

although I'm not sure it's not going to be redundant and we're not telling everybody what they already know.

COMMISSIONER TOWLER: Right.

MR. MOSS: I think everybody understands our positions essentially. First that it's not, doesn't meet the definition of a project as set forth in 338.016.

Secondly, that even if it did meet that, it's exempted or excluded by 388.011 because it was awarded in compliance with 552, and we say obviously meets the conditions that related to the normal operation and normal maintenance of the facility.

Thirdly, and this is the one that everybody loves so much, is that we think it's exempted because of 388.080 and the exemption of work done on behalf of railroad companies.

And then finally, if we get to the point of paying wages, or prevailing wage, we think it should be the rate that would be paid to electronic communications installers-technicians.

A couple of points just for context of what we're going to put on. On the question of whether this is repair under the statute, we argue it's not a project, and if it is, it's not a project for repair. And we think repair, as used in the statute, does not

apply in a technical sense of defining fixing something or not, but that you've got to look at the purpose of the contract and the purpose that the work is being performed for.

Is it primarily to fix something, or is it primarily, as we say, to make sure that the trains run and run on time and run the way they're supposed to, and that most of our work -- and we'll have evidence of that -- is done to make sure that nothing does break, to have to happen. And inevitably it does, but the amount of work and the type of work that's done in the repair aspect of this is, I don't want to say de minimis, but is minimal in compared to all the work that we perform, and is simply done because the other aspects of the work we did didn't quite accomplish what it was intended to do.

And on the project, as we say, it's got to have a goal and we have to have timetables and those kind of things.

And on the railroad thing, I know he kind of pooh poohs this, but I think our position is being badly misinterpreted. We're not contending, for purposes of this, that the tram system at the airport is a railroad. It probably is, but that's not the basis of our contention. Our basis of our contention

is the statute says what it says. It was work that was performed on behalf of and by a railroad company, and our argument is we are a railroad company, and so the statute says what it is, and then it should apply.

COMMISSIONER TOWLER: And I think I read your argument that 40 percent of Bombardier's total work nationally was railroad?

THE WITNESS: Yes. Our first witness is going to testify to that information, yes.

COMMISSIONER TOWLER: Just to go back to something you'd mentioned about if it is deemed a public work, the appropriate classification of work, you'd mentioned electrical technician, as opposed to, I believe, the elevator constructors?

MR. MOSS: And a couple of points on that one as well. I think if we ever got to that point, one question would be that, what would it rate, but the other would be what are we paying on, what hours would we be paying on? I don't know what the Union's contention is. I don't know if they're contending that if it's a repair contract, every hour under the contract is paid at that rate, or simply hours that would qualify as the kind of repair that they would say the statute covers.

COMMISSIONER TOWLER: Correct.

MR. MOSS: So that's something that we need to flesh out a little bit I think. I guess we'll do that in the case, but --

COMMISSIONER TOWLER: So now I'll move to the Awarding Body, the County. If you have any arguments you want to make now, you can make them, or you can reserve those for your case.

MR. THOMSON: The Commissioner's had so much sent to him, I'd just as soon get to the hearing.

COMMISSIONER TOWLER: I don't disagree with that. I'll give the same option to the Union. You can defer until you start your case, you can argue then if you want to, or you can make arguments now.

MR. KAHN: I'll make a brief argument now, just to respond to some of the points Mr. Moss made.

First of all, we believe this is public work, because the vehicles, together with the wayside, constitute a fixture. They are adapted to McCarran, they're never moved, they're of enormous weight, and you have a project here in the same sense that you have a project when you have long-term requirements-type contracts like other agencies have entered into for street light repair. The same issue exists. You hoped you maintain those street lights. It didn't work, so you're going to have to now come in and repair them.

The exemptions for normal maintenance and operation, we believe, do not apply here because you have some tasks that are of such significance in terms of the time they take, the skill of the workers involved, and the cost of the parts that it doesn't meet the common sense distinction between normal maintenance, and repair. The kind of distinction between changing the oil in your car and rebuilding the engine after your car breaks down.

So, we believe the evidence will show that repairs were a high percentage of the work performed here. We are only seeking back wages on those, on hours that you deem to be repair hours, not for the entire contract.

And finally, we believe the elevator constructor classification best fits what these workers do here. They are skilled mechanics who understand both electrical and mechanical components of a complex system. Just like elevator repairmen, ATS mechanics do a variety of different work on different systems, and electronic communications technicians, meanwhile, are limited to one small aspect of the overall work.

So that's why we believe that IUEC rate is most appropriate here.

And finally with the railroad company

exemption, I would just point out that if this isn't a railroad here, the legislature could never have intended to grant an exemption to conglomerates that happen to pick up some railroad operation somewhere else in the country, and then have that extend a blanket of exemption across all the different types of work they do.

If Bombardier were building a school, they should not be exempt. The legislature could never have intended that. Thank you.

MR. MOSS: Could I make, add one point, as we start our case? When we're examining our witnesses, and it's already happened here, we keep, we use the phrase "Bombardier," because that's easier. The name of the company is Bombardier Transportation (Holdings) USA, Inc., and that's kind of a tongue twister, so whenever I ask, we ask questions and our witnesses answer to Bombardier, that's what they're talking to, unless we have said something otherwise. Okay?

MR. KAHN: I would like to observe that, but my confusion is is that you have some witnesses who are apparently employed in dual capacity.

MR. MOSS: We don't object to your asking them about that. I'm just saying when I say, okay, "Does Bombardier have a contract for this," that we're not

going to get into --
MR. KAHN: What's going on in South Africa?
MR. MOSS: Right.
COMMISSIONER TOWLER: And I understand that, and like I've mentioned here, I've called one side Bombardier, the other side the Union, the Awarding Body, obviously represented by the District Attorney's office, and I think for purposes of ease of the hearing if we would just refer to this as the airport project, does anybody have an issue with that? I know there's an issue, obviously the main issue whether it's a Public Works project or not, but it's still, unless there's a different word everybody wants to use.
MR. THOMSON: Well, 552 is a very easy reference to it as well.
COMMISSIONER TOWLER: That's fine with me, you can call it Contract 552 or CBE-552, that's fine. So okay, we'll try to do that as much as possible.
MR. KAHN: Thank you.
MR. MOSS: Do we have any joint exhibits?
MR. TRIMMER: Not right now.
MR. MOSS: I guess we don't.
COMMISSIONER TOWLER: So with that, I'll have Bombardier call their first witness.
MR. MOSS: Our first witness will be Michael

Shaman and Mr. Trimmer's going to examine him.
Whereupon,
MICHAEL CRAIG SHAMAN,
having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

COMMISSIONER TOWLER: If you could please state your name and spell your last name for the record.
THE WITNESS: My name is Michael Craig Shaman, S-H-A-M-A-N.
DIRECT EXAMINATION
BY MR. TRIMMER:
Q. Good morning, Michael.
A. Morning, Paul.
Q. What's your current position?
A. My current position is Vice President of Systems Division, HSE, which is health, safety and environment, and services.
Q. And how long have you been employed by Bombardier?
A. Coming up to 15 continuous years.
Q. What positions have you held before your current one?

A. Before this one, commencing with Bombardier in Asia, I was seconded to KTMB Berhad, which is the Middle Asian national railway system, as Chief Operating Officer.
Following that tenure in the UK as general manager of the Virgin contract, which was implementation of 352 diesel electric multiple units.
And then commensurate with the acquisition of Adtranz into the Bombardier portfolio, I moved to Pittsburgh, Pennsylvania around 2001.
Q. Once Bombardier acquired Adtranz, what were you in charge of, what was your responsibility?
A. At that time I was asked to set up what we call the operations and maintenance business for worldwide for the systems division.
Q. And what did that entail?
A. Basically the oversight of management of approximately 25 operations and maintenance contracts, and with that, within that family of contracts, there was technical advisory agreements, right through to maintenance agreements, to full operations and maintenance agreements.
Q. When you say "full operations" -- well, I'll get to that. I'm sorry.
How long did you hold the O&M position?

A. O&M position, I was Vice President of O&M for about 10 years.
Q. So from 2001 to 2011?
A. That's correct.
Q. What position did you hold between 2011 and the present?
A. I decided to go -- I really wanted to retire, but I was persuaded to stay within the company on a special project basis for two years, and that concluded April of this year.
Q. And that's when you took your current position?
A. I took my current position, and I've been recalled permanent to Bombardier.
Q. Before working for Bombardier, did you have any other rail or transportation experience?
A. Yes, I have.
Q. Can you describe that?
A. I started the railway in a partnership position in 1969, so I had 29 years. The preponderance of the time was with freight rail, and then I had a penchant for rail companies and transit companies, and I moved to Via Rail Canada, which is somewhat parallel to your Amtrak in the USA.
Q. What is Bombardier in the global sense? What

is Bombardier?
A. In the global sense, we are a diversified company. We are headquartered in Montreal, Canada, diversified in the sense that we have two major revenue streams, one on the transportation side, which is predominantly rail products and services. The other side is aerospace. And our revenues are about 50/50 split, approximately 16 billion U.S. dollars per year in terms of annual sales, and with a backlog portfolio of about 60-plus billion U.S. dollars. About 70,000 employees all combined.
Q. There's a binder down to your right side that says "Bombardier Exhibits"; do you see that?
A. Yes.
Q. I'd like you to turn to Exhibit 10 in that binder.
A. Okay.
Q. And --
A. Did you say 10?
Q. 10, sorry.
A. Okay.
Q. And do you recognize this multi-page document which is Bates numbered Bombardier 50 through Bombardier 113?
A. What it appears to be, I'm quite familiar,

this is our, basically a description of Bombardier products and services and transportation division, as the company as a whole.
Q. I'd like you to turn to page, the Bates No. 69.
A. Page 69. I'm there.
Q. And this is describing Bombardier Transportation; do you see that?
A. Yes.
Q. Can you give me a description of what Bombardier Transportation is, what its divisions are, explain that?
A. Yes. I think by proof by revenues and market capture, we refer to ourself as the global leader in the rail sector. And I can basically describe Bombardier as having the broadest portfolio of products and services, including solutions, for any purpose-built requirements that the customer is requiring.
For example, driven by the design requirements of the system, we could supply anything, as an example, as small as a streetcar, which satisfies small-capacity systems, right through to the high end of very high-speed trains, and everything in between.
Q. If you turn to page 83, and is that a list of

Bombardier Transportation's divisions?
A. Yes.
Q. And can you describe the six divisions?
A. Yes. Starting on the left-hand side, this is a depiction of the range of vehicles that we would supply. Inclusive of the range of vehicles would be locomotives.
As I gave the example earlier, light rail vehicles starting with the LRT, most people refer to them as a street tram, moving through metro applications, something you would see as a metro vehicle in New York subway, to higher-capacity vehicles, intercity commuter trains, regional transit, intercity transit. That's the division that has the accountability to design, build, and commission whether it's a rail passenger vehicle or a locomotive.
Q. And I see the Transportation Systems is next?
A. Yes. This is the division I'm responsible to report to. It's based in Berlin, Germany, our headquarters, and we are accountable as a division to provide turnkey solutions, meaning we offer full turnkey solutions to any transit systems, delivering any technology, and the source of that technology is from our sister divisions, whether it's a vehicle -- and later on we'll talk about propulsion or

signaling -- so we internally purchase products from our Expert Services Division. Our role is to integrate all of those products within a turnkey system.
Q. So a turnkey system, what's an example of that?
A. Probably an example you may be familiar with is, if you traveled through JFK Airport, for example, would be through the procurement process, we partnered with a major civil partner and we delivered the entire system, inclusive of erection of the elevated guideways, stations, facilities, trackwork, fare collection, power distribution, passenger information systems, vehicles, signaling, inclusive of operation and maintenance what includes, as a passenger I can, my example I always give as a passenger, if you're walking through the system, the minute you purchase your ticket through the fare collection system, from that point everything inside the transit system we operate and/or maintain.
Q. And I see Services is the next division?
A. Although we do services within the Transportation Division, we have a major separate division called Services whose expertise is predominantly based in Europe because of the market size, so they offer maintenance services on major rail

operators, inclusive of a major undertaking of material logistics and overhaul.

Q. "Rail Control Solutions"?

A. Very rudimentary. Rail Control Solutions is the signaling system and all the architecture, inclusive of software and hardware that's delivered as part of the project.

Again, a simple example of that would be an open-line freight rail system where it is a signal system, meaning that the locomotive engineer would observe traffic lights, as commonly referred to, to display signals for safe operation of the train, and ranging from that fundamental basic system, right through sophisticated systems where we substitute the locomotive driver for automated train operation, meaning that we'll man train control operation centers, but the full operation of the train is undertaken through automation.

Q. And Propulsion and Controls?

A. Propulsion and Controls is a separate division that is, their specialty is provisioning anything related to what source of the primary power coming into the vehicle, transforming that energy to a tractive effort, meaning all of the ancillary components required to undertake that. It could be propulsion

software, propulsion systems inclusive of inverters, converters, traction drives, traction motors, driveshafts, they are responsible to deliver.

Q. Is a locomotive an example of propulsion?

A. You will have propulsion systems on a locomotive, yes.

Q. So propulsion is sort of like the motor?

A. I would say that without propulsion you would not be able to propel the vehicle.

Q. And the last one is bogies.

A. Bogies I can equate to a truck axle. Basically this is a major component that is found underneath the vehicle, one at each end normally. Carries the wheel sets which really transfers the weight of the vehicle through a suspension system, providing the ride quality and the cohesion to the rail.

Q. Now, how does Bombardier Transportation, these six divisions, do business in the United States?

A. May I ask for a glass of water before I answer that? I'm getting Las Vegas dryness. Thank you.

So the question, Paul, if I can ask you to repeat, please?

Q. Yes. How does Bombardier Transportation do business in the United States? How does it sell the

products that these six divisions deliver?

A. Right. Most, if not all of our business in the United States is done through a legal entity in BTUS Holdings.

Q. Is that Bombardier Transportation (Holdings) USA, Inc.?

A. Yes.

Q. So, for example, BTHUSA handles sales of locomotives?

A. That is correct, yes.

Q. And it handles the operation and maintenance of a variety of systems?

A. That is correct.

Q. So basically does all the things that you described that these divisions do?

A. Yes. The only one I'm not actually, can confirm is the bogies, if we ever sold bogies directly under that legal entity.

Q. And in some cases, does it also handle international sales?

A. Yes.

Q. I'm going to show you a document. First go to, turn to page, or Exhibit 11 in the folder. As you can see, that document is, with the exception of some percentages, totally redacted, and I'll represent to

you that there was a discussion earlier that this document is to remain confidential, with the exception of the things that we directly put into the record, and the document figures that are at the bottom. Do you recognize what this chart is?

A. Yes, I do.

Q. And what is it?

A. It's a depiction of the, I'll say the three parallel years. They're full contract years of, full contract years of Las Vegas during, mirroring Las Vegas APM, where we had tasked, I had personally tasked our senior controller of the Americas Division, who is very intimate with BTUS Holdings, legal entity, to extract all of the volume of revenue sales through that legal entity within those three corresponding years, and I wanted him to differentiate the volume of sales on a percentage basis and a dollar basis between APM products and non-APM products.

Q. When you say "APM products," what do you mean?

A. APM products is an acronym used for airport people-mover systems. I think here McCarran may refer to it contractually as the ATS system.

Q. And when you say non-APM work, what do you mean by that?

A. Non-APM is anything that is other than an

APM-related contract. It could even be a propulsion system sold to an APM contract, or signaling sold to APM contract. We've extracted that and have shown non-APM work as predominantly work committed to steel-wheel, steel rail systems, whether it's U.S.-based or internationally based.

Q. Okay. Now, the third page in your, the third page in the tabbed exhibit, do you see that? And that has some percentages. In 2009, what was the percentage of non-APM revenue for Bombardier Transportation (Holdings) USA, Inc.?

A. 31.3 percent.

Q. And in 2010, the percentages of non-APM revenue was what?

A. Moved to 51 percent.

Q. And in 2011, the percentage was what?

A. 42.3 percent.

Q. And now I'm going to ask you some specific, go through a couple of specific examples on this list. Using the non-redacted copy, first, there's a couple of different columns in the 2009 column; do you see that?

A. Yes.

Q. One of the projects listed is called C65 SEPTA upgrade?

A. Yes.

Q. Do you see that?

A. Yes.

Q. And then the product is LRT650; do you see that?

A. Yes.

Q. What is C65 SEPTA upgrade?

A. C65 is the contract preference. SEPTA is Southeast Pennsylvania Transportation Authority. It's a small amount of work with $29,000, and it was a simple software solution sold to enhance the operability of the signaling system.

Q. So this is a signaling or rail control product?

A. RCS, Rail Control Solution product, yes.

Q. Is the C65 SEPTA program, is that a steel-wheel railroad?

A. Yes, it is.

Q. And one of the other examples I want to point your attention to is Toronto TTC Rocket. Do you see that? It's a little bit, it's about four or five --

A. Yes, I see it now.

Q. What is the Toronto TTC Rocket?

A. Toronto, Toronto, Ontario of Canada, TTC, the acronym for Toronto Transit Commission, and the Rocket is, call it a brand name of their underground metro vehicle that we have manufactured in Thunder Bay, Ontario.

Q. So like a subway?

A. Yes. Yes.

Q. Is that steel-wheel?

A. Yes.

Q. And it says that the sale was for propulsion? Do you see that?

A. That's correct.

Q. And earlier you talked about JFK and the work we do there?

A. Yes.

Q. Can you describe that in a little bit more detail? What do we do at JFK?

A. Yes, it's a -- the description is, its core mandate as a system is to provide interconnection with terminals within the airport. Secondary to that, it also provides an opportunity for passengers to arrive or depart, connecting to major hubs with either, at Jamaica station with Long Island Railway and New York subway, or taking a second leg which is an alternate route which takes them to the A Line of New York subway. That's approximately 5 to 7 miles in track length, steel-wheeled on steel rail, with our latest technology called linear induction motor technology.

Q. Is that system limited to airport transportation?

A. No, it is not.

Q. It provides public transportation?

A. It's a big -- a major, major contributor to the success is people who connect, again using Long Island Railway or the New York subway to connect to the JFK Airport for time and cost.

Q. In terms of the size of our, of Bombardier Transportation (Holdings) USA, Inc.'s operations and maintenance contracts, where does JFK stand?

A. In terms of operation and maintenance, in terms of this legal entity, it's our largest volume contract in terms of annual revenues.

Q. Is it steel-wheeled?

A. Yes, it is.

Q. With steel tracks?

A. Yes.

Q. Looking at 2010, if you go down to the bottom entry, or the second-to-last entry, there's a reference to NJT Alpha 46A.

A. Um-hum.

Q. Do you see that?

A. Yes.

Q. What does that transaction involve?

A. This is a supply of 30-plus purpose-built locomotives. They are diesel electric, and they also supply what we call head-in power, meaning they have an alternator within the locomotive that provides hotel power or power to the trailing vehicles, which are bi-level vehicles. It's a very major transit system that operates from the Philadelphia area into the New York major terminal.

Q. And in terms of sales, was this a significant sale?

A. Yes.

Q. Without saying the amount in the record?

A. Yes, this probably is the most significant sale in 2010.

Q. Was it over a hundred million dollars?

A. Yes, it was.

Q. Okay. And is that a steel-wheel system?

A. Yes, it is.

Q. And then 2011, I want to talk about two entries in that yearly summary. Up towards the top there's a reference to Southern New Jersey O&M. Do you see that?

A. Yes.

Q. And what does that entail? What kind of system was the Southern New Jersey line?

A. Southern New Jersey is a light rapid transit system, LRT. It's basically a commuter system that operates on dedicated scheduled hours over shared infrastructure, so there's a time period that it's passenger traffic only.

When the service schedule terminates for the day, then we operate freight trains over that section of track. We have the accountability to operate and maintain that system.

Q. And that's a steel-wheel, steel rail system?

A. Yes.

Q. And 2011, towards the bottom again refers to NJT Alpha. Is that another sale of locomotives?

A. That's the continuation of the same motor.

Q. So the total value of that sale exceeded $200 million?

A. That's correct.

MR. TRIMMER: I ask that Exhibit 11, the redacted version be admitted.

COMMISSIONER TOWLER: Do we have one that we can mark?

MR. TRIMMER: Pardon me?

COMMISSIONER TOWLER: Do we have one that we can mark? We do have them here, I just want to make sure. The ones I have have holes punched in them is

why I ask.

MR. TRIMMER: I do have a copy.

I also ask that Exhibit 10 be admitted.

COMMISSIONER TOWLER: It might be easier if we just called these Exhibit 10 and Exhibit 11, unless, Bombardier Exhibit 10 and Bombardier Exhibit 11, unless somebody has an objection to that?

MR. KAHN: No.

COMMISSIONER TOWLER: Is there an objection to the admission of those exhibits?

MR. KAHN: No.

(Exhibits Bombardier 10 and 11 admitted)

MR. TRIMMER: Still talking about Exhibit 11.

COMMISSIONER TOWLER: Sorry, just a minute, I was waiting for those to get stamped.

Without objection, there was a motion to have those entered. That they are entered into the record as Bombardier Exhibit 10 and Bombardier Exhibit 11.

MR. TRIMMER: Thank you.

BY MR. TRIMMER:

Q. Without saying the exact figure, each year that this chart depicts, which is 2009, 2010, 2011, are the revenues, do the revenues exceed a hundred million dollars a year?

A. On non-APM products?

Q. Yes.

A. The answer's yes.

Q. And then we've already talked about the facilities. So are there any projects or activities that Bombardier is involved in that are not reflected on this chart that involve non-APM work?

A. Yes.

Q. And have you heard of Desert Express?

A. Yes, I have.

Q. Can you describe what Desert Express is?

A. I could say that Desert Express, we've been, we as Bombardier Systems Division have been engaged with developers trying to position theirself as the sole source supplier for electro-mechanical works, meaning the delivery of specific components, i.e., track, signaling, overhead catenary electrical power, power distribution and vehicles.

We have been working with the developer to build the financial model for the eventuality of having this product launched, which is a system between Victorville, California, connecting passengers to Las Vegas.

Q. And that project hasn't been approved, has it?

A. No, it has not.

Q. But that's the kind of project that BTHUSA has

the capacity to do?

A. Quite easily, yes.

Q. Okay. And based on the data in Exhibit 11, as well as your experience, do you believe BTHUSA is a railroad company?

A. What I believe as I stated before, we are the global leader in the broadest portfolio products and solutions to the rail transit market. I believe that in many of our contracts we step into the shoes as a railway operator. Customers put their trust in us through contractual obligation that we do operate transit systems, railways, yes.

Q. Now, some of the things we've talked about involve selling products to railroads. Others involve design-and-build applications, and others involve maintenance. And I want to shift our focus from what we are as a railroad company to the way we deliver maintenance services.

A. Um-hum.

Q. Once Bombardier's contracted to develop an APM system at an airport for example, or any other transit system, how does that start? How does the process work?

A. It's all about timing. I mean, we have, if we have advanced intelligence on a market opportunity,

naturally we try to position ourselves with the stakeholders and speak to the capabilities we have and perhaps do some modeling that depicts the right solution for their application.

More importantly, through the procurement process, depending on how that is shaped, we will either self-perform the work as the prime, or we will partner up with a variety of contractors or partners, and then ultimately putting -- you know, when the procurement process happens, we will clearly understand the specification that the customer has identified, and we will, through a series of engineering assessments, we will provide the best solutions, the right technology, the right signaling system, the right size power distribution system, station spacing, signaling, headways, route time, et cetera.

Q. All of those things are designed for the particular project?

A. Every contract we do we sit and analyze the requirements and put the best value proposition together for the customer to ensure that we are competitive.

Q. So that's the design-and-build process. How does it shift to the maintenance?

A. Maintenance in most locations is quite

seamless in terms of the procurement process. In most occasions on what I would call a greenfield site, a new contract, that the O&M opportunity's identified in parallel with the design/build contract, and this is where we can again seamlessly calculate our value proposition to ensure that once the system is design/built, we can roll into the operations environment, and through the complete asset management of the customer's asset, continue the life cycle of repeat business.

Q. Does the design process inform how you develop your maintenance process?

A. More importantly, when we are, as part of the solution for operations and maintenance, we will look at the design once again and make sure that it puts our best competitive advantage forward in terms of designing for safety and designing for maintainability around our philosophy of maintenance.

Q. What is the philosophy of maintenance? What's the approach?

A. In all occasions, I mean, our philosophy of maintenance evolves continuously, and it evolves to the point because of customer's demands in terms of high performance of the safety of the system, number one.

Second to that would be punctuality,

reliability. In particular airports I can tell you that customers are very, very conscious about punctuality, which equates to availability of the system uptime, and having said that, all our maintenance philosophy is, surrounds the, what I would say the heart of our program is built on preventative maintenance, meaning that when we do preventative maintenance schedules, whether they're done on increments of time, mileage, or cycles, it is evolved through learning that we would import reliability as part of our preventative maintenance program regimes, to import reliability into those PM examinations that assures us that the vehicle or system will perform to the next scheduled preventative maintenance program and operate without service affecting failures of the operation. That is our philosophy.

Q. Is preventative maintenance limited to visual inspection?

A. No, it's not. No.

Q. What does preventative maintenance involve?

A. Preventative maintenance, and again, it is a purpose-built maintenance plan that is normally endorsed by the customer and/or their consultants, and it's dynamic in nature. It always evolves based on the learnings that we have on reliability-based

maintenance.

What it involves is a schedule of tasks, based again on frequency, periodicity of maintenance, if we elect to do it on mileage, time or cycles. The schedule could be on a daily basis; it could be on a weekly basis; it could be on a monthly basis, dependent on the environment the vehicle or the system operates on.

Each inspection has a host of specific tasks which describe the how-to or the what-to, however, what to do at what interval. And we ask our technicians to refer to the examination. It's called up based on the time that I expressed earlier, and each one of those items is done in accordance to the task procedure.

So, I'm sorry, Paul, just to answer your final question, is it only a visual? The answer is no. It's accompanied with specific measurements at times. A small example would be a brake shoe, brake lining, collector shoe, carbon shoe. You know, there's instrumentation required to make sure that, again, the quantity of material left will perform until its next scheduled inspection, as an example. That's one example. Could be calibration. It could be instrumentation with an electrical meter, those types of activities beyond a visual.

Q. What's corrective maintenance?

A. Well, to go back to the preventative maintenance program, maybe I can start there to answer your question.

You know, our philosophy, as part of the preventative maintenance program, you are purposely validating the condition of subsystems to ensure it meets expected standards and limits before the vehicle or wayside component is released back to service. If any one of those tasks performed, and we identify an area where it is a substandard condition, we remedy that situation back to expected values before the equipment's back to service.

Q. So you used the word "periodicities." What do you mean by that?

A. Frequency of examinations. Again, it goes back to, if it's a time-based maintenance regime, mileage-based regime, or a regime like a switch for example, a switch machine, it's measured on frequency of movements or cycles. We do a switch examination at 1,000 cycles. That's 1,000 movements of the switch machine, as an example.

Q. And can parts be removed or replaced during the preventative maintenance process?

A. Oh, yes.

Q. And how does that work? Is that part of the periodicity concept?

A. Oh, yes.

Q. Can you explain that?

A. The example, the exam could call for an examination of the traction, DC traction motor. The mechanic refers to the task. It tells him what to do. Takes the inspection cover off. He checks the brush length of the traction motor. He sees that the brush length is below nominal limits that are required. He'll remove the old brush, the existing brush, and renew the new brush.

Q. At that point has the motor failed?

A. No, it has not.

Q. So what's the purpose of the replacement?

A. The purpose of the replacement again is to give us the assurance that that traction motor will function without fail when it goes back to service, at least back to its next exam. That's preventative maintenance.

Q. Does Bombardier monitor preventative and corrective maintenance work, how much is performed?

A. Bombardier does, yes. We do.

Q. And can you explain that? Is there a program for it?

A. In my former capacity, it was born from one particular operation where trains continually failed in service, and our analysis demonstrated that the failures occurring exhausted our available technicians' time to attend to the failures. We were not building preventative maintenance into our preventative maintenance schedules. We had to turn that table around. We have to invest more time on the PM work, preventative work, and less time on the corrective work. So --

Q. Go ahead.

A. So in that instance, we developed what we called a PM/CM ratio, target. We set out a, we aspired to set out a target in this location with an 80-20 rule. We were down at 40 percent preventative. We needed to move that to 80 percent and lower the amount of time invested in the corrective side.

That launch of that program was very successful. We chose, as a leadership team, to adopt that same principle at every one of our Transportation Systems divisions locations.

Q. And that began in 2004 or '5?

A. That's about right, yeah.

Q. And do you know, you may not know the precise numbers, but what was the approximate percentage at

McCarran?
A. Yeah, I can't be exact on this, but I know this was one of our leaders in this exercise, and I think when I last looked, we were bordering around 90 percent preventative maintenance versus the -- so we were exceeding our goal of 80-20. It was like 90-10.
MR. TRIMMER: Could we go off the record for a second? I think I'm done.
COMMISSIONER TOWLER: We'll go off the record.
(Discussion off the record.)
MR. TRIMMER: I just have a couple of more questions.
COMMISSIONER TOWLER: We're back on the record.
BY MR. TRIMMER:
Q. You said that McCarran was achieving approximate 90 percent in the PM/CM ratio. Do you know what the period of time for that was? How long was it achieving that level of success?
A. No. I can't say for sure.
Q. And I want to ask one more question. You referenced availability a while back, system availability.
A. Yes.
Q. What's the target for system availability?

A. Is your question specific to a contract?
Q. Yes. If you know McCarran, and if not, what's the industry standard?
A. The industry standard is around 99.5 percent availability. Simple mathematics, if you ran a hundred hours a week, they're expecting you to run a minimum of 99.5 hours without a servicing affecting failure. And I know McCarran was at 99.65 percent, requirement in terms of availability requirements would provision you with a payment factor of 1.
Q. How does that affect the preventative maintenance regime?
A. Well, it certainly puts more emphasis on punctuality and raises the bar of performance that you needed to ensure that that .35 percent allowance that you had for failures, which equates to about 6 minutes a day, by my calculation, so if you can envision a system that has so much demands on it in terms of passenger traffic, one train failure over 6 minutes has such cascading, rippling effects over the airport, it's intolerable because there's no really alternative way to move passengers.
So in that sense, the demands of performance on the contract are extremely high, and our obligation was to invest in the availability through a PM regime

that resulted in that high level of performance.
Q. And is it true that you can schedule when PMs take place?
A. Through the predictability of the schedules at McCarran at the time, barring peaks of holiday traffic, yes, for the most part, you can.
Q. And does that allow you to control your availability?
A. Yes. Because you structure your maintenance regime around the available time the equipment is afforded to you in non-revenue service.
Q. And I used the word "PM." What does "PM" stand for?
A. Preventative maintenance.
Q. And in the parlance of Bombardier or the work performed at McCarran, what is a PM?
A. What is a PM?
Q. Yes.
A. A PM -- it could be used as a scheduled activity of maintenance. It could be a vehicle. It could be a battery charger. It could be a signaling system. It could be a section of the software or power distribution system. It's a word commonly used in our industry to describe an event of maintenance.
MR. TRIMMER: Thank you. No further questions

right now.
COMMISSIONER TOWLER: Go ahead.
CROSS-EXAMINATION
BY MR. KAHN:
Q. Thank you. Does Bombardier employ any operators of traditional railroads that carry freight in the U.S.? For example, do you provide a service like Union Pacific or Southern Pacific as far as employing operators in the U.S.?
A. Under BTUSA?
Q. Under BTUSA.
A. I want to qualify my answer and say, yes, we do at Southern New Jersey where we have the responsibility to operate and manage the Southern New Jersey transit. We have responsibility for operations Control Center.
Q. The Operations Control Center. But sort of onboard rail personnel, do you employ any in the country?
A. The answer is no, under BTUS Holdings.
Q. Right. And what percentage of the revenues of BTUS Holdings comes from supplying the traditional rail operators of the sort like Southern Pacific, Union Pacific?
A. I don't have the exact number in front of me,

but I am not aware of any at this moment.

Q. So most of the agencies you supply are engaged in subway or light rail like BART in the Bay Area?

A. That's correct.

Q. That sort of agency?

A. That is correct.

Q. And you talked about 90 percent PM figure at McCarran. Some of those PM tasks could take the personnel several hours of time to complete, isn't that correct, that are counted towards this 90 percent?

A. Yes, like an in-depth inspection, for example, a monthly inspection would take far more time than a daily. The answer is yes.

Q. And some of the tasks counted as PM could involve replacing parts that are worth hundreds or thousands of dollars; isn't that correct?

A. That's correct. Yes.

Q. And would you trust to someone who was newly hired off the street to complete a PM task on one of these McCarran ATS cars in the first two months of their employment, by themselves?

A. I think the answer has to be qualified, and we do hire new employees at other locations, but they come with experience from another location. So it's all contingent about the competencies and the experience an

individual has had.

Q. You need at least several months of experience in order to participate, in order to do one of these functions on your own?

A. As a new employee?

Q. Right.

A. Not familiar with the transit and the APM?

Q. Right.

A. Yes, you would.

Q. And that 90 percent statistic, that's based on a variety of different technicians and managers preparing reports on their time and their tasks, correct?

A. My understanding, and I haven't gone to the depth of an examination of the reports for McCarran, but the rules were it's the actual wrench time spent on performing either preventative maintenance or corrective maintenance.

Q. Right. But the figure results from a variety of different people reporting on what they did and how long it took them, correct?

A. You said "management." I'm sorry, that threw me a bit. I don't see management contributing to time against the 90-10.

Q. No, I'm asking do they help submit the figures

to Bombardier headquarters that go into the 90 percent?

A. Oh, yes, management, it's part of our monthly metrics in terms of a key performance indicator, yes.

Q. So the managers are, in part, measured by or evaluated by how they're doing on this 80-20 scale; is that correct?

A. That's one of many things they're measuring, yes.

Q. Are there any locations where Bombardier's APM system that it installed is being maintained now by a different company?

A. Other than where customers self-perform the work. As an example, we sold systems to Seattle. They elected to self-perform the work. I am not aware today of any other competitors performing maintenance or operations on Bombardier APM equipment today.

Q. But there are a number of customers who self-perform now?

A. That's correct.

MR. KAHN: Okay. I have nothing further.

MR. THOMSON: Nothing.

COMMISSIONER TOWLER: Any follow-up from Mr. Moss?

MR. TRIMMER: No more.

COMMISSIONER TOWLER: So with the witnesses,

we didn't discuss earlier, are they excused, or do you want them retained for rebuttal purposes? Anybody? Or maybe if they just leave a cell phone number? Is that agreeable to everybody?

MR. KAHN: Yes, that's fine.

COMMISSIONER TOWLER: So the witness will be released, and if he leaves his cell phone number with counsel, if they do not already have that.

THE WITNESS: Thank you.

COMMISSIONER TOWLER: Thank you. We will take a break. We're off the record.

(Recess.)

COMMISSIONER TOWLER: Everybody ready? All right, we're back on the record.

MR. MOSS: Bombardier calls Mr. Roy Ryan.

Whereupon,

ROY RYAN,

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

COMMISSIONER TOWLER: Please state your name and spell your last name for the record.

THE WITNESS: My name is Roy Ryan, last name R-Y-A-N.

COMMISSIONER TOWLER: Mr. Trimmer, go ahead.

DIRECT EXAMINATION

BY MR. MOSS:

Q. Roy, are you currently employed?

A. Yes.

Q. By whom?

A. Bombardier Transportation.

Q. And what is your current position?

A. My current position is director in the services organization.

Q. And basically what are your duties as director of the services organization?

A. I support our general manager in the oversight of the day-to-day operations at our service delivery centers here in the United States.

Q. How do you assist the site managers?

A. Just in dealing with day-to-day issues involving operations or maintenance of the system. That could be commercial issues, technical, HR-related. The whole variety of items.

Q. So basically you're an adviser or something like that?

A. Yes. I support them when they need help from Pittsburgh or additional support on matters.

Q. Have you held any other positions with

Bombardier?

A. Yes, I have.

Q. What are they?

A. I was the director of the western region for the O&M organization. I had all the service delivery centers west of the Mississippi.

Q. About what period of time was it?

A. That was from June 2010 through July of 2012.

Q. Keep going.

A. Prior to that, I was in the project management role within Bombardier, working on APM projects and overhauls of various systems at some of our service delivery centers.

Q. Have you ever been a project manager?

A. Yes.

Q. And what is a project manager?

A. Project manager, we're in charge of executing a contract that Bombardier was awarded. Typically it involved the design, the manufacture, procurement, installation, and testing of a system or an end product.

Q. Does completing a project have any relationship to maintenance?

A. Would you repeat the question, please?

Q. You were a project manager and you oversaw the

completion of the design, build and install, correct?

A. Yes.

Q. In that position and doing those duties, were they related at all to maintenance?

A. Yes.

Q. How?

A. A lot of the items, at the beginning of the contract there's requirements that outline passenger flow rates, they dictate alignments. These are the items in which we have to design the system around to meet a certain level of performance, and throughout the process, the designing of the equipment, we want to make sure that it can be maintained within the proper manner.

There's a lot of it dictated by the contract, that the facilities are there to ensure maintenance can be done on the system and operations of the system. We provide spare parts. We provide the tools. We provide the maintenance plans, the operating plans, the equipment manuals. We provide the training. All that's part of the project deliverable in our contracts.

Q. You say "train" or "training"?

A. Training.

Q. All right. You mentioned a maintenance plan.

What is that?

A. The maintenance plan outlines the preventative maintenance tasks at a high level that are to be performed along with the frequency that they're to be performed.

Q. And are you involved in the preparation of that plan?

A. Not directly, but it's one of the requirements that I was, delivery requirement as part of our contract. We had engineers and other folks put together that information. We'd review it and then submit it on to the customer.

Q. Are you familiar with the Las Vegas ATS system?

A. Yes.

Q. And ATS is the phrase that's used in relation to this system in the contract; is that correct?

A. Yes.

Q. And how do you have familiarity with the system?

A. One of the projects I was assigned to during the project management was the rehab of Legs C and D and the T3 contract, providing the tram for the T3 contract.

Q. And when you were western regional manager,

did you have any responsibility for it?
A. Yes, I did. This was one of the service delivery centers that was under my oversight.
Q. Now, the western regional manager's position was a maintenance position?
A. It was a position in our operations and maintenance operation, yes.
Q. We keep using the phrase "operations and maintenance" and "O&M." We know what the "M" is. Presumptively it's maintenance. What's the "O"?
A. The "O" is operations. It's --
Q. Refers to what?
A. Physically, the operation of the system.
Q. Okay. And does the contract at McCarran have any operational aspects to it?
A. When Bombardier had the contract, it did not.
Q. Okay. All right. I want to talk about the ATA (sic) systems a little bit. Do you know how long it has been in existence, some form of the system?
A. This system here?
Q. Yes.
A. I believe since 1985 is when we entered our first maintenance contract with the County.
Q. And we had a contract for maintenance that terminated when?

A. In May of 2012.
Q. Could you describe for us the configuration of the system on May of 2012, and we have a document that we've prepared to assist you in doing that. It's a map. Do you have a copy of the map?
A. Yes, I do.
Q. Just looking at this, do you understand what it is?
A. Yes, I do.
Q. What is it?
A. It's just a schematic of the airport system.
Q. Using this map, would you just describe where the system is, where the trains go, where the equipment is, that kind of thing?
A. Okay. The system, we have a tram system that moves passengers from Terminal 1 to the C Gates.
Q. What's Terminal 1, what is that?
A. T1, that's the airport terminal where you would check in. That's where your bags, that type of thing would happen. The gates are out where the C Gates are, called the airside. So there's a tram providing service from Terminal 1 out to the C Gates.
Q. Now, are the C Gates directly connected to Terminal 1?
A. Yes, they are.

Q. By what method?
A. There's the tram, and there's also a walkway.
Q. Has that always been the case?
A. The interior walkway, I believe so.
Q. Okay. Keep going.
A. The other system there is the one that connects to the D Gates from Terminal 1, so you can go from Terminal 1 to the D Gates. And the final leg is from Terminal 3 to the D Gates, and that's the one that was recently just opened.
Q. What are the components of the system?
A. The system consists of a dedicated roadway or guideway.
Q. What's that mean? What's a guideway?
A. It's a dedicated roadway that the tram will travel on, that the vehicle travels on.
Q. Roadway is --
A. In this case it's a concrete --
Q. Path?
A. -- structure, yes.
Q. Okay. Okay. Keep going.
A. You also have trams or vehicles on each of the various roadways. Each roadway has two lanes. There's -- so the trams go both directions for all the systems. You have guidance equipment that's located on

the guideway itself or on the roadway. You have equipment on the wayside, like station doors which are at the ends where the tram stops and the people get on and off.
You have communication, signage. You also have equipment on the wayside in equipment rooms that provide the controls and other communications for the vehicles for the system while it's running. And also, there's equipment in Central Control which is now located at the D Gates. That system, that monitors the operation of the system for the three legs.
Q. Would you explain how the tram works, what makes it move from A to B?
A. Basically it's electrical power. It's a fully automated system. There's no driver, and Central Control basically has the control over the vehicles and making it go down the roadway. Since it's automatic, it has sensors and other software-related items that will tell it when and where to stop. The doors and all that are automatic as well.
It basically runs off electrical power. Let it go, and it runs for the day, and at night it comes in to, usually the Terminal 1 end or down at Terminal 3. The power's turned off, and the system's maintained.

Q. Does it run on a track?
A. Yes. It's a dedicated roadway.
Q. Does it have wheels?
A. Yes, it does.
Q. What type of wheels?
A. They are rubber wheels, tires.
Q. And is there anything that keeps the tram running in the right direction so it doesn't move back and forth?
A. There's a guide beam that runs the length of each roadway. It's basically a steel I-beam, and there's guide tires that attach the vehicle to that beam so that it can't veer off the track.
Q. Now, this is 2012, this is the configuration now. You said it went back to 1985. Do you know what it was in 1985, the configuration?
A. Yes. It was just the tram that ran from Terminal 1 to the C Gates.
Q. And then how did it evolve to where it is now? Describe that.
A. Through a series of both expansions of the fleet and new construction. The next leg that was built was the runout to the D Gates from Terminal 1. That was new construction. And then there was a fleet expansion done there shortly after where they increased

the number of trams or trains on the system, and then more recently there was the addition of the T3 line here.
Q. Did Bombardier have any involvement in any or all of that at that evolution?
A. The original leg was done by Westinghouse Transportation, which Bombardier acquired that business unit. That same business unit has done each of the legs and follow-on maintenance contracts.
Q. Now, when you say "done," what do you mean?
A. They've been awarded and executed that work.
Q. What work?
A. Both the project work for the construction of the new systems, and the maintenance of those systems for Clark County.
Q. So you're talking about the design, manufacture and installation of the work; is that correct?
A. Yes.
Q. Of all of this?
A. That's correct.
Q. And then maintenance of the system, they maintained the entire system for all that period of time?
A. Yes, they have.

Q. To your knowledge, has McCarran ever had a contract with any other company to provide maintenance to the system?
A. No.
Q. Is there a phrase that, or a word that is used to describe the kind of system that we have here?
A. These are typically referred to as shuttle systems.
Q. And describe what a shuttle system is.
A. Again, a shuttle system, there's a minimum of two stations, one on each end. You have a dedicated guideway between the two stations. There's one train that will run between the two stations. It cannot -- there's one lane on each side of the guideway. These trains cannot cross over into the other lane. There's only one train that can run on that side, and it's basically one system travels in one direction, then reverses back the other direction. There's no switches or any type of technology that would allow the trams to cross over from lane to lane.
Q. So are there other types of systems?
A. There is what they refer to as a pinched loop system.
Q. And what's that as compared to this?
A. That's a system that does have switches. It

allows trams to change from lane to lane. Typically it allows you to run more trains on each side of the system than you would be able, because on a shuttle, it can only be one train. It allows for more stations, more flexibility. It all depends on the system you're looking to put in.
Q. Now, on the shuttle system, where is maintenance work performed?
A. On these systems, the maintenance work is performed at the Terminal T1 station and the Terminal T3 station.
Q. When you say "at the station," what's the station?
A. The last station where the train berths to let people on and off. It's an online maintenance system. The trains do not leave that section of guideway for any reason. They're attached there permanently.
Q. So when the maintenance technicians need to perform maintenance on it, they do it at that location?
A. That's correct.
Q. In a loop system, for example, is that the case?
A. On loop systems, pinch loop systems, there is a maintenance facility, an offline maintenance facility where the trains can be driven into and physically

taken off of the guideway. There's usually different types of pits established for light maintenance, heavy maintenance, different areas. So there's a little more flexibility on the maintenance side.

Q. Does the fact that the work has to be done while the tram is on the track in the shuttle system affect maintenance in any way?

A. Yes, it does.

Q. How?

A. We have to take into different considerations for the task that they're doing. You have to deal with obstructions, either walkways or beams that are in the middle of the system, the guide beam, for example. So we'll make a portion of the track where you can remove that guide beam. Since you're on a system that, you know, every morning that tram's got to run, so come 5:00 a.m. or the start time, you have to have the train ready to go, some of your longer maintenance tasks you have to break up and do those over a series of days, as opposed to being able to take the train offline, put a replacement train in or a spare train, and then do all your tasks on that train at one time.

Q. Are the maintenance functions that are performed on this system different than on the loop system, or are they the same? What?

A. No. They're essentially the same.

Q. So it's just what you described in terms of the difficulties of doing it while it's on the track that's the main difference?

A. Yes.

Q. Okay. All right. Now, you mentioned that you have, Bombardier has done the design/build, manufacture build work for all of these facilities. Were those done, or were there contracts to do that work that were entered into?

A. Yes, there were.

Q. Are you familiar with some of the contracts?

A. Yes, I am.

Q. In those contracts, did the contracts define what it was that they wanted you to build, design, build and install?

A. Yes, they did.

Q. Did they have any completion dates in them?

A. Yes, they did.

Q. Were there any penalties on them for failure to meet the completion date?

A. Yes, there were.

Q. Were there in-progress timetables set up?

A. By default, yes. Certain times you had to get certain tasks done.

Q. All right. Now, we're doing the maintenance work here, that we were, was that done pursuant to a written contract?

A. Yes, it was.

MR. MOSS: Before we move on, let's have this marked as an Exhibit, 1? How do we do this?

COMMISSIONER TOWLER: I think maybe we should go through the alphabet. We could do A through Z for any that aren't premarked.

MR. MOSS: We've got 10 and 11 here.

MR. TRIMMER: This here, we could either make it Bombardier 25, or we can make it Hearing A.

COMMISSIONER TOWLER: We should probably do --

MR. KAHN: 25 would be my vote.

MR. TRIMMER: Bombardier 25.

(Exhibit B 25 marked)

MR. MOSS: Let's call it that. I offer it into evidence.

COMMISSIONER TOWLER: Any objection?

MR. KAHN: Voir dire.

VOIR DIRE EXAMINATION

BY MR. KAHN:

Q. The maintenance of the system between the D Gate and Terminal 3 has been handled by County employees since the system was released to the County?

A. That's correct.

Q. It's never been maintained by Bombardier; is that correct?

A. That is correct.

MR. KAHN: With that clarification, I have no objection to Exhibit 25.

COMMISSIONER TOWLER: It is admitted.

(Exhibit B 25 admitted)

DIRECT EXAMINATION (Resumed)

BY MR. MOSS:

Q. But Bombardier did do the design, build, manufacture and installation?

A. Yes, they did.

MR. MOSS: Okay. All right. So it's in?

COMMISSIONER TOWLER: Yes.

BY MR. MOSS:

Q. There's a booklet right next to you, I think. We can't see over the table. Would you turn to Exhibit 1? And that's a multi-page document. Would you review it? You're going to give him a copy?

MR. TRIMMER: I'm going to give a loose copy to be marked.

THE WITNESS: This is all coming apart here.

COMMISSIONER TOWLER: Take your time.

MR. KAHN: While he's doing that,

Mr. Commissioner, I don't have an extra copy of all my exhibits for marking. How would you like to deal with that?

COMMISSIONER TOWLER: We do have a folder, so we have this folder. My concern is if there is a need for appeal later on, the holes sometimes get caught when I scan, but if that's all you have, if you have the ones with the punched holes, we'll make it work.

MR. KAHN: I just have the one copy that I provided to you, and I have a witness copy, but if that's all right.

COMMISSIONER TOWLER: Whatever you guys -- you know, we're as flexible as we can be, so whatever you need to do, we'll do, but if you do have a copy without the hole punch.

MR. MOSS: Andy, we have them all?

MR. KAHN: Yes.

THE WITNESS: Okay.

BY MR. MOSS:

Q. You ready to go? Okay.

Can you identify that document?

A. Yes.

Q. And what is it?

A. This was the maintenance contract for Legs C and D.

Q. And are you familiar with the contents of that document?

A. Yes, I am.

Q. And what period of time was the document intended to cover?

A. The document was intended to cover from July 1, 2008 through the end of June, 2013.

Q. And has the agreement since been canceled?

A. Yes, it has.

Q. And what date was it canceled?

A. I believe early May.

Q. Do you know the last date we did any maintenance under the contract was?

A. I would say May 1st.

Q. Now, so it's 2008 to 2013, in theory. Was there a maintenance contract in effect prior to 2008?

A. Yes, there was.

Q. And was it similar to this contract?

A. Yes, it was.

Q. Do you know what its period of time was?

A. No, I don't.

Q. Well, do you know -- there have been maintenance contracts in effect since 1985?

A. Yes, there has.

Q. There's not been a period when you operated

without a contract that you're aware of?

A. Not that I'm aware of.

Q. Let me direct your attention to what is labeled, designated page 5 in the right-hand corner of this document. Do you have it?

A. Um-hum.

Q. Okay. You'll note that this says, "This contract made and entered into as of the day of July 3rd," et cetera, et cetera, it says, "between Clark County, a political subdivision, hereinafter called 'owner'." You see that?

A. Yes, I do.

Q. What did Clark County own?

A. They owned the system.

Q. When you say "they owned the system," what's that mean?

A. They own everything out there for the ATS system for the C Gates, the D Gates and T3.

Q. And how do they obtain that ownership?

A. Through a project contract that Bombardier or Westinghouse was awarded to perform against.

Q. When you say through a project contract, what do you mean? How do they get it as a result of that contract?

A. We bid on a project and were awarded the order

to provide that system as part of that contract.

Q. So when you were finished with the design, manufacture and installation, somehow the ownership of the property passed to Clark County?

A. That's correct.

Q. Okay. Now, it says that in this, on this page that Bombardier will be known as the contractor. So speaking the obvious perhaps, but what were your obligations as the contractor?

A. It was actually to provide maintenance services in accordance with the County-approved maintenance plan. This was a performance-based contract, so we had to meet, do these maintenance services against an availability type set up.

Q. Under this contract, were you required to manufacture or design, manufacture and install anything else?

A. No.

Q. Now, the agreement says that you will employ employees to perform maintenance work on the ATS. Did you do that?

A. Yes, we did.

Q. So you have, or had a cadre of employees here to do that function?

A. Yes, we did.

Q. Were they assigned here?
A. Yes, they were.
Q. And they didn't rotate around or anything of that sort?
A. No.
Q. You had a dedicated crew. Okay. Can you describe the management structure of that crew?
A. For this facility, we had a Service Delivery Center Manager who was supported by two field site engineers, and then a number of technicians.
Q. But the management part was the, what did you call him, the --
A. The Service Delivery Center Manager.
Q. Service Delivery Center Manager. What was his responsibility?
A. He was responsible for the execution of this contract at this facility and the oversight of all the employees.
Q. And you said there were two engineer types?
A. We had two field site engineers. One was a slash-supervisor.
Q. Are those called FSEs?
A. Yes.
Q. You said one was a supervisor?
A. One was in a supervisory role. Both FSEs

would direct the technicians on their daily assignments and tasks that they had to do related to the maintenance.
Q. When you say "direct," what did they actually do?
A. Per the maintenance plan, there would be preventative maintenance tasks generated out of the site information management system that basically outlined, here's the tasks that need to be done over the week, this day, and the FSE and the technicians would be assigned those tasks to go out and perform them in accordance with those time periods.
Q. Do they actually turn wrenches and do that kind of thing?
A. The FSEs?
Q. Yes.
A. Typically not.
Q. What was the difference between the one denominated the supervisor and the other one?
A. He was the No. 2 guy in charge for the service delivery center.
Q. "He" being the one that was designated supervisor?
A. Yes. If the service delivery manager was out of the office or not there, that would be the person in

charge.
Q. What other employees are on the crew, were on the crew?
A. We had technicians, and we also had a site coordinator to handle the administrative functions, paying invoices.
Q. The site coordinator was kind of a clerical position?
A. Yes.
Q. And so everybody else there was a technician. Did you have lead technicians?
A. I would say yes.
Q. But that was it?
A. Yes.
Q. Now, the contract, I will represent, says that in some places County employees will do maintenance on the system; is that correct?
A. That's correct.
Q. What maintenance work did County employees do under this agreement?
A. The County was responsible for the guideway structure, including the running surface, the surface that the tires of the vehicles ran on. They were also responsible for the power distribution system. They would take care of all the equipment and cabling up to

where it connects onto our power rail.
Q. Now, you said they were responsible for the guideway?
A. Um-hum.
Q. Okay. What's "responsible for" mean?
A. They had to maintain and take care of any issues that came up with the guideway structure.
Q. Did our maintenance technicians do any of that?
A. Not to my knowledge.
Q. You mentioned the power distribution center; is that what you called it?
A. System.
Q. System? What is that?
A. That is essentially all the power fields that come into the airport, they provide power to the stations, and some of it provides power to our system, so it comes into a room where there's equivalent to a substation or switch gear and other electrical gear, relays, whatever, and then from there the feeds come up to our system.
Q. And the County has employees who maintain that power equipment?
A. Yes.
Q. And ours were not involved?

A. No.
Q. No?
A. No.
Q. I direct your attention to the Paragraph 2.1.1, which is page 23 of this document.
A. Okay.
Q. Now, this section says that the owner will operate the Control Center. You see that?
A. Um-hum.
Q. What is the Control Center?
A. The Control Center is, again it's located at the D Gates airside. It's a room where all the computers reside that give them oversight of the system, giving them the availability to select different modes of operation. They can see what's going on in the system.
Q. They can monitor the system through these various types of computer programs and things?
A. That's correct.
Q. And it says that the County will operate that. So they have County employees who do that work?
A. Yes, they did.
Q. And do we have any relationship with respect to that, the control --
A. There's a day-to-day interface, naturally,

between the maintenance folks and the guys running central.
Q. Do we maintain it?
A. No. Well, actually, we maintain the screens and the computers that are up there as they relate to the ATS system.
Q. And there's other maintenance done by other people on the system, on the center?
A. Yes, there is. There's other facilities up there outside of the ATS system.
Q. Did Bombardier design, manufacture and install that equipment?
A. Yes, we did.
Q. Do you know, did Bombardier provide training to the employees who operate it?
A. Yes, we did.
Q. The County employees?
A. Yes, we did.
Q. Do you have contracts in some locations where Bombardier actually operates the Control Center?
A. Yes, we do.
Q. Do the employees who operate the, the County employees who operate the Control Center interface in any way with the Bombardier employees?
A. Yes, they did.

Q. How?
A. Through day-to-day interaction. If there's an issue with the system, whether it's a mechanical or electrical-type issue, they would notify the maintenance technicians of a problem. Any passenger-related incident or issue, we would work with the Central Control operators in resolving. Also, the startup and shutdown of the system was coordinated with the Central Control folks.
Q. What's "coordinated" mean?
A. You know, they'd announce that the system was being shut down. You want to make sure that the train's in the right location, all the people are off of the system, everyone's aware that it's being turned off. It's just more coordination.
Q. Let me have you back up a little bit and go back to Section 1 -- Paragraph 1.3. Page 6. Okay, have you got page 6 in front of you?
A. I'm getting there. Okay.
Q. Now, there is reference in this particular paragraph to a term called "downtime." And then there is also an appendix here, Appendix A that I will represent also references downtime. Can you tell us what downtime is?
A. Downtime is essentially when the train is not

running, the system is not running when it should be. There's an operating schedule for the tram to run, for the system to run and perform. When it's not running it's considered a downtime if it's supposed to be.
Q. Under the agreement, is it correct that there are times when the agreement says the trains will be running now or will be available now?
A. Oh, yes.
Q. Okay. So downtime means any period during that time that they're not running?
A. And they should be, yes.
Q. Because there are periods when, under the contract, you can shut down the trains and do work on them, right?
A. That's correct.
Q. And that's defined in the agreement?
A. Um-hum.
Q. So that isn't falling in that period, but during the time otherwise you're supposed to be running?
A. Yes.
Q. Now, is downtime an important concept under this contract?
A. Yes, it is.
Q. In what respect?

A. The payment that we receive is based on a formula that includes downtime events, system availability formula, which basically says here's how many hours the system was planned to operate, here's how many it operated, and based on that percentage we'll determine how much your payment is.

Q. Let me ask you to turn the page and go over to 7.

A. Okay.

Q. And you will see the entries on 7, the first four are Year One, Year Two, Year Three, Year Four, Year Five, and if you'll look at those paragraphs, there are numbers there. For example, Year One says $3,079,037. You see that?

A. Yes, I do.

Q. What is that number?

A. That would be the yearly value, the maximum yearly value that we could be paid for that year of the maintenance contract.

Q. Under the contract, is the County obligated to pay you that money?

A. No.

Q. And in what ways would they pay less than that amount?

A. If the system did not perform for the planned

number of hours it was supposed to for that month.

Q. And how would anybody know that?

A. There's a formula that's used to calculate, and based on that calculation, a straight multiplication to get the payment.

Q. The formula's in the contract?

A. Yes, it is.

Q. Now, let me have you go over to page 10. And more particularly, Paragraph 1.3.5, "Credits for System Availability." Are you familiar with that provision?

A. Yes.

Q. And what does that provision set forth?

A. This basically sets forth the payment scale based on the calculation for system availability.

Q. Okay. In other words -- well, what was the standard that you were supposed to meet?

A. We have to meet 99.65 percent system availability to receive 100 percent payment.

Q. And is that provided for in the agreement?

A. Yes.

Q. The 99.65 number?

A. Yes.

Q. Okay. So that means that of the time that it's supposed to be running, you have to make sure it's running at least 99.65 percent of that time?

A. Essentially, yes. There's some exclusions, but yes.

Q. Okay. If it's related to maintenance, do you get dinged for it?

A. Yes, we do.

Q. And then as I look at this scale, it appears that as the number varies, the payment factor also varies?

A. That's correct.

Q. It means, I assume, if you hit these lower numbers, you'll get a lower amount of money?

A. Yes.

Q. How was the money under the agreement paid?

A. It's paid on a monthly. They take the amount for the year that's on the previous pages, it's divided by 12, and then the system availability formula is calculated on a monthly basis, and that's multiplied out and that's our payment.

Q. So at the end of the month you would get either a payment that's 1/12th of 3,000,097 or whatever it is, or a check in the amount of something less than that because you didn't make the 99.65?

A. That's correct.

Q. Okay. Let me ask you, is the 99.65, is that a negotiable number?

A. No.

Q. Who imposed that number?

A. The County.

Q. Now, did the agreement, or does the agreement have any provisions in it that would allow you to earn more money? For example, if you hit 99.99, did you get a bonus for that?

A. No.

Q. So any of the money that you lost as a result of the application of this language was gone?

A. That's correct.

Q. Okay. Now, under my calculations, using the dates you've given us, looks to me like you operated under this contract for 46 months. You agree with that?

A. Okay. Yes.

Q. Do you know how many months during that period you did not make 99.65?

A. Yes, I do.

Q. How many?

A. Nine.

Q. Was meeting the 99.65 number important to you, the company?

A. Yes.

Q. Why?

A. Well, naturally it impacts our payment, but more importantly, it also impacts our credibility, because we generally like to have our systems running at that 99.65 percent level or above.

Q. And did you believe it was important to the County that you hit that number?

A. Yes.

Q. Why do you believe that?

A. It does impact the level of service that they can provide for the passengers.

Q. How did the County know if you were complying with this number?

A. This data was presented to the County at least on a monthly basis as part of our invoice, and when the tram's down, everyone knows that, especially the D Gates tram, so information was presented and reviewed with the County at least every month.

Q. Were the maintenance technicians made aware of the fact that you had to meet the 99.65 number?

A. Yes.

Q. How did that happen?

A. Through all employee meetings, and just the whole maintenance regime is scheduled around this payment factor approach, this system availability approach.

Q. What factors can cause system unavailability?

A. Equipment failure is one.

Q. What kind of equipment?

A. It could be a piece of equipment on the train that would cause the tram to stop moving. It could be something on the wayside of the equipment.

Q. Wayside's a term we're going to hear a lot. What's "wayside" mean?

A. Wayside is everything that's not on the vehicle.

Q. Everything in the system that's not on the vehicle?

A. Yeah, that's not carried on the vehicle.

Q. Okay. So you have a problem with the train itself, with the vehicle?

A. Yes.

Q. Or some other kind of problem that makes it, creates a situation where you have to shut it down?

A. Yes.

Q. What kind of things would create a situation where you have to shut the system down, other than the vehicle not working?

A. Some of them are passenger-induced type items. While the tram's going between the two stations, someone decides they want to get off the tram and open one of the emergency door locks, and that automatically stops the train. Sometimes there's an issue in a platform where the train would stop between the stations. Passengers again would try to pull the door handles.

Other issues are if someone goes out the gate, the doors at the end of the stations, at T1 or C Gates to go onto the emergency walkway, if you open that door, there's an alarm that goes off and the system's stopped.

Q. And failures of computers cause it to shut down?

A. Yes, it can.

Q. Are there, you said the wayside. Wayside's different than the guideway?

A. Yes, it is.

Q. Okay. What other wayside problems, maintenance problems could cause it?

A. Loss of power or failure of something that would -- anything that would take the train control system offline would also cause the train to stop.

Q. Would you now look at Paragraph 2.1.5. Page 26, I'm told. 2.1.5. "Maintenance Plan and Procedures." "All maintenance work on the ATS will be performed in accordance with the approved maintenance

plan and manuals." Do you see that?

A. Yes.

Q. First, what is a maintenance plan?

A. Maintenance plan is it outlines the preventative maintenance tasks that need to be performed in order to keep the system running. These are time-scheduled tasks. These are a subset of the information that's contained in the manuals.

Q. Well, okay, but the plan itself does what, shows what?

A. The plan itself establishes the maintenance program for the system.

Q. And who creates the plan?

A. Bombardier created the plan initially, Bombardier's engineers and support functions in Pittsburgh. The plan's presented to the customer and approved by the customer.

Q. It says it's approved. I was going to ask you who does the approval?

A. It's the customer that does the approvals.

Q. So they looked at your plan, said yeah, we're okay with this?

A. Yes.

Q. What's a manual?

A. A manual is, it's information on the equipment

that we provide. It gives you like a system description, a description of how this piece of equipment plays into the overall system. It outlines the preventative maintenance tasks, corrective maintenance, troubleshooting guides, and also just additional reference material.

Q. Now, does the manual itself contain information that tells the maintenance tech how to perform functions?

A. It would tell them what to perform, and it would have some information on how to perform.

Q. And do the manuals have information on how to perform?

A. The manuals?

Q. The functions, yes.

A. Yes, they would.

Q. Now, you said that the plan establishes when you're supposed to do certain things. How specific is the plan in terms of, in that regard?

A. It will break it down by subsystem whether it's a vehicle or wayside item. It goes and it tells you tasks you need to do on a daily basis, weekly, monthly, quarterly, yearly. And it covers all the equipment that's provided as part of the system.

Q. Let me direct your attention to Exhibit 15.

A. Okay.

Q. Have you found it?

A. Yes.

Q. Would you look it over for a minute? What is this document?

A. This is the maintenance plan.

Q. The maintenance plan that was in effect when?

A. For this Contract 552.

Q. And do the other contracts have maintenance plans with them as well?

A. Yes.

Q. Do the plans change? In other words, is the one you used 10 years ago the same as you used then?

A. There will be revisions done, updates, but essentially no.

Q. Let me ask you some questions about this. Direct your attention to the very top, says "Vehicle inspection/maintenance." Do you see that phrase?

A. Yes, I do.

Q. Then if you go down these pages, every few inches there's another similar kind of statement. The next one is "Vehicle inspection/maintenance." You see those?

A. Yes.

Q. And they're throughout the agreement. What is

that describing?

A. This is basically telling you what subsystem it is and what --

Q. And what's a subsystem?

A. Again, it's the whole system. It's breaking it out between the vehicle and typically the wayside, and then from there to break into further breakdown of what equipment's under each of those items.

Q. Are these subsystems, are the subsystems, is the equipment generally related to that particular subsystem that they're maintained?

A. Yes.

Q. Directly below that in parentheses, in each of these, is, in one it's words, but the rest are numbers, the first one says, "Daily," then there's 7 days, 30, 60, 90 to 180; do you see those?

A. Yes, I do.

Q. What do those numbers indicate?

A. That's telling you the frequency that the tasks below need to be performed on.

Q. "Frequency" meaning what?

A. Meaning every seven days you have to do this task.

Q. Every seven days, forever?

A. As long as the contract's in place, yes.

Q. All right. So you don't have any of the, say, do it for the first 90, then stop?

A. No.

Q. Okay. All right. Now then, there's a number, 100 or 200. Do you see those numbers?

A. Yes, I do.

Q. What are those numbers?

A. Those are the preventative maintenance task number.

Q. So they're preventative maintenance tasks that we have attributed numbers to?

A. That's correct.

Q. Then to the right of the number, like on the vehicle/wayside inspection/maintenance, 7 days, 201 weekday, 7-day vehicle inspection." Do you see that?

A. Yes.

Q. What are those words describing?

A. That's describing the preventative maintenance task that's to be done.

Q. So this tells me then that every seven days we need to do a weekday 7-day vehicle inspection?

A. That's correct.

Q. And what's a vehicle inspection?

A. Again, there would be a series. If you pulled the preventative maintenance task, it would outline

what items need to be checked every seven days on the vehicle.
Q. "Checked" meaning what?
A. Inspected. In this case, looked at.
Q. Check real hard. Okay.
A. It's a visual inspection.
Q. Okay. There are numerous entries on this where they have these descriptions. Do maintenance techs perform all of those things?
A. These? Yes.
Q. Yes. Does anybody else perform any of those things?
A. No.
Q. And is this plan made available to the technicians?
A. Yes.
Q. How?
A. It's in our Site Information Management System which schedules these preventative maintenance tasks.
Q. Site Information Management System, sometimes referred to as SIMS?
A. That's correct.
Q. When you say it's in there, what's that mean?
A. It's a computer program. It's loaded in. It automatically generates the sheets and the tasks that

the technicians need to do.
Q. Okay. How does a tech know -- for example, look at 309, "Lubricate undercar components 30 and 60 days." How does the tech know, oops, it's 30 days, I better go do that?
A. Again, this is the role of the FSE and the site manager. These items were generated, they're handed out to the FSEs and then delegated to the technicians based on the works of the shift they're working.
Q. So technicians come in, and there's something that tells them today's the 30-day whatever inspection for this?
A. Yeah. We use a daily log, we use a bunch of things to outline to the guys what's going on and what tasks they need to do. But they meet with the FSEs prior to the shift, or the lead technicians, and these assignments are known and handed out.
Q. Do you know how it's determined which maintenance tech will do what function?
A. No.
Q. Who would know that?
A. The site manager or one of the FSEs.
Q. Now, would you take a took at Paragraphs 2.20, through 2.2.5.3.

COMMISSIONER TOWLER: Are we back to Exhibit 1?
BY MR. MOSS:
Q. No, 10. Sorry. Exhibit 1.
A. What section was that again?
MR. KAHN: Your witness is playing with you, Gary.
BY MR. MOSS:
Q. 2.20.
MR. TRIMMER: Page 27.
THE WITNESS: That's better.
BY MR. MOSS:
Q. Through 2.2.5.3. Again, are you familiar with those provisions?
A. Yes.
Q. Now, those provisions, as I read it, contain information about what maintenance work you were supposed to perform under the contract; is that right?
A. That's correct.
Q. And do you know how that information got included here?
A. No. Just -- these descriptions?
Q. Yes.
A. This was the contract. No, I don't. This came from the County.

Q. So the County told you, "We want you to do these things as a routine maintenance on so and so"?
MR. KAHN: Objection, lacks foundation.
THE WITNESS: Um-hum.
MR. KAHN: We haven't established this witness was communicating with the County during contract negotiations.
BY MR. MOSS:
Q. Well, did you understand that you had to comply with all these provisions as part of the contract?
A. Yes.
Q. And to perform the maintenance?
A. Um-hum.
Q. All right. Now, does the plan, the maintenance plan address all of these things?
A. No.
Q. What do you mean "no"? Let me ask you this: If you do the maintenance plan completely, will you satisfy these obligations?
A. We would satisfy the obligations, yes.
Q. Yes, okay. All right.
Now, we've talked about the maintenance plan and the manuals which were referred to in the contract. Are you familiar with a document or documents called

"work instructions"?
A. Yes, I am.
Q. And what are work instructions?
A. Work instructions are detailed instruction of how to perform the PM task. The PM tasks come out, they tell you what to do. The work instruction tells you exactly how to do it, the tools you need, any safety precautions, safety equipment that you would need. It references you to additional reference material if need be.
MR. MOSS: Okay. Before we move on, Mr. Commissioner, I would like to offer Exhibit 10 into evidence.
COMMISSIONER TOWLER: I think you mean 1.
MR. DAVIS: 10's been admitted.
MR. MOSS: Offer 1 also.
MR. KAHN: No objection to 1.
COMMISSIONER TOWLER: 1 is admitted. That is Bombardier Exhibit 1.
(Exhibit B 1 admitted)
MR. THOMSON: Is it 15? That's the plan.
COMMISSIONER TOWLER: Okay, 15 is the plan. Have we offered that? No, we have not.
MR. KAHN: No objection.
MR. MOSS: 15 has not been offered. We offer

it.
COMMISSIONER TOWLER: Bombardier Exhibit 15 is also now admitted.
(Exhibit B 15 admitted)
BY MR. MOSS:
Q. Okay, Mr. Ryan, you've been handed a document. I'd like you to look it over, please. Have you gone through it?
A. Okay.
Q. Do you recognize this document?
A. Yes, I do.
Q. What is it?
A. This first item is work instruction for PM305.
Q. Okay. Can you be more explanatory about what, it's a work instruction for what, to do what?
A. It's a work instruction for the guide spindle/tire inspection. And again, it outlines the safety requirements, the tools, materials. It gives instruction with additional notes, warnings, references and then a little section at the end on quality.
Q. What's a guide spindle?
A. A guide spindle is part of an assembly that holds the train onto that guide beam we talked about earlier. Keeps the train on the roadway.
Q. And we have to inspect those guide spindles

regularly?
A. We inspect those guide spindles per the schedule and the maintenance plan.
Q. But it's one of those periodic inspections then?
A. Yes.
Q. Is slash-tire something else?
A. The tire inspection I believe referenced here is the bottom of the guide spindle there's a tire that actually rides on the inside of the guide beam to hold the train on the track and keep it, steer it along the way.
Q. Now, do you know what's involved in doing a guide spindle inspection?
A. I personally don't, but it's written here.
Q. Okay. Now, this is one of the -- this is a work instruction, correct?
A. Um-hum.
Q. Are there other work instructions?
A. There are work instructions for each of the PMs listed in the maintenance plan.
Q. Again, "PM" we're saying?
A. Preventative maintenance task.
Q. So if you go through 15, Exhibit 15, each of those things that is described there will have its own

work instruction?
A. Yes.
Q. And are these available to the maintenance techs?
A. Yes, they are.
Q. And how do they get them?
A. They're variable in hard copy and on the local computer drive that they have access to.
Q. Now, if you go to about, oh, 8 or 10 pages from the back of this, there's a thing called, there's an entry called "Rebuild Instruction."
A. Yes.
Q. What is a rebuild instruction?
A. There's items that we rebuild on a plan basis. This would be one of them, the guide spindle assemblies, and again this is a work instruction outlining again the safety requirements, all the tools, material and detailed instructions on how to perform that task.
Q. Okay. And how to perform the rebuild aspect of it?
A. That's correct.
Q. After it's been inspected and needs rebuilt, this tells you what to do?
A. What happens after it's been inspected,

Further, the evidence also showed that an additional exemption applies to significant portions of those activities which were actually related to warranty work required under Contract 2305 and were not covered under the prevailing wage laws for that reason as well.

Finally, the evidence also showed that some of the work activities claimed to be performed under CBE-552 were actually outside the scope of the maintenance contract and performed by others who were paid directly by the County, or were not performed during the time period that CBE-552 was in effect. Three determinations on this matter have been submitted to the Labor Commissioner and now extensive testimony and approximately 80 exhibits were introduced at the hearing. The issues in this matter have already been extensively briefed by the parties. This Post-Hearing Brief is intended to provide the Commissioner with a discussion of the key points which compel confirmation of the County's determinations.[1]

I. ISSUES

The Scheduling Order, filed June 27, 2012, set forth the four issues which are addressed in the discussion session. According to the Scheduling Order, and by the agreement of the parties, these issues provide a framework, but do not limit the issues or sub-issues which any party may raise.

II. KEY EVIDENCE

A. History Of ATS Construction And Maintenance And Transit System Maintenance At McCarran International Airport

[1] Other detailed arguments on the issues discussed herein are certainly raised by Bombardier in its Post-Hearing Brief, as well as its previous briefs, especially its Motion for Summary Judgment, and in its Post-Hearing Brief which are incorporated by reference to avoid repetitive argument.

Undisputed evidence was produced which showed that, for over thirty years, the County, on behalf of its Department of Aviation ("CCDOA" or "County"), has consistently applied a common sense application of the plain meaning of NRS 338.011(1), and has made reasonable differentiations between ATS projects for construction, installation and rehabilitation, which are not activities related to normal operation and maintenance of the Airport and which require payment of prevailing wage, and ATS maintenance work, to which prevailing wages do not apply. ATS maintenance work is "perpetual in nature, with no fixed beginning or completion point" for the purpose of keeping the ATS trains operational and available to move the Airport's passengers to and from the gates.

The County has found the language in NRS 338.011(1) to be clear as to what is and is not exempt from the prevailing wage requirements of NRS Chapter 338. In every case when the County has contracted for the on-site construction or major rehabilitation of its ATS, the County has required that prevailing wages apply to workers doing work at the Airport site. In every case when the County has contracted for maintenance of the ATS, it has determined the procurement of the services, supplies, materials and equipment necessary to the normal operation and normal maintenance of the ATS to be a contract properly awarded pursuant to NRS Chapter 332.

Randall H. Walker, former Director of the Clark County Department of Aviation, presented unrefuted testimony of these facts. Walker testified that, since 1982, the CCDOA has had multiple contracts with Bombardier for either complete ATS design, manufacture and installation or for comprehensive ATS upgrades, expansions, and refurbishments. These included the original ATS contract, dated September, 1982 (County Proposed

Exhibit ("CPX") 6); Contract 2013, for the Satellite D ATS, dated October, 1994 (CPX 10); Contract 2131, for expansion of the Satellite D ATS, dated December, 1999 (CPX 11); Contract 2273, for the Terminal 3 ATS, dated May, 2006 (CPX 12); and Contract 2305 for the rehabilitation of the C and D legs of the ATS, dated November, 2006 (CPX 13). He described the scope of work in each contract and referred the Labor Commissioner to the prevailing wage requirements in each contract. Walker 27-434.[2]

Roy Ryan, Director of Services, Bombardier Transportation (Holdings) USA, Inc., ("Bombardier") also provided testimony regarding the history of the tram system at McCarran International Airport and the scope of CBE-552. Ryan 72-147. CBE-552 covered maintenance work on the ATS vehicles and the "wayside" facilities (which included station doors and everything in the system that is not on the vehicle). Ryan 102. Ryan also testified about what was not included in the scope of CBE-552. The County, not Bombardier, was responsible for maintaining the guideway structure and the running surface that the ATS tires ran on, as well as the power distribution system and all equipment and cabling up to where it connected into the power rail. Ryan 91. See, also, BX1, p. 24, Sec. 2.1.2.1. Ryan also confirmed that "heavy maintenance" was not part of the scope of CBE-552, and that there had been no upgrades or enhancements of the ATS done under CBE-552. Ryan 126.

Bombardier, or its predecessors, had contracts to maintain the ATS at McCarran International Airport for nearly 27 years beginning in 1985 (when the first ATS leg

[2] CPX 6, 10 11, 12, & 13 each consisted of hundreds of pages covering all aspects of the construction or rehabilitation requirements for each project. Due to the limited purpose for presenting evidence at this hearing, Mr. Walker was able to describe the scope of work and prevailing wage requirements in each of the contracts. It served no purpose to submit them for formal admission.

commenced operation at the Airport). Ryan 73. No assertion was made during that time that prevailing wages had to be paid on the scope of the maintenance contract work until IUEC raised the issue and filed the instant Complaint on October 9, 2009. Walker testified that there has never been confusion between the scope and purpose of the ATS construction and rehabilitation contracts and the ATS maintenance contracts and that prevailing wage has never been paid on any maintenance contracts. Walker 435. In fact, not a single maintenance contract at the Airport has required prevailing wages. Walker 386.

The evidence also shows that the Airport has two passenger shuttle systems with similar maintenance requirements which include elements of repair. An examination of the Airport's two shuttle system contracts shows a consistency in the County's application of the exemption given in NRS 338.011(1). The ATS utilizes rubber-tired passenger vehicles pulled in multiple-car trains along a dedicated roadway without the use of a driver. Ryan 76-77. The evidence indicates that the size, construction and purpose of the ATS has more in common with buses than sideways elevators or railroads. The second passenger transportation system utilizes shuttle buses between the Airport Terminals and its Consolidated Car Rental Facility. The shuttle bus contract, "Shuttle Bus Operations and Maintenance for the Consolidated Car Rental Facility at McCarran International Airport," has been in force since September, 2006 (CX 14).

Both passenger shuttle systems are critical to the normal operations of the Airport. Walker 438. Both CBE-552 and the Shuttle Bus Contract are consistent in their interpretation of what needs to be done on an ongoing basis to keep these two shuttle systems operational. Article 5 of the Shuttle Bus Contract, "Bus Maintenance and Repair,"

contains an extensive recitation of the types of work activities, including what IUEC would characterize as "heavy duty" repairs which are necessarily related to the normal operation and normal maintenance of the shuttle bus system. CX 14; also, see Walker 440-443. None of this work has ever been considered to be public work subject to prevailing wages. Walker 386.

Notably, there was no evidence presented that any maintenance and repair, including "heavy repair" such as refurbishing motors or axles, of the bus, truck or other vehicle fleets of regional transportation commissions and school districts, or of the state and local government motor pools, was considered to be public work and subject to prevailing wages. The evidence presented concerning the ATS system and the Shuttle Bus system, along with the absence of any evidence of a different interpretation concerning the applicability of prevailing wages to this type of work on publicly owned vehicles compels the conclusion that, statewide, contracts which provide for maintenance and repair of these vehicles are not considered public work and do not require the payment of prevailing wages.

B. Contract CBE-552 And Facts Related To The Exemption Provided By NRS 338.011(1)

1. Evidence That CBE-552 Was Awarded In Compliance With NRS Chapter 332

Contract CBE-552 became effective July 1, 2008, for the operation and maintenance of both the existing Automated Transit System ("ATS") legs that connect Terminal 1 to Satellites "C" and "D." BX1. The County Agenda Item #36, dated June 3, 2008 (BX5), shows the Contract was awarded pursuant to NRS 332.115(1)(a) (sole source) and

332.115(a)(c) (maintenance of equipment can be performed more efficiently by a certain company). The term of the Contract was for five years.

Walker testified that the reasons that CBE-552 was awarded as a sole source contract and was not competitively bid were:

> We (Airport Staff) felt that the contract was best maintained by Bombardier since they were the installer of the system. The software clearly is a critical component of the operation of the system, and they're the only ones that have access to that software.
>
> Secondly, we were not aware at the time that there were any other providers that, third-party providers that provided maintenance of Bombardier systems.

Walker 376.

2. Evidence That CBE-552 Was Related to The Normal Operation of the Airport or The Normal Maintenance of Its Property

The evidence was overwhelming that the work performed under CBE-552 was not only directly related to, but absolutely necessary for, the normal operation or normal maintenance of the ATS at the Airport. Randall Walker testified:

> BY MR. MOSS:
>
> Q. Well, let me put it this way. Based upon your experience with the tram system, was the tram maintenance contract important to the operation of that system?
>
> **A. 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 the 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 D Gates, as efficiently as a train system, so we – I do not believe we could handle 44 gates of capacity at terminal – at the D Gates, excuse me, satellite**

facility, without a train system. It would be impossible in my opinion, to properly manage that part of the airport without a train system. . .

Q. And in your experience, was the maintenance contract important to the maintenance of that property?

A. Yes. If we didn't believe it was important, we would not have had a maintenance contract. Walker 398.

He then identified BX4, a letter sent by him to the State Contractors Board, wherein he had stated, "The [ATS] system is vital and integral to the airport's operation." He also discussed how the ATS is a complex piece of equipment and that it is necessary to constantly have a maintenance program in place in order to have the complex system stay operation. Walker 435. He further testified that all maintenance contracts at the Airport include some element of repair in order to keep normal operations going. Walker 436. Walker also testified in detail about the total chaos caused by the complete failure of the ATS on May 25, 2013. Walker 415-417. Roy Ryan, bombardier, also testified that, without the activities performed under DBE-552, the ATS trains could not function at the required performance level and that the ATS was an essential part of the Airport. Ryan 135-136. Joel Middleton, formerly a Bombardier field service engineer and now the County's ATS Manager, testified that the work performed under DBE-552 is done to "Keep the trains running. Keep availability up and move passengers back and forth between the gates and the terminals." Middleton 302.

Witnesses called by IUEC also testified that the work under CBE-552 was necessary in order for the ATS trains to operate. Ken DePiero testified that the activities done under CBE-552 that he had characterized as "repair" were necessary to keep ATS "Up—safely up and running." DePiero 737. DePiero also testified that parts needed to be replaced

before they failed to prevent a train outage and interruption of service. He explained the purpose of such activities was for "...keeping the passengers safe, and...the availability for Bombardier's contract within the window." DePiero 722. DePiero justified calling activities "repair" numerous times based on "safety of the train" and "passenger safety."

Nicholas Banas was also called as a witness by IUEC. When asked if the preventative maintenance, corrective maintenance and recovery activities performed under CBE-552 were essential to keeping the ATS up and running, he responded:

> **Yes, sir. A lot of the work...we do is extremely essential to keeping the system running. It's—it becomes very evident when the system isn't running. The airport takes notice. In fact, the system wasn't running here a few weeks back and the entire nation took notice that this system wasn't running.**

Banas 803.

Another IUEC witness, Vernon McClain, also affirmed the relationship of the activities performed under CBE-552 in response to questioning:

> Q:...A couple of times in your testimony...you were talking about the necessity of doing the work because it was essential to the safety of the [ATS] system.
> **A. Yes, sir.**
> Q. Would you say the activities you performed in your work for Bombardier during this time period was essential to keep the ATS up and running?
> **A. Yes, sir.**

McClain 906.

The contract language of CBE-552 is clearly written to cover normal operation and maintenance requirements. Section 1.3.5. of CBE-552 required Bombardier maintain system availability of at least 99.65% in order to meet the Airport's needs to provide

reliable transportation on a nearly 24/7/365 basis.[3] Under Section 2.2, the work was broken down into three subcategories "sufficient to maintain system performance characteristics at the levels specified in the ATS contract": Routine Maintenance; Scheduled Maintenance; and Non-Scheduled Maintenance, Subsection 2.2.6 additionally contemplated possible "Heavy Maintenance and Overhaul," but any such work required Bombardier to submit a separate proposal, which had to include the additional fixed cost for performing the work, and the work could not be performed without express written approval from the County. In other words, the Contract provided for this type of work to be identified and quantified but, before any of the work could be done, it had to be approved and it had to be paid for separately. There was no agreement as to the scope or payment terms of any such particular work proposal, if any, were to be later identified as being necessary to be performed, at the time of the formation of the contract. During the term of CBE-552, the County received and approved only one proposal from Bombardier requesting performance of Heavy Maintenance or Overhaul for overhaul of a traction motor under Subsection 2.2.6, which was done by a third party. Ryan 128.

3. Evidence That Other Equipment Maintenance Agreements Which Require Repair And Replacement of Parts and Components Are Not Treated As Public Work By Public Entities in Nevada

CBE-552 was not the only maintenance contract which includes repair in its scope of work and which is not subject to NRS Chapter 338. Walker testified that CBE-552 was only one of many maintenance contracts at the Airport and that all maintenance contracts involve an element of repair. Walker 379,436. Airport maintenance contracts he listed

[3] As testified to by Walker, Ryan, Banas and others, a serious failure of the ATS on Sunday, May 19, 2013, proved how vital the ATS is to the normal operation of the Airport.

included the badge control system maintained by Johnson Controls, the fire and life safety system maintained by Honeywell, landscaping maintained by Sedillo, chillers maintained by York or another company, elevators maintained by Kone (BX7), some heating, ventilation and air condition ("HVAC") maintenance work, as well as the bus maintenance done by First Transit. Walker 379-386. None were awarded pursuant to NRS Chapter 338 and none require prevailing wages. Walker 386, 389, 393.

The other equipment maintenance contracts admitted into evidence similarly showed that repairs were part of the scope of work, that none of them were awarded pursuant to NRS Chapter 338 and that none of them required the payment of prevailing wages.

CX22, City of Las Vegas contract with Progressive Elevator, Inc. was awarded pursuant to a request for proposals under NRS Chapter 332 and had an award amount of $60,000 for one year, with four one-year options. The Statement of Work calls for "full preventative maintenance and corrective repair." CX22, RFP p. 8.

CX23, University Medical Center's ("UMC") contract with Honeywell Building Solutions for HVAC control, fire alarm and security system maintenance was awarded pursuant to NRS 332.115 and had an award amount of $614,000/year for five years $3,070,000). Attachment "A," "Scope of Services Offered," Sections 1.3, 1.9 and 1.15, requires a broad range of "repairs."

CX25, UMC's contract with Kone, Inc., for elevator maintenance was awarded pursuant to a bid under NRS Chapter 332 for $79,560/year for two years ($159,120) and

included "examinations, cleaning, painting, lubrication, adjusting, parts replacement, repairs, testing, etc." CX25, pp.2-3, UMC Agenda Item.

CX26, Clark County's contract with Lloyd's Refrigeration, Inc. for HVAC maintenance was awarded pursuant to a bid under NRS 332.065 for $772,645.50 (CX26, pp.2-3 "Agenda Item"). Its "Instructions to Bidders," p. I-1, defines "repair" as "corrective actions required to ensure proper operation of existing equipment, up to and including replacing of said equipment," and its "IV-Service Specifications" provides an extensive list of HVAC-R equipment to be repaired and serviced and states: "The repairs will be scheduled and unscheduled work required in order to prevent a breakdown of HVAC-R equipment, related systems; . . . to ensure HVAC-R services are restored in a timely/efficient manner after a failure or breakdown has occurred."

CX27, Clark County's contract with Carrier Corp. for chiller maintenance was awarded pursuant to a bid under NRS Chapter 332 (General Provisions, p. I-1, Sections 20 and 23), and had an award amount of $240,163 for one year subject to option years that was later amended to increase the amount to $278,246. Its "performance requirement" states: "Preventative maintenance and remedial maintenance shall include the replacement of parts and materials . . ." and also refers to "non-emergency repair" and "emergency service." (Special Conditions, p. II-3).

CX30, Las Vegas Convention and Visitors Authority contract with Schindler Elevator Corp. for elevator maintenance was awarded pursuant to a bid under NRS Chapter 332 (See: Clauses, p. 14 of 26) and had an award amount of $193,948 for one year with three one-year options. Its "Scope of Work" includes "full-preventative maintenance,

adjustment and repair service . . ." including replacing elevator guide shoe jibs or rollers and elevator cables (Technical Specs. Pp. 21-24).

None of the contracts in CX23, CX25, CX26, CX27 and CX30 operate pursuant to NRS Chapter 338 in any way and none require prevailing wages. All of these contracts would also appear to cover work on "fixtures" as IUEC has defined the term in earlier filings, in its questions asked about the difficulty moving the ATS vehicles, and in the testimony of Anthony Schneider (Schneider 507-10), yet there was no evidence presented that any local government in the state believes NRS 338 or prevailing wage apply.

4. Evidence That the Warranty Coverage on the New ATS Trains and Wayside Equipment Provided Under Contract 2305 Provides an Exemption From Prevailing Wage Requirements.

A key fact related to CBE-552 was that, Contract 2305 for the rehabilitation of the C and D legs of the ATS, dated November, 2006 (CPX 13) resulted in the delivery of new ATS vehicles and wayside equipment during the time the maintenance contract was in effect. Section 10 of Contract 2305 required Bombardier to provide warranties. The warranty provision of Contract 2305 provided for a general warranty for one year from the date of substantial completion for each phase of the work, except that the warranty on the vehicle body structure and bogie consisting of the drive, friction brake, suspension and guidance systems (see: CX40, I-9, 2-43 and Figure 2-10) remained in effect for five years following the date of substantial completion for Phases I and II. CX16.

County Exhibits 17-20B all addressed the commencement and duration of the warranties under Contract 2305. CX17 contains a useful graph which shows the warranty durations. For Leg C vehicles, the warranty period started December 19, 2008

(approximately five months after CBE-552 began), with the one year period ending December 19, 2009 and the five year warranty period for the vehicle body structure and bogie ending December 19, 2013. For Leg D, the warranty period started May 7, 2009 (approximately 10 months after CBE 552 began), with the one year period ending May 7, 2010 and the five year warranty period for the vehicle body structure and bogie ending May 7, 2014.

Numerous witnesses testified that there were significantly more repairs required on the new equipment, e.g., Ryan 142-43; (wayside doors); Smith 190, 1181 (vehicle and station doors most common repairs, also leaf springs, pinion seals and CCTV); and Middleton 322-26 (pinion seal leaks, wayside door autolocks and motors).

C. IUEC Complaint

IUEC filed its complaint on October 9, 2009. The complaint alleged that contract CBE-552 should be deemed to be a public works contract requiring the payment of prevailing wages. The Complaint alleged "[t]he repair component of the contract requires the contractor...to compensate employees performing the repair..." and that "...the contract has an extensive repair element, estimated by employees performing the work to be as high as 80% of the work." The complaint also asserted that this work should be classified and compensated as "elevator constructor."

IUEC offered the testimony of Anthony Schneider, Dr. Kevin Murphy, Kenneth DePiero, Nicholas Banas, Daniel Safbom, Vernon McClain, William Stanley and Mark McGhee and introduced 28 exhibits in support of its Complaint. The County calls the Labor Commissioner's attention to key parts of the testimony of DePiero, McClain and

Stanley and relevant exhibits for the purpose of discussing the legal issues raised in this brief.

A significant portion of IUEC's case was directed at attempting to prove that the work done under CBE-552 was nearly all "repair." The principal support for IUEC's position was presented through Union Exhibit 1 ("UX1"), a 183-page "Summary of Cost Repairs for CBE 552." UX1 purported to be a summary of Bombardier's work records, which was prepared by two of the claimants, Kenneth DePiero and Vernon McClain, who claimed to have the expertise to determine what activities were "repair" and how much time it takes to perform each such "repair." [4]

DePiero testified that he and/or McClain assigned the designation of "repair" to work activities and also assigned the amount of time to complete the "repairs" which appear in UX1 based on their opinions. DePiero 599-601. They made up the hours it took to complete each task even if it conflicted with the times on the official records filled out by the employees. DePiero 646; McClain 864.[5]

According to the declaration of Vernon McClain dated April 11, 2013 (BX30), the two agreed upon a criteria declaring a work activity to be "repair if it: 1) took more than 15 minutes to complete; 2) required skill generally not attained in less than 6 months training; and 3) involved parts costing $50 or more. McClain also declared, "Most of our repair work as we have defined it was not scheduled, "but instead resulted from something breaking (on occasion the repair resulted from a routine inspection)."

[4] Neither DePiero nor McClain were designated as expert witnesses nor was their "report" submitted as required by the Labor Commissioner's discovery orders. Despite the County's objection (Vol. IV, 614), UX1 was admitted and the witnesses were allowed to testify on subjects beyond their personal knowledge.

[5] McClain applied his own estimate of time despite what workers who did the work had listed. When examined about this, he became nervous and asked for a break to talk to counsel.

A thorough, factual critique of the hundreds of entries in UX1 and the testimony of authors is not possible in the 50-page limit for this brief. Bombardier has already presented some compelling challenges to the logic and accuracy of UX1 in BX31 and will certainly have more in its Post-Hearing Brief. The County calls the Labor Commissioner's attention to a number of key evidentiary facts which shows that IUEC's interpretation of "repair" work which has to be considered public work under NRS Chapter 338 is extreme and that UX1 is embellished with conclusions or inferences drawn by its creators which are unreasonable, unreliable and untrustworthy.

(1) The criteria for inclusion in UX1 was not developed until April, 2013 despite the fact the authors starting developing UX1 in January or February of 2013 and were at least 80% done by April. DePiero 656; McClain, 891.

(2) Despite McClain's declaration that the two were in agreement as to the criteria to be used, DePiero testified that he disagreed with McClain that "repair" designation should only apply to parts that were already broken and not scheduled. DePiero 683.

(3) McClain's declaration lists thirty "most common repairs," none of which involved "recovering" vehicles. Yet UX1 claims vehicle recovery to be repair and a substantial portion of the exhibit is devoted to recoveries. DePiero admitted that most entries in UX1 relate to replacement or recovery, not to fixing broken parts. DePiero 732.

(4) UX1 covers the time period of May 8, 2008 to May 8, 2012. This was done due to instructions from the attorney. DePiero 732. This resulted in inclusion of a significant number of work activities occurred before CBE-552 was in existence. CBE-552

became effective July 1, 2008. BX1. See, e.g., UX1-004-007. Other pages have pre July 1, 2008 dates that are intermixed. See, e.g., UX1-50 and 138. Other pages do not have dated entries.

(5) After hearing testimony from witnesses for Bombardier and the County attacking the inclusion of "SD McDonald" security alarm recoveries as repair, IUEC withdrew all but one of its claims for those items from UX1. DePiero 602. The remaining security alarm recovery was for driving the vehicle in order to warm up brakes. DePiero 654. A sample of some other extreme designations of "repair" in UX1, many of which don't come close to meeting the stated criteria in McClain's Declaration, (BX30), include:

- Escorted third party contractors. The ATS techs were "there to watch and assist but mostly to ensure the job got done and to report it." DePiero 628.
- Escorted contractor working on guideway concrete cracks for County (not in scope of CBE-552). DePiero 744.
- Recycled a door by turning a key. DePiero 665.
- Watched wayside doors due to winds. DePiero 679, 729
- 45 hours claimed for 15 computer reboots done at a computer work station. (This work was done in January 2012, 3 years after the IUEC Complaint was filed and not a single tech called it "repair." They all listed it as "maintenance – weekly reboot"). DePiero 687-689.
- Another reboot actually done from Pittsburgh, claimed to be repair because techs had to standby and monitor. DePiero 693.
- Reboot Clark County "C" computer due to not printing. DePiero 736.

- Cleaning and inspecting brakes is repair even if no parts are used. DePiero 721.
- Replacing brakes that are still working is repair. DePiero 723.
- Fire alarm response requiring only a breaker to be reset is repair. DePiero 726.
- Removing trash from guideway. DePiero 726.
- Replacing 2 tail lights. DePiero 728.
- Cleaned smoke detectors. DePiero 730.
- Replaced functioning tire with flat spot. DePiero 731.
- Placed Loctite on a screw. DePiero 733.
- Placed rubber sleeve on a tube. DePiero 735.
- Recycle door command done with radio. DePiero 739.
- Tightening bolts on "clam shell" during regular 90 day guideway inspections. McClain 852, 867.[6]

(6) No IUEC witness offered an explanation why responding to a fire alarm or other alarm (deemed repair) was different from responding to a "SD McDonald" security alarm (withdrawn from repair claim).

(7) Even though McClain signed a declaration in April, 2013 stating that he and Ken DePiero had created the criteria used to create UX1, McClain just remembered on the morning he testified, June 28, 2013, that Mike Moran had told him 4 years earlier during a brief meeting in 2009 what was properly considered to be repair and McClain relied on that guidance in preparing UX1. McClain 833-34. McClain admitted that Moran did not

[6] See, also: Middleton's discussion of recoveries done by talking on a radio, pushing doors together and jumping up and down. Middleton 338-343, CX43.

indicate he had any expertise concerning the ATS work activities, that he had no written record of Moran's four year old conversation and no record of discussing Moran's conversation with DePiero. McClain 897-899. And, "recovery of trains" is not a listed "common repair" in McClain's declaration. BX30. Despite all that, McClain claimed to remember Moran "advising" him:

> It could be recovery, it could be changing a lightbulb. If the part was changed out or we spent time getting a train back in operation, that could be defined as repair. Could be a radio call where we issued commands via Central Control, you know, something as simple as please issue a door recycle command to cause vehicle and station doors to open and close, therefore re-establishing a close-and-lock circuit allowing the train to go.

McClain 833-34.

(8) DePiero and McClain admitted the times allegedly required to perform the work activities had been changed from the times listed on Bombardier's records. For example, recovery times were based on an estimate of the time period from when notice was received to when paperwork was completed and tools put away. This included the time walking out to the train and back to the office and do paperwork. DePiero 647-48. In another example, ATS tech Nicholas Banas recorded one-half hour to repair an autolock when he did the work, yet McClain felt qualified to list that work as taking two hours. McClain 869. McClain based adding all the extra time to work items from his experience as a field services technician who was paid travel time to make service calls to Laughlin. McClain 830-31. Neither McClain nor any other witness offered testimony that travel time pay applied to a worker who remained at his regularly sited work for an entire eight hour shift.

William Stanley, Director of Government Affairs for IUEC also testified. Stanley provided the labor cost assumptions for UX1. Stanley 920. Stanley was asked to confirm that workers employed by Kone on the Airport's elevator maintenance contract received prevailing wages, but later clarified that those wages are paid pursuant to a collective bargaining agreement and not because of prevailing wages laws. Stanley 945, 1052.

Stanley identified UX7, which is the Airport's contract to have its jetways removed and then reattached to the gates. Stanley 970.

Stanley also testified concerning other public contracts which have the term "maintenance" in their titles which are considered public work and have a PWP from the LC, that he had compiled in UX27 and UX28. Stanley 975-96. Stanley only reviewed approximately 70% of the contracts he listed. Stanley 1077.

The listed contracts in UX27 and UX28 are for work such as annual street light maintenance, on-call services for the replacement of permanent pavement, annual concrete replacement and asphalt patching and flood control facilities repair, reconstruction and maintenance. UX28. Stanley admitted that a lot of the work for the contracts listed on these exhibits deal with civil work and several are for emergency or on-call repair. Stanley 1077. Stanley also discussed the County's Government Center Elevator Rehabilitation contract, which he said was similar to the Airport's Contract 2305 ATS C&D Leg Rehabilitation project (which the Airport did not consider to be a maintenance contract and, accordingly, required prevailing wages to be paid). Stanley 1046, 1083. Stanley testified that there were no elevator maintenance contracts that had a PWP from the Labor Commissioner. Stanley 1084. Stanley was shown several public agency equipment system

maintenance contracts, CX22, City of Las Vegas RFP for Elevator Maintenance and Repair; CX23 UMC HVAC Control Fire Alarm and Security System Maintenance; CX25 UMC Elevator Maintenance; CX26 County HVAC Maintenance and Minor Repairs; CX27 County Chiller Maintenance; and CX30 LVCVA Elevator Maintenance. Earlier Stanley had tried to distinguish these exhibits as inapplicable because he believed the "repair" component of the contract probably didn't exceed $100,000. Stanley 951, 1088. However, Stanley later had to concede that state law does not break out labor cost to reach the $100,000 threshold for the purpose of applying prevailing wages under NRS Chapter 338. Stanley 1092.

Stanley also testified on the issue of expanded "travel time" used by McClain in UX1. He testified that being paid for travel is the result of a collective bargaining agreement, not prevailing wage laws. Further, he stated: "And Mr. Thomson, that's not during regular working hours, you're paid for the time you're at work." Stanley 1076.

Stanley acknowledged that the Airport elevator maintenance contract with Kone consists of 30% repair work and other elevator maintenance contracts generally have 15-20% repair work. Stanley 1099.

Stanley also testified that he agreed with DePiero and McClain that removing a bottle cap in a door trackway is repair. Stanley 1117.

D. County Investigation and Determination

When the Complaint was raised, CCDOA conducted its investigation of the IUEC's Complaint concerning CBE-552 as mandated by NRS 338.070(1). County staff issued its First Determination Letter to the Labor Commissioner, dated November 24, 2009 (CX3)

which found the work done under the Contract to be properly exempted from prevailing wage requirements under NRS 338.011(1). After meeting with Deputy Labor Commissioner Sakelhide, the County went to the extraordinary measure of retaining the services of Michael Moran, an experienced and trusted analyst of wage claims, from Richardson Construction Company. See: CX44, resume.

Mr. Moran conducted his own investigation which involved a comprehensive review of the Contract, interviews with Bombardier's employees (CX2), interviews with Bombardier's site managers (CX1), and observations of the work itself. Moran 460-465. He also conducted a thorough examination of the relevant parts of CBE-552, in particular, Section 2.1.2, "Owner Provided Work and Services" and Section 2.2 "Subsystem Maintenance." Moran, 465-72. He learned that care for the fixed guideway structure was the County's responsibility not in the scope of CBE-552. Moran 466. Neither was overhaul. Moran 420. Moran also requested additional information from Bombardier breaking down what hours were spent doing particular classes of tasks. Moran 479. Bombardier produced to Moran a 2-page spreadsheet for 2008-2009 which identified "repair hours, enhancements, other nonproductive maintenance hours, manpower hours, meetings, general administrative tasks, storeroom tasks, training, subcontracting and miscellaneous." Moran 478. He also used the information in this document (CX40) in his investigation. Moran 479. Moran also consulted with Deputy Labor Commissioner Sakelhide. Moran 460. And he familiarized himself with NRS 338.011. Mr. Moran found that CBE-552 was entered into under NRS 332.115(1) and was exempt from NRS Chapter 338 pursuant to NRS 338.011. He found that normal maintenance inherently includes some

repair work as needed or as specified in the Preventative Maintenance Schedule. Moran 497. He also found that repairs and replacements were done on individual bases and not as a systemic upgrade. Moran 474. He concluded that the Contract was awarded in compliance with NRS Chapter 332 and was not subject to NRS Chapter 338. The County then issued its Second Determination Letter, dated March 30, 2010 (CX4).

Former Labor Commissioner Tanchek issued his Interim Order, dated June 7, 2011, directing the County to reopen its investigation and assess the work performed under DOA Contract CBE-552 to further investigate the cost of repairs to what he had determined were the "fixed works" areas of the ATS, such as the guideway, stations, power distribution systems and automatic training control systems, but not the ATS vehicles. Mr. Moran dutifully investigated, as directed by the Labor Commissioner, and determined the work performed by Bombardier's workers consisted of routine maintenance and adjustments along with the repairs that are inherent to the maintenance of the ATS.

Moran's focus on the "fixed works" drew his attention to the guideway and wayside systems. Moran 477. He learned that work on the guideway and associated electrical components of the guideways were contracted out and paid directly by the County under purchase orders. Moran 477. Moran identified the six purchase orders for this work: five made out to Truesdale Corporation (CX33, CX34, CX35, CX36 and CX37) and one to Morse Electric (CX38). Moran 482-484. The total amount of all six purchase orders was $62,509.00. Further, as previously noted, the work done by these contractors related to the County–controlled guideway and was outside the scope of CBE-552.

Moran was also aware of problems with the new vehicles and wayside doors which had been put into service in 2008 and 2009 under Contract 2305 during the time CBE-552 was in effect. This was called to his attention by the employees during his initial interview and confirmed by Joel Middleton. Moran 477. Moran was uniquely able to understand the interconnection between CBE-552 and Contract 2305 because of his involvement in another IUEC prevailing wage complaint.[7]

Moran reviewed the warranty obligations under Contract 2305 (CX16). Moran 487-490. Moran also researched the records of Contract 2305 and determined when the new equipment came into service. Moran 490-495. The general one year warranty extended from at least 12/19/08 to 12/19/09 on C leg vehicles, etc.; 5/7/09 to 5/7/10 on D leg vehicles, etc.; and 9/15/10 to 9/15/11 on Central Control. The 5-year warranty on the vehicle structures and bogies commenced on 12/19/08 and 5/7/09 and ran throughout the remainder of the term of CBE-552 (and are still in effect today).

Moran asked for and received handwritten wayside door logs from Joel Middleton which indicated the number of times the wayside doors failed. Moran 485. Moran used the information from these logs (CX39) to verify the information in CX40. Moran 485.

Moran testified that all of the enhancements, upgrades and rehabilitation were performed on Department of Aviation Project 2305, Automated Transit System (ATS) Leg C and D Rehabilitation. Mr. Moran also stated that all of the "repair" work he witnessed was on the defective upgraded trams and was considered warranty work. Moran 487-495;

[7] As the Labor Commissioner is aware, Moran was also retained to investigate another IUEC complaint that Bombardier had used workers normally assigned to CBE-552 to perform work on Contract 2305, C&D Leg Rehabilitation, for which prevailing wages had to be paid. Moran 457. Moran found IUEC's complaint to be valid in that prevailing wages should be paid for the time spent working on Contract 2305 (however, wage rates were based on the type of work performed and no hours were found to be related to elevator construction work).

1204-1205. He also found that no repairs exceeding $100,000.00 had occurred to the "fixed works" areas under CBE-552. The County then issued its Third Determination Letter, dated July 25, 2011 (CX5).

IUEC went to considerable effort to discredit Mr. Moran by raising that he had told William Stanley early in 2010 that "70 percent of the employee's time could have been repair versus maintenance." Moran 499. Also, Stanley testified that Moran told him that he couldn't speak further with him. Stanley 955. Vernon McClain tried to claim Moran instructed him in 2009 on what was repair, including "recovery" of vehicles in his 2013 spreadsheet. McClain 851, 899. Mr. Moran candidly discussed his conversation with Stanley and the employees and how he conducted his investigation. He testified that he begins every investigation assuming the worker's claim is right. Moran 1195. He testified about the nature of his meeting with Mr. Stanley at the Labor Commissioner's office (which was dominated 60/40 concerning his separate investigation concerning Contract 2305). Moran did tell Stanley there appeared to be a high amount of repair work on CBE-552 based upon his employee interviews. Moran 1098. He also testified that he stopped talking to Stanley because his "employer," Bechtel, was concerned about getting involved in the complaint. Moran 1199-1200. Moran also testified that his comments about "repair" to the employees were based upon the information given to him by the employees, themselves, about what should be repair. Moran 1202-03. Prior to interviewing the employees, Moran knew nothing about the ATS. Moran 1202. And, he had never before done an investigation concerning a maintenance contract. Moran 1204. After conducting the interviews, he did further investigation of the CBE-552, Contract 2305 and Nevada law,

as well as the work itself. Moran 1203-1204. All of the information he gathered lead to his determination, as summed up by his concluding testimony:

> Q. Okay. Did you ever, prior to this investigation, conduct an investigation involving a maintenance contract?
>
> **A. No, sir.**
>
> Q. Did you learn anything concerning the types of work that was done on this particular job or contract work regarding systemic work, or systemic replacement versus some other type of replacement?
>
> **A. Under contract CBE-552, there was a lot of repair work that was being done, but none of it was systemic. In other words, they didn't replace all of the tires at one time, they didn't replace all the axles, except for the warranty issues that were coming up. The systemic portion, from my understanding and from my investigation, was done under Project 2305 when they actually did the rehab of both the C and D Tram. They took—they replaced the trams and also rehabbed the guideways. So all the systemic repair, or all that replacement that were covered under 338 in my opinion was under, was for Contract 2305.**
>
> Q. Did you also come to a determination of the relationship between repair and maintenance?
>
> **A. I understood that there's a lot of definitions out there. I also looked at SC, the Service Contract Act, I looked at Davis Bacon Act, I looked at the Attorney General's opinions. Maintenance, in my mind, is going to always include repair. It's inherent to maintenance. You have to repair things to maintain them. And the Attorney General concluded that maintenance and repair were synonymous, and for the purposes of this contract, it was a maintenance contract, and I felt it should be treated as such and not be paid as prevailing wage.**
>
> Q. Okay. You've sat through all the testimony in this hearing?
>
> **A. Yes, sir.**
>
> Q. You've stated your opinions to this Labor Commissioner?
>
> **A. Yes, sir, I have.**
>
> Q. Has your opinion changed after hearing all this testimony?
>
> **A. No, sir, I still believe that this complaint should be dismissed.**

Moran 1204-06.

Other evidence was also received which tended to discredit information given by the workers to Moran in his initial investigation, (CX2), the claims made by Vernon McClain in his declaration (BX30) and the claims made in UX1.

Melvin Smith provided a point-by-point discussion of the 30 items listed in McClain's declaration to be the "most common repairs we did" which raised significant doubt that any of them were a "common repair." Smith 1165-80. Many of the 30 items in McClain's declaration overlap the repair items related to Moran by the employees.

Joel Middleton also provided key testimony concerning what work was really done. Middleton reviewed the items listed in Moran's notes from the employee interviews (CX2) which supposedly claimed they had to "rebuild the following either in shop or on tram." Middleton 306-10. Several of the listed items, e.g. traction motors, compressors, graphic signs, and door frames were never rebuilt. Others were rarely worked on. Id.

Middleton also testified that, since the ATS trains were running during the daytime shift, there wasn't much for the employees to do. Middleton 305-06. Smith also confirmed that the day shift activities included some recovery, some routine maintenance and some rebuilding of parts when there was nothing else to do. Smith 156. The "standby" designation on Bombardier's records indicated the employees were not actively doing anything. Smith 161. Smith estimated 70% of the shift's time was recovery and standby. Smith 168.

Roy Ryan provided testimony about Bombardier's analysis of UX1 (BX131), which demonstrated how the significant variations and inconsistencies in UX1 made it inaccurate and unreliable. Ryan 1146-57.

The testimony of Smith, Middleton and Ryan all served to reinforce the correctness of Moran's determinations and provided further evidence that the County has complied

with the laws as they apply to CBE-552 and with its obligation to investigate and report its findings to the Commissioner.

III. DISCUSSION

ISSUE #1. Is the Contract, CBE-552 ("Contract"), a "Public Work" Contract, as Defined in NRS 338.010, or is the Contract a Normal Maintenance (or Normal Maintenance and Repair) Contract, For Existing Equipment or an Existing System, Awarded Under NRS Chapter 332?

Bombardier has briefed this issue thoroughly and correctly addresses the particulars. The County, however, feels obligated to address certain concerns about specific allegations raised by IUEC on this issue.

A contract awarded in compliance with NRS Chapter 332 which is directly related to the normal operations or the normal maintenance of the Airport is not subject to the requirements of NRS Chapter 338, including prevailing wages and its specialized bidding requirements. NRS 338.011(1).

NRS 338.011 is a unique statute. It was enacted in 1981 with the apparent purpose of preventing a 1944 Opinion of the Attorney General, AGO 171, from forcing all government maintenance work to be under the definition of "public work" and subject to prevailing wages. AGO 171 states:

> Under the definition of public work, the words construction, repair and reconstruction are used, which appear broad enough to include the word "maintain." According to Webster, one of the definitions of the word "maintain" is to hold or keep in any particular state or condition. Therefore, the employment by the day of workmen on regular maintenance on public owned works or property comes within the provisions of the statute.

AGO 171, P. 2 (1944).[8]

The legislature obviously enacted NRS 338.011 in response to the Attorney General's opinion, which has never been revised or superseded. The legislature decided that local governments had to be protected from the dilemma identified by the Attorney General. The legislature in 1981 was completely aware of the language in NRS Chapter 332, including NRS 332.115 (which had been enacted in 1975). In enacting the statute, the legislature did not choose to differentiate between what was "maintenance" and what was "repair" or "heavy maintenance," even though it was aware of the opinion of the Attorney General in AGO 171. It did not set a dollar limit or differentiate based upon difficulty of the work, the time it took to do the work, or the skill of the people performing the work. Whether it was a good idea or not, the legislature left local governments with two different chapters in the statutes which, at times, overlap in the areas of maintenance and repair (and defined by the Attorney General to be synonymous) and with a specific exemption from the requirements of NRS Chapter 338 if a contract is awarded in compliance with NRS Chapter 332 "...which is directly related to the normal operation of the public body or the normal maintenance of its property." NRS 338.011(1).[9] Therefore, even if some work might otherwise be determined to be covered as "public work" and subject to NRS Chapter 338 because it involves repair, the provisions of that chapter do not apply if the work is in a contract awarded according to the criteria provided in NRS 338.011(1). Ample evidence was presented proving that is the case here.

[8] Of interest is a comparison of the various definitions of "repair" and "maintenance" given by DePiero (591, 737), Banas (772-73), McClain (832, 859) and Stanley (948-49, 952, 1072 and 1074). None make reference to AGO171 or to dictionary definitions of the words. They vary considerably from each other, as well.

[9] A contract's relation to normal operations does not require Bombardier itself to be operating the ATS as IUEC contends.

Contract CBE-552 is exempt under NRS 338.011(a) because it was legally awarded pursuant to the provisions of NRS 332.115(1). The purpose of the Contract was to ensure the existing Automated Transit System ("ATS") performed on a virtually 24/7, 365 days per year basis with a 99.65% availability and was directly related to the normal operation of McCarran International Airport to serve the large majority of its approximately 40 million passengers a year. Walker 398. There was unrefuted testimony by numerous witnesses concerning the necessity of these activities in order to maintain and operate the ATS and the Airport. (See: pp. 7-10, above.) Numerous witnesses testified that normal maintenance inherently includes some repair work. (Middleton 303, Walker 436, Moran 497).

It is a standard rule of statutory construction that, if the statute's language is plain and unambiguous, it must be given effect and that resort to legislative history is unnecessary to interpret its meaning. *State v. State of Nev. Employees Ass'n, Inc.*, 102 Nev. 287, 720 P.2d 697 (1986).

Nevertheless, IUEC has argued that the Commissioner should apply criteria which appear nowhere in the statute to impose tests for expense, worker skill, and the time it takes to complete the work. IUEC likens "normal maintenance" to "changing oil and rotating tires on a car,"[10] and "normal operation" to "routine tasks like cleaning or operating trains or checking equipment to make sure it is running properly." It is asking the Commissioner to rule that any repair element in a maintenance contract would invoke the application of the prevailing wage requirements in NRS Chapter 338. While that may be what IUEC wishes the legislature had enacted, its proposed definitions of "normal maintenance" and

[10] Given DePiero's and McClain's extreme designations of "repair" items in UX1, it is hard to understand how these would escape the same designation.

"normal repair" are simply not supported by the plain meaning of the words in the statute. As the Attorney General stated in AGO 171, "[a]ccording to Webster, one of the definitions of the word "maintain" is to hold or keep in any particular state or condition." The normal maintenance of the ATS requires far more than changing oil and rotating tires in order to hold or keep the ATS in an operable state or condition.[11]

IUEC has dismissed AGO 171 as "old" and argues that the legislature intended "to reject the AG's approach when it enacted NRS 338.011, leaving repairs covered but exempting "normal maintenance" only. IUEC Pre-Hearing Brief ("UPB") 9. That argument is contradicted by IUEC's immediately following argument in its UPB, which refers to the legislative history of NRS 338.011.[12] Some of the activities discussed before the legislature repairing broken windows and door locks (carpet replacement was another) which could clearly be deemed "repairs." UPB9. Under IUEC's UX1 and the extreme definition of "repair" created by DePiero and McClain, these legislative history examples which IUEC has earlier cited as the type of activity intended to be exempt, would seem to be claimed by IUEC to be repair subject to prevailing wage.[13] Also, Stanley testified that the Airport's elevator maintenance contract involves 30% repair activities and other public elevator maintenance contracts involved 15-20% repair. Stanley 1099-1100. Yet, since there was no evidence produced that a single elevator maintenance contract in the state is

[11] There was testimony, including a statement attributed to the Deputy Labor Commissioner, using automobile maintenance as an easily understood example. In fact, every automobile manufacturer's maintenance plan calls for a far more involved program than just oil changes and tire rotations. Typical auto maintenance calls for inspections at intervals of distance or time, e.g., 15,000 mile intervals, and for repair or replacement of parts based on wear or mileage, similar to Bombardier's maintenance plan. See, also, the maintenance programs in CX22, CX23, CX25, CX26, CX27 and CX30.

[12] The County contends reference to the legislative history is not appropriate since the statutory language is clear. IUEC did not present any evidence on this issue. This is discussed solely to demonstrate the inconsistency of IUEC's positions.

[13] UX1 includes repairing a broken window and work on door locks as repairs.

under NRS Chapter 338 and subject to prevailing wage, it would appear this is compelling evidence that not all repairs are covered by prevailing wage, as IUEC has argued.

If the legislature had not considered repair to be a necessary part of local governments' contracts for maintenance or operation, there would have been no need to create the exemption in NRS 338.011.

IUEC contends that the County "seeks to create enormous gaps" in prevailing wage laws. It also contends that a ruling upholding the County's determination would "eviscerate" NRS Chapter 338 and would end up with the "tail wagging the dog." IUEC fails to acknowledge that the County's determination recognized the status quo that has existed for decades. The County introduced evidence through the testimony of Walker concerning how maintenance contracts for equipment such as the ATS, HVAC, fire life safety and elevators are awarded under NRS Chapter 332 and that prevailing wages aren't paid on any of them. Walker 379-86. The County also introduced CX22, CX23, CX25, CX26, CX27 and CX30 as examples of other public equipment maintenance contracts which require repairs which were entered into under NRS Chapter 332 and do not require prevailing wages. Vol. V, 1088-93.

IUEC attempted to counter this evidence through the testimony of Stanley, the introduction of UX7, concerning the Airport's removal, reconditioning and reattachment of jetbridges (Stanley 970) and UX27 and UX28, which were lists of contracts with Labor Commission PWP numbers that referred to "maintenance" and "repair." Stanley 974-976.

The first attack on CX22, CX23, CX25, CX26, CX27 and CX30 was that none of them could possible contain $100,000 worth of "repair work" on an annual basis. Stanley

947. However, Stanley had to admit that there is no provision in state law breaks out any "repair" labor component from the contract total amount in order to determine if the $100,000 threshold has been met in order for prevailing wage laws to apply. Stanley 1092. There is no annual breakout in multi-year contracts.

Even if the equipment maintenance contracts introduced as evidence were determined to not meet the $100,000 threshold for prevailing wage purposes, the point is that none of them were entered into pursuant to NRS Chapter 338. Some of them were awarded using a "request for proposal" process (CX22) or awarded without any competitive process (CX23), neither of which is allowed under NRS Chapter 338 (CX22, CX27 and CX30). The others used the Chapter 332 bid process. Some provided for option years and amendments to payment not allowed under Chapter 338 (CX22, CX25, CX27). Chapter 338 applies to contracts below $100,000. Stanley 1086. Since all of these equipment maintenance contracts contain significant elements of "repair" (AGO 171 says "maintenance" is synonymous with "repair"), they would have had to be treated as "public work" and subject to the bidding laws of Chapter 338 but for the exemption in NRS 338.011(1), whether or not they contained $100,000 of "repair" labor, and would have to comply with the bidding requirements in Chapter 338.

The second attack IUEC uses concerning the contract in UX7 regarding the Airport jetways' removal, resetting and recommissioning actually proves the County's point. The jetway work was similar in many ways to Contract 2305, a prevailing wage contract. This work was not in any way related to normal maintenance or normal operations. This was a one-time, systemic action not eligible for exemption from prevailing wages.

The third attack using the list of contracts in UX27 and UX28 which referred to "maintenance" and "repair" also, actually, proves the County's point. Stanley testified a lot of the contracts he listed on the two exhibits were typically "civil in nature." Stanley 1077. Chapter 332 contracts are for equipment, goods and services and do not cover civil work. Other contracts on the UX28 list were for emergency repair or on call work and not related to normal maintenance or normal operations. Stanley 1078. Another contract on the list for rehabilitation of the County's Government Center elevators was, by Stanley's admission, akin to Contract 2305 (a prevailing wage job). Stanley 1082. Tellingly, not a single contract listed in UX27 and UX28 deals with maintenance of elevators, chillers, HVAC, or any other type of equipment. After examining the listed contracts in UX27 and UX28, the only conclusion that can be drawn is that none of them are comparable to CBE-552 or the other public equipment maintenance contracts which were legally awarded under Chapter 332. It is evident that the County and other public agencies have consistently interpreted NRS 338.011 the same way for years, with no dire consequences.[14] No "enormous gaps" have existed in the application of prevailing wage laws. NRS 338.011 is quite self-limiting and can hardly result in the "tail wagging the dog." NRS Chapter 338 has not been eviscerated. These alarmist claims simply have no substantiation.

[14] Former Commissioner Tanchek improperly rewrote NRS 338.011(1) in his Interim Order when he made an overly-broad and unreasonable interpretation of the term "normal operation" for the sake of creating a false argument that "the exemption consumes the general rule." It was a false assumption by the former Commissioner to posit that the construction of a new runway at the Airport would be part of its "normal operations." This has never been the interpretation by any public body in this state and should not be the basis for dismissing a term purposefully adopted by the Legislature. It is improper to interpret a statute in a way which would render a material term meaningless. *See, Buckwalter v. Eighth Judicial Dist. Ct.*, 234 P.3d 920, 922 (Nev. 2010).

IUEC has also asserted that no agency or court has ever held that a maintenance exception to a public works statute also extends to "major repairs." Whether or not that is the case, it is also true that no agency or court has ever addressed the very unique exemption from the requirements of NRS Chapter 338 created by the legislature in NRS 338.011(1). The ATS involves rubber tired passenger vehicles which, in size, construction or purpose, have more in common with buses than sideways elevators or trains. The regional transportation commissions and school districts in the state with their bus fleets, as well as the state and local government motor pools, do not treat the work they have to do to keep their fleets up and running as public works and subject to prevailing wages (including IUEC's termed "heavy maintenance," such as refurbishing motors or axles).[15]

Any attempts by the Commissioner to shape the meaning of the statute according to cost, difficulty, skill or other factors or to adopt a definition derived for other purposes by other agencies would be in excess of the Commissioner's authority and would be legislating in place of the legislature.[16] IUEC cites many cases which call for a liberal application of prevailing wage laws, but none of them permit an agency to ignore an express exception enacted by the legislature. The IUEC's citations to other agencies and other state courts do not provide the Commissioner useful guidance because they are not precedent in this case. In each instance, they address such different situations and/or such different statutory or

[15] IUEC notes that CBE-552 calls for "routine maintenance," "non-scheduled maintenance" and "heavy maintenance" such as axle and motor work done before there is a breakdown of the ATS Replacement. Replacement work done before there is an actual failure is not a "repair."

[16] This matter has been before the Commissioner through two legislative sessions. If an amendment to NRS 338.011 was desired, it should have been by seeking a change to the law instead of trying to impose an administrative change to its plain meaning.

regulatory provisions for the application of prevailing wages to maintenance contracts that they do not translate to the unique language of NRS 338.011(1).[17]

The Nevada Division of Industrial Relations regulations defining "maintenance" and "repair"[18] are for internal purposes in order to regulate permits and inspections necessary to set its standards and procedures for elevators, not ATS, under NRS 455C.110(1).[19] The Davis-Bacon definitions[20] are within the context of federal construction law, which do not mirror Nevada's definition of public work and this unique exemption. Other examples cited by IUEC are in the arena of an active construction project under different regulatory schemes and definitions, including the Wage Appeals Board determination in Norsaire Systems, Inc.[21] OSHA Standard Interpretation 1926.32. The Commissioner's own schedules for prevailing wages for truck and heavy equipment mechanics, referred to by IUEC, are all in the context of a construction project at the construction site and they have not been applied to non-construction work, including the mechanics working on regional transportation commission buses, school bus fleets or government motor pools.

The County has followed the law by requiring the payment of prevailing wages on construction and rehabilitation projects and by not requiring the payment of prevailing

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[17] For example, Washington law requires payment of prevailing wages on all ordinary maintenance contracts whether or not any repair is involved. See *Manson v. Wheelabrator Spokane, Inc.*, 357 F. Supp. 2d 1256 (E.D. Wash. 204), interpreting RCW 39.12.020 and WAC 296-127-010(7)(a)(iv).

[18] NAC 455C.424 and NAC 455C.436

[19] The definition of repair in NAC 455C.424 does not include preventative maintenance/replacement before failure. A comparison of that definition to those given by IUEC and its witnesses shows there are significant differences, even if it applied.

[20] 29 CFR Subtitle A Section 5.2 (7-1-09 Edition)

[21] 1995 WL 90009 (DOL W.A.B.). Repair work ostensibly done under warranty before the construction contractor could turn over the air conditioning units at the time of building acceptance was work done under the scope of the construction contract.

wages on maintenance contracts, such as CBE-552, which were awarded under NRS Chapter 332 and are related to the normal operation or normal maintenance of the Airport.

The County is concerned about the Commissioner reshaping and redefining definitions of "repair," "maintenance," and "operations" in the context of NRS 338.011(1) and then applying them retroactively against the public entity that entered into this contract in compliance with NRS 332.115 and in good faith reliance on the plain terms of the NRS 338.011(1) that exempt this contract from requirements of NRS Chapter 338. If any action is to be taken, the legislature should be responsible for any changes in the law. The County's application of the laws is reasonable and appropriate. The County is the government body charged with applying NRS Chapters 332 and 338 to its contracts and it should be given deference to its long-standing interpretations of the laws.

IUEC advocates an extreme and unreasonable interpretation of NRS 338.011 which would effectively render the statute meaningless. The evidence it proffered to supports its claim was anchored by UX1, a purported summary of "repair" work records performed under CBE created by two claimants who were not objective. The authors of UX1 inserted their own arbitrary classifications of work activities and inflated activity performance times[22] based upon their arbitrary, extreme and unreasonable definitions of "repair." UX1 was repeatedly shown to not be accurate. A summary document must be accurate, and non-prejudicial and not misleading. It must not be embellished by or annotated with the conclusions of or inferences by the proponent. U.S. v. Bray, 139 F.3d 1004, 1110 (6th Cir.

[22] As admitted by IUEC's own witnesses that the addition of "travel time" to any work activity done on site during an 8-hour shift is not done. And the issue of "travel time" is a bargained for term of a collective bargaining agreement and has no relation to prevailing wage determinations. Stanley 1076.

1998); See, also: Davis & Cox v. Summa Corp., 751 F.2d 1507, 1516 (9th Cir. 1985); U.S. v. Taylor, 210 F.3d 311, 315 (5th Cir. 2000). A summary should only be admitted into evidence after the proponent has laid the proper foundations and show the summary is accurate. Neeham v. White Laboratories, 639 F.2d 394, 403 (7th Cir. 1981). The Labor Commissioner should strike UX1 because it is arbitrary, extreme, unreasonable and unreliable, and should reject IUEC's extreme and unreasonable arguments about NRS 338.011 and its applicability to CBE-552.

As pointed out by Moran, there is an additional exemption to prevailing wage laws for warranty work performed during the term of CBE-552. Moran 487-95, 1204-1205; CX16. It is anticipated that IUEC will argue that the County never served notice on Bombardier requiring warranty work. However, since Bombardier performed the maintenance contract and self-identified and corrected any problems, the County was not in a position to serve notice. This should not be held against the County and doesn't diminish the fact that Bombardier apparently honored its warranty obligations. Plus, any issue regarding warranties between the County and Bombardier is properly before another forum on another day.

ISSUE #2. Was the Work Performed on the Automated Transit System ("ATS") Vehicles a "Public Work" Under NRS 338.010(16)?

NRS 338.010(16) provides:

> "Public work" means any project for the new construction, repair or reconstruction of: (a) A project financed in whole or in part from public money for: (1)Public buildings; (2)Jails and prisons; (3)Public roads; (4)Public highways; (5)Public streets and alleys; (6)Public utilities; (7)Publicly owned water mains and sewers; (8)Public parks and playgrounds; (9)Public convention facilities which are financed at least in part with public money; and (10)All other publicly owned works and property.

In his Interim Order, filed June 7, 2011, former Labor Commissioner Tanchek interpreted the meaning of NRS 338.010(16) and found that, even though the definition of public work appears to provide an expansive definition, the scope of the statute was never intended to include mobile equipment like ATS cars, fire trucks, police cars, snow plows and buses. (Interim Order, p. 3.) IUEC petitioned for reconsideration on the issue of "APM car repair," which was denied by this Commissioner's Order, filed May 18, 2012.

It is the position of the County that Contract CBE-552 satisfies the requirements outlined in NRS 338.011, therefore negating the need to define it a public work as outlined in NRS 338.010. Further, even though the definition of public works states that it applies to "all other publicly owned works and property," former Commissioner Tanchek was right in concluding that NRS Chapter 338 has never applied to publicly owned vehicles and that the statute does not extend to ATS cars, police cars, fire trucks, etc. As stated above, a decision which finds that work on engines, axles, transmissions, etc., will have far-ranging and devastating effect on public entities.

IUEC has attempted to counter this by arguing the ATS vehicles are "fixtures." It questioned Bombardier's witnesses and had Schneider testify that the vehicles were very heavy and had to be lifted up to the guideway by cranes. Schneider 507-10. Schneider did admit the vehicles were moveable from the C to D leg. If the Airport had chosen to use buses identical to the shuttle buses in its other shuttle contract, those vehicles would have had to be lifted onto the guideway. The County contends the type of vehicle and its use should be the determining factor and that the applicable portion of Former Commissioner Tanchek's Interim Order should be upheld.

Even if the ATS vehicles were deemed to be "fixtures," that does not compel a finding favoring IUEC. As noted earlier the equipment maintenance contracts for HVAC, chillers, fire, life safety, etc., all concern maintenance of "fixtures" and are all exempt from Chapter 338 pursuant to NRS 338.011.

ISSUE #3. Applicability of NRS Chapter 338: Exemptions:

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

The County does not agree that any work under CBE-552 was railroad work.

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

See above.

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

As discussed above, the Contract was awarded under Chapter 332 and was related to the normal operations of the Airport and the normal maintenance of the ATS. Therefore, it was exempt from NRS Chapter 338 and should not be treated as a contract for public work. As discussed in (d), below, the contract exceeded $100,000.00. However, the County has determined that any work which might be deemed to be repair work was either not done under the Contract (e.g., warranty work or under separate purchase order to an independent contractor) or was under $100,000.00. County Determination Letter #3 sets forth that purchase orders for work by the independent contractors totaled $62,509.00 and work done by Bombardier's employees on the wayside terminal doors totaled $4,090.32.

d. What is the cost of the Contract?

The total Contract award amount was $19,989,608.00 to be paid as follows: contract year 1--$3,139,037.00; contract year 2--$3,225,250.00; contract year 3--$3,897,658; contract year 4--$4,700,600.00; contract year 5--$5,027,063.00.[23]

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

The County believes that this matter should be concluded after considering Issue #1. However, if the Commissioner does decide to consider compensation, the County feels obligated to raise certain points, without conceding that any such analysis is appropriate in this case.

Nevada Administrative Code 338.0095(1)(a) states that "A workman employed on a public work must be paid the applicable prevailing rate of wage for the type of work that the workman actually performs on the public work and in accordance with the recognized class of the workman."

Based on Bombardier employee interviews conducted by DOA and based on the content of the context of CBE-552, if it were determined to be subject to prevailing wages on some or all of the work performed, Bombardier employees would be classified by the type of work they actually performed. The "Elevator Constructor" classification does not include nor reference ATS but does specifically reference "electric and hydraulic freight and passenger elevators, escalators and dumbwaiters."[24] The tasks performed by Bombardier employees, which relate to the ATS, dictate their classifications on this

[23]CBE-552 also contemplated adding maintenance of the yet to be constructed ATS between the new Terminal 3 and Satellite "D," which opened in June, 2012, but the County terminated CBE-552 and took maintenance in-house before this part of the ATS became operational. Thus, the contract was not in force for part of year 4 and all of year 5.
[24]ATS work is also not in the statutory definition of elevator.

contract. This was the determination made in IUEC's separate claim concerning work on Contract 2305.[25]

Additionally, based on the recent McCarran Airport Project Labor Agreement Pre-Job Jurisdictional Conference for work on the Terminal 3 ATS, [26] the jurisdictional assignments were made by the signatory contractors performing the work based solely on the scope of work and the tasks required to perform that scope. Although the IUEC claimed much of the work associated with the Terminal 3 ATS work, its members were not awarded any portion of the work when the jurisdictional assignments were made.

Stanley also provided testimony that, while APM work is included in collective bargaining agreements, it isn't included in the Nevada Labor Commission job description for elevator constructors. Stanley 929-30. He also cited the specific inclusion of APM work under elevator work in the Federal 2006 Service Contract Directory of Occupations, 5th Ed. (UX3) (Stanley 963), but had to later admit that the more recent 2008-2009 U.S. Department of Labor Bureau of Statistics (CX141) did not specifically list APM work as elevator work. Stanley 1111.

In conclusion, the County is concerned that, if the Commissioner decides to consider the rate of compensation, any such evaluation take place according to the factors set forth in the NAC and in light of union action in the County's PLA jurisdictional assignments.

Stanley also confirmed that IUEC was a participant in the Airports' Project Labor Agreement and that the work installing the Terminal 3 ATS was assigned not to IUEC

[25] ATS workers who are not certified as elevator constructors cannot work on elevators.
[26] The County's ATS construction and rehabilitation projects are not for maintenance and are subject to the prevailing wages, which demonstrate its differentiation between maintenance and non-maintenance work.

members but to "Electricians, iron workers, carpenters, operating engineers, glaziers of the ATS System itself. The civil work would have included carpenters, cement masons, structural reinforced steel iron workers, structural steel iron workers, electricians. Stanley 1115.

IV. CONCLUSION

NRS 338.011(1) is clear in what it exempts from the requirements of NRS Chapter 338. The County entered into CBE-552 in compliance with NRS 332.115(1), which was directly related to the Airport's normal operations of transporting passengers at the Airport and its normal maintenance of the Airport and its ATS.[27] The contract was entered into in compliance with NRS 332.115(1) and it is inappropriate to now penalize the County for following the law in good faith or for its good faith investigation of this complaint.

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[27] IUEC has also raised an argument in its previous filings with the Commissioner that the work under CBE-552 is public work subject to the prevailing wage requirements of NRS Chapter 338 because "...IUEC disputes that there has been compliance with Chapter 332, for the County relies upon an exception to formal bidding there (332.115) that is based on the false premise that no company other than Bombardier can provide APMs." IUEC Brief on Legal Issues, 12/14/10, p. 6. IUEC's position ignores the language of NRS 332.115(c), which covers **"[a]dditions to and repairs and maintenance of equipment which may be more efficiently added to, repaired or maintained by a certain person"** (emphasis added). There is no obligation to prove that only one person is capable of providing any of these items. The statutory requirement is a determination that it may be more efficient to utilize a certain person. Bombardier's experience and expertise with its own product and its control of proprietary parts and materials make such a determination that it may be more efficient to contract with it obvious. This is a non-issue. [The County's Agenda Item, which placed the Maintenance Contract for CBE-552 before the Board of County Commissioners on June 3, 2008 for award, shows that public notice was given that the award was being made under NRS 332.115(1)(a)&(c). Although staff's statement in the background information of the agenda item that Bombardier was the only company which could perform the maintenance work may have been inaccurate (at the time staff was only aware of Bombardier as capable of performing the work), the award under NRS 332.115(1)(c) was valid and won't be overturned if a correct result was made, albeit for different reasons. See *Rosenstein v. Steele*, 103 Nev. 571,575 (1987). No protest was made at the time concerning the propriety of awarding the contract under NRS Chapter 332. The doctrine of laches prohibits challenges to the award at this late date. *Building and Construction Trades Council of Northern Nevada v. State, ex rel. Public Works Bd.*, 108 Nev. 605, 836 P.2d 633 (Nev. 1992).]

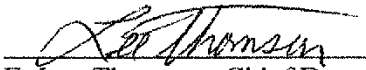
Further, even assuming, *arguendo*, that award of CBE-552 should not have been made under NRS 332.115(a) or (c), the work still could have been awarded under NRS Chapter 332. NRS 332.115 addresses exceptions to competitive bidding requirements set forth in NRS 332.065. Even if the award to CBE-552 could have been successfully challenged in a timely manner, the Contract could have been bid and awarded under NRS 332.065 and would still have been exempt from NRS Chapter 338 under NRS 338.011. Since no evidence on this issue was proffered by IUEC, perhaps it has conceded the point.

There are no bases for the Commissioner to create artificial definitions or differentiations between "maintenance" and "repair" based on the factors urged by IUEC. IUEC's interpretation of NRS 338.011 and its definition of "repair" are both extreme and unreasonable. It would also be unfair to apply any new interpretation retroactively. Further, any such decision would have serious implications upon regional transportation commissions and school districts which operate bus fleets as well as any governmental motor vehicle pool. This is a matter for the legislature if changes are to be made.

The evidence is undisputed that, for over thirty years, the County has consistently applied a common sense application of the plain meaning of the law, which differentiates between construction, installation and rehabilitation of the ATS system, which are not activities related to normal operation of the Airport and which require payment of prevailing wage, and the ATS maintenance contract, which, as Bombardier has aptly put it, "...is perpetual in nature, with no fixed beginning or completion point," for the purpose of keeping the ATS trains operational and available to move the Airport's passengers to and from the gates. The County's application of the laws is reasonable and appropriate. The County is the government body charged with applying NRS Chapters 332 and 338 to its contracts and it should be given deference to its long-standing interpretations of the laws.

Dated this 9th day of December, 2013.

CLARK COUNTY
STEVEN B. WOLFSON, DISTRICT ATTORNEY



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CERTIFICATE OF SERVICE

Pursuant to NAC 607.160, I hereby certify that the original, and three (3) copies of Clark County's Pre-Hearing Brief, was Federal Expressed on the 9th day of December, 2013 to the following:

Commissioner Thoran Towler
STATE OF NEVADA
Office of the Labor Commissioner
675 Fairview Drive, Suite 226
Carson City, NV 89701

An Employee of Clark County

OTHER AUTHORITIES

OPINIONS

01365

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF NEVADA

FILED

DEC 11 2013

NEVADA
LABOR COMMISSIONER - CC

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS

Claimant/Objector

and

BOMBARDIER

Respondent/Employer

RE: CLARK COUNTY DEPT. OF AVIATION CONTRACT CBE 552

CLAIMANT'S POST-HEARING BRIEF

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I. INTRODUCTION AND SUMMARY

The Commissioner should find it likely that over $100,000 worth of work done here falls on the side of "repair" versus exempt "normal maintenance" and remand this matter to the County for a proper determination. The Commissioner should not define "normal maintenance" expansively, as that defeats both (a) the underlying overall purpose of the prevailing wage laws to preserve labor standards, and (b) the exemption's purpose to allow tiny contractors to get bits of unskilled work and reduce the burdens on agencies of the formal contracting process for such work. Normal maintenance is inspection, cleaning, lubrication and at most minor repairs like changing a lock or window pane which take only a few minutes work, little or no skill, and no expensive parts. Here, various repair tasks took multiple man-hours, years of training, and parts usually costing in the hundreds of dollars. Bombardier hired not the low-skilled handymen whom the Legislature were told "normal maintenance" was about. Instead the company relied on skilled mechanics with several years' prior experience, several skilled enough to repair radar equipment and aircraft (TR 572-73, 749, 1137).

The fact that Bombardier internally called some major replacement tasks "preventive maintenance" and scheduled examination of those parts in advance does not mean this work is "normal maintenance" rather than repair: no employer with a safety-sensitive operation would ever wait until there was actual failure if that could possibly be helped, so "repair" cannot be limited to just those tasks done after system failure. Repairmen who do safety-sensitive work should not be punished relative to workmen who repair cosmetic items. Indeed, the sensitivity of their work is all the more reason why ensuring the quality associated with prevailing wage would be proper. The work being done by these repairmen is the same whether the part is scheduled for replacement or instead replaced after it breaks. The impact on the labor market of underpaying this replacement work is the same whether the replacement is pre-scheduled or not.

Quantifying the amount of repairs here was made difficult by Bombardier's insistence on barring IUEC staff from having access to the job records and severely limiting access to a few workers, by large gaps in the records produced, and by the testimony showing the unreliability and bias of Bombardier's SIMS timekeeping. However, certain simple numbers jump out here: Bombardier admitted that at the outset of this contract an average of 60% of its work here was on "corrective maintenance" ("CM", most

of which should be deemed repair under the statute) rather than "preventive maintenance". TR 60. Bombardier's contract started at $2.7 million per year and rose at 5% per year to $3.07 million in the final year it worked. Multiplying 60% by the annual contract amounts means Bombardier and the County knew or should have known that repair was likely to be around $1,620,000 in Year 1, $1.7 million Year 2, and so on. Bombardier admitted it had another facility at 32% corrective work (TR 133), so that was possible here despite Bombardier's desire to push CM down to just 20%. Indeed, even at the target of just 20% CM, such CM would still equate to $540,000 in the first year alone here. And this CM figure does not include the serious amount of repair work done here whenever parts needing replacement were discovered during a previously-scheduled PM inspection, so the CM figure grossly underestimates the actual amount of repair here. Thus Bombardier had no reason to believe it could so revolutionize the work here at McCarran as to actually bring the amount of repair during the foreseeable contract period below the statutory trigger of $100,000.

Bombardier through BX 131-132 attacked the calculations done by its ex-employees Ken DePiero and Vern McClain. However, even when Bombardier subtracted various entries out, BX 132 still shows a total of $274,000. Moreover, the workers' original calculations were extraordinarily generous to Bombardier because they used only the first-year contract price for all work and ignored the 5% per year increase in the contract price. Further, most of Bombardier's subtractions are improper: (1) for the Commissioner to mandate expenditure on parts as part of the definition of every "repair" would not make sense under a common-sense definition of repairs, because if an auto mechanic does not have to use any new parts but still spends hours making critical changes to your non-functioning carburetor to get it to start working again, the average person would still consider that a "repair" not "normal maintenance;" (2) Bombardier cannot take advantage of the fact the workers counted work done for a few months under the prior contract, because they did not include many subsequent months under the current contract, yet Bombardier witness Ryan had to admit the type of work done in the unanalyzed period was not likely to have changed with the single exception of brake work (TR 1160); and (3) Bombardier with a pink marker crossed off every labor entry without a parts cost associated with it on the same page, but the spreadsheet in most instances listed the parts cost on a different page (the rebuild logs on pp 002-3), and the labor task description usually made it evident some parts were replaced

(showing the work as "rpl"), so there is no question that a parts cost was involved even if a precise figure is not shown. Bombardier's pink marker improperly expected the workers who prepared this spreadsheet to list a parts cost twice in the same spreadsheet or to guess about parts costs they were not provided by Bombardier.

The work done on these ATS vehicles was "public work" even those these vehicles roll. The similar Davis Bacon Act since its inception was applied to moveable government property (ships), even before the Nevada Legislature copied most of its terms. Even if somehow a requirement of "fixture" was read into NRS Chapter 338, courts have repeatedly held that vehicles specialty adapted to a particular property (like elevator cars) are fixtures even though they move and could theoretically be pulled out if one was willing to waste large sums of money on bringing in a crane and large workforce to do so. The same is true here.

The County presented a "parade of horribles" argument as to other maintenance contracts, but these lack substance: (1) there is no reason to believe buses are "public work" as they run out on the roads and are readily movable to another locality and to private bus operators, and hence are more analogous to office equipment than to a 30,000-lb vehicle specially built for McCarran running on a specially-designed guideway entirely within this one public facility; (2) there has never been a posted job class for which bus repair has been shown as included by the DOL's SCA Directory or a labor agreement filed with the OLC, unlike here; (3) there is no reason to believe that replacing a sprinkler head is more skilled, time-consuming or expensive in parts than the excluded work of replacing a lock, and hence no reason to think that true repairs exceed $100,000 for any landscape maintenance contract; (4) none of the elevator maintenance contracts involved repairs over $100,000 because of the small size of the total contract. Even if the County could somehow show there is a practice among agencies to bury over $100,000 worth of repairs under maintenance contracts, the fact that agencies engage in some practice without telling the Commissioner's office about it also must weigh against giving such practice any weight. The agencies have a financial self-interest in not enforcing prevailing wage, and bring no expertise to interpretation of this law, which instead is committed to the Commissioner for interpretation (the agencies' role under the statute is simply initial factual investigations).

The County's warranty argument must be rejected because Bombardier has not made any such argument and the County lacks standing to pursue a defense which the employer is unwilling to make. Moreover, there is no statute, regulation or case exempting warranty work. In many trades there are warranties covering many (and perhaps most) repairs, as in roofing. The DOL and state courts elsewhere have rejected the notion that warranty work is exempt. The County's argument merely elevates labels over substance: the CEB 552 caption here does not determine what wage corrections the Commissioner can direct. The underlying law must be enforced by the OLC regardless of which contract to which the work hours should have been billed.

The proper job class to apply here is Elevator Constructor ("EC") for numerous reasons. First, the OLC in surveying wages and job classes found the IUEC agreement to prevail and this agreement expressly includes APM work. UX 2 at Art. IV(2). Courts and agencies routinely hold that reliance on the prevailing CBA is proper under prevailing wage laws. If Bombardier wanted a different outcome, then it should have participated in the OLC's survey process. Second, the DOL through its SCA Directory has agreed that the EC class is proper for APM work. UX 3. No other published nor unpublished job class comes even close: the Electronics techs discussed by Dr Moss only address a small part of the ATS work. Traditional ECs and ATS mechanics both share something unique in the skilled trades: they have to know how to fix both electronic and mechanical systems. Dr. Murphy talked to workers and observed their worksite before rendering an opinion on the proper job class, unlike Moss. Moss relied on misconceptions about both ECs and ATS techs. However, at minimum the Commissioner should use the truck repairer job class or direct a survey be done of the Stationary Engineers who repair casino APMs.

II. OVER $100,000 WORTH OF WORK HERE WAS "REPAIR" RATHER THAN "NORMAL MAINTENANCE"

"When construing an ambiguous statute, legislative intent is controlling, and we look to legislative history for guidance.[cite]. Finally, we consider 'the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result.[cite].'" *Washoe Medical Center v. Second Jud. Dist. Ct.*. 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006). Remedial statutes like prevailing wage laws are construed in favor of their intended beneficiaries, the workers. See, e.g., *I. Cox Const. Co., LLC v.*

CH2 Investments, LLC, 129 Nev. __, 296 P.3d 1202, 1204 (Nev. 2013)("The mechanic's lien statutes are remedial in nature and should be liberally construed to protect the rights of claimants and promote justice."); *International Game Technology, Inc. v. Second Judicial Dist. Court ex rel. County of Washoe,* 122 Nev. 132, 179 P.3d 556. 560-61 (Nev.2008) ("remedial statutes, like NRS 357.250, should be liberally construed to effectuate the intended benefit . [citing four cases]."); *D.W. Close Co., Inc. v. Wash. State Dept. of Labor and Industries,* 177 P.3d 143, 152 (Wash.App. 2008)("the Prevailing Wage statute is remedial and should be liberally construed to affect its purpose."); *City of Long Beach v. Dept. of Industrial Relations*, 34 Cal.4th 942, 949, 102 P.3d 904, 22 Cal.Rptr.3d 518 (2004) ("Courts will liberally construe prevailing wage statutes").[1] The burden of establishing a jurisdictional exemption to a remedial statute like the Nevada prevailing wage law lies with the party urging the exception. *Pendleton v. State,* 103 Nev. 95, 734 P.2d 693 (Nev.1987). Moreover, because the definition of public work in 338.011 also determines whether the bidding provisions of Chapter 338 apply, the Commissioner should follow the caselaw protecting the public interest by narrowly construing exceptions to bidding requirements.[2]

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[1] Accord, *Board of Trade, Inc. v. State, Dept. of Labor, Wage and Hour Admin.*, 968 P.2d 86 (Alaska 1998); *Bockelman v. Prevailing Wage Appeals Bd.*, 30 A. 3d 616, 620-21 (Pa. Comm. 2011) ("Because the Act is a remedial statute, it must be construed broadly for its coverage, and any exceptions to the coverage must be narrowly construed. [citing three other cases]"); *FFC, Ltd. V. N.J. DOL*, 720 A. 2d 619, 316 NJ Super. 437 (NJ App. Div. 1998)("We have previously recognized that the Prevailing Wage Act is remedial legislation entitled to liberal construction"); *Matter of Stephens & Rankins Inc. v. Hartnett*, 160 AD 2d 1201, 555 NYS 2d 208 (NYAD 1990) (same).

[2] See, e.g., *Associated Builders & Contractors, Inc. v. So. Nev. Water Auth.*, 115 Nev. 151, 158-59, 979 P.2d 224, 229 (1999)("with respect to bidding procedures, this court has held that: 'The purpose of bidding is to secure competition, save public funds, and to guard against favoritism, improvidence and corruption. Such statutes are deemed to be for the benefit of the taxpayers and not the bidders, and are to be construed for the public good.' *Gulf Oil Corp. v. Clark County*, 94 Nev. 116, 118–19, 575 P.2d 1332, 1333 (1978)."); *Skakel v. North Bergen Tp.* 181 A.2d 473, 478 (N.J. 1962) ("The fundamental philosophy of our competitive bidding statutes is that economy be secured and extravagance, fraud and favoritism prevented. [cite] . Such statutes are designed to safeguard the public good and should be rigidly enforced by the courts to promote that objective. [cite]. This common good is best advanced by cultivating the most extensive competition possible under the circumstances and municipalities should organize their efforts in that direction. [cite]."); *Brasi Development Corp. v. Attorney General,* 925 N.E.2d 826, 835(Mass. 2010) ("Consistent with its broad remedial purpose, the competitive bidding statute is to be strictly construed. [cite]); *Staten Island Bus, Inc. v. Board of Ed. of City of New York*, 82 A.D.2d 891, 440 N.Y.S.2d 293 (N.Y.A.D.1981)(policy of competitive bidding laws required rebidding of additional work even though existing contract allowed contractor at its option to take on more work); *Manson Const. and Engineering Co. v. State,* 600 P.2d 643, 646 (Wash. App. 1979) ("We begin ... by reasserting this jurisdiction's strong public policy that, except as permitted by legislation, public contracts shall be let only after competitive bidding

Lacking a statutory definition of the ambiguous terms "normal maintenance" and "repair", the Commissioner should take the advocates for the public agencies at their word in lobbying for the bill creating the maintenance exception. They described the work they wanted exempt as follows: "generally speaking, services provided are performed by non-skilled laborers" (Washoe County Devine Written Testimony at 4, Ex. A to Minutes of Ass. Comm. On Gov. Affairs Hrg. 2/19/81)(copy previously provided as Ex. H).[3] But non-skilled labor is a far cry from the APM technician work on complex electronic and mechanical systems requiring several years of training to accomplish. The examples given to the Legislature of what should be exempted were cleaning, "housekeeping" and changing locks and window panes in ordinary doors. Minutes of Ass. Comm on Gov. Affairs 2/12/81 at pp. 15, 17-18, 2/19/81 at 1 (Compiled Leg. Hist. at pp. 231, 233-34, 473). All of these are tasks taking less than a half-hour (TR 980-81) and involving little cost in the way of materials. There is no need for a lengthy complex contract or bidding process for such tasks, and small local minority contractors could readily do the work. Yet here by contrast the contract on its face was complex, and exempting the work from Chapter 338 does nothing to aid small local minority contractors.

Respondents argue for deference to the County DOA here, but awarding bodies cannot be trusted to decide on an exemption themselves. *Lusardi Const. Co. v. Aubry*, 1 Cal.4th 976, 987, 4 Cal.Rptr.2d

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procedures have been complied with. [cite] *** It is the function of the legislature, not the judiciary or an administrative agency, to circumscribe competitive bidding. When, as in the case at bench, the legislature has already defined those limits, courts will be wary of interpreting the legislatively mandated standards so as to further circumscribe the competitive bidding policy."); *Associated Builders and Contractors v. Contra Costa Water District*, 37 Cal. App. 4th 466, 470 (1995) ("The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud, and corruption; avoid misuse of public funds; and stimulate advantageous market place competition. Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside . . . . The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements."); *Marshall v. Pasadena Unified School District*, 119 Cal.App.4th 1241, 1256, 15 CR3d 344 (2004)("[A]n interpretation . . . which upholds the broadest possible application of the statute is consistent with the strong policy favoring competitive bidding."); *Miller v. McKinnon*, 20 Cal.3d 83, 88, 124 P.2d 34 (1942) ("The competitive bidding requirement is founded upon a salutary public policy declared by the legislature to protect the taxpayers from fraud, corruption, and carelessness on the part of public officials and the waste and dissipation of public funds.").

[3] Hereafter all references to lettered exhibits are referring to Claimants' exhibits to prior briefs filed with the Commissioner in this case.

837, 824 P.2d 643 (Cal.1992) ("As the facts of this case show, both the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law."). The County investigator had no prior experience in applying the repair-maintenance exception and was inconsistent in his interpretation without explaining reasons for completely changing his mind. Even when courts normally defer to administrative interpretations, they make an exception when agencies reverse themselves without providing a reasoned explanation. *See High Ridge Hinkle Jt. Ven. v. City of Albuquerque*, 888 P.2d 475, 488 (N.M. App. 1994)("Courts generally show little deference to an agency's interpretation of its own statute when the interpretation is an unexplained reversal of a previous interpretation or consistent practice. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30, 107 S.Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434 (1987); *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S.Ct. 2367, 2376, 37 L.Ed.2d 350 (1973) (agency has 'duty to explain its departure from prior norms').").

Guidance here can be found in a recent decision of the Missouri courts addressing a maintenance exception to a prevailing wage statute, *Util. Serv. Co., Inc. v. Dep't of Labor & Indus. Relations*, 331 S.W.3d 654, 658-62 (Mo. 2011):

> Because the Act is a remedial statute intended to prevent payment of substandard wages for work on public works projects, it "should be construed so as to meet the cases which are clearly within [its] spirit or reason ... or within the evil which it was designed to remedy, provided such interpretation is not inconsistent with the language used." [cite] Doubts about the applicability of a remedial statute are resolved in favor of applying the statute. See *id.* Accordingly, exceptions or exclusions to a remedial law are narrowly construed. *Cf. id.*; *State v. Breckenridge*, 219 Mo.App. 587, 282 S.W. 149, 150 (1926) ("As a rule, exceptions in statutes are strictly construed.").
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> **"Construction" & "Maintenance Work" Under The Prevailing Wage Act**
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> The issue in this case is whether the contracted work falls under section 290.210(1)'s definition of "construction," which requires payment of prevailing wages. Section 290.210(1) provides a broad definition of "construction" that "includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair." Contractor argues that the application of this definition is limited by the definition of "maintenance work" under section 290.210(4). Contractor contends that work is "maintenance work," not "construction," if it is "the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased." **** Comparing the definitions for "construction" under section 290.210(1) and "maintenance work" under section 290.210(4) by

> those statutes' respective terms, this Court disagrees with Public Utilities's suggestion that work on an existing facility is "maintenance work" unless it changes the size, type, or extent of the facility. Because "maintenance work" is exempt from coverage under the Act, its definition must be read narrowly. *** the Act cannot be read to mean that repairs are classified as "maintenance work" unless they change a facility's size, type, or extent. Such an interpretation would undermine the inclusion of the term "major repair" in the definition of "construction" under section 290.210(1). A "repair" that is "maintenance work" under section 290.210(4) must be considered something less than a "major repair" under section 290.210(1). But a "repair" that is "maintenance work" under section 290.210(4) is something that is not "construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair" pursuant to section 290.210(1). In this case, the contract encompasses "major repairs" under section 290.210(1) in that it provides for the replacement of major component parts, particularly after "severe pitting or steel loss" damages occur. Because the contracted work in this case fits within terms defining "construction" under section 290.210(1), the trial court erred in determining the work was "maintenance work" for purposes of applying the Act.

The Nevada Legislature could have chosen to define maintenance broadly to encompass everything save alterations of the facility's size, type or extent as other legislatures have done, but it did not do so, hence the instant case is an even weaker one for giving broad reading to a maintenance exception.

Courts elsewhere have held that when something non-operational is made operational, as with the CM done here, that is "repair" not "maintenance", as in *Quinn v. Hillside Dev. Corp.*, 6090-00, 2002 WL 171626 (N.Y. Sup. Ct. Jan. 22, 2002):

> The threshold question here, however, is whether the work in which plaintiff was allegedly engaged when he was injured falls within the ambit of Labor Law § 240(1). Section 240(1) requires all contractors and property owners and their agents:
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> > ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure [to] furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.
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> Contrary to defendant's position, the Court finds that the unscheduled call to the premises to address the complaint of a leaking roof followed by the caulking or sealing of the defective area constitutes a repair under Labor Law § 240(1) (see, *Goad v. Southern Electric International Inc.*, 263 A.D.2d 654, 693 N.Y.S.2d 301 [3d Dept., 1999] citing *Crossett v. Schofell*, 256 A.D.2d 881, 681 N.Y.S.2d 819 [3d Dept., 1998]; *Cox v. International Paper Co.*, 234 A.D.2d 757, 758, 651 N.Y.S.2d 230; see also, *Russ v. State of New York*, 267 A.D.2d 833, 699 N.Y.S.2d 822 [3d Dept., 1999]). This is so even though the area sealed or caulked may be small. While the area upon which work is performed and the time needed to perform the task may be factors to consider upon distinguishing maintenance work from a repair, neither is determinative. This is especially so where, as here, the underlying work is performed in connection with a complained of leak.

The Commissioner should treat as a "repair" here (1) work getting the ATS system to run again after it was shut down due to significant mechanical difficulty;[4] and (2) replacement of non-consumables (the protypical examples of consumables being the oil filter in one's care or window panes and locks in wooden doors), including the rebuilding of parts for such replacements.

A "repair" exists even when parts are replaced on a schedule or during a prescheduled inspection, because (1) the work done by the actual workers is the same regardless of its prescheduled nature, and hence the impact on the labor market the same, and (2) relegating everything prescheduled to be exempt "normal maintenance" does not help bring in small contractors nor relieve awarding bodies of any contracting paperwork (the stated goals of those advocating a normal maintenance exception before the Legislature). By packaging repairs into a single long-term requirements contract like that here, there are administrative savings achieved which make payment of prevailing wage even more affordable than if no package existed and each task had to be contracted separately.[5] Moreover, if all it takes to bring otherwise-covered repairs outside the coverage of prevailing wage law is to have some schedule, that is not a hard piece of paper for an awarding body and contractor to create in order to eviscerate the ostensible coverage of repairs by the Prevailing Wage Law (PWL). Even though OSHA expressly favors defining tasks as "maintenance" rather than as repairs/construction because this results in workers

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[4] There should be no requirement that parts replacement be involved, because common experience in dealing with automobile repair and maintenance is that work considered "repair" often does not involve parts replacement: for example, if your transmission stops working because a piece of debris lodges in the transmission valve, it takes a mechanic several hours to pull out parts of the engine to get at the transmission, pull out and disassemble the transmission, remove the debris, and put everything back together. Everyone considers such significant work to be repair. Similarly, if a sensor for your seat belt malfunctions and the mechanic has to spend hours taking the seat apart to get at and switch it off, or a sensor in your dashboard is stuck on but it requires hours taking the dashboard apart to reset it, no one would reasonably call that extensive work mere "normal maintenance" rather than repair just because no parts were replaced.

[5] Practice under the federal Davis Bacon Act and Service Contract Act (which treat maintenance different from repair) is to treat parts replacement in conveyances as repair even if prescheduled. TR 952-53. The Nevada Division of Industrial Relations has also recognized in its regulations that it is "repair" rather than "maintenance" to replace parts:

> NAC 455C.424 "Maintenance" defined. "Maintenance" means a process of routine examination, lubrication, cleaning and adjustment of parts, components and subsystems of an elevator to ensure that the elevator satisfies the requirements set forth in NAC 455C.400 to 455C.528, inclusive. ***
> NAC 455C.436 "Repair" defined. "Repair" means the reconditioning of a part, component or subsystem of an elevator which is necessary to ensure that the equipment of the elevator satisfies the requirements set forth in NAC 455C.400 to 455C.528, inclusive.

being provided greater protections,[6] OSHA nonetheless has noted that pre-scheduling does not mandate a finding of maintenance: "if a bridge was to be stripped and repainted it would be considered construction even if the repainting were to be done on a scheduled basis. *** Note that, though the work may itself occur during a scheduled 'maintenance outage', this alone is not enough to qualify it as maintenance. For example, it is possible that the work may be construction, but scheduled during a maintenance outage to minimize lost productivity." OSHA Standards Interpretations 1926.32(g), Letter of 11/18/03 to Raymond Knobbs, Minnotte Contracting Corp, at ww.osha.gov/pls/oshaweb.

The Commissioner should set forth his standards for what constitutes a "repair" and then leave to the County to exactly determine the amounts, rather than his taking on the burden of doing such calculations himself. The "corrective maintenance" tasks here which were usually repairs by any common-sense definition exceeded $1.2 million in the first year alone because they were 40% of the work. They dropped in percentage largely because of company's removal of SIMS codes used by workers to indicate repairs (UX 23) and new instructions on recording by managers (which resulted from pressure from upper management to reach company-wide statistical targets), including reiteration of the absurdity of labelling as "preventive maintenance" any repair done during a scheduled inspection no matter how major the repair done. TR 129-30; BX 29 at 3. Because the actual repair tasks detailed on UX 1 even rejecting many entries still comes to many times more than $100,000, at minimum a remand to the County is called for.

Bombardier's Exhibit 131 attempting to exclude most of what was listed in UX 1 makes the serious error of excluding many entries for lack of a parts cost next to the work entry – but the work was clearly replacement of parts (as usually marked "rpl") and earlier in UX 1 the cost of most of these parts was already shown under the rebuild logs. See BX 131 at pp 002-003. The workers preparing this spreadsheet judiciously did not list a parts cost twice, so thus for example when listing the task of replacing filler strips on 7/2/08 (p. 009), did not repeat the fact these strips cost $219 each which was shown on p. 002. Bombardier should not have stricken that 7/2 entry in pink as it did. Similarly on that

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[6] See, e.g., OSHA Standards Interpretation 1926.32, 1994 WL 16189770, Memorandum For Regional Administrators of 8/11/94: "where an activity cannot be easily classified as construction or maintenance even when measured against all of the above factors, the activity should be classified so as to allow application of the more protective 1910 or 1926 standard, depending on the hazard." www.osha.gov/oshweb and prior Ex. L.

day workers replaced door operators but Bombardier suck the entry in pink for supposed lack of parts cost, but the cost for these parts ($215.27) is again shown on p. 003. Indeed, many (perhaps most) of the entries stricken by Bombardier for supposedly lacking a parts cost are shown as "rpl" tasks meaning there must have been an associated parts costs, as obviously none of this stuff is free.[7] Hence Bombardier's revisions to UX1 are utterly unreliable.

DOA should be instructed what the Commissioner considers to constitute "repairs" and then ordered to calculate the total amount of repair hours and the resulting backpay. However, if the Commissioner for some reason decides that his office should calculate the exact dollar amount of repairs, then it should defer to worker testimony and estimates such as UX 1, as that is the norm for courts and agencies when the employer as here has not followed legal or regulatory requirements as to keeping of time records. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88, 66 S.Ct. 1187, 1192-93, 90 L.Ed. 1515 (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 as contemplated by the Fair Labor Standards Act. 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. See Note, 43 Col.L.Rev. 355.
>
> 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 requirements of s 11(c) of the Act. 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.

[7] For example, it struck from pages 009-12 the 29 entries for replacements next to which no parts cost was listed, even though most of the parts' cost was listed in the Rebuild Logs on pp 002-003.

This approach has been applied to numerous wage/hour laws. See, e.g., *Amaral v.Cintas Corp.*, 163 Cal.App.4th 1157, 1189, 78 Cal.Rptr.3d 572, 597 (2008)("One long-standing application of burden-shifting occurs in the wage-and-hour context when an employer's compensation records are so incomplete or inaccurate that an employee cannot prove his or her damages."); *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333, 1338 (CA 9 1988) ("The records that employers are required to keep by the FLSA and by ERISA may be the only evidence available to employees to prove that their employers have failed to compensate them in accordance with the statute. An employer cannot escape liability for his failure to pay his employees the wages and benefits due to them under the law by hiding behind his failure to keep records as statutorily required.").[8]

Bombardier's reliance on its SIMS records is hopelessly-mistaken as it did not treat as "repair" anything done under a PM- or CM-type code. TR 220. Moreover, workers were told at time of hire that all that mattered was inputting something for all hours, not categorizing the work correctly. TR 753-57; 1128-29, 1136. The task codes were obviously inputted inaccurately on many occasions given that the site secretary would often input these codes without getting information from workers (Id; TR 840). The detailed weekly records (BX 16) on their face are questionable as they show many workers put down the same general recovery code for every hour of every week, week after week. The testimony from all witnesses made clear this workplace is not that monotonous. Those who used this recovery code testified that in fact some of the time coded as recovery was actually spent on rebuilds and repairing spindles. TR 754, 756-57; 1128-30. Melvin Smith admitted that Nick Banas who listed all his time as recoveries in

[8] *Accord, Mid Hudson Pam Corp. v. Hartnett,* 156 A.D.2d 818, 549 N.Y.S.2d 835 (N.Y.A.D. 1989)("Although petitioners are experienced public contractors and were aware of the prevailing wage statutes, their records were so incomplete that it was not possible to bring them to the statutorily mandated standard of record keeping. The remedial nature of the enforcement of the prevailing wage statute [cite] and its public purpose of protecting workmen [cites] entitled the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate (see, *Anderson v. Mt. Clemens Pottery Co.*[cite]). 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."); *Hernandez v. Mendoza*, 199 Cal.App.3d 721, 726-28, 245 Cal. Rptr. 36 (1988); *Wage Claim of Holbeck v. Stevi-West, Inc.*, 783 P.2d 391, 395 (Mont. 1989); *State ex rel. State Labor Commissioner v. Goodwill Industries*, 478 P.2d 543, 545 (N.M. 1970); *Geneva Woods Pharmacy, Inc. v. Thygeson*, 181 P.3d 1106, 1109 (Alaska 2008); *Schoonmaker v. Lawrence Brunoli, Inc.*, 828 A.2d 64 (Conn. 2003); *People ex rel. Illinois Dept. of Labor v.2000 W. Madison Liquor Corp.*, 917 N.E.2d 551 (Ill. App. 2009).

fact instead did significant work on replacing autolocks. TR 194. Smith also admitted the rebuild logs would be more reliable than SIMS entries. TR 200-201. A comparison of SIMS entries with more contemporaneous and diligently-kept workplace records showed the SIMS coding in merely maintenance categories was inaccurate. UX 24. DePiero personally observed much undercounting of repair work in SIMS coding by co-workers. TR 578-80. The SIMS entries here are no more reliable than a lawyer's whose timesheet claims he or she worked work on a single case and nothing else 8 hours per day 5 days per week every week for years: the accuracy of that is extraordinarily-unlikely given all the interruptions everyone experiences in daily life from other demands on their time, both from work and family. Hence the Commissioner should not use SIMS data to make any calculations here. Instead he should direct the County to complete the task begun by UX 1 of looking at the actual tasks done, with adjustment for any tasks the Commissioner believes are not truly repairs.

County staff was mistaken in arguing Claimants' interpretation of the maintenance exception would mean that minor repairs such as sprinkler replacement as part of lawn care contracts would become covered by prevailing wage. Not so: (1) the amount of such repair work would almost never exceed the $100,000 threshold required for prevailing wage coverage; (2) further, each of the factors considered by courts and agencies in finding something true repair rather than maintenance would not be met: for example, sprinkler heads cost only a few dollars, not the hundreds of dollars that many Bombardier parts cost; (3) sprinkler heads are not a major structural system like elevators and APMs, (4) sprinkler head repair is unskilled work, whereas Bombardier techs need years of training in order to do most of the repair tasks they did; and (5) the number of minutes needed for a sprinkler head replacement is, like the lock and window replacement described in the legislative history, a handful of minutes, not the hours that many repair tasks took on the ATS system.

In the prevailing wage context, Pennsylvania also has a statute very similar to Nevada's under which maintenance is exempt but repair is covered, and courts have repeatedly construed this to mean that major repairs are covered even when done in conjunction with maintenance tasks. *See Henkels & McCoy, Inc. v. Dept. of Labor & Industry*, 598 A.2d 1065 (Pa. Commw. Ct. 1991) (holding that replacement of wiring was repair not maintenance even though existing conduit was just reused); *Borough of Schuylkill Haven v. Prevailing Wage Appeals Bd.*, 6 A.3d 580, 584 (Pa. Commw. Ct. 2010)

("the Board also correctly relied upon the $250,000.00 cost in characterizing the work at issue as large scale rehabilitation that does not fall within the maintenance exclusion for repairs under the Act."); *Borough of Youngwood v. Pennsylvania Prevailing Wage Appeals Bd.*, 596 Pa. 603, 615-16, 947 A.2d 724, 731-32 (Pa. 2008) ("given the clear purpose of the Act to protect workers from receiving substandard wages on public works projects, these modifiers cannot be interpreted to mean that only when a structure or other facility is, through a public works project, enlarged, reduced, or replaced with an entirely new material is the project non-maintenance, no matter how extensive the work. Such an interpretation would be completely incompatible with the clear and significant legislative intent of ensuring that workers on public works projects be paid at least the prevailing minimum wage. The exception does not eviscerate the rule. *** In *Kulzer Roofing, supra*, the Commonwealth Court observed that the word 'repair' would be written out of Section 2(5) of the Act should an expansive interpretation of 'maintenance work' be observed.").

III. THE "NORMAL OPERATION" EXEMPTION DOES NOT APPLY HERE

"Directly related" to "normal operation" under NRS 338.011 means more than the fact that the part of the property being repaired is important to the property's users. Having running water, electrical and air conditioning systems are obviously just as essential to the Airport's operation as its tram system, but there is no hint the Legislature intended to exempt repairs of all these systems. Under Respondents' interpretation, only cosmetic work would be left covered by the law, as everything else is essential to buildings' essential functions. Respondents' interpretation of the "directly related to normal operation" exception as excluding any work on an essential part of a building would lead to absurd consequences and hence must be rejected. See *Welfare Division v. Washoe Co. Welfare Dept.*, 503 P. 2d 457, 88 Nev. 635 (1972)("The entire subject matter and the policy of the law may also be involved to aid in its interpretation, and it should always be construed so as to avoid absurd results."); *Las Vegas Sun v. District Court*, 104 Nev. 508, 511, 761 P.2d 849, 851 (1988)("the interpretation should be reasonable and avoid absurd results.[cites]."); *Washoe Medical Ctr. v. Reliance Ins. Co.*, 112 Nev. 494, 497, 915 P.2d 288, 289 (1996)(same). The legislative history shows that custodial-type work is what was actually intended by the "normal operation" exception. Ex. H. Most of the repair work done by the ATS techs here was done at night or during the daytime window while the system was actually not operating. See, e.g., *United States v. West Indies Transp., Inc,* 127 F.3d 299 (3d Cir.1997) and *Oelsner v. US*, 2003 WL

1564255, 60 Fed. Appx. 412 (3d Cir. 2003) (construing "normal operation" of a vessel to not include work repairing it in drydock). CBE 552 itself labels "operation" as what is done by the County employees in the Control Center, not what Bombardier ATS techs did. See Section 2.1.1 ("Operation of the ATS, including staffing of the Control Center Facility, will be performed by the OWNER.").

However, even applying an expansive definition of the operation exception to anything necessary to keep a building open, the evidence showed the new security gate for Terminal C eliminated any necessity for passengers to use trams, and indeed made this tram less convenient than walking for many passengers. This lack of necessity for the C trams was known at the time CBE 552 was entered into. TR 420-21. Thus by any reasonable interpretation of the "normal operation" exception, it does not apply to fixing the ATS system.

IV. THERE IS NO LEGITIMATE WARRANTY DEFENSE HERE

Bombardier makes no argument that hours appearing on the CBE 552 payroll actually should have been deemed warranty work covered by Contract 2305. Bombardier would be admitting to seriously over-billing the County. The County alone makes this warranty argument, but its failure to show any effort whatsoever to recover from Bombardier from this warranty overbilling shows the County is simply grasping at creative new theories to justify its earlier mistake in not including a prevailing wage clause. The parties' conduct is a better guide to what their contracts covered than post hoc reinterpretations by counsel. More importantly, the Commissioner's job is not based on what contract number the work should have been billed to. If the work was underpaid under the law, the Commissioner is obligated to enforce the law even if this case bears a CBE552 caption. The hours now claimed to be warranty work were not included in the claim for Construction hours. The County was not party to the prior settlement and hence has no standing to assert it as a bar here, and the Commissioner was specifically instructed by the Legislature to disregard private agreements in NRS 338.050. The courts and agencies have frequently rejected the claim that warranty work is not covered by prevailing wage laws. The DOL'S Wage Appeals Board did so in *Norsaire Systems, Inc.*, 1995 WL 90009 (DOL W.A.B. Case No. 94-06, decided 2/28/95)(Ex. J)("Neither Board precedent, nor Wage and Hour opinion letters, nor the guidance set forth in Wage and Hour's Field Operations Handbook places work outside the bounds of Davis-Bacon coverage simply because the work is performed under warranty."; follows

Wage Hour Staff's position in the case that "no special significance should be attached to the label 'warranty work'"). This is strongly-persuasive authority in Nevada: "Nevada's prevailing wage law is derived from the federal Davis-Bacon Act. 'When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts.'" *State, Bus. & Indus. v. Granite Constr.*, 118 Nev. 83, 88, 40 P.3d 423, 426 (2002). New York courts have also rejected the claim that warranty work is not covered by prevailing wage law:

> Petitioners contend that a manufacturer's replacement of warranted goods used in a public works project cannot constitute a public works contract subject to the prevailing wage rate requirement of Labor Law § 220. We disagree. Although we are not required to afford deference to respondent's interpretation of the statutes (see, *Matter of Stephens & Rankin v. Hartnett*, 160 A.D.2d 1201, 1202, 555 N.Y.S.2d 208), we nevertheless must agree with conclusions arrived at by respondent in the case at bar. The Labor Law's prevailing wage requirement reflects a strong public policy in this State and the statute is to be liberally construed to effectuate its beneficent purposes (id.). As a general rule, the following two elements must be present before the statute applies: "(1) the public agency must be a party to a contract involving the employment of laborers *497 * * * and (2) the contract must concern a public works project" (*Matter of Erie County Ind. Dev. Agency v. Roberts*, 94 A.D.2d 532, 537, 465 N.Y.S.2d 301, aff'd 63 N.Y.2d 810, 482 N.Y.S.2d 267, 472 N.E.2d 43).
>
> With respect to the first element necessary for application of the statute, we reject petitioners' contention that because the State was not a named party to the sales contract of the roofing materials, respondent is precluded from applying Labor Law § 220 to Firestone's warranty work. Significantly, there is no statutory requirement that the State be a direct party to the challenged contract because the wage and supplement provisions apply broadly to "laborers, work[ers] or mechanics upon such public works" (Labor Law § 220[3]). The State's general contract required the roofing material to include a 10–year warranty. Accordingly, Firestone's 10–year warranty was an essential term of the State's general contract. Moreover, inasmuch as a warranty can be deemed to be a contract (see, **773 77 CJS, Sales, § 302[c], at 1118–1119; see also, *Caceci v. Di Canio Constr. Corp.*, 72 N.Y.2d 52, 55, 530 N.Y.S.2d 771, 526 N.E.2d 266), the State was a party to the warranty contract since it was issued to the State.
>
> As for the question of whether the subject agreement (whether it be perceived as the general contract or the subsequent warranty contract) concerns a public works contract, we find that it does. The replacement of the roofing material on the Armory, a State-owned public building, for the benefit of public employees certainly constitutes a public works project (see, *Matter of Twin State CCS Corp. v. Roberts*, 72 N.Y.2d 897, 899, 532 N.Y.S.2d 746, 528 N.E.2d 1219). Notably, while a "public works" contract is not statutorily defined (see, *Matter of Erie County Ind. Dev. Agency v. Roberts*, *supra*, 94 A.D.2d at 537, 465 N.Y.S.2d 301), the phrase has been judicially defined to include a contract to repair a "public works" project (see, *Matter of Sewer Environmental Contrs. v. Goldin*, 98 A.D.2d 606, 469 N.Y.S.2d 339; see also, *Matter of Stephens & Rankin v. Hartnett, supra*). Petitioners point out, however, that this definition does not include contracts for the sale of goods used in public works projects (see, *Bohnen v. Metz*,

> 126 App.Div. 807, 810, 111 N.Y.S. 196, aff'd 193 N.Y. 676, 87 N.E. 1115; *Downey v. Bender*, 57 App.Div. 310, 314, 68 N.Y.S. 96 [earlier cases involving the interpretation of a predecessor of Labor Law § 220]) and Firestone's original status in this matter was that of one selling roofing material. Nevertheless, Firestone subsequently contracted to repair the roof, if necessary, and Firestone's own preinstallation notice makes clear that a warranty contract was an optional component of any purchase of roofing material and, as such, the purchase price of the warranty was severable from the purchase price of the materials.
>
> Petitioners' remaining arguments that Labor Law § 220 does not apply to its warranty work on the Armory's roof have been examined and have been found to be unpersuasive. The warranty was publicly funded in the amount of $2,100 of the general contract price. The lack of competitive bidding on the warranty contract does not mean that it cannot be considered a public works contract (see, *Matter of Door Specialties v. Commissioner of Labor*, 158 A.D.2d 923, 924, 551 N.Y.S.2d 88).

Bridgestone/Firestone, Inc. v. Hartnett, 175 A.D.2d 495, 496-98, 572 N.Y.S.2d 770, 772-73 (1991)

Hence the existence of a warranty here provides Bombardier no defense. The prior claim under Contract 2035 did not include hours which at that time were not treated by the County or Bombardier as under 2305, such as the work done on the vehicle bogey. In any event, Bombardier has never before asserted the prior settlement as a bar and hence has waived any such argument. Moreover, a private settlement is no bar to the Commissioner's authority due to NRS 338.050.

V. REPAIR WORK ON THE VEHICLES THEMSELVES WAS COVERED PUBLIC WORK, AS A FIXTURE IS NOT REQUIRED BY LAW, BUT EVEN IF IT WERE, THESE VEHICLES WERE FIXTURES

The PWL's coverage of "public works or property" is quite broad, for it does not say "real property" nor contain any limit to "fixed" works. Indeed, the Legislature confirmed in NRS 338.16985 that "public work" can include things other than fixed works:

> A construction manager at risk who enters into a contract for the construction of a public work pursuant to NRS 338.1696: * * * 2. If the public work involves the construction of a fixed work that is described in subsection 2 of NRS 624.215, shall perform not less than 25 percent of the construction of the fixed work himself or herself or using his or her own employees.
>
> (Emphasis supplied)

Nevada prevailing wage law has never been construed as requiring the work tasks be done on permanent fixtures: for example, the Commissioner's listed job classes have always included scaffolding erectors and repairers of trucks, and normally listed repairers of construction equipment. *See also Heller v. McClure & Sons, Inc.*, 963 P.2d 923 (Wash. App. 1998)

(equipment mechanic's work held covered by state prevailing wage law);[9] *Hous. by Vogue, Inc. v. State, Dept. of Revenue*, 403 So. 2d 478, 480 (Fla. Dist. Ct. App. 1981) approved, 422 So. 2d 3 (Fla. 1982) ("While all fixed works constructed for the state or its subdivisions are public works, we do not consider that "public works" are limited to fixed works. * * * The only distinction between this contract and a traditional contract for a construction of a fixed building is that these units are relocatable. We do not consider this to be a material distinction in the determination of whether or not appellants have shown that this construction comes within the exemption."); *Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S. 24, 33, 31 S.Ct. 140 (1910) (holding construction of ships for federal government was covered by statute for "public work", noting "Of course public works usually are of a permanent nature and that fact leads to a certain degree of association between the notion of permanence and the phrase. But the association is only empirical, not one of logic. Whether a work is public or not does not depend upon its being attached to the soil; if it belongs to the representative of the public it is public, and we do not think that the arbitrary association that we have mentioned amounts to a coalescence of the more limited idea with speech, so absolute that we are bound to read 'any public work' as confined to work on land."); 38 U.S. Op. Atty. Gen. 418, 1936 WL 1683 (U.S.A.G. 1936) (Ex. O) (applying this Supreme Court holding to coverage under Davis Bacon, finding Davis Bacon covers work on ships);[10] DOL Field Operations Handbook (2010) at 15d11 (adhering to this view); *Twin State CCS Corp. v. Roberts*, 125 A.D.2d 185, 11 N.Y.S.2d 958 (N.Y. Supr. 1987) (installation of telecommunications system in public building held "public work" even though removable), aff'd, 72 N.Y.2d 897, 528 N.E.2d 1219, 532 NYS 2d 746 (N.Y. App. 1988). If Nevada

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[9] Accord, *Griffith Co.*, 17 BNA Wage & Hour Cases 49 (DOL WAB 1965) ("laborers or mechanics employed by equipment rental dealers who, pursuant to a lessor-lessee arrangement with contractors, may be required to go upon the site of construction otherwise covered by the Act to repair leased equipment are entitled to the benefits of the Act."); *U.S. v. Sparks*, 939 F. Supp. 636 (C.D. Ill. 1996) (also holding equipment repair covered); *In re Vecellio & Grogan. Inc.*, 1984 WL 161749 (DOL WAB 1984); *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) (finding coverage for mechanics who do "not work on a highway, building, or other structure but rather is engaged solely in maintenance of construction equipment.").

[10] This decision is of unique significance because it was rendered before Nevada first adopted any prevailing wage laws.

prevailing wage law does not apply to moveable items, then the Airport should never have required prevailing wage for repairs to the moving walkways which can be wheeled around or even outside the Airport. UX 7.

While a fixture is not required by Nevada's PWL, these ATS vehicles were fixtures: they were specially manufactured to the Airport's particular specifications, weigh over 40,000 pounds each, cannot run on roads but only a specialized concrete guideway, require a special crane to install, require hundreds of manhours to be adapted to their location, and never leave the location where initially installed except to be discarded. TR 134-35, 503-9; UX 5. This is not like a bus which readily can be driven out of Las Vegas and immediately put to work in another community. ATS vehicles are instead like elevator cabs have long been recognized to be fixtures. See, e.g., *Medical Tower Corp. v. Otis Elevator Co.*, 104 F.2d 133 (CA 3 1939) (Ex. B); *Blake-McFall Co. v. Wilson*, 193 P. 902 (Or. 1920) (Ex. C); *Oliver & Williams Elevator Corp. v. State Bd. of Equalization*, 48 Cal.App.3d 890 (1975) (Ex. D). Courts have repeatedly found other systems similar to this one to constitute "fixtures". For example, in *Seatrain Terminals of California, Inc. v. County of Alameda*, 83 Cal.App.3d 69, 147 Cal.Rptr. 578 (1978) (Ex. E), the Court found a large movable crane to be a fixture, relying on decisions finding that rail and conveyance systems like this one adapted for use on a single piece of property are also "fixtures." 83 CA3d at 78-79, 147 CR at 584 (citing among other cases *United Pac. Ins. Co. v. Cann*, 129 Cal. App. 2d 272 (1954) (Ex. F)). In addition to the cases cited by the *Seatrain* Court, see also *Dobschuetz v. Holliday*, 82 Ill. 371 (1876)(Ex. G) (holding boxes used in mine's system for hauling coal to be fixtures even though themselves removable: "Such boxes are a part of one system of machinery, each part being indispensable to the working of the other, and without which other parts would be utterly valueless for the purposes intended.") (Ex. G); *Curran v. Smith*, 37 Ill. App. 69 (1890) (Ex. H) (same conclusion as to cars used in connection with a drier in a brickyard); *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 P. 744 (1897) (Ex. I) (same as to ore cars used in operation of smelting plant).

Fixture status exists here under the Nevada test reiterated in *Leasepartners Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182, 187 (Nev. 1997):

> This court has stated that the three factors to determine whether an item is a fixture are annexation, adaptation, and most importantly, intent. *Fondren v. K/L Complex, Ltd.*, 106 Nev. 705, 710, 800 P.2d 719, 722 (1990). We also stated:
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> > The annexation test is met where the chattel is actually or constructively joined to the real property.
> >
> > The adaptation test is met when the object in question is adapted to the use to which the real property is devoted. However, the most important factor in making the determination of whether an item is a fixture ... is the intention of the parties at the time the items were installed.
>
> *Id.* (citations omitted).

There can be no dispute the ATS cars are specially-adapted for use at McCarran. Both adaptation and intent are shown by the fact the cars at McCarran were adapted for this particular location, and have never been used elsewhere, either before or after their arrival at McCarran. These cars are "constructively joined to the real property" (id.) because the facility has been altered with a special concrete guideway and doors just for them, and they are so unique, heavy, large, and hard to move elsewhere that it would be unreasonably difficult to move them (except to discard them when they no longer work). These facts were established by adverse witnesses. UX 5; TR 134-35; 503-9. See also *Searle v. Town of Bucksport*, 3 A.3d 390, 396 (Me. 2010)("Physical annexation occurs when an object is affixed to the realty . . . or simply through the object's sheer weight, *Hinkley & Egery Iron Co. v. Black*, 70 Me. 473, 480 (1880); see also *United States v. County of San Diego*, 53 F.3d 965, 968 (9th Cir.1995) (concluding that a nuclear device weighing between 400 and 500 tons was annexed to the ground by gravity); *Pritchard Petroleum Co. v. Farmers Co-op. Oil & Supply Co.*, 117 Mont. 467, 161 P.2d 526, 531 (1945) (finding that four-ton tanks held in place by their weight were affixed to the ground)."); *General Motors Corp. v. City of Linden*, 20 N.J.Tax 242, 324 (N.J.Tax 2002) ("An item of personal property not physically attached or fastened to a building or land will be deemed affixed where the item is sufficiently large and heavy that gravity alone holds it in place and the building or land has been specially modified or adapted to accommodate or enclose the item."); *In re Heflin*, 326 B.R. 696, 702 (Bkrtcy.W.D.Ky. 2005) ("Simply because an item could possibly be removed does not prevent it from becoming a fixture."); *Taco Bell v. Commonw. Transp. Comm'r*, 710 S.E.2d 478, 481-82 (Va.

2011)(reaffirming ore car cases, noting "whether an item can be removed from the realty is not the test for establishing whether or not it is a fixture.").

VI. THE REPAIR WORK HERE WAS A "PROJECT"

Bombardier has argued that this work was not a project because not every task was listed with a deadline in the contract. However, CBE 552 incorporated Preventative Maintenance Schedules, three single-spaced sheets listing more than 50 scheduled repairs, including replacing significant systems such as guide spindles, air dryers, nine kinds of relays, traction motors, gears, and reverser cylinders. The industry standard from ASCE which Bombardier helped develop requires a "comprehensive maintenance plan". UX 8 at 14.

Just as important, Bombardier's interpretation of the statutory term "project" as requiring prescheduling is also flawed. So long as NRS 338 covers "repairs", it is going to have to cover work that is not scheduled well in advance, because that is in the very nature of many repairs: one cannot readily predict when the elevators, air conditioning or plumbing systems are going to break down. The word "project" is broad enough to encompass long-term requirements contracts like the one here and like localities' contracts for a year's worth of area-wide streetlight repair, signal repair and pavement repair.[11] Injecting a requirement that work be short-term or pre-scheduled makes no sense in terms of the underlying purposes of prevailing wage law to protect workers and local contractors from low wages. Indeed the more months of work are to be provided under a single contract, then the less protection would exist for workers and local contractors. However, this type of long-term requirements contract generates additional funds to help pay prevailing wage, as it is often more cost-effective for awarding bodies and contractors to bundle various tasks into a single long-term contract rather than spend more time and money bidding and contracting each task separately.

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"

[11] See, e.g. UX 27-28 (Clark County Annual Streetlight Maintenance Contract for Clark County 215 Bruce Woodbury Beltway–CL-2012-295 ; City of Las Vegas Annual Traffic Signal Maintenance–CL-2010-366; City of Henderson 2012 Streetlight knockdown and replacement program–CL-2012-193; City of Las Vegas 2010 Annual Slurry Seal–CL-2010-223; City of Henderson 2013 On-Call Pavement Patching–CL-2012-118).

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."). Nevada agencies have repeatedly defined the term "project" without requiring the work be short-term or prescheduled by an agency. NAC 445A.720 ("'Project' means the activities or tasks identified in an agreement for financial assistance for which the recipient may expend, obligate or commit money."); NAC 348A.100 ("'Project' means any construction, planned expenditure, program or other activity intended to be financed by a private activity bond which is described in sufficient detail to determine eligibility for financing."); NAC 321.330 ("'Project' means a project that is authorized by law and may include a project for: 1. The control of erosion; 2.Treatment relating to water quality; or 3. The restoration or enhancement of natural watercourses or stream environment zones, in the Lake Tahoe Basin.").[12]

Moreover, here the "project" is really the entire Airport, because just like repairing plumbing or electrical systems, the APM work here allows this large facility's customers and workforce to better use the facility. Defining project to require pre-scheduling would force awarding bodies and the Commissioner's office to review all of the numerous tasks that go into any construction or repair activities and then determine how pre-scheduled they must be, which would be incredibly burdensome to the Commissioner's office and to the contracting agencies. Such herculean administrative efforts cannot be what the Legislature intended in using the term "project". Bombardier's approach is also contrary to the many 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

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[12] See also NAC 527.120 ("'Project' means all activities conducted in this state by a person on or beneath the surface of the land that could: 1. Result in the removal or destruction of any plant on the list of fully protected species of native flora, including, without limitation, the seeds, roots or other parts of such plants; or 2. Disturb any management area established for the conservation, protection, restoration and propagation of any plant on the list of fully protected species of native flora.").

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); *In re Dworshak Dam*, 1973 DOL Wage App. Bd. LEXIS 9 (1973); *Chester Bross Const. Co. v. Missouri Dept. of Labor and Indus.*, 111 S.W.3d 425, 427 (Mo.App. 2003).

To inject a requirement that work be short-term makes no sense in terms of the underlying purposes of the prevailing wage law, to protect workers and local contractors from depressing of the labor market. Indeed, such a requirement would be exactly contrary to these statutory purposes, as the more months of work was provided under a single contract, then the less protection would exist for workers and local contractors. Moreover, this type of long-term requirements contract generates additional funds to help pay prevailing wage, as it is often more cost-effective for both awarding bodies and contractors to have various tasks bundled into a single long-term contract rather than deal with the extra time and expense of bidding each task separately. [13]

Defining the term "project" broadly is both consistent with the statutory purpose and with longstanding caselaw about such term:

> In interpreting "project" our task has been made difficult both by the dictionary definition of the word and the use of "project" and similar terms in the act itself. Webster defines project as a "plan or design ... scheme ... proposal...." (Webster's New Internat. Dict. (3d ed. 1961) p. 1813.)
>
> Such synonyms provide little interpretative aid. *** With this in mind, we resort to the rule declared in *People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 543-544 [72 Cal. Rptr. 790, 446 P.2d 790]: A principle "which must be applied in analyzing the legislative usage of the word `project,' is that `the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in [the word's] interpretation, and where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is enlarged or restricted and especially in order to avoid absurdity or to prevent injustice."
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> *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 260, 104 Cal. Rptr. 761, 502 P.2d 1049 (1972)(construing "project" to include any "lease, permit, license, certificate or other entitlement for use")

[13] Numerous agencies view even a maintenance contract as a "project": see, e.g., USDOT, 23 C.F.R. § 630.1104: "For the purposes of this subpart, the following definitions apply:*** Federal-aid Highway Project means highway construction, maintenance, and utility projects funded in whole or in part with Federal-aid funds."

The Alaska Supreme Court rejected an effort to construe the term "project" as merely short-term in *Anderson v. Alyeska Pipeline Serv. Co.*, 234 P.3d 1282, 1286-88 (Alaska 2010), in part because this ill-served statutory purposes:

> Anderson urges us to construe "project owner" in AS 23.30.045(f) so that it applies only to projects, particularly construction projects, that have a limited duration. *** the policy considerations that prompted the legislature to enact the 2004 amendments to the workers' compensation act apply outside the construction context. As we noted in *Schiel v. Union Oil Co. of California*, the 2004 amendments had the following purposes: "to ensure or expand workers' compensation coverage for workers, to increase workplace safety, to prevent 'double dipping,' and to provide protection from tort liability to those who are potentially liable for securing workers' compensation coverage." Limiting application of the amendments to the construction field or exempting large employers with ongoing businesses from the definition of "project owner," as Anderson urges, would undermine some of these goals. If Anderson's limited construction of "project owner" were adopted, a grocery store could use contract labor to stock its shelves and completely avoid workers' compensation liability for work-related injuries to the contract laborers simply because its use of contract labor was not related to building or construction or because it used contract labor as part of its day-to-day operations. We see nothing to suggest that the legislature intended such a result.

So too here, there is nothing to suggest the Legislature intended the terms "repair" and "project" in NRS 338.010 to refer to only short-term agency-specified work rather than long-term requirements contracts like CBE 552.

VII. BOMBARDIER CANNOT PROVE THE RAILROAD COMPANY EXCEPTION APPLIES HERE

The railroad exemption in NRS 338.080 does not apply here because (1) this APM system is not a true railroad and Bombardier does not own or operate it, and (2) the company is not a true railroad company as it employs no on-board personnel in Nevada nor indeed anywhere else in the U.S.A.

Bombardier's APM system does not use true rails nor have the special challenges of a true railroad of grade crossings – the challenge which led to the exemption. Instead, the ATS has a concrete guideway on which it runs rubber-tired vehicles. It is not governed by the usual legal and regulatory standards for railroads. It does not run across any property lines, not even leaving the property of a single public agency. It is unmanned. For these reasons Bombardier's predecessor (Westinghouse) successfully persuaded the courts that an airport APM is not a "railroad" in *Westinghouse Elec. Corp. v.*

Williams, 325 S.E.2d 460, 463-64 (Ga. App. 1984)(Ex. A).[14] 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 (nor been regulated by: according to PUCN Staff, the only two "railroads" in the State are those listed on its website, Union Pacific and BNSF). NRS 705.690 exempts the Las Vegas Monorail from the PWL but would rendered surplusage if any type of transit on a guideway is somehow a "railroad".[15] Here there are none of the policy reasons for state laws exempting true railroad projects from prevailing wage explained in *Long Island R. Co. v. Dept. of Labor of State of New York*, 256 N.Y. 498, 177 N.E. 17 (N.Y. App. 1931), aff'g 247 NYS 78 (N.Y. Special Term 1931)(Ex. C)(explaining urgent problem of massive increase in use of autos on literally hundreds of streets in each state where railroads crossed meant the delay in bidding process and wage burden from applying state wage and bidding laws would have dealt crushing financial blow to both the railroads and governments involved). The Interstate Commerce Clause and preemption by federal laws governing interstate railroads posed a serious legal obstacle to state regulation of working conditions of true railroad projects.[16] Railway unions with

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[14] Not only is this decision persuasive, but also Bombardier is legally bound by it as the successor to Westinghouse (through Adtranz). See UX4 (last two pages); *Gamble v. Silver Peak Mines*, 35 Nev. 319, 133 P. 936 (Nev. 1913)("Former decrees which are final and unreversed are res judicata of the subject-matter of the suits as then decided between the parties thereto and their successors in interest").

[15] The McCarran Airport APM is not a "monorail" either because that is defined to exclude "a system to transport passengers between two endpoints with no intermediate stops." NRS 705.650. Nevada statutes governing true railroads reference their "track" (NRS 484B.048; 705.428, 705.460), which Bombardier lacks because instead it has a concrete guideway. True railroads require protections such as fencing (NAC 705.170) which any trip on McCarran APM confirms is obviously not in place here. Nevada statutes and regulations address railroad crossings of public streets in detail, crossings which obviously do not exist here with this APM. NRS 704.300, 305; NRS 705.430; .0665, .066. Numerous Nevada statutes and regulations on "railroads" address the conditions of the tracks and rails themselves (NRS 705.460; NAC 705.020 et seq.) and employment qualification and conditions of those working on the train (NRS 705.210, 705.240, 705.390), but the Bombardier APM cars here are entirely unmanned and do not run on rails. The Nevada Legislature confirmed that it has understood "railroad" in its traditional sense when it wrote in NRS 484B.050:"'Railroad train' means a steam, electric or other motor engine, with or without cars coupled thereto, operated upon stationary rails, except streetcars.". That ordinary railroads are all the Legislature had in mind in NRS 338.080 is also clear from the Legislature's repeated references in railroad statutes to shipping of freight and references to the carrying of livestock and protecting of livestock near railroad tracks. NRS 705.090, .100, .110, .120, .130, .140, .150, .160, .170, .180, .190, .200. All these statutes make no sense applied to an airport APM.

[16] See, e.g., *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 47 S.Ct. 207 (1926)(striking down state law restricting interstate railroads as preempted by federal laws); *Southern Pac. Co. v. Mashburn*, 18 F. Supp. 393 (D. Nev. 1937)(striking down state statute regulating number of railcars under Interstate Commerce Clause, following

contractual wage protections were already well established by the time this exemption was put into place by the Legislature, making state statutory wage protection superfluous. See Railway Labor Act ("RLA") of 1926, 45 USC 151 et seq; *Pennsylvania R. Co. v. U.S. Railroad Labor Board,* 261 U.S. 72, 43 S.Ct. 278 (U.S. 1923)(explaining history of wage agreements). None of these reasons for exempting true railroads apply to an APM that does not cross any streets, nor cross state lines, nor is covered by the RLA.[17] Finally, even the APM Guide co-sponsored by Bombardier also distinguishes APMs from railroads. UX 10.[18]

The term "railroad company" is vague as applied to companies with both rail and non-rail businesses. Obviously the Legislature intended the exemption only to apply to when a company is acting *in the capacity of* a railroad company within Nevada. The mere fact Bombardier produces and services railcars elsewhere does not avail it of this exemption, as otherwise any contractor could take control of the entire public works market in Nevada by buying some tiny rail outfit elsewhere and then use the railroad company exemption from prevailing wage for all its work on Nevada schools, office buildings, roads, etc. Bechtel and URS (Washington Group) could have tried that gambit in Nevada public works because of their railcar subsidiaries, but never have. UX 19. Moreover, the "railroad companies" at the time this legislation were passed were the ones providing on-board personnel like Union Pacific, as shown by the various statutes concerning the on-board employees' employment conditions. Such employment is exactly what the Legislature understood a railroad company to do: see NRS 705.210,

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Atchison, T. & S.F. Ry. Co. v. La Prade, 2 F.Supp. 855 (D. Ariz. 1933)). NRS 705.005 confirms the Legislature's intent to avoid federal preemption.

[17] The Company instead stipulated to National Labor Relations Act coverage in NLRB Case No. 28-RC-6636 and itself asserted NLRA jurisdiction in a ULP charge against IUEC, NLRB Case 28-CB-7118.

[18] Bombardier's entry into the McCarran Construction Contract No. 2305 with a prevailing wage provision for painting and electrical work and any work by a licensed subcontractor was an admission that Bombardier was not functioning as a railroad company at McCarran, for this exemption argument would have equally applied to this painting electrical, and subcontracted work. The existence of APM industry standards from ASCE totally separate and apart from railroad standards (UX 8) also helps confirm that APMs are not a type of railroad. "The group that develops construction standards and material specifications for the railroad industry is the American Railway Engineering and Maintenance of Way Association (AREMA). AREMA's web page is www.arema.org." Federal Railway Administration, www.fra.dot.gov/ Pages/1342.shtml.

705.240, 705.390. However, Bombardier admitted that it does not employ any on-board personnel. TR 64.

Even if "railroad company" means a company which merely supplies railcars and services them, could the Legislature have intended that receiving a small percentage of overall revenues from such activities turns a building repair contractor into a "railroad company"? Bombardier did not prove a majority of its revenues come from true railcar work as opposed to other kinds of conveyances. Its revenues and operations outside BT Holdings USA cannot be counted because those are handled by a different subsidiary, and a company cannot pierce its own corporate veil. "A corporation may not pierce its own corporate veil, nor cause its parent or subsidiary to do so. [cite]." *Coast Mfg. Co. v. Keylon*, 600 F. Supp. 696, 698 (S.D.N.Y. 1985). *Accord*, *Betson v. C.I.R.*, 802 F.2d 365, 368 (CA 9 1986); *Stott v. Fox*, 805 P.2d 1305, 1308-9 (Mont. 1990)("To permit this litigation to go forward as to Lee and Bessie Stott, is to permit 'reverse piercing of the corporate veil', thus allowing the shareholders to 'invoke the corporate entity only when it would be to their advantage.' [cite]"); *Jones v. Teilborg*, 727 P.2d 18, 25 (Ariz. App. 1986).

Even if somehow the railroad exemption statute here were deemed clear, Nevada courts say the underlying legislative intent must be enforced even if contrary to the ordinance sense of the language. *McKay v. Board of Sup'rs of Carson City*, 730 P. 2d 438 (1986)("The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute. *City of Las Vegas v. Macchiaverna*, 99 Nev. 256, 257, 661 P.2d 879, 880 (1983). This intent will prevail over the literal sense of the words. Id. at 257-258.")(emphasis supplied). Applying the railroad company exemption here to something that is clearly not a railroad is contrary to legislative intent. Obviously what the Legislature intended was an exemption when a company was functioning inside this State as a railroad company, rather than thinking employment of a few central control operators 2500 miles away in New Jersey entitles such company to build and repair any type of public work it wants to in Nevada without prevailing wage compliance, which is what Bombardier's argument results in.

VIII. THE PROPER PAY RATE

The evidence showed most Bombardier techs made less than $25 an hour in total compensation. UX 18. Bombardier technicians were paid less than the posted rates for all job classes except the

unskilled Fence Erectors and Highway Stripers. The lowest-paid posted classifications potentially applicable (according to Bombardier's expert), Electrician - Communications Technician and Senior Technician, made $35.37 and $49.60 per hour under the applicable 2007-8 posting by the Commissioner. Bombardier apparently argues for using some unposted job class (which would be contrary to NRS 338.020), or for Comm Tech, but very little of the work done by ATS techs resembles the latter's work of installing low-voltage cable. TR 534-36; 943-44

The most closely-analogous job class is Elevator Constructor ("EC"). That is the job class used by the US Department of Labor for APM work. UX 3. Moreover, IUEC labor agreements filed with the Commissioner's office expressly included APMs in their scope of work. UX 2; TR 928-29. An EC who became an ATS tech testified to the overlap in skills and duties. TR 805-6, UX 17. Dr Kevin Murphy actually talked to ATS techs and viewed their worksite before rendering his opinion that the EC job class was closest (TR 534-36), in contrast to what Dr Moss did, which was purely based on paper. Moreover, Moss relied on misconceptions as to the reality of EC work, such as his misconception they are primarily in the initial construction industry (BX 9 at 9): the reality is that the vast majority of them are just repairmen. TR 962-63, UX 17. Moss viewed ATS techs as belonging to the transportation industry, but ECs are just as much in the transportation industry as ATS techs: (1) they both work on conveyances; and (2) they both work extensively at airports. TR 958.[19]

Moss admitted he was relying heavily on the difference in actual pay rates received (TR 272-74, 296), but that approach to job classification means the employer automatically wins in every case like this (his approach can be summarized as "if you accepted such low pay from this employer then your job class must be different"). Such an approach defeats the purpose of prevailing wage laws and their reliance on industry practice of job classification (NRS 338.020(5)) rather than one employer's own unilateral decision what to pay its workers.

Moss also relied on the absence of a formal apprenticeship program for ATS techs, but this is an artifact of their non-union status (TR 289), not a fundamental difference in the nature of the work

[19] His reliance on the fact that a publication mentions ECs adjusting counterweights (BX 9 at 9) further reflected his lack of real-world knowledge, as those need no adjustment after initial installation hence make up an extremely-small proportion of the work done by ECs. TR 963.

performed: ATS techs come to the job with extensive training and then they receive a structured on-the-job training, both of which serve the functional equivalent of apprenticeship.

Bombardier argues that applying the EC rate to this work would be impermissible as a policy change adopted without APA rulemaking. However, the Commissioner's published job descriptions use the phrase "includes but is not limited to" to make clear to everyone that his descriptions are not exhaustive. The Commissioner's introduction to his descriptions in Item 3 instructs all parties not finding some task expressly listed in such descriptions to contact the Commissioner's office – not to simply to put their heads in the sand and walk away from the statutory command to pay the prevailing wage based on prevailing local job class. Further conformity with the APA here stems from the fact IUEC is relying upon a collective bargaining agreement on file with the Commissioner and a DOL publication (its SCA job descriptions). The Commissioner has already fully complied with the APA by adopting regulations notifying employers that his office will rely on CBAs and federal authority in determining job classes in NAC 338.015 an 338.020(2). Commissioner Johnson with judicial support already rejected a similar employer contention that the Commissioner's office must list every single duty in its job descriptions, in *Kusz v. Universal Electric* (Ex. Q), enf'd, Nev. Supreme Ct. Case No. 38031 (2002) (unpublished) (relying on DOL publications and industry labor agreement to determine duties of "general foreman"). This is clearly a very different situation from that involved in the Nevada court cases involving the Operating Engineers and rulemaking which Bombardier has cited. There, the Commissioner was reversed for changing *policy* by stripping job classes of coverage.[20] Here, no policymaking is requested by IUEC's claim, but instead merely interpreting at a single workplace what is commonly understood in the industry by the posted job titles. No case suggests the Commissioner must resort to rulemaking first before enforcing the prevailing wage as to any duty not listed in his posted job descriptions: for example, hammering is not listed under "Carpenter". The APA does not require that which is humanly impossible: for the Commissioner's office to list every last possible task which might be done on every imaginable future construction project. Employers are not allowed to take

[20]Nor is IUEC here asking the Commissioner to reassign tasks which had already been assigned in posted wage determinations to another job class, such as metal roofs, as was involved in another APA case. All IUEC is seeking is to have the Commissioner flesh out the meaning of the terms "Elevator Constructor" and "includes but is not limited to" already in the posted wage determination. Any APA challenge from Bombardier to such terms is long ago time-barred under the two-year statute, NRS 233B.0617.

an ostrich-like approach to this statute, only following it if the Commissioner somehow magically obtains the much-larger budget needed to find the staff time to prepare job descriptions expressly listing every possible task performed by every construction employer's employees. Hence this case is closer to *Morgan v. Committee on Benefits*, 111 Nev. 597, 894 P.2d 378, 383-84 (Nev.1995), rejecting an APA claim because the nature of the duties given the agency by the Legislature did not lend themselves to formal rulemaking. So too here, it is integral to the functioning of the Commissioner's office that it be able to consult CBAs and DOL publications to flesh out what various kinds of work is done by posted job classes. There are simply too many different tasks done during construction and repair projects to list every single one of them in a posted job description.

As reliance on DBA precedent under Nevada's PWL is proper absent a difference in the statutory language, the Commissioner should follow what is known as the "Fry Brothers" rule under the DBA, which obligates employers with any doubts to consult the prevailing labor agreement to determine proper job class. *U.S. ex rel Plumbers v. C.W. Roen Construction Co.*, 183 F.3d 1088, 1093-94 (CA 9 1999) ("where the Department determines that prevailing wages are established by a collectively bargained agreement, the job classifications for the project or area at issue are also established by that agreement."). Accord, *Abhe & Svoboda, Inc. v. Chao*, 2006 WL 2474202 (D.D.C. Aug. 25, 2006), aff'd., 508 F.3d 1052 (D.C. Cir. 2007); *George Campbell Painting Corp. v. Chao*, 463 F.Supp.2d 184 (D. Conn. 2006)("since the leading decision in *Fry Brothers Corp.*, 1977 WL 24823 (DOL W.A.B. 1977), contractors have been on notice under the DBA that they have to pay employees according to locally prevailing practices"; contractors must turn to "locally prevailing practices, and that, where union rates prevail, the proper classification of duties under the wage determination is established by the area practice of union contractors signatory to the relevant collective bargaining agreement."). Bombardier cannot argue now it should be excused from liability due to good faith because it presented no record evidence as to that issue. Moreover, the prior dispute in Denver put the company on ample notice of the potential problem here. Also, good faith has never been recognized as a defense to wage liability under prevailing wage laws like Nevada's, and penalties are not being sought by IUEC here. *See also P&N, Inc./Thermodyn Mechanical Contractors, Inc.*, ARB Case No. 96-116, 1994-DBA-72 (DOL ARB, Oct. 25, 1996) ("blissful ignorance" is no defense to debarment for prevailing wage violations by paying

laborers' wages to workers doing the work of sheet metal workers); *Berbice Corp.*, 1998-DBA-9 (ALJ, Apr. 16, 1999) ("Blissfully ignorant is no way to operate a business and is certainly no defense to debarment under the DBA."); *Dep't of Labor & Indus., Div. of Workplace Standards v. Union Paving & Const. Co., Inc.*, 401 A.2d 698, 704 (N.J. Super. Ct. App. Div. 1979). The fact the Commissioner's office has been too busy and frustrated by legislative obstacles to deal with updating its job descriptions to add an express reference to APMs to the EC job description is not something that can be used to punish these innocent workers.[21] In *Lusardi Constr. v. Aubry*, 824 P.2d 643, 1 Cal. 4th 976 (1992), the Court held that even positive assurances by the contracting agency to the employer that its work was not covered by prevailing wage were held not enough to defeat workers' rights to the proper wage under prevailing wage laws, but only were relevant to the issue of penalties. *Accord, Ohio Asphalt Paving, Inc. v. Ohio Dept. of Indus. Relations et al.*, 63 Ohio St.3d 512, 589 N.E.2d 35 (1992)("Simply because the public authority failed in its duty to fix the prevailing wage rates within the contracts in issue does not mean that the contractor is excused from its statutory duty of ensuring compliance."). Administrative agency difficulties do not excuse employer noncompliance with a statutory mandate like this for the protection of innocent workers. *Tidewater Marine Western v. Bradshaw*, 927 P. 2d 296, 59 Cal. Rptr. 2d 186, 14 Cal. 4th 557 (1996) ("If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA, then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations. Here, for example, if Tidewater and Zapata violate applicable IWC wage orders, they should not be immune from suit simply because the DLSE adopted an invalid policy."). Hence it would be reversible legal error for the Commissioner to deny the claim for EC pay on APA grounds. Indeed, it would likely be an APA violation for the Commissioner to now suddenly in this case for the first time to refuse to give meaning to the longstanding phrase "includes but is not limited to" in his posted job descriptions, for that would represent the larger and more basic change in policy without rulemaking.

[21] IUEC specifically asked the prior Commissioner to update his EC job description but was turned down for reasons having nothing to do with the merits of the request. TR 930-33. Thus to now rely on the brevity of the posted job description to rule against these workers would be to simply blame the victim for the prior Commissioner's refusal to carry out his duty to make his postings conform to prevailing industry practice.

Finally, if EC pay is not provided, then other posted job classes of Operating Engineer Classes 8 & 9 (heavy equipment repairmen) and truck repairmen (Truck Driver Class 3) are the next closest to what ATS techs do. If those are not used, the Commissioner should direct a survey to gather data on what the Stationery Engineers are paid who repair APMs at local casinos. Using the County's own pay rates is not a good solution because it would require considerable adjustment for the absence of Social Security deductions from County workers' pay and the large but uncertain hourly value of County benefits. TR 978-80. County pay rates are artificially held down by political factors even when market conditions justify higher pay, as here. Id. The least-supportable option is using the job class of office electronics repairmen as Moss suggested (jobs lacking the considerable heavy mechanical and night-shift work done by ATS techs which in the real world often lead to higher pay). It would be absurd to pay these skilled ATS techs less than the most-general posted job class, that of Laborer, the rate awarded for the temp agency workers on the McCarran installation project.

IX. CONCLUSION

Nevada prevailing wage statutes must be construed in accordance with their basic purpose to protect local residents from depressing of the labor market (and the market for in-state contractors) resulting from public monies going to out-of-state companies willing to pay workers less than what prevails in this area for similar work. Combining maintenance and repair into a single long-term contract cannot serve to exempt the repair work without creating a loophole which would quickly result in no repair work being done at prevailing wage. Numerous awarding bodies in Nevada are doing this sort of long-term repair contracting the right way, such as streetlight and slurry seal contracts in UX 27-28.

Claimant's objections to the County's determination should be upheld. The Commissioner should remand this matter to the County for redetermination pursuant to instructions from the Commissioner on the definition of repair and the proper wage rate.

Dated: December 9, 2013

Respectfully submitted,

McCRACKEN, STEMERMAN & HOLSBERRY

By: _____
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BEFORE THE NEVADA LABOR COMMISSIONER

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Complainant,

v.

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.,

Respondent.

Contract CBE-552

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.'s POST-HEARING BRIEF

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BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.'s POST-HEARING BRIEF

On June 25, 2013 through June 28, 2013 and September 9, 2013 through September 10, 2013, the Labor Commissioner conducted a hearing regarding the International Union of Elevator Constructor's Complaint under NRS Chapter 338 ("Chapter 338" or the "Act"). The Union contends that Bombardier Transportation Holdings (USA), Inc. ("Bombardier" or the "Company") violated Nevada law because it failed to compensate Maintenance Technicians who performed maintenance work on the Automated Transit System ("ATS") at McCarran International Airport (the "Airpor") under CBE-552 (the "Contract") at the prevailing wage rate applicable to Elevator Constructors. The hearing confirmed that the Complaint is meritless. CBE-552 is not subject to the Act because it is not a project for the construction, reconstruction or repair of a public works as required by NRS 338.010(16); and even if it were, the Union's claim is barred by the exemptions set forth in NRS 338.011 and NRS 338.080(1).[1]

I. ISSUES PRESENTED

The issues before the Labor Commissioner are well-defined. Four of them are threshold questions regarding the coverage of the Act, all of which must be resolved in the Union's favor or the Complaint must be dismissed.

1. Is the work performed pursuant to CBE-552 a "project" within the meaning of NRS 338.010(16)?

2. If the work[2] performed pursuant to CBE-552 is covered "public work," is it nonetheless exempt from Chapter 338's requirements under NRS 338.011(1) because it is directly related to the normal *operation* of Clark County property, specifically the Airport and the ATS system?

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[1] The collective provisions in Chapter 338 are referred to generally as both "Chapter 338" and "the Act."

[2] The Union amended its Complaint on the record at the beginning of the hearing, stating that it was seeking compensation only for "hours that [the Commissioner] deem to be repair, not for the entire contract." 31:12-14. This admission is binding. *See Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("Admissions in the pleadings ... withdraw[] a fact from issue ... dispensing wholly with the need for proof[.]").

3. If the work performed pursuant to CBE-552 is covered "public work," is it nonetheless exempt from Chapter 338's requirements under NRS 338.011 because it is directly related to the normal *maintenance* of Clark County property, specifically the Airport and the ATS system?

4. If the work performed pursuant to CBE-552 is covered "public work," and is not exempt from Chapter 338's requirements under NRS 338.011, is it nonetheless exempt because Bombardier is a "railroad company" within the meaning of NRS 338.080(1)?

If the Commissioner determines that the Union has proven that CBE-552 is a project within the meaning of Chapter 338 and that the above-referenced exceptions do not apply, there are additional issues to consider with respect to the remedy. Those issues are discussed below in Section VII.

II. SUMMARY OF ARGUMENT

CBE-552 was a contract between Bombardier and Clark County, Nevada for the operation and maintenance of the ATS and its associated equipment at McCarran International Airport ("McCarran" or the "Airport"). Under that contract, Bombardier performed all maintenance services required to ensure that the ATS system remained in good working order and able to transport the approximately forty million visitors who travel through McCarran each year from the terminal to the gates. Although the Contract contains no prevailing wage provisions – until this case, no one has ever contended that the Contract was subject to Chapter 338 even though Bombardier and its predecessors had been performing the same work since 1985 – the Union now claims that the maintenance work performed under CBE-552 is "public work" and that the maintenance technicians who perform that work should be paid prevailing wage.[3] This claim has no merit.

First, the Union's complaint fails Chapter 338's threshold requirement for coverage by the Act because work activity performed under CBE-552 is not "public work." NRS 338.010(16).

[3] In determining whether Bombardier's employees were involved in "public work," the Labor Commissioner must consider whether the contract and the work performed pursuant to that contract, constitute a "project." Although this brief often refers to just the contract, it is clear that both must be considered together.

Prevailing wages must be paid only for "public work" and the accepted meaning of "public work" is well-established. It is "[t]he work of *building* such things as roads, schools, and reservoirs, carried out by the government for the community."[4] NEW OXFORD AMERICAN DICTIONARY, THIRD EDITION, at p. 1411. NRS 338.010(16) also makes it clear that the Act does not apply to all work financed with public funds. The Act's coverage is limited to "projects," which are plans or schemes to complete a particular objective in accordance with a defined schedule,[5] for the new construction, repair or reconstruction of public buildings, roads, highways, utilities, parks, public convention facilities, and all other publicly owned works.

The evidence at the hearing firmly established that the work performed under CBE-552 does not constitute a "project", but even if it did, it is not a "project for" the purpose of constructing, repairing or reconstructing a public work. CBE-552 is a maintenance contract whose sole purpose is to ensure that the ATS system is available for passenger service no less than 99.65% of the time. It simply does not fall within the plain and ordinary meaning of the terms "public works" or "project," and stretching those words' meaning to include a maintenance contract like CBE-552 would be inconsistent with Chapter 338.

Second, even if there was a plausible argument that a maintenance contract like CBE-552 could be considered a "project," it is still exempt. NRS 338.011(1) expressly provides that the prevailing wage requirements of Chapter 338 "do not apply to a contract [a]warded in compliance with chapter 332 or 333 of NRS which is directly related to the normal operation of the public body ***or*** the normal maintenance of its property." (emphasis added). There can be no dispute that the Contract was awarded under Chapter 332 and that both exceptions are satisfied. The Union

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[4] BLACK'S LAW DICTIONARY, NINTH EDITION, confirms that a "public work" involves the *construction and physical modification* of buildings. In defining the term "public works", p. 1352, it directs a reader to the definition of the term "works." "Works" are "any building or structure on land." "Public works" as "structures (such as roads or dams) built by the government for public use and paid for by public funds." *Id.* at 1746.

[5] *See* MERRIAM-WEBSTER DICTIONARY, *available online at http://www.merriam-webster.com/dictionary/project* (accessed on December 30, 2010), defining "Project"; *see also* Section VI.B, *infra.*

has conceded that the ATS system is a critical component of the Airport's normal operations. The Airport relies upon the ATS system to transport passengers to and from the terminal areas. Neither the C nor the D gates could function without this work being performed. It is also self-evident that CBE-552 is directly related to the normal maintenance of Clark County's property: *all* of the ATS system's maintenance was performed under the auspices of the Contract.

Third, the work performed pursuant to CBE-552 is exempt because Bombardier is a railroad company, and Chapter 338's prevailing wage requirements do not apply to "[a]ny work, construction, alteration, repair or other employment performed, undertaken or carried out, by or for any *railroad company*[.]" NRS 338.080(1). The facts on this issue are undisputed. Bombardier operates both light and heavy rail lines in the United States. From 2009-2011, more than 41% of Bombardier's revenues were derived from the operation, manufacture and sale of steel-wheel railroad equipment and the ATS itself is a high volume rail transit system, transporting millions of passengers each year. Accordingly, Bombardier is a railroad company in the truest sense of the word. Every phase of its operations is dedicated to railroads and railroad equipment. Although neither gaming machine manufacturers Bally Technologies nor International Game Technology (IGT) own or operate casinos, no one would dispute that both are gaming companies.[6] The same reasoning applies here. There is no valid interpretive basis for limiting the application of NRS 338.080(1) in the manner suggested by the Union.

The hearing confirmed the arguments advanced in Bombardier's Motion for Summary Judgment. CBE-552 is not a "project" which can constitute "public work," and even if it was, it is exempt from Chapter 338's prevailing wage requirements in accordance with NRS 338.011(1) and NRS 338.080(1). The Complaint should be dismissed.

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[6] In fact, the companies' respective CEO's sit on the American Gaming Association's Board of Directors. *See* http://www.americangaming.org/leadership/board-directors.

III. PROCEDURAL HISTORY

The Union initiated the Complaint process by letter dated October 9, 2009. Deputy Commissioner Sakelhide authorized the Complaint at issue here on October 13, 2009 and directed the DOA to conduct an investigation into the Union's allegations and determine whether Bombardier had committed a violation. On November 24, 2009, Bob Kingston, the Assistant Director, Facilities at the DOA, announced the DOA's determination. CC-03. Kingston stated that he had conducted an investigation into the work performed under the Contract, and, just as importantly, reviewed the County's past practice and the Clark County District Attorney's interpretation of NRS 338.011(1). Based on that analysis, he found that CBE-552 and the work performed thereunder is exempt. *Id.* at 2-3. Kingston explained:

> The purpose of maintenance is to care for, preserve and keep in proper condition. It is obvious that maintenance work requires the inclusion of repairs in order to keep things operating and in proper condition. Windows need replacing. Lights need to be kept working. Sprinklers need repair. County vehicles need new brakes and the [ATS] System needs to be kept in operating condition. ... Further research on other maintenance contracts within the Clark County Department of Aviation and other local government entities has reinforced that this type of contract for maintenance and repair is not a public work.

Id. at 2. Accordingly, "[i]t is the opinion of the District Attorney's office [and] the Clark County Department of Aviation and Purchasing Administration ... that [CBE-552] is a maintenance and repair contract [that is not] ... subject to prevailing wage under NRS Chapter 338." *Id.* at 3.

The Union objected to the DOA's findings. Although its objection was based on a clear misapprehension of the meaning of NRS 338.011, which exempts work not because of the type of work performed but because of its immediate relationship to the local government's normal operations or maintenance, Deputy Commissioner Sakelhide nonetheless sent the Union's objection to Kingston on December 31, 2009. In his cover letter, he inexplicably suggested that the DOA's prior review had been insufficient because it did not analyze the scope of work performed under the Contract to determine if that work constituted "normal maintenance" as

opposed to "a modernization, an upgrade, a remodel, etc., and therefore subject to the provisions of NRS Chapter 338." *See id.* Although NRS 338.011 is written in the disjunctive, the Deputy Commissioner said *nothing* about analyzing whether the work was directly related to the Airport's normal operations.

On March 30, 2010, the DOA affirmed its decision that CBE-552 was exempt. CC-4. The DOA explained that it had conducted interviews with "Bombardier on site managers as well as most of the Bombardier employees performing the work" required by the Contract. It had also reviewed the scope of work contemplated by CBE-552 and found that "throughout the investigation process none of the work appeared to be modernization, upgrades, remodels, etc... All of the work that was identified through interviews and observations was maintenance of the existing equipment and therefore not subject to the provisions of NRS 338."

The Union once again objected to the DOA's findings and requested a hearing. Thereafter, the parties resolved the Union's administrative complaint regarding Contract 2305, such that the scope of the Complaint is limited to CBE-552, and subsequent proceedings led then-Labor Commissioner Tanchek to issue an "Interim Order" on June 7, 2011. Both Bombardier and the Union appealed the Interim Order to Clark County District Court. Those appeals were dismissed after the parties and the Labor Commissioner stipulated (1) that the Interim Order did not constitute a final decision for purposes of NRS 233B.130, and, (2) that when this matter returned for hearing before the Commissioner the Interim Order would not limit any party "from asserting the arguments or presenting evidence" in any way. B-02.

The DOA's issued a second Revised Determination on July 25, 2011. CC-05. Both parties filed objections, leading to the hearing that took place in June and September 2013.

IV. STATEMENT OF FACTS

The hearing included six days of testimony and receipt of a significant number of exhibits. The Commissioner conducted the hearing and actively participated. Rather than try to recount the testimony of every witness and the import of every document here, this brief assumes the Commissioner's familiarity with the underlying facts, and without waiving the right to discuss any of those facts in any subsequent proceedings, focuses on the legal questions that will determine the outcome of the case.

A. McCarran's ATS System.

Approximately 40 million travelers utilize McCarran Airport each year. During the relevant time period, the vast majority of those travelers utilized the C and D gates. Bombardier installed the original ATS train at McCarran Airport in 1985.[7] 358:11-365:22. That train system connects Terminal 1 with the "C" Concourse gates. At the time the "C" gates were constructed, they were a satellite terminal and the only way to access those gates was by train. *Id.* Even now, after the Airport constructed a new walking ramp to the "C" Concourse, at least 30% of departing travelers take the ATS to the "C" Concourse, and virtually all of the arriving passengers take the ATS from the concourse to the terminal. *Id.*

Almost half of McCarran's currently operating gates – fifty-eight at this time – are located in the "D" concourse. Bombardier Exhibit 3. The ATS system servicing the "D" gates was constructed in 1998, and was designed with the intention of using the ATS system as the only direct link between the "D" concourse and the terminal. As Randy Walker, the former Director of Aviation, explained: "It was part of the plan and part of the operational scheme of the airport to have the train system[.]" 365:9-20. Unlike the currently configured "C" concourse, the "D" Concourse is not physically connected to Terminal 1. *Id.* *See also* B-25. It is also not physically

[7] At that time, the business unit serving the Airport was a division of Westinghouse. The "Operations and Maintenance" business unit was ultimately acquired by Bombardier in 2001 and it has continued to serve the Airport in different capacities.

connected to the recently constructed Terminal 3. *Id.* Passengers who arrive or depart from "D" gates must use the ATS system. In a normal situation, passengers go through the "D" security checkpoint, board the ATS train, and then travel to the "D" Concourse. Passengers whose Airlines' maintain ticketing facilities at Terminal 3 but who are flying from the "D" concourse face a similar situation: they must use the ATS system in order to get to their plane.

For these reasons, the maintenance of the ATS system is critical to the Airport's operation:

> 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.

397:13-398:8[8]; *see also* B-04 (stating that the ATS system is "vital and integral to the airport's operation"). Moving passengers from the terminal to gates and from the gates to the terminal is the purpose of the Airport's "existence. The airport exists to facilitate transfer ... between two modes of transportation. ... That's what we're about. That's our very existence. If we can't do that, we're failing our principal requirement." 398:12-17.

B. Bombardier Was The Exclusive Provider of Operations And Maintenance Services For McCarran's ATS System, And CBE-552 Governed The Terms And Conditions Under Which Those Services Were Provided.

Beginning with the original C leg, Bombardier was responsible for the installation of all of the ATS lines at the Airport. 376:16-277:4. Bombardier' technology for both the C and D legs was selected through a competitive design process. *Id.* Until May 2012, Bombardier was continually responsible for their maintenance because of its high performance and ability to

[8] Walker testified at length regarding the importance of the ATS system to the customer experience and how its continuous availability is necessary to ensure airport operation. 404:10-407:14.

deliver reliable service because of its technical expertise. 365:23-374:9; Bombardier Ex. 5. Bombardier's innate capacity to offer competitively priced services on its own equipment led the County to enter into a new maintenance contract, CBE-522, in 2008. *Id.*; B-05.

CBE-552, the most recent iteration of Bombardier's maintenance agreement with Clark County, was approved by the Clark County Commission on June 3, 2008 and was terminated in May 2012.[9] B-05. The award was issued in accordance with NRS 332.115(1)(a) and (c). Walker had concluded that competitive bidding for the Contract would be inappropriate and that approval was proper under NRS 332.115(1) because Bombardier is the only firm that can supply maintenance services for the ATS trains at McCarran.[10] 376:16-377:4. As Mr. Walker explained:

> We felt that the contract was best maintained by Bombardier since they were the installer of the system. The software clearly is a critical component of the operation of the system, and they're the only one that have access to that software.
>
> Second, we were not aware at the time that there were any other providers that, third party providers that provided maintenance of Bombardier systems. ... And so for those reasons we believed it was best to renegotiate the contract with Bombardier.

376:16-377:4.[11]

As Michael Shaman, Roy Ryan, Melvin Smith, Joel Middleton and Mike Moran explained, CBE-552 is a *maintenance contract*, dedicated to meeting the 99.65% availability figure through preventative and corrective maintenance of the system. Bombardier's preventative maintenance

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[9] It is important to note that Clark County negotiates and manages all of its major maintenance contracts as contracts under NRS 332 which are exempt from prevailing wage. Most relevant to this case is the elevator maintenance contract, which is handled by Kone and which involves employees who are represented by the International Union of Elevator Constructors. *See* Bombardier Ex. 7; 390:22-393:15. The contract is virtually identical to the one at issue and it is *not* covered by Chapter 338.

[10] The Union has contended that other elevator companies could have performed this work. The only "evidence" of that is Bill Stanley's personal belief. 1018:4-1020:15.

[11] As Mr. Walker also explained, only Bombardier has access to the technical expertise that is required to maintain the system. 407:18-413:25. For that reason, he thought terminating the contract with Bombardier was a mistake and advised against it. *Id.* He also insisted that the County enter into a technical services agreement to ensure Bombardier was available to provide technical support. *Id.* The need for this support was demonstrated during an event that took place on May 25, 2013 when the ATS system had a "complete failure" that led to extraordinary delays and passenger problems. 415:10-420:5. This testimony establishes two things. First, that Bombardier was in a unique position to provide service that no other party can provide. Second, that CBE-552 and the maintenance work performed under its auspices is directly related to the normal operation and maintenance of the Airport.

begins during the design build process. 54:5-56:16; 71:7-21. Each ATS system is designed and configured around the customer's needs, and in the airport environment, that means almost 100% reliability. 71:7-21. In this case, the layout of McCarran airport was considered, as was the amount of passengers using the system, and the number of times that the trains would cycle through the system on a daily basis. The goal is that once the system is built, Bombardier will have put a preventative maintenance regime in place. Preventative maintenance is combined with corrective maintenance to create a

> purpose built maintenance plan that is ... dynamic in nature. It always evolves based on the learnings that we have on reliability based maintenance.
>
> What it involves is a schedule of tasks, based again on frequency, periodicity of maintenance, if we elect to do it on mileage, time or cycles. The schedule could be on a daily basis, dependent on the environment the vehicle or the system operates on.
>
> Each inspection has a host of specific tasks which describe the how-to or the what-to ... do at what interval. And we ask our technicians to refer to the examination. It's called up based on the time I expressed earlier, and each one of the items is done in accordance to the task procedure. ...
>
> [With respect to corrective maintenance] as part of the preventative maintenance program, you are purposely validating the condition of subsystems to ensure it meets expected standards and limits before the vehicle or wayside component is released back to service. If any one of those tasks is performed, and we identify an area where there is a substandard condition, we remedy that situation back to expected values before the equipment's back to service.

56:21-58:13.

To effectuate these goals, and comply with CBE-552's requirements, Bombardier developed and maintained a written maintenance plan. B-15; B-27; 72:2-12; 103:22-109:25. That plan establishes a defined scheme whereby all of the tasks and maintenance regimes associated with the ATS system were designated with Preventative Maintenance ("PM") codes. *Id.* It begins with daily and weekly procedures that involve little more than visual and light instrument inspection, includes inspections and replacements that are based on time cycles or mileage, such as

replacement of the guide spindle, and concludes with tasks that are performed on an annual basis or in some cases, even less. *Id.* Bombardier's staffing scheme and electronic database tools (like SIMS) were also dictated by the maintenance plan. For example, Bombardier employed two specialized field service engineers. Those individuals had significant technical expertise, and the purpose of their position was to insure compliance with the maintenance plan. 108:11-110:20.

Because of the manner in which parts were inspected and then replaced on a regular schedule according to time or component condition, the ATS system very rarely experienced an unexpected equipment breakage that interrupted service and caused downtime. 1160:12-1180:8. Maintaining system availability and avoiding such breakage and the downtime associated with making such a repair, is the driving force behind the maintenance plan. *Id.* Indeed, Bombardier is subjected to financial penalties every time there is an event that takes the system down for more than a few minutes. 95:5-103:21.

For that reason, the maintenance plan was adapted to McCarran's operational practices. Because the ATS system at the Airport was a shuttle system, there was no way to remove a train from active service and replace it with another. 79:10-81:22; Bombardier Ex. 25. As such, most preventative and corrective maintenance tasks occurred during a nightly maintenance window when the trains were on a reduced operational schedule. *Id.* A good illustration of the manner in which this work was done is PM 305, which is associated with the maintenance of the guide spindle. B-15; B-26; 114:13-117:14. As Ryan and Smith explained, the PM process, which includes the replacement and rebuild schedule, is highly regimented and spelled out exactly in the maintenance plan. To ensure the consistency of the ATS system's performance, the Maintenance Technician's workdays consisted of a well-defined sequence of tasks such as visual inspections and rebuilds. A very large percentage of time, upwards of 40%, was dedicated to "recovery," which was nothing more than standby time. Bombardier Exs. 12, 13, 14; 153:1-157:25. The other

60% consisted of preventative and corrective maintenance (including heavy maintenance tasks). As established by Bombardier exhibits 12, 13, 14 and 16, Maintenance Technicians spent approximately 10% of their time performing corrective maintenance tasks, and, Mr. Smith explained, this work was anticipated within the maintenance plan and PM work orders, like PM 305. B-26.

Finally, to confirm that the maintenance plan was sound, that the staffing model was correct, and that the percentage of preventative maintenance versus corrective maintenance remained at 90%/10% or better, Bombardier also required its employees to track their labor hours using a computer program called SIMS. 207:2-234:5. During the relevant time period, the amount of work that the Union has attempted to characterize as "repair" amounted to 10% or less of the work performed under the contract. *Id.*; Bombardier Exs. 12, 13, 14, 16.

V. ARGUMENT

As set forth below, CBE-552 is not a contract for the performance of "public work." And, even if it were, Chapter 338 contains two exemptions applicable to this dispute, both of which independently warrant dismissal of the Complaint in its entirety.

A. Nevada Statutes Are Interpreted In Accordance With Their Plain Meaning.

This is a case of statutory interpretation. In that regard, the Nevada Supreme Court has repeatedly admonished lower courts and administrative agencies that "words in a statute should be given their plain meaning[.]" *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648 (1986). "When construing a statute, [the Nevada Supreme Court] looks to the words in the statute to determine the plain meaning of the statute, and this court will not look beyond the express language[.]" *Hernandez v. Bennett-Haron*, 287 P.3d 305, 315 (Nev. 2012) (emphasis added). To that end, a statute must also be construed as to "give meaning to all of [its] parts and language." *Coast Hotels v. State, Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001) (reversing Labor

Commissioner for failing to account for the disjunctive meaning of "or"). If an interpretation imposes a limit on the statutory language which is not supported by the text, or which renders a word in the text meaningless, it cannot be sustained. *Id.* As the Court recently explained, "[t]he preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Bldg. Energetix Corp. v. EHE, LP*, 129 Nev. --, 294 P.3d 1228, 1230 (2013) (quoting *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004)).

B. The Complaint Must Be Dismissed Because The Work Under The Contract Does Not Constitute A "Public Work" Within The Meaning Of NRS 338.010.

Nevada law requires employers to pay prevailing wages to individuals who are employed on covered "public work." In that regard, Chapter 338 contains a very specific definition of "public work." NRS 338.010(16) provides:

> **Public work** means any **project for** the new construction, repair or reconstruction of:
> (a) A **project** financed in whole or in part from public money for:
> (1) Public buildings;
> (2) Jails and prisons;
> (3) Public roads;
> (4) Public highways;
> (5) Public streets and alleys;
> (6) Public utilities;
> (7) Publicly owned water mains and sewers;
> (8) Public parks and playgrounds;
> (9) Public convention facilities which are financed at least in part with public money; and
> (10) All other publicly owned works and property.
> (b) A building for the Nevada System of Higher Education of which 25 percent or more of the costs of the building as a whole are paid from money appropriated by this State or from federal money.

(emphasis added).

In short, under NRS 338.010(16), in order to be considered a "public work," CBE-552 must pertain to a "project." Because the term "project" is not otherwise defined, that term must be interpreted in accordance with its plain meaning and its contextual place in the statutory

framework of Chapter 338. Here, the context makes clear that the term is referring to a construction or development project. All of the enumerated examples in the statute concern the construction of buildings and structures, *see* NRS 338.010(16)(1)(1)-(10), and in accordance with the doctrine of *noscitur a sociis* "words are known by – acquire meaning from – the company they keep." *Bldg. Energetix Corp.*, 294 P.3d at 1238 (interpreting the meaning of a general term in accordance with the enumerated examples contained within the statute). Moreover, the common meaning of the term "public works" refers to "structures, as roads, dams, or post offices, paid for by government funds for public use."[12] DICTIONARY.COM UNABRIDGED BASED ON THE RANDOM HOUSE DICTIONARY, © RANDOM HOUSE, INC. 2013, *available online at http://dictionary.reference.com/browse/public+ works?s=t* (accessed on March 27, 2013).

The reported cases discussing whether a given contract concerns a public work for purposes of Chapter 338 all concern contracts for the construction or improvement of structures and real property. *See, e.g., City of Reno v. Bldg. & Constr. Trades Council of Northern Nev.*, 251 P.3d 718, 719 (Nev. 2011) (construction of retail store with public funds is public work); *City Plan Dev. v. Office of the Labor Comm'r*, 121 Nev. 419, 423 (2005) (holding that the construction of a fire station was a public works project); *Citizens for a Pub. Train Trench Vote v. City of Reno*, 118 Nev. 574, 584 (2002) (discussing construction project); *Garvin v. Ninth Judicial Dist. Court*, 118 Nev. 749, 765 (2002) (construction project).

As a maintenance contract, CBE-552 and the work performed in accordance with its terms, does not fit within the meaning of "project" as utilized in NRS 338.010(16). Customary usage and experience support Bombardier's proffered interpretation of the statute. As noted above, it is not like any of the examples of "public work" that the Legislature enumerated when it enacted the

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[12] The Cambridge University Dictionary is in accord. It defines "public works" as "the building of roads, hospitals, etc. that is paid for by the government." CAMBRIDGE UNIVERSITY BUSINESS ENGLISH DICTIONARY, *available online at http://dictionary.cambridge.org/us/dictionary/business-english/public-works?q=public +works* (accessed on March 27, 2013).

statute. In addition, CBE-552 and its predecessors have never been treated as prevailing wage projects, including when the maintenance relationship began in 1985. As explained by Walker and Moran, public works projects are construction, not maintenance, projects, and such contracts contain milestones, completion requirements, and other kinds of information that is directly tied to the beginning and end of construction work.

Maintenance work, in contrast, is ongoing. It is perpetual in nature, with no fixed beginning or completion point, and to that end, Clark County's practice is to treat maintenance contracts differently from construction or rehabilitation projects which call for prevailing wage. In short, the customary usage of the term "project" is starkly different than the forced reading that the Labor Commissioner would have to adopt in order to bring CBE-552 work within coverage of Chapter 338.

This custom and usage is supported by the meaning of the word "project" that is found in dictionaries. Dictionaries define "project" in different ways, but in each instance, the definition concentrates on the fact that a project is a planned undertaking with a specific, defined objective. *See, e.g.,* MERRIAM-WEBSTER DICTIONARY, *available online at http://www.merriam-webster.com/dictionary/project* (accessed on March 27, 2013). In fact, the Merriam-Webster Dictionary uses the example of a "development project" to exemplify the meaning of the term and convey its programmatic and highly scheduled nature. 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," and it includes "construction projects," as a primary example. CAMBRIDGE UNIVERSITY ACADEMIC CONTENT DICTIONARY, *available online at http://dictionary.cambridge.org/us/dictionary/american-english/project_1?q=project* (accessed on March 27, 2013).

This definition of "project" is also consistent with other provisions of Chapter 338. For example, NRS 338.010(16)'s reference to financing confirms that the prevailing wage statute is concerned with public works construction projects, not maintenance contracts. Ongoing maintenance contracts are not "financed" with bonds or other long-term debt measures. They are budgeted as normal operating expenses and paid for with normal operating funds. *See, e.g.*, Exhibit 5 (contract approval); Exhibit 22 (Kone contract approval).

Similarly, in defining the term "contractor," which is the term used to refer to employers under the statute, NRS 338.010(3) provides that it is either a "person who is licensed pursuant to the provisions of chapter 624 of NRS" **or** a "design-build team." Neither definition is applicable to a maintenance provider like Bombardier, a fact underscored by the definition of contractor in the construction code, NRS Chapter 624. NRS 624.020 states that "contractor" is synonymous with "builder" and can be used to refer to any person who contracts to "construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement[.]"

Chapter 338 of the Administrative Code supports the same conclusion. It contains no reference whatsoever to maintenance, and it does not define the term "project." It does, however, use the term in different contexts which show that the word is not intended to capture long-term service contracts like CBE-552. Specifically, NAC 338.231 defines a "[s]uccessfully completed project" as

> the contract or the portion of the contract for which the prime contractor was responsible was completed: 1. Within the deadline for completion specified in the contract, as adjusted by any change order or extension of time granted; and 2. In compliance with any remaining contractual requirements, including close-out documents, within 90 days after the substantial completion of the contract.

Obviously, CBE-552 is not "completed" in the sense described here. As Mr. Walker explained, and as the Contract makes clear, it has no milestones or completion targets. It requires

Bombardier to satisfy a static performance requirement on a continuing basis: ensure that the ATS system is available for use more than 99% of the time.

NAC 338.231(2)'s reference to substantial completion provides further support. "Substantial completion" means that "the construction of a public work is, in accordance with the contract documents, sufficiently complete that the owner can occupy and utilize the public work for its intended use." NAC 338.144. CBE-552 does not involve construction, and more specifically, it does not result in the creation of a structure which can be occupied or used by the public. The Contract merely specifies how Bombardier will deliver maintenance services.

In light of the above, there is simply no way to find that work done under a five year long maintenance contract like CBE-552 can fall within the meaning of the term "project." Doing so would require the Labor Commissioner to adopt a strained interpretation of the term that is inconsistent with the word's plain meaning, and which cannot be applied in a consistent manner throughout the statute and the administrative code. It therefore cannot be considered "public work."

C. CBE-552 Is Directly Related To The Normal Operation Of McCarran Airport, Or The Normal Maintenance Of Its Property, And Is Therefore Exempt Under NRS 338.011.

As provided in NRS 338.011(1), contracts executed by a local government in accordance with its authority under NRS Chapters 332 or 333 are exempt from NRS Chapter 338's prevailing wage requirements so long as the contract is either: (1) directly related to the local government's operations, or (2) directly related to the normal maintenance of the local government's property. The Contract satisfies both conditions.

1. The Plain Meaning of NRS 338.011 is Readily Ascertainable.

Section 338.011 provides that the requirements of NRS Chapter 338 "do not apply to a contract ... [a]warded in compliance with chapter 332 or 333 of NRS which is directly related to

the normal operation of the public body or the normal maintenance of its property." Neither the phrase "normal operation of the public body" nor "normal maintenance of its property" is defined. There is no need for a definition, however, because these are ordinary words, and in Nevada, "words in a statute should be given their plain meaning[.]" *V & S Ry., LLC v. White Pine County*, 211 P.3d 879, 882 (Nev. 2009) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648 (1986)). In setting forth the methodology that must be used when interpreting statutes, the Nevada Supreme Court has emphasized that the focus of any interpretation is the text of the statute itself.

> When construing a statute, we first examine its plain meaning. In examining the plain meaning of a statute, we read its provisions as a whole, and give effect to each of its words and phrases. When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction.

Davis v. Beling, 278 P.3d 501, 508-509 (Nev. 2012) (quotations and citations omitted).

In this case, the scope of the exemption set forth by NRS 338.011(1) is plain on the face of the statute. A contract which has been authorized by a local government in compliance with NRS Chapter 332 is not subject to Chapter 338's prevailing wage requirements if the contract has at least one of two possible purposes[13]: (1) the normal operation of the public body, or (2) the normal maintenance of the public body's property. Put another way, CBE-552 is exempt from Chapter 338's prevailing wage requirements so long as it was properly ratified under NRS Chapter 332 or Chapter 333 and it can be deemed to be directly related to the normal operation of the DOA or the normal maintenance of the DOA's property. CBE-552 easily satisfies these conditions.

2. CBE-552 Was Approved In Accordance With NRS 332.115(1).

There can be no dispute that CBE-552 was approved in accordance with NRS 332.115(1). As set forth in the Clark County Commission Agenda Item submitted as Exhibit 5, the Contract

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[13] Because NRS 338.011 is written in the disjunctive – using the word "or" to separate two phrases concerning distinct subject areas – it is clear that the Legislature intended to create two alternative means of satisfying the exemption. *See Coast Hotels & Casinos*, 117 Nev. at 841; *see also State v. Catanio*, 120 Nev. 1030, 1033 (2004) ("By using the disjunctive 'or,' the statute clearly indicates that "upon" and "with" have different meanings.").

was approved by the Clark County Commission on June 3, 2008. It complied with NRS 332.115(1)(a)[14] because Bombardier "is the only firm that can supply maintenance services" for the ATS trains at McCarran.[15] *Id.* The approval complied with subsection (c) because, even if Bombardier were not the only service provider that could handle the County's maintenance needs, it was, given its experience and technical know-how, the party in the best position to provide maintenance in an efficient manner.[16]

No objections to the Contract were filed, and CBE-552 was approved unanimously. Significantly, the Agenda Item specifically notes that the Contract had been "reviewed and approved as to form by the Clark County District Attorney's Office." Bombardier Exhibit 5. Because NRS Chapters 338, 607, and 608 do not delegate to the Labor Commissioner any authority to review local governments' purchasing decisions under NRS Chapter 332, the County's determination is conclusive. *See Clark County v. Equal Rights Comm'n*, 107 Nev. 489, 492 (1991) ("agencies have only those powers which the legislature expressly or implicitly delegates"); *City of Reno v. Civil Serv. Comm'n of Reno*, 117 Nev. 855, 858 (2001) ("administrative agencies cannot enlarge their own jurisdiction. The scope of an agency's

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[14] The relevant language from NRS 332.115(1) is as follows:

NRS 332.115 Contracts not adapted to award by competitive bidding; purchase of equipment by local law enforcement agency, response agency or other local governmental agency; purchase of goods commonly used by hospital.

1. Contracts which by their nature are not adapted to award by competitive bidding, including contracts for:

(a) Items which may only be contracted from a sole source;

...

(c) Additions to and repairs and maintenance of equipment which may be more efficiently added to, repaired or maintained by a certain person;

(d) Equipment which, by reason of the training of the personnel or of an inventory of replacement parts maintained by the local government is compatible with existing equipment[.]

[15] There is no doubt about this conclusion. The licensing provisions of CBE-552 preclude third parties from having access to the technical information required to provide maintenance services. Although the County has now taken this work in-house, it was able to do so only because Bombardier agreed to provide a technical services agreement. The technical services agreement was necessary because the County could not maintain the ATS system without that intellectual property and ongoing assistance.

[16] Whether the awards explicitly reference each provision in NRS 332.115(1) is immaterial. As the Nevada Supreme Court has repeatedly recognized, it will affirm a lower court's decision if it "reached the correct result, albeit for different reasons." *See, e.g., Rosenstein v. Steele*, 103 Nev. 571, 575 (Nev. 1987) (citing *Burroughs Corp. v. Century Steel*, 99 Nev. 464 (1983)). The same reasoning applies here.

authority is limited to the matters the legislative body has expressly or implicitly delegated to the agency.").

3. CBE-552 Is Directly Related To The Normal Operation Of McCarran Airport.

a. Testimony and documents presented at the hearing demonstrate CBE-552's direct relationship with the Airport's normal operations.

Bombardier's ATS systems have been a continuous and integral part of McCarran's operations and expansion since 1985, when the Company manufactured and installed the first ATS system at the airport to transport passengers to and from the gates located along Concourse C. For the next thirteen years, Bombardier provided maintenance support for that ATS system, and in 1998, the Company was retained to manufacture and install an additional ATS system to service the gates in Concourse D. Thus, it is apparent that as McCarran Airport has developed and expanded its primary plan for transporting passengers to the new areas of the airport, it has done so in total reliance on Bombardier's ATS system. Because the reliable operation of those trains is, by extension, essential to passenger transport, the DOA has entered into a series of maintenance agreements with Bombardier to provide continuous maintenance support.

In 2006, the Department of Aviation announced construction of a new airport terminal – Terminal 3 – to handle McCarran's ever-expanding passenger load. Intended to be a self-contained facility, its only connection to Terminal 1 is an underground ATS linked to the ATS that provides service to Concourse D. Because of Bombardier's exemplary performance and safety record, the DOA once again selected Bombardier to complete the design-build of this new system. In conjunction with that, the DOA chose to extend Bombardier's maintenance responsibilities, which lead to the negotiation and execution of CBE-552. The Contract conspicuously omits the provisions required by NRS 338.020 or any other reference to prevailing wage rates.[17] B-01.

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[17] The Seventh Circuit Court of Appeals has recognized in considering whether employees were properly considered exempt under the FLSA that while "it is possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing[. . . it is] a more plausible hypothesis [ ] that the ... industry has

IN THE SUPREME COURT OF THE STATE OF NEVADA

BOMBARDIER TRANSPORTATION (HOLDINGS) USA INC.,

Appellant,

v.

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

Respondents.

Case No. 71101

APPELLANT BOMBARDIER TRANSPORTATION (HOLDINGS) USA INC.'S APPENDIX

VOLUME 6

ER1248-ER1497

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3800 Howard Hughes Parkway, #600
Las Vegas, Nevada 89169
(702) 921-2460

Attorneys for Appellant

Bombardier Transportation (Holdings) USA, Exhibit 31		2626–2808
Bombardier Transportation (Holdings) USA, Exhibit 32		2809
Bombardier Transportation (Holdings) USA, Inc.'s Motion for Summary Judgment	April 8, 2013	0094–0418
Bombardier Transportation (Holdings) USA, Inc. Post-Hearing Brief	December 13, 2013	1406–1467
Bombardier Transportation (Holdings) USA, Inc. Pre-Hearing Brief, List of Witnesses and List of Exhibits	June 3, 2013	0841–1294
Bombardier Transportation (Holdings) USA, Inc. Reply in Support of Motion for Summary Judgment	April 24, 2013	0675–0765
Bombardier Transportation (Holdings) USA, Inc. Supplement to Unopposed Motion to Seal	June 17, 2013	1311–1319
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Clark County Department of Aviation Witness List		0833–0836
Determination of Clark County Department of Aviation		0003–0005
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Hearing Transcript (Volume 3)	June 27, 2013	1661–1774
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Interim Order	June 7, 2011	0009–0017
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International Union of Elevator Constructors Post-Hearing Brief	December 11, 2013	1366–1405
International Union of Elevator Constructors Pre-Hearing Conference Memorandum	June 18, 2012	0068–0075
International Union of Elevator Constructors Pre-Trial Brief	April 19, 2013	0766–0794
International Union of Elevator Constructors Prevailing Wage Complaint	October 9, 2009	0001–0002
Notice of Entry of Order	August 10, 2011	0045–0054
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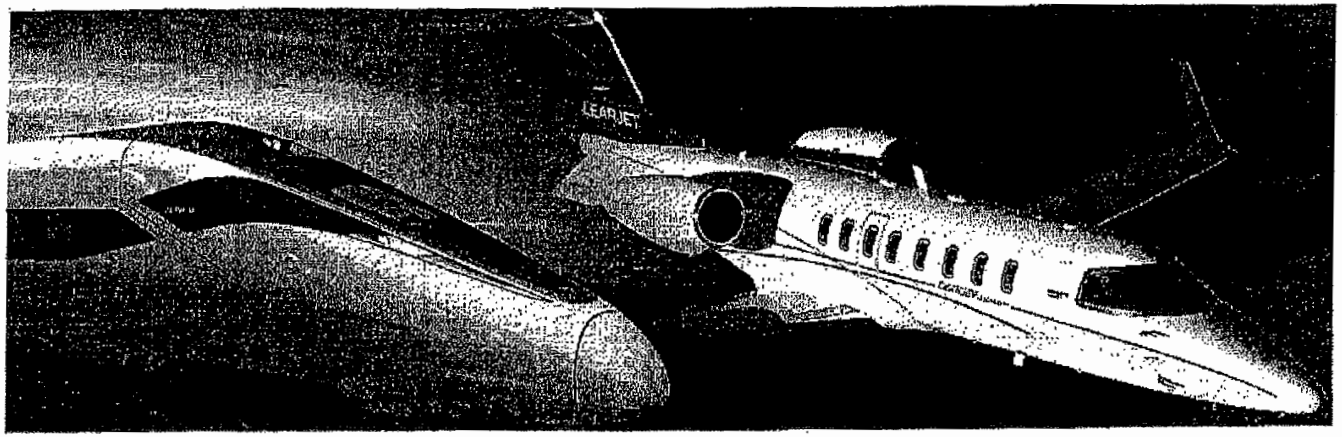
Order Denying Motion for Summary Judgment	June 3, 2013	0795–0799
Order on International Union of Elevator Constructors' Petition for Reconsideration	May 18, 2012	0055–0067

Revised Determination of the Clark County Department of Aviation	March 30, 2010	0006–0008
Scheduling Order	June 27, 2012	0076–0080
Stipulated Protective Order, signed by the Labor Commissioner	November 7, 2012	0081–0090
Summary of Legislation History of 1981		3953–4005

Bombardier
Overview



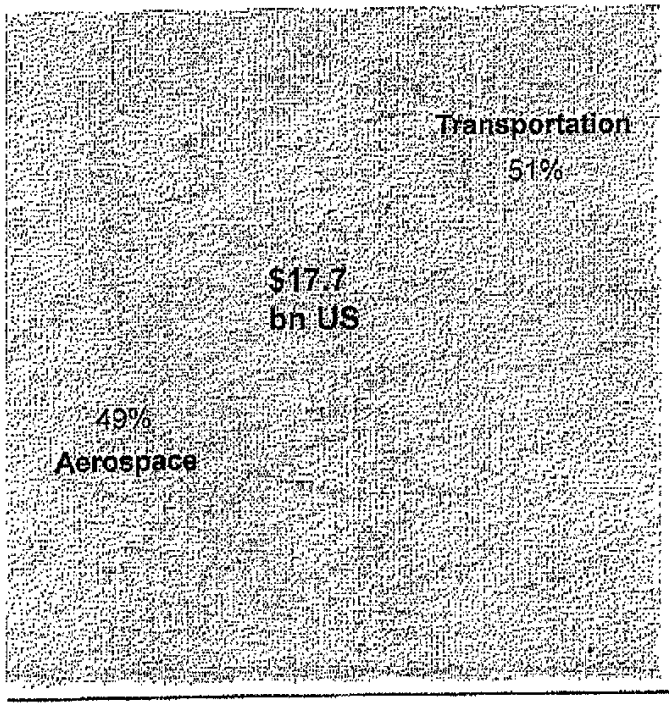
Corporate office based in Montréal, Canada	Workforce of 65,400 people worldwide[1]	Revenues of $17.7 bn US[1]	94% of revenues generated outside Canada	Listed on Toronto Stock Exchange (BBD)

[1] for fiscal year ended January 31, 2011

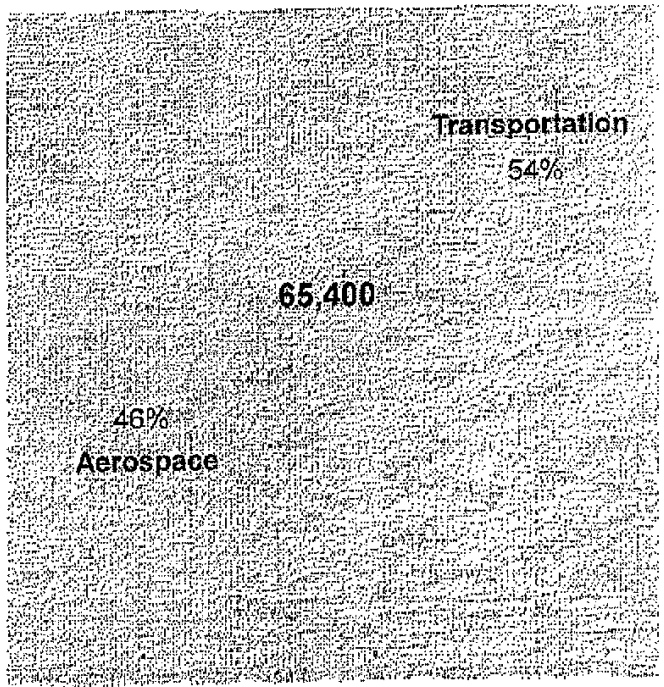
BOMBARDIER

Bombardier
A diversified company

Breakdown by revenues



Breakdown by workforce



1 for fiscal year ended January 31, 2011

BOMBARDIER

Content

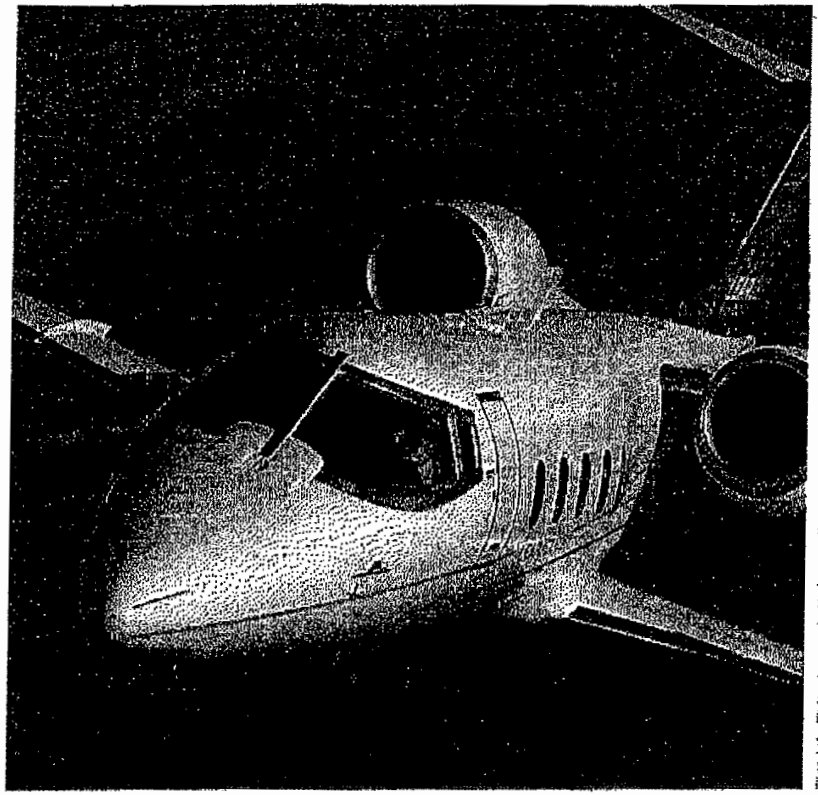
Bombardier

Bombardier Aerospace

Bombardier Transportation

BOMBARDIER

Bombardier Aerospace
Overview



- Bombardier Aerospace is a world leader in the design and manufacture of innovative aviation products and related services for the business, commercial, amphibious and specialized aircraft markets.
- It also offers *Flexjet* fractional ownership, *Skyjet* aircraft charter and management, technical services, aircraft maintenance and pilot training.

Bombardier 000065

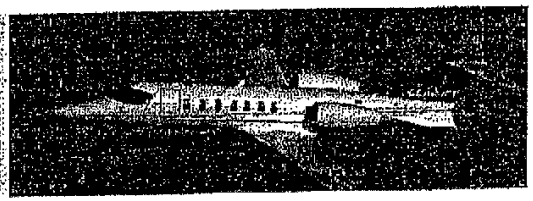
01251

ER1251

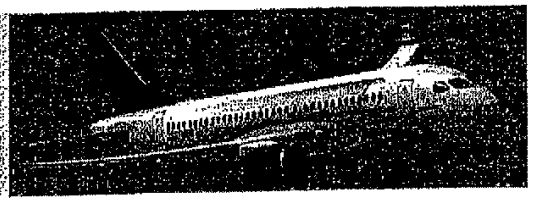
BOMBARDIER

Bombardier Aerospace
Portfolio

Business Aircraft
- *Learjet* family
- *Challenger* family
- *Global* family

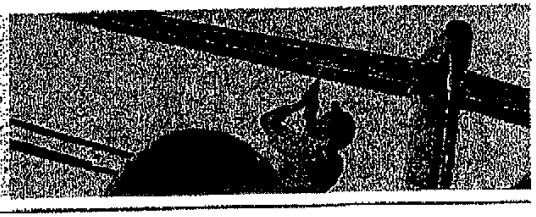


Commercial Aircraft
- Turboprops (*Q-Series*)
- Regional jets (*CRJ* family)
- Single-aisle mainline jets (*CSeries*)



Amphibious Aircraft

Services and solutions
- Jet travel solutions
- Specialized aircraft solutions
- Customer support and services



BOMBARDIER

Content

Bombardier

Bombardier Aerospace

Bombardier Transportation

BOMBARDIER

Content

Bombardier Transportation
Facts & figures

- A global leader in the rail sector
- Broadest product portfolio
- *ECO4* technologies for more sustainable mobility
- Worldwide installed base of more than 100,000 vehicles
- Revenues $ 9.1 bn US[1]
- Order backlog $ 33.5 bn US[2]
- Global headquarters in Berlin, Germany

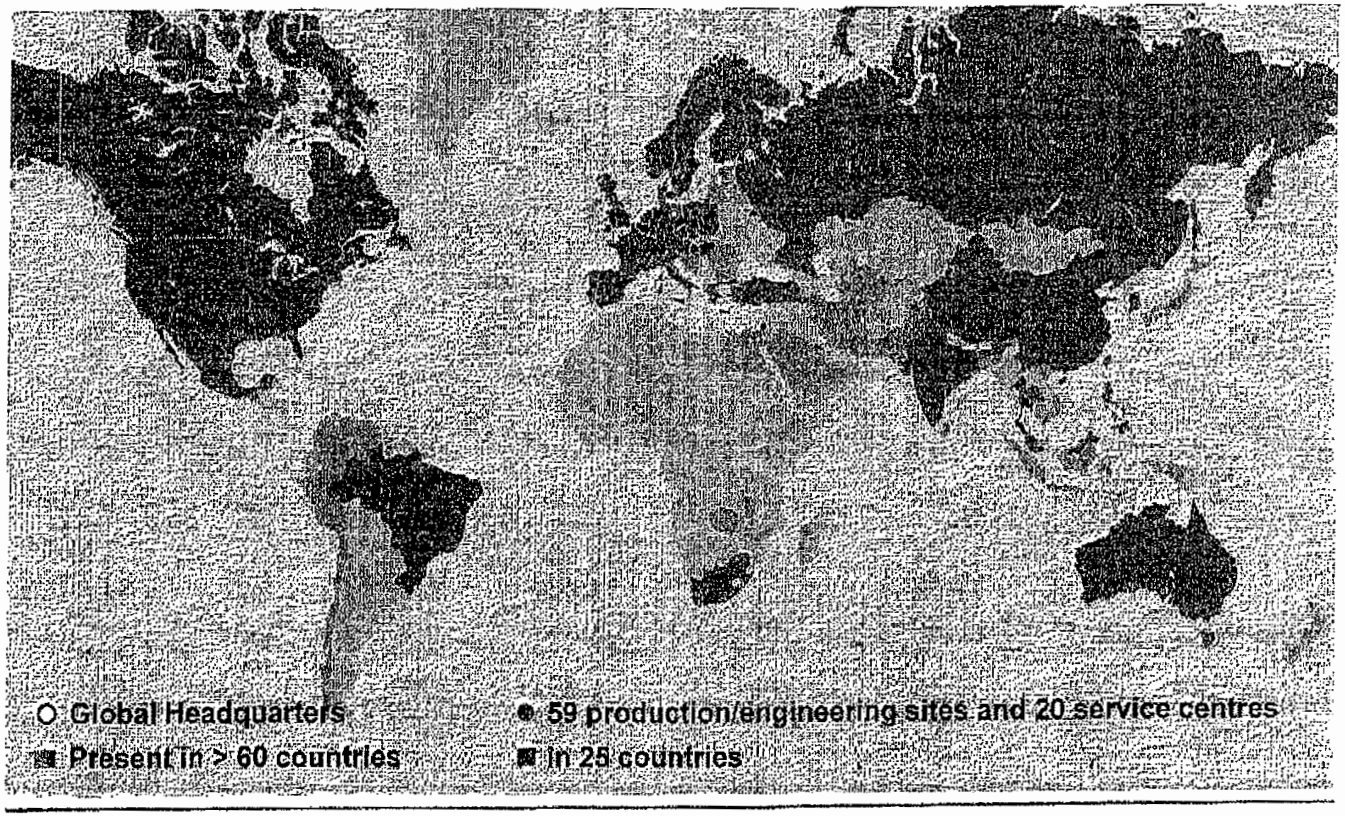
ECO4 is a trademark of Bombardier Inc. or its subsidiaries.

[1] for fiscal year ended January 31, 2011; [2] as at January 31, 2011

BOMBARDIER

Bombardier Transportation

Global expertise – Local presence



Bombardier 000070

01256

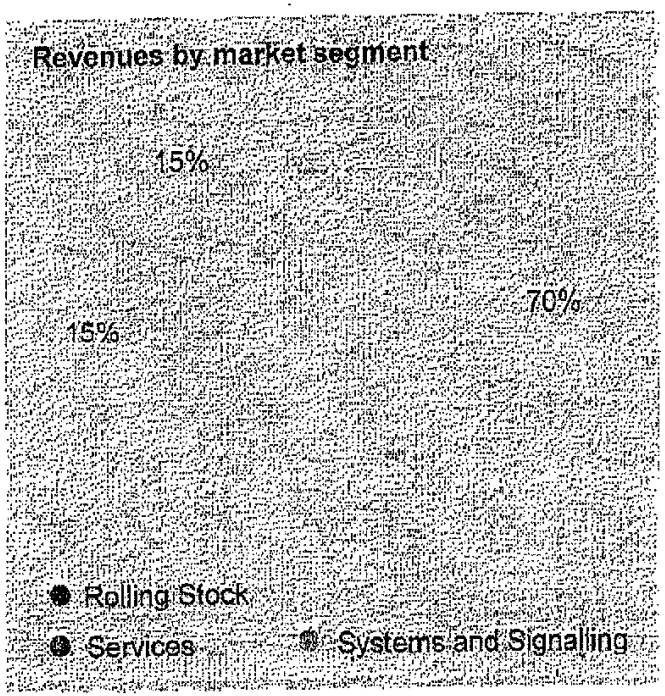
ER1256

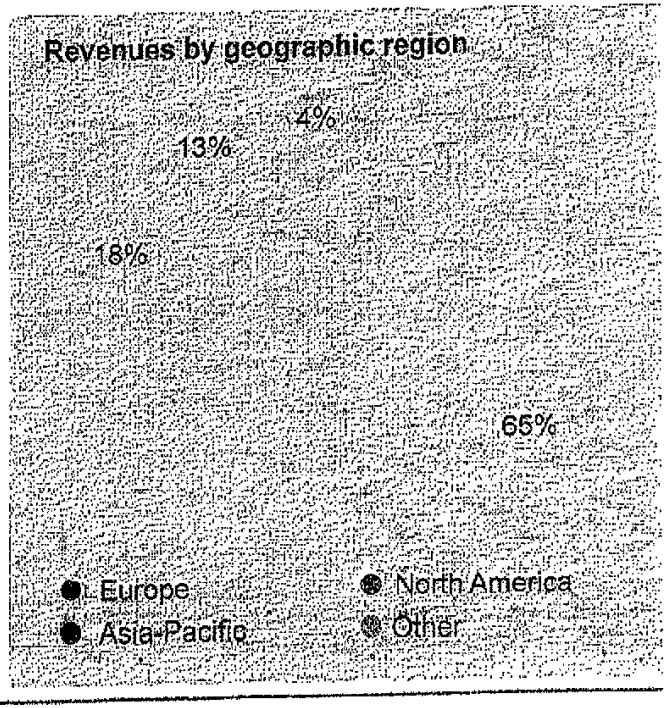
BOMBARDIER

Bombardier Transportation

Segmented revenues

Total 2011 revenues: $9.1 bn US

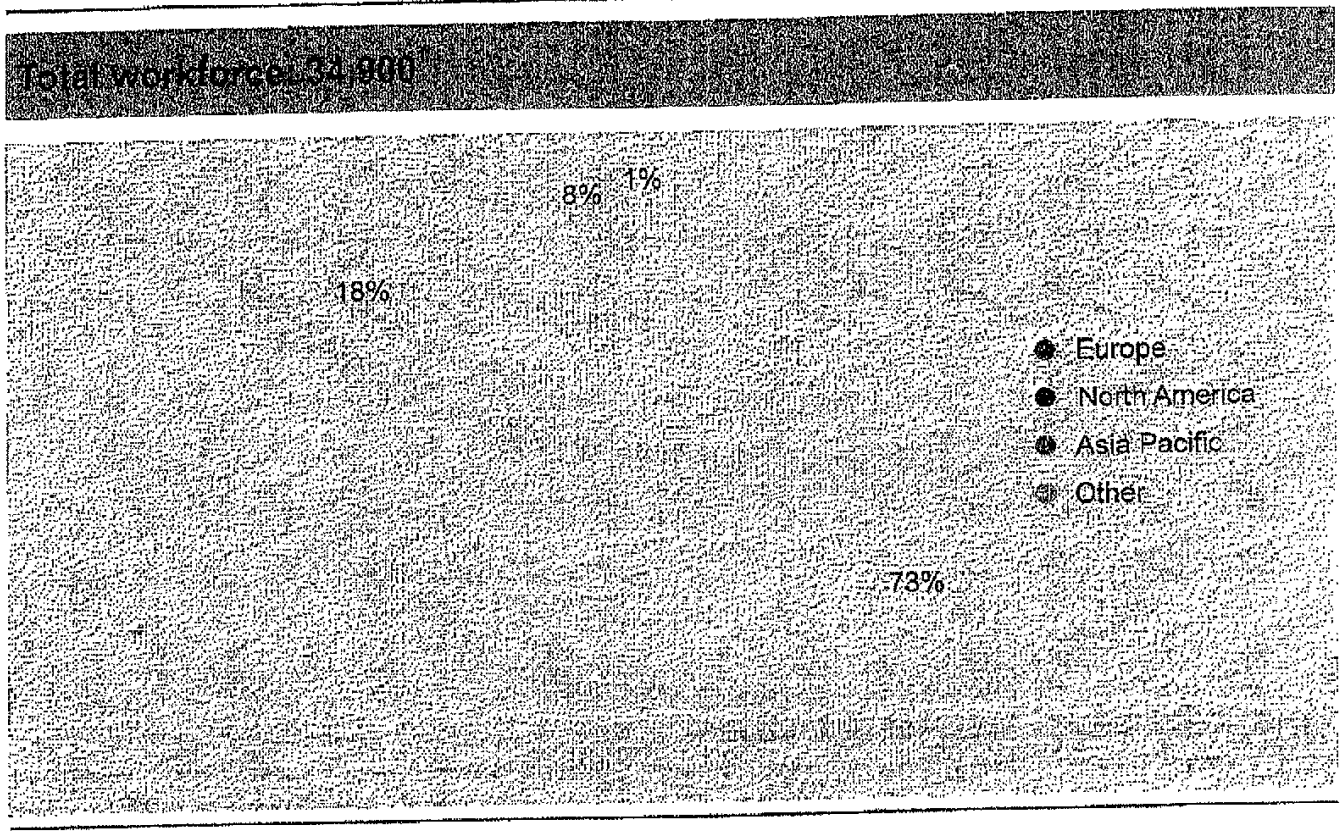




[1] for fiscal year ended January 31, 2011

BOMBARDIER

Bombardier Transportation
Employees by geographic region



1 for fiscal year ended January 31, 2011

BOMBARDIER

Bombardier Transportation
Our strategy

Objectives & scope

- Grow EBIT further while maintaining leadership position
- Deliver excellent project performance through improved execution
- Increase product competitiveness through innovation and customer-driven development
- Be the preferred and most reliable partner to our customers
- Continue to capitalize on new market opportunities

Components of our strategy

Way Forward

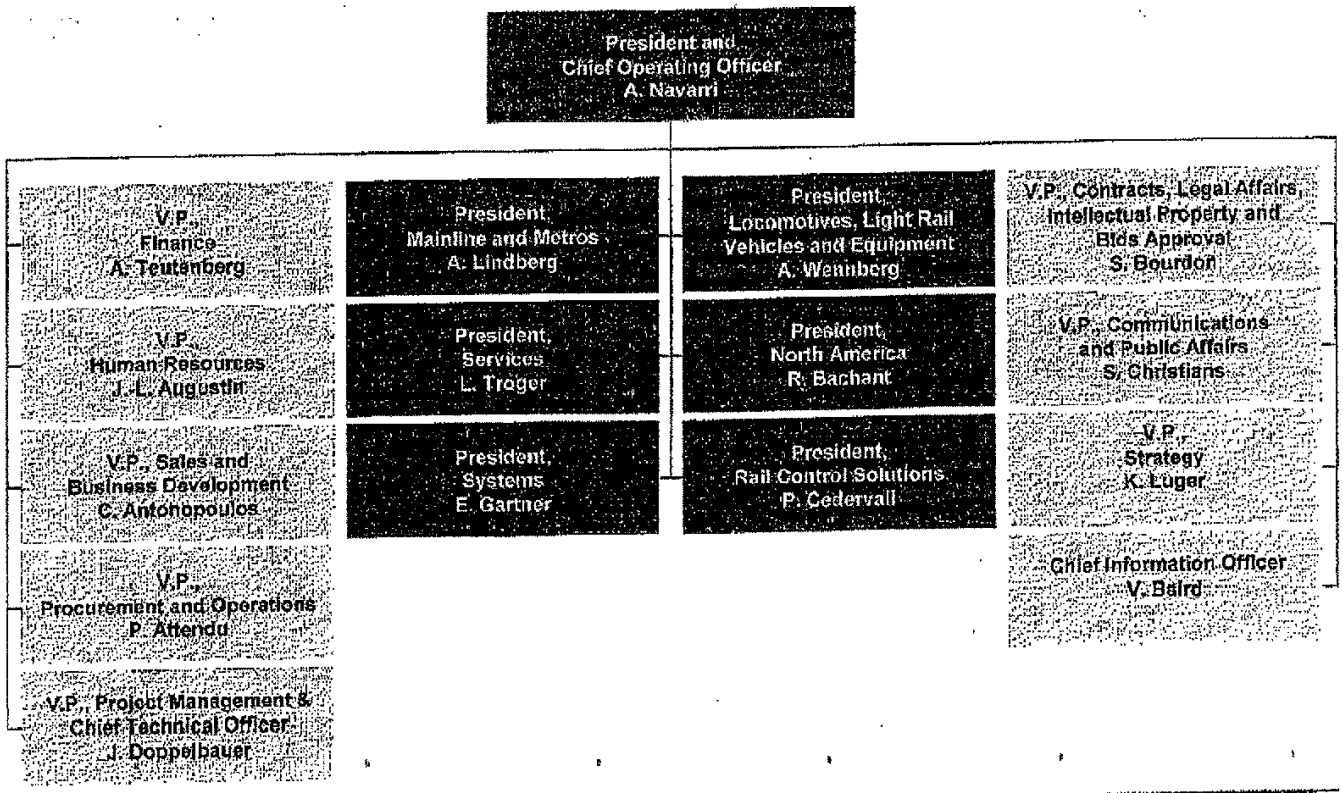
1. Be #1 in customer satisfaction through flawless execution
2. Raise our game on global talent management
3. Actively manage risks
4. Establish local roots in all key markets
5. Enhance our corporate social responsibility

Operations

6. Develop innovative, environmentally conscious products that meet customer needs globally
7. Optimize our footprint/ supply chain and ensure efficient structures

BOMBARDIER

Bombardier Transportation
Our divisions and group functions

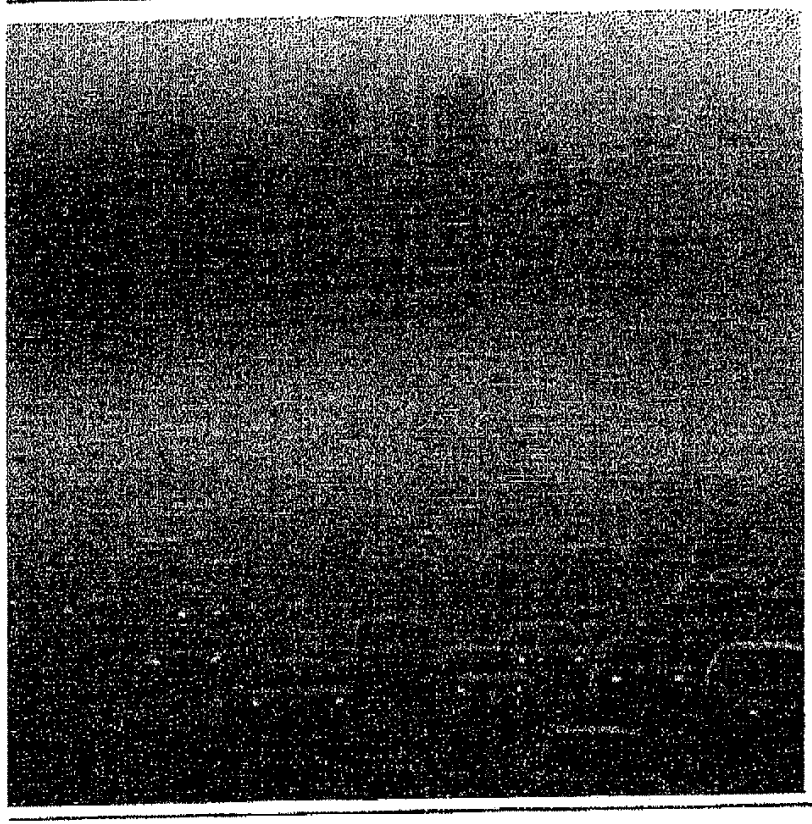


BOMBARDIER

Content

The Climate is Right for Trains

Megatrends – Overview

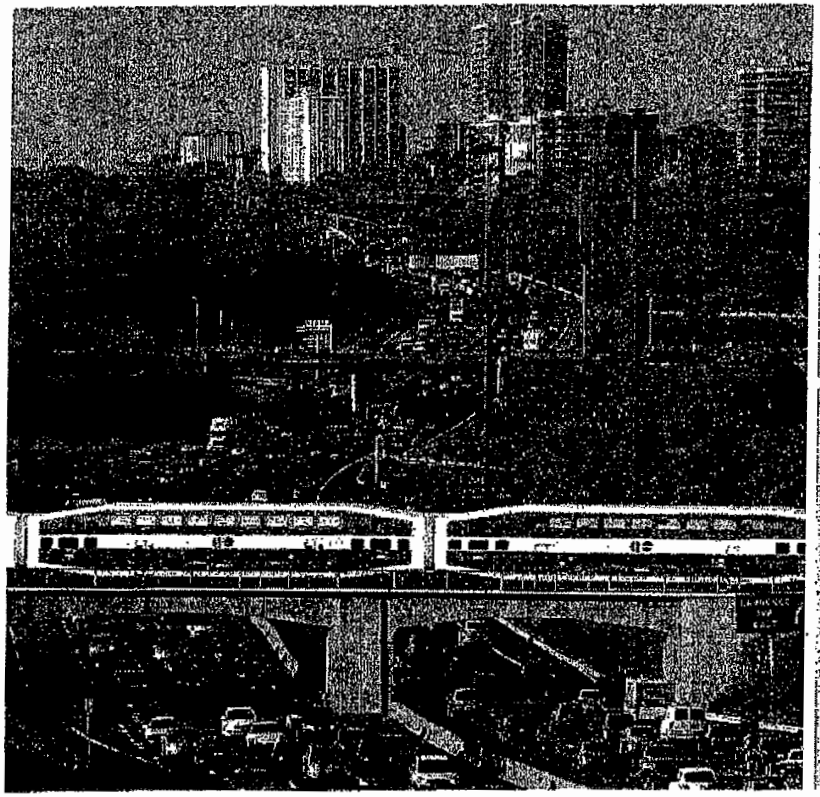


- Climate change
- Urbanization and population growth
- Congestion
- Oil scarcity and price of energy
- Aging of societies

BOMBARDIER

Climate change

The climate is right for trains

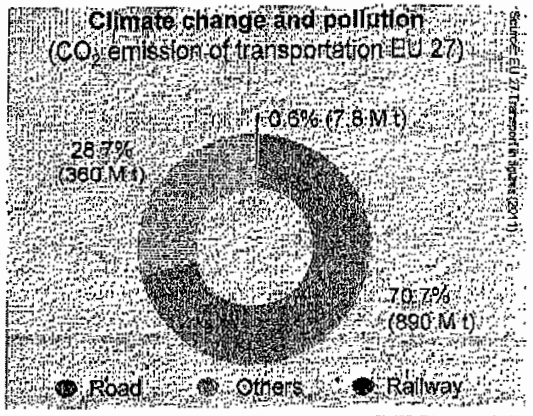


Challenge

CO_2 emissions are a contributing factor to climate change

Solution

Rail has lower CO_2 emissions than other modes of motorized transport



[1] Passenger car, 1.7 persons/car

BOMBARDIER

Urbanization and population growth

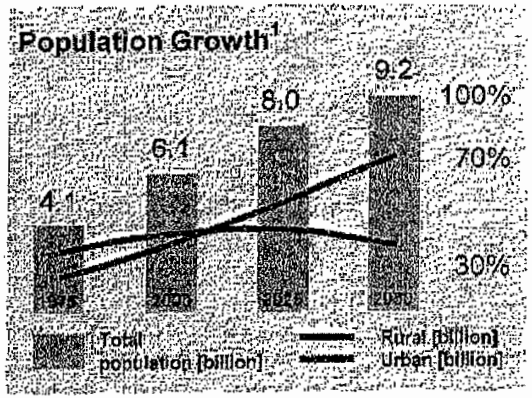
Need for flexible high capacity systems

Challenge

Increasing demand for passenger transportation, esp. in urban areas

Solution

Rail provides capacity for projected urban population growth



Source: United Nations Department of Economic and Social Affairs/Population Division: "World Urbanization Prospects: The 2007 Revision"

BOMBARDIER

Congestion

Demand for collective efficency

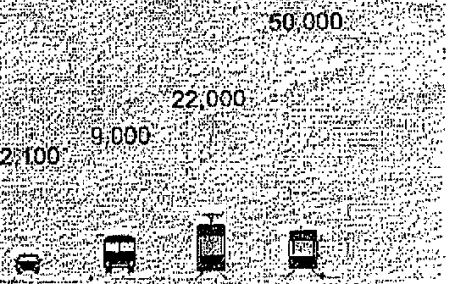
Challenge

Congestion wastes time, energy, money and creates pollution

Solution

Rail uses considerably less land and carries high number of passengers

Number of people transported per hour in urban environment[1]



[1] Number of people crossing a 3 to 5 metre-wide space in an hour in an urban environment
Source: International Association of Public Transport (UITP)

BOMBARDIER

Oil scarcity and price of energy

Need for reduced consumption and energy savings

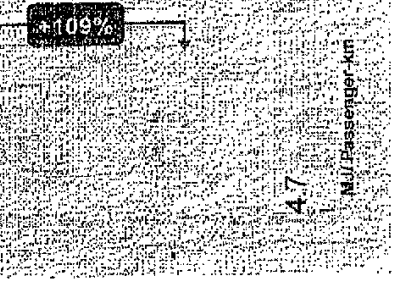
Challenge

Oil becoming scarce and energy prices will continue to be volatile

Solution

Rail consumes dramatically less energy

Energy consumption during operation plus vehicle production



Source: Report DOE/EIA-0484(2008), Release Date: September 2008
"Better urban mobility in developing countries", IAPT, 2003
Federation of Canadian Municipalities, National Transit Strategy, March 5, 2007

BOMBARDIER

Demographic changes

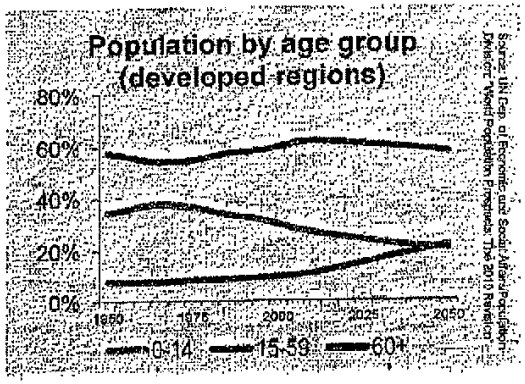
Need for accessible mass transit

Challenge

Aging of population (esp. in developed countries)

Solution

Rail provides easily accessible transport systems to all age groups



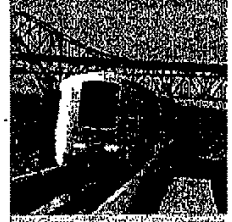
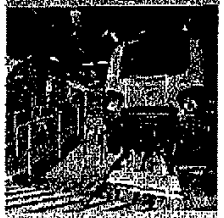
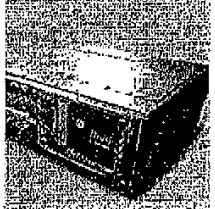
Source: United Nations Department of Economic and Social Affairs/Population Division: "World Population Prospects: The 2006 Revision", 7 March 2007

BOMBARDIER

Content

Our products and solutions

The broadest portfolio in the rail industry

Rail vehicles	Transportation Systems	Services	Rail Control Solutions	Propulsion & Controls	Bogies
					
▪ Light rail vehicles ▪ Metros ▪ Commuter trains ▪ Regional trains ▪ Intercity trains ▪ High speed trains ▪ Locomotives	▪ Monorail systems ▪ APM systems ▪ Light rail systems ▪ ART systems ▪ Metro systems ▪ Intercity systems ▪ Transit Security	▪ Fleet management ▪ Operations & maintenance ▪ Material solutions ▪ Vehicle refurbishment ▪ Component reengineering	▪ Integrated control systems ▪ Automatic train protection and operation ▪ Interlocking systems ▪ Wayside equipment ▪ Services	▪ Traction converters ▪ Auxiliary converters ▪ Traction drives ▪ Control and communication	▪ Portfolio to match entire range of rail vehicles ▪ Full scope of service over the lifetime of a bogie

BOMBARDIER

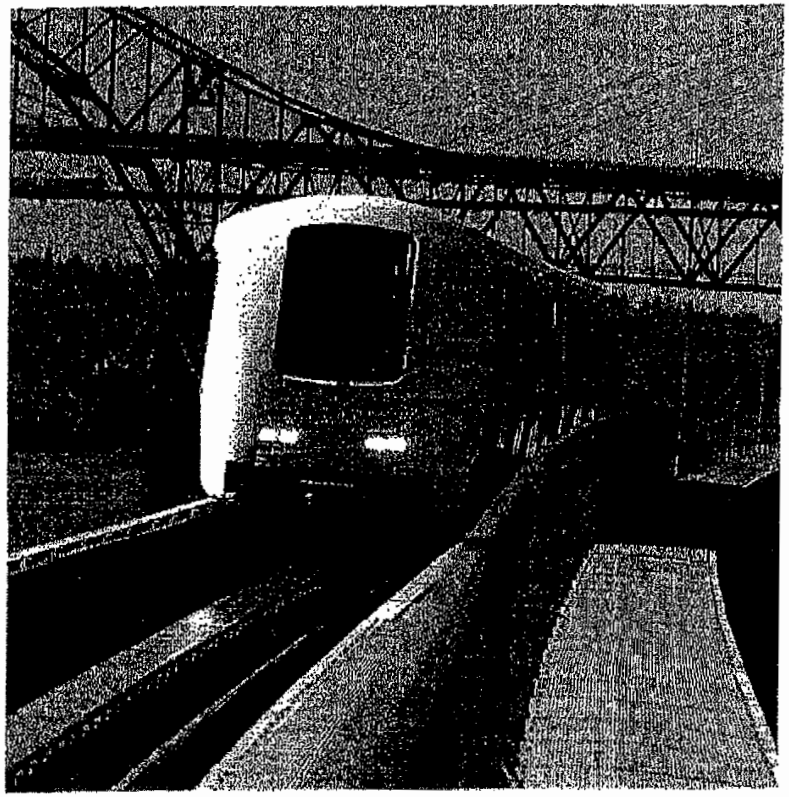
Products and solutions
Rail vehicles

- Broadest rail vehicle portfolio
- More than 100,000 Bombardier rail vehicles in service worldwide

Portfolio
- **Light rail vehicles** *(FLEXITY)*
- **Metros** *(MOVIA)*
- **Commuter trains** *(SPACIUM, BiLevel)*
- **Regional trains** *(ITINO, TALENT, TWINDEXX, OMNEO, AGC)*
- **Intercity trains** *(REGINA, ELECTROSTAR, TURBOSTAR)*
- **High speed trains** *(ZEFIRO)*
- **Locomotives** *(TRAXX)*

BOMBARDIER

Products and solutions
Transportation Systems



- Provider of over 60 systems worldwide
- Over 40 years of experience in systems engineering and integration

Portfolio

- **Monorail systems** (*INNOVIA* Monorail)
- **APM systems** (*INNOVIA* APM)
- **Light rail systems**
- **ART systems** (*INNOVIA* Metro)
- **Metro systems**
- **Intercity systems**
- **Transit security** (*SEKURFLO*)

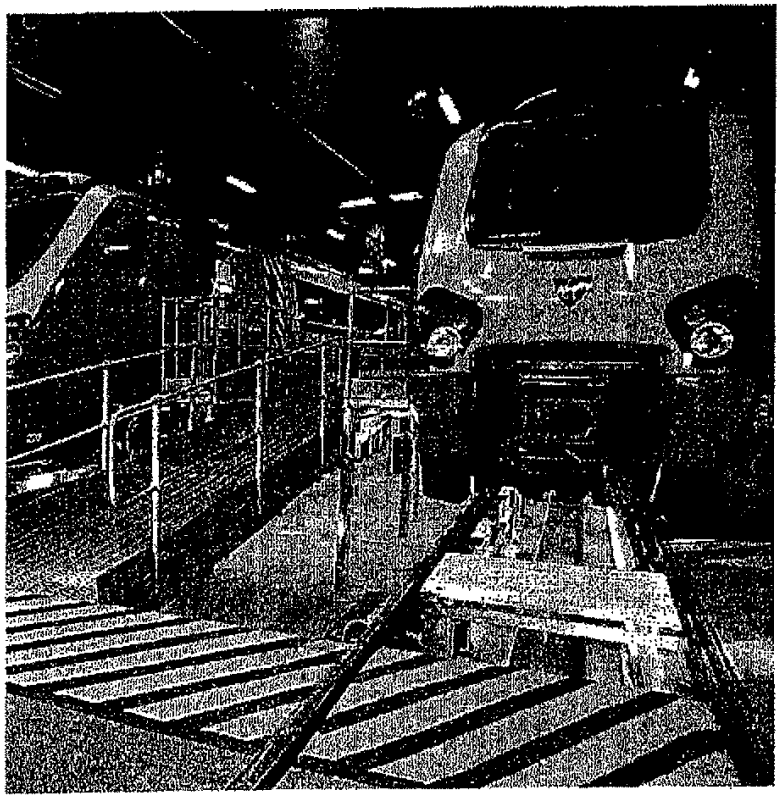
Bombardier 0000B5

01271

APM=Automated Peoplemover
INNOVIA and *SEKURFLO* are trademarks of Bombardier Inc. or its subsidiaries.

BOMBARDIER

Products and solutions
Services



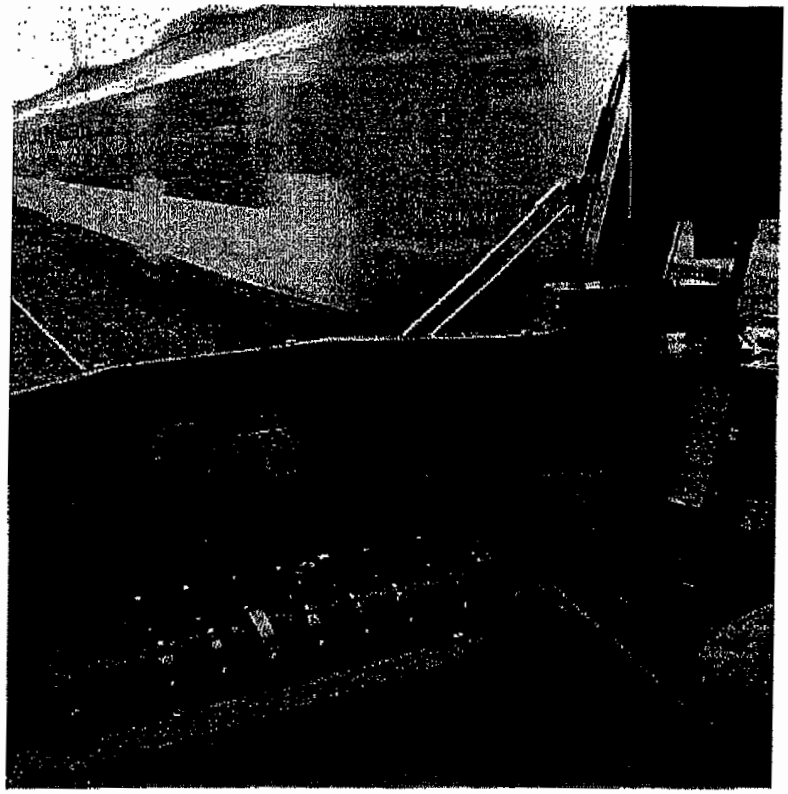
- First choice for reliability, availability, maintainability and safety
- Complete life-cycle service and support

Portfolio

- Fleet management (*ORBIFLO*)
- Operations & maintenance
- Material solutions
- Vehicle refurbishment
- Component reengineering

BOMBARDIER

Products and solutions
Rail Control Solutions



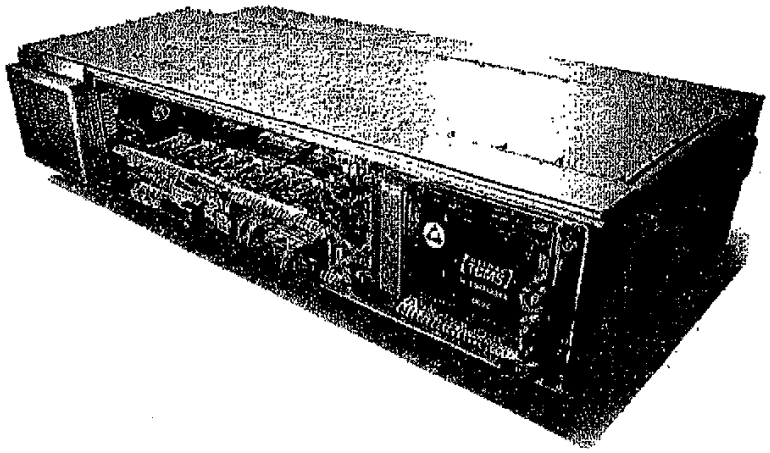
- *CITYFLO* mass transit solutions
- *INTERFLO* mainline solutions
- Leading the way in ERTMS technology

Portfolio
- Integrated control systems
- Computer and relay based interlocking systems
- Automatic train protection and train operation systems
- Radio based rail control and signalling systems
- Wayside equipment

ERTMS=European Railway Traffic Management System

BOMBARDIER

Products and solutions
Propulsion and Controls



- *MITRAC* – The heart, muscles and brain of the train
- Leading provider of propulsion and control equipment for rail vehicles

Portfolio
- Traction converters
- Auxiliary converters
- Traction drives
- Control and communication

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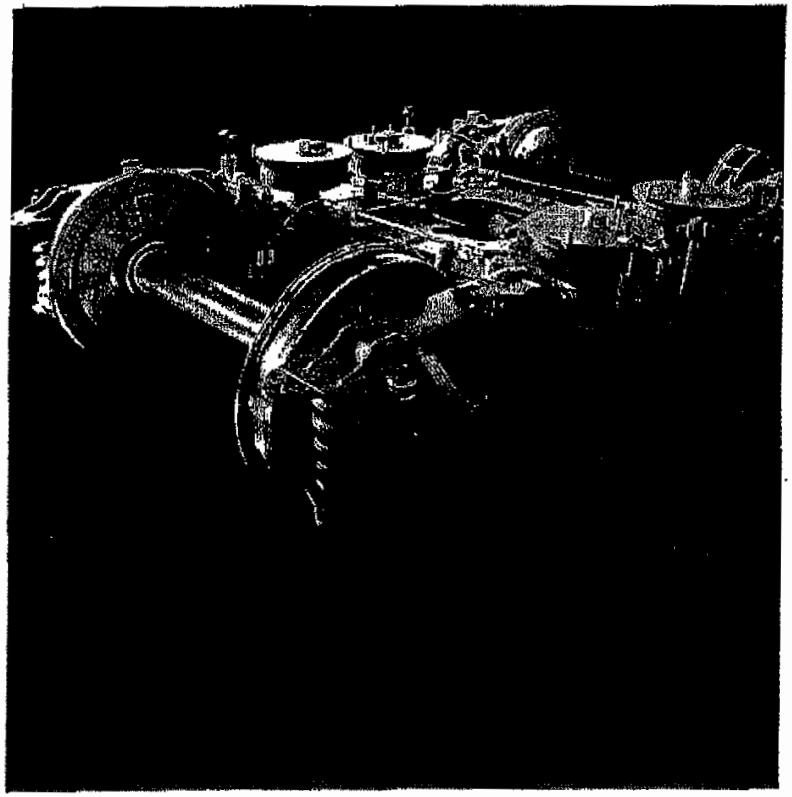
BOMBARDIER

Products and solutions

Bogies



- More than 260,000 *FLEXX* bogies in operation worldwide
- Most comprehensive bogie portfolio covering the entire range of rail vehicles
- *FLEXX* bogies offer high operational benefits

Portfolio

- S – *FLEXX* Urban for Trams and Light Rail Vehicles
- M – *FLEXX* Metro for Metro and Mass Transit Applications
- M – *FLEXX* Bogies for Regional, Long Distance and High Speed Trains
- L – *FLEXX* Power for Locomotives

BOMBARDIER

Our products and solutions

ECO4: the formula for total train performance

***ECO4* technologies**

- Modular portfolio of innovative technologies and solutions that add value to trains and services
- Ideal response to wide spectrum of performance requirements
- Easy customization to any fleet

Benefits to our customers

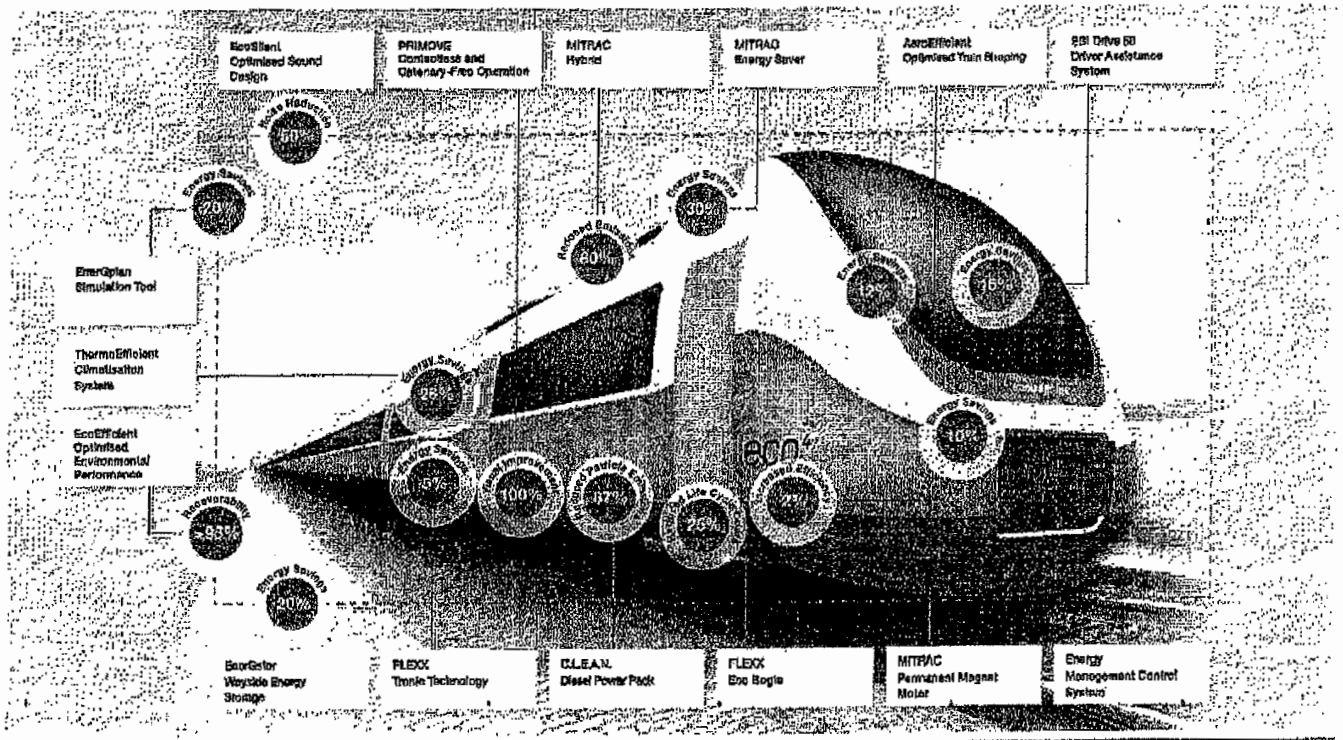
- Save energy
- Improve efficiency
- Achieve sound economic value
- Protect the environment

eco4 BOMBARDIER

Our products and solutions

ECO4: the formula for total train performance

Bombardier's *ECO4* technologies can create energy savings of up to 50%[1]



[1]Compared to current products

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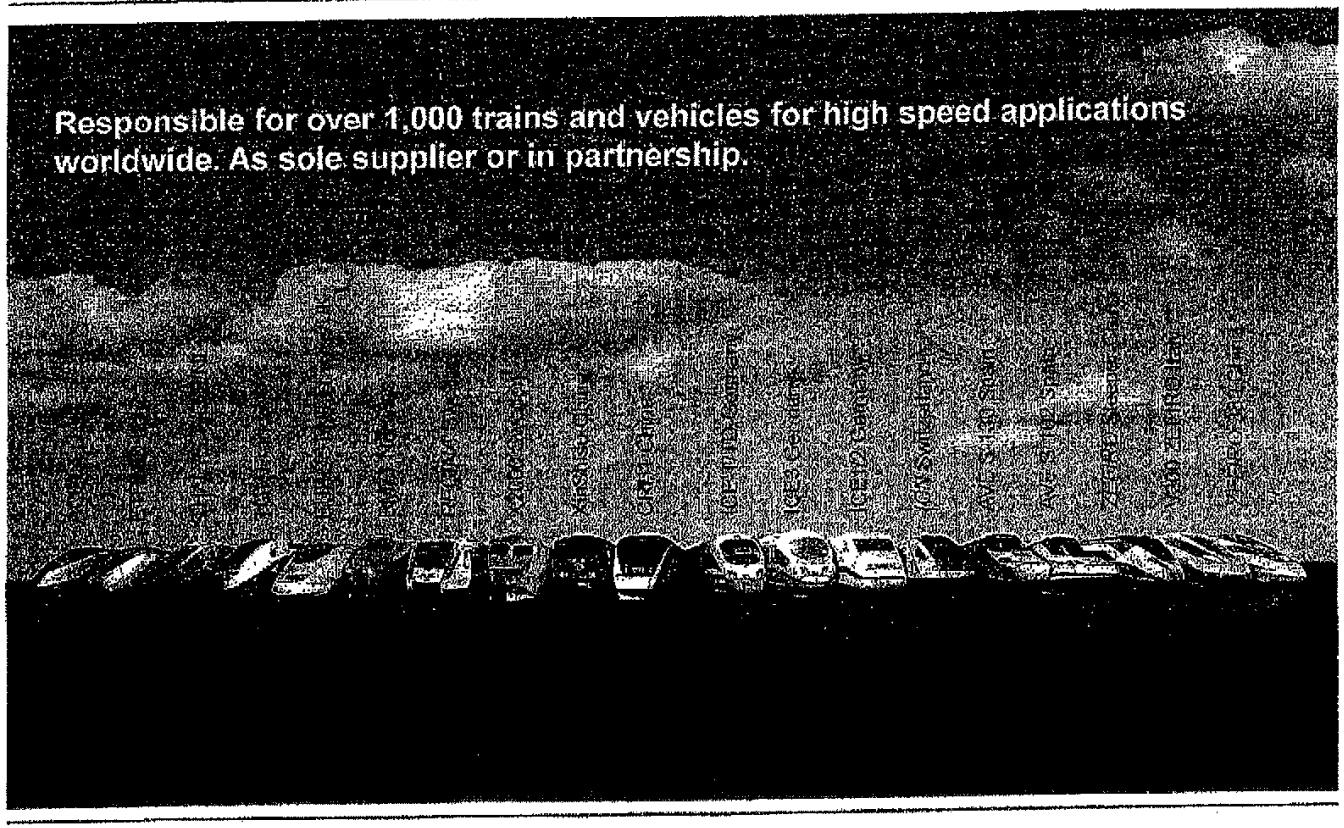
eco4 BOMBARDIER

Our products and solutions

Superior experience in high speed rail

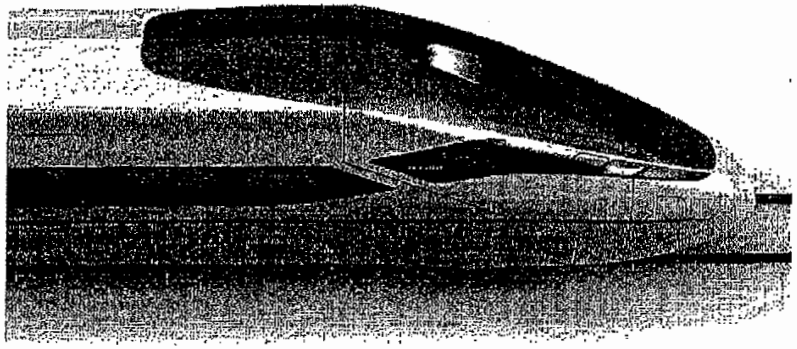


ICN, REGINA and *ZEFIRO* are trademarks of Bombardier Inc. or its subsidiaries.
* Manufactured by Bombardier Sifang Power (Qingdao) Transportation Ltd.
** Manufactured in cooperation with a strategic partner.

BOMBARDIER

Our products and solutions

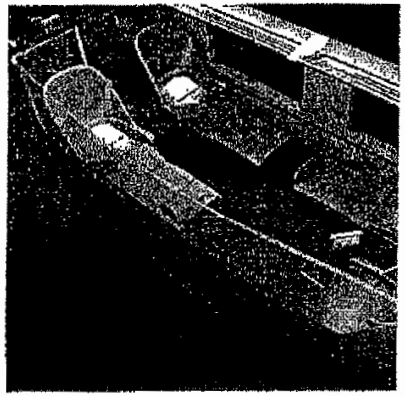
ZEFIRO – A new sense of speed



The ZEFIRO train is one of the world's most economical and eco-friendly VHS trains.

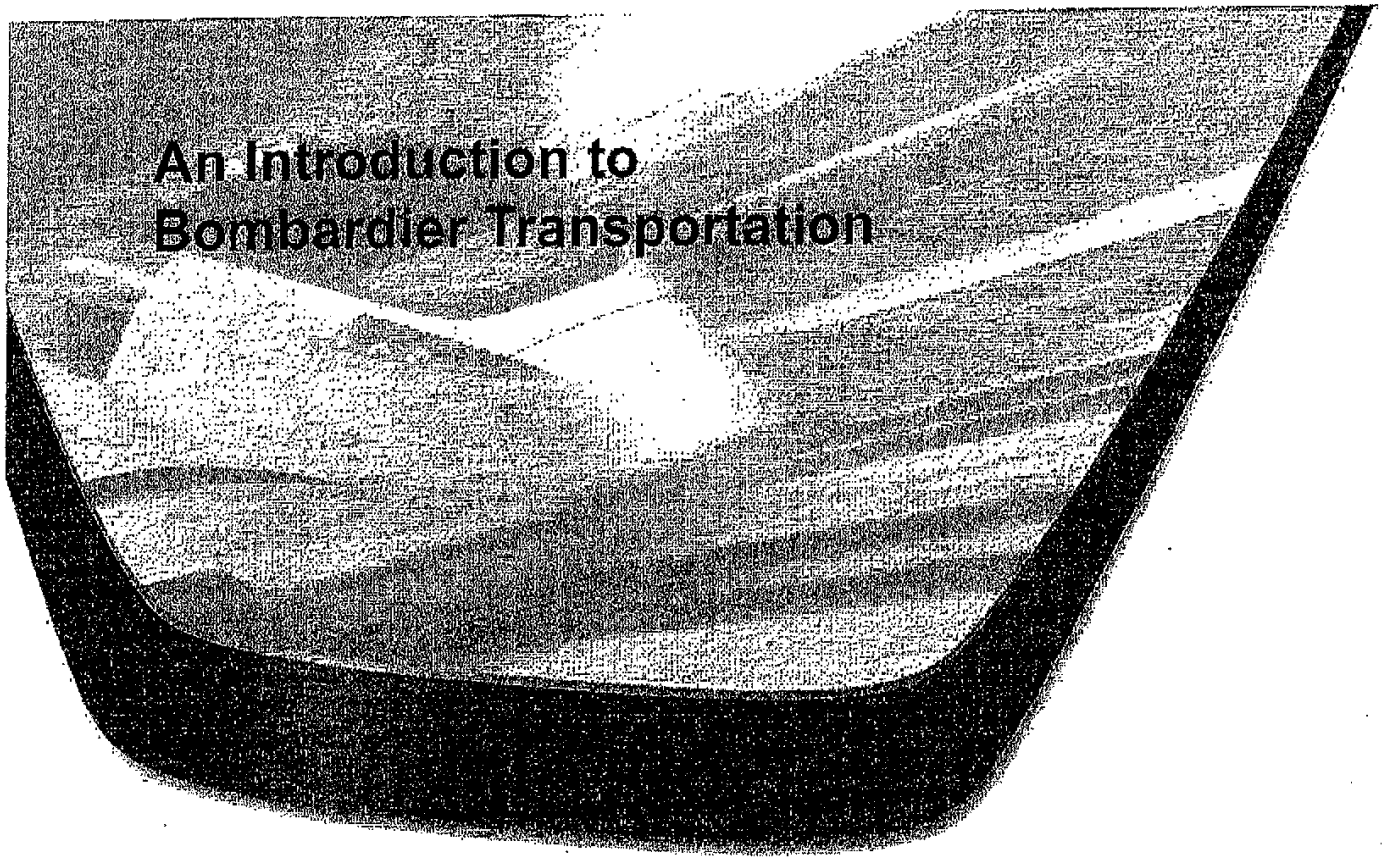
Bombardier has developed three different variants:

- ZEFIRO 250 for very high speed
- ZEFIRO 160 for European VHS networks
- ZEFIRO 250 tunnel for tunnel travel



- Unique aerodynamic design
- Lowest energy consumption per seat
- Carbody in UIC or wide-body profile
- Up to four different power supply voltages
- Designed for cross-border travel
- Up to 664 seats in an 8-car train or 1,336 seats in a 16-car train incl. bistro or restaurant

BOMBARDIER



The Climate is Right for Trains

BOMBARDIER

EXHIBIT 23

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Bombardier Transportation

BT News

Jan / Feb

News for all Employees

German Operator Deutsche Bahn Orders New Coaches and Locomotives

Bombardier Transportation (BT) has won an order worth about 362 million euro to deliver 137 *BOMBARDIER® TWINDEXX®* double-deck coaches and 27 *BOMBARDIER® TRAXX®* locomotives for long-distance routes to Deutsche Bahn AG (DB). The latest-generation *TWINDEXX* 2010 double-deck coaches and *TRAXX* P160 AC locomotives are due to enter service on DB's long-distance routes in December 2013.

The contract involves *TWINDEXX* double-deck cab cars and intermediate coaches with high/low-floor entrance. It is part of a framework agreement signed in December 2008. The locomotives order is also part of a framework agreement signed in 2000. This latest order marks the first time that DB has requested *TWINDEXX* double-deck coaches for long-distance routes. Bombardier double-deck coaches have been operating successfully on the DB regional network since 1998.

Gregg Peters, President Business Unit Germany and Scandinavia, said: "Together with Deutsche Bahn AG, we are launching a new chapter for double-deck coaches. We are delighted that DB has now decided to introduce our successful double-deck units on its long-distance routes as well."

Åke Wennberg, President Locomotives and Equipment, said: "DB has once again turned to our high-performance, reliable and maintenance-friendly *TRAXX* platform. We are proud that our locomotives will now become an important part of DB's new long-distance route concept. They form an ideal combination with our *TWINDEXX* 2010 double-deck coaches."

The new coaches are designed for a top speed of 160 km/h and will be built at our site in Görlitz, Germany. The final assembly of the locomotives will take place at our site in Kassel, Germany, while the carbodies will be produced at our site in Wroclaw, Poland. The bogies for both the coaches and locomotives are manufactured at our site in Siegen, Germany.

137 TWINDEXX coaches and 27 TRAXX locomotives will serve long distance routes in Germany

Bombardier Signs Strategic Agreement with China

Bombardier and China's Ministry of Railways (MOR) signed a Memorandum of Understanding aimed at strengthening their strategic partnership in the development of various products and systems, from high speed and regional trains to the newly established China Railway Signal and Communication Corporation. The agreement was signed at the UIC High Speed Congress in Beijing by China's Minister of Railways, Liu Zhijun, and BT President, André Navarri.

"China has a clear vision of the critical role rail must play in sustainable economic development, and is making the strategic investments necessary to ensure that vision is realised," said Mr Navarri. "We are pleased to have worked closely with the MOR and our local partners in the past and look forward to working together in the development of new, game-changing technologies." Read more about our latest achievements in China inside.

André Navarri and Minister Liu Zhijun sign the Memorandum of Understanding

BOMBARDIER

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BT News Jan/Feb 2011
News for all Employees

News from across BT

Bombardier Signs Agreement with Russian Railways

BT Signaling B.V. has signed an agreement to purchase a stake in the signalling equipment manufacturer United Electrical Engineering Plants, known as Elteza. Elteza is a subsidiary of Russian Railways (RZD). Initially, BT Signaling B.V. will purchase a 25 per cent stake in Elteza. Following further approval, BT Signaling B.V. will increase its stake to nearly 50 per cent. RZD will remain the majority shareholder.

The agreement was signed at a ceremony in Moscow by Pierre Beaudoin, President and CEO of Bombardier Inc, and Vladimir Yakunin, President of Russian Railways. This new agreement will lead to the creation of an Elteza department dedicated to new technologies and focusing on the manufacture of products including *BOMBARDIER* EBI** Lock 960 as well as the latest generation of wayside products.

Our *EBI* Lock 950 computer-based interlocking system was commissioned at the 100th railway station in Russia on December 25, 2010, going into operation on the Eastern Siberian branch of Russian Railways.

Pierre Beaudoin (left) and Vladimir Yakunin sign the agreement in Moscow

Gautrain Fleet Delivery Complete

In South Africa, local workers completed the last *BOMBARDIER* ELECTROSTAR** train for the Gautrain rapid rail link on time. The final delivery of the 24 four-car trains marks a highly successful transfer of know-how and an excellent working relationship between BT and its South African partners.

Our facility in Derby, United Kingdom, manufactured the first 15 *ELECTROSTAR* cars for export to South Africa. The remaining 81 vehicles were supplied as flat pack deliveries of roof, underframe, cab and intermediate end modules, for final assembly in South Africa.

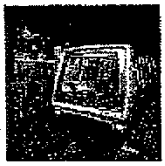
Signalling Technology for Shenzhen Metro Line 3

Our *BOMBARDIER* CITYFLO** 650 mass transit signalling solution has been delivered for the first phase of the Shenzhen Metro Line 3, in southern China. This is the first application of our communication-based train control signalling technology on a steel-wheel, mass transit line in China. The line was officially opened on December 28, 2010.

New Orders

January 5 - Third Major Signalling Contract in Latvia
Customer: Consortium of civil works companies led by Skonto Buve, for delivery to Latvian Railways
Value: 9,25 million euro for the design, installation, test and commissioning of *BOMBARDIER* INTERFLO** 200 solution, comprising *EBI* Lock 950 CBI Release 4, *EBI* Screen 2000 control room and *EBI* Gate 2000 level crossing systems
Delivery: Scheduled to enter commercial operation in 2014 on 100 km of double-track with five stations on the main East - West corridor.

December 22 / January 4 - Operation and Maintenance at US Airports



Customers: City and County of Denver, Department of Aviation / Houston Airport System
Value: 77 million euro for the operation and maintenance (O&M) of *BOMBARDIER* INNOVIA** APM 100 system at Denver International Airport, from 2011 to 2017, plus 20 million euro for O&M of our same system at George Bush Intercontinental Airport, Houston, from 2011 to 2015, with the possibility of extending to 2020.

December 23 - Locomotives for Railpool in Germany

Customer: Railpool GmbH
Value: Approximately 120 million euro for the supply of a total of 35 *TRAXX* locomotives
Delivery: First locomotives planned for July 2011. All of the vehicles are planned to be in service by November 2013.

December 14 - Additional Order from Israel Railways

Customer: Israel Railways
Value: 115 million euro for a further 72 double-deck coaches, part of a framework agreement concluded last October, which included a firm order for 78 coaches and foresees optional batches
Sites: The vehicles will be manufactured at our Görlitz site in Germany and in Israel.

BOMBARDIER

Our People

Employee Engagement Survey 2011 Launched

Your feedback is vital in helping Bombardier address areas of concern and highlight our successes. That is why all BT colleagues are asked to complete this year's Employee Engagement Survey, which should not take more than 20 minutes. The survey was officially launched on Monday, January 31, and runs until Friday, February 18. It supports the second pillar of our Way Forward programme to raise our game in global talent management.

The survey is an important tool for measuring, understanding and developing appropriate action planning to optimise our working environment at BT and to ensure we all enjoy our work and succeed at what we do. All survey responses will remain anonymous and confidential. As in previous years, the consulting firm Hay Group will administer the survey on behalf of BT.

This year, the same provider will manage the survey for all Bombardier employees worldwide with a common set of 35 questions which employees at Aerospace, Transportation, Flexjet and the Head Office will all complete.

The results of the survey will be shared with employees once they are available during the second quarter of the year. To ensure areas of concern are addressed effectively, an action planning tool will be made available to help our leaders develop robust follow-up action plans based on combined anonymous results for their teams.

Have you had your PMP conversation with your manager?

Now is a great opportunity for you to review your performance in 2010 and discuss your objectives and development for 2011 with your manager[1]. An upgraded and more user-friendly version of the eHR/SIGAL tool is now available. In particular, the ePMP is easier and faster to use. Please note that the 2010 PMP has to be finalised in the old eHR/SIGAL version. Your current eHR/SIGAL username and password works for both system versions.

Promoting Bombardier

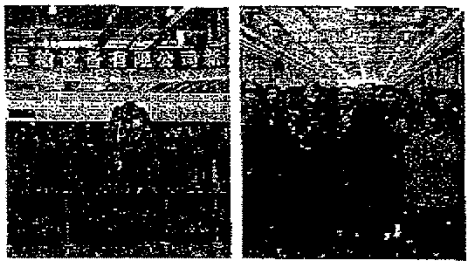
Strengthening Our Presence in China

Senior BT colleagues travelled to the Chinese capital Beijing for the seventh World Congress on High Speed Rail as well as inaugurating our new production plant in Qingdao, in December. A top-level delegation from BT received a warm welcome from the Chinese Ministry of Railways (MOR) on their visit to this rapidly developing key railway market.

[1] PMP is a voluntary process for German non-executives

Our *BOMBARDIER® ZEFIRO®* 380 very high speed train, designed for the country's vast rail network, took centre stage at the exhibition Modern Railways 2010, coinciding with UIC Highspeed 2010, the seventh World Congress on High Speed Rail. It was the first time the congress was held outside Europe, in recognition of China's accomplishments in high speed rail development. China already boasts the world's longest high speed rail network at 7,631 km, with more than a further 10,000 km under construction.

As well as signing a multi-level **Strategic Cooperation Agreement** with MOR, BT President André Navarri took part in the inauguration ceremony at our Qingdao plant, to which all employees of Bombardier Sifang (Qingdao) Transportation (BST) were invited. The new plant covers about 90,000 sqm. BST currently has 2,000 employees, expected to grow to more than 3,800 by the end of 2011.



The grand opening ceremony in Qingdao

BT Gains Top Marks at Recruitment Fair

A survey of 140 students who attended the recent Recruiting Days of the ESCP business school in Berlin, Germany, gave Bombardier Transportation (BT) the highest score out of more than 30 companies that took part in the event. Nine colleagues from BT - including six ESCP alumni - participated, giving a company presentation as well as holding a workshop about our Global Graduate Programme.

Bombardier at MercinTreno 2010

BT was the only manufacturer invited to the second International Forum for the development of Rail Cargo Transport, held at La Sapienza University, in Rome, Italy. The theme of this year's event was the dialogue which is necessary between rail, road and sea operators in order to achieve a more efficient transport network, and to promote ever more capable and effective rail-road-sea integration. BT was represented by Alberto Lacchini, Sales Director Locomotives.

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BT News
Jan / Feb 2011
News for all Employees

Our sites: Kassel, Germany

Site overview

The Kassel site is our oldest – it celebrated its 200th anniversary last year. Over 34,500 steam, diesel and electric locomotives have been produced here to date. The site's product palette ranges from heavy haul locomotives via the *TRAXX* and *BOMBARDIER* ALP** platform locomotives through to high-speed power heads.

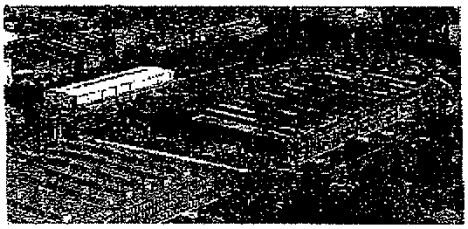
About 750 employees work at the site, where modular production takes place under a single roof. Production-synchronous pre-assembly and the clocked final assembly take place in five sections of a single large hall. As part of our production network, our Wroclaw site in Poland supplies the locomotive carbodies, while the bogies come from our Siegen site in Germany. The ready-assembled locomotives are then mounted on their bogies. Testing starts soon after in the same hall, with homologation also part of the process chain.

Short history and milestones

- 1810 - Factory founded by Georg Henschel
- 1848 - "Dragon" steam engine marks switch to innovative locomotive manufacturing
- 1905 - Production of electric locomotives starts
- 1925 - Production of standard steam locomotives for passenger and freight transport
- 1947 - Breakthrough in production of high-performance diesel locomotives
- 1985 - Delivery of first prototype ICE power head (ET 410)
- 2003 - *TRAXX* brand and *TRAXX MS* locomotives introduced
- 2009 - The site reaches its highest production rate to date of 30 locomotives per month
- 2010 - Presentation of the first DUAL POWER locomotive (called the *ALP*-45DP, made in Kassel) at InnoTrans

Main products and contracts

- *TRAXX* P140 AC, MS and DE locomotives for freight transport for a range of European customers
- *TRAXX* P160 AC and DE locomotives for passenger transport in Germany
- High-speed power heads of up to 250 km/h and even 350 km/h for Spain (in partnership with Talgo Spain)



- *ALP*-46, *ALP*-46A and *ALP*-45 Dual Power locomotives for North America
- IORE heavy haul locomotives for iron ore transport in Sweden

Meet Site General Manager Steffen Riepe

Building ship models, but not the ready-made ones – obtaining construction plans, researching the relevant data and sources, browsing through museums and the Internet: That is one of my favourite hobbies. And much of this hobby also characterises my working style. The fun involved, of guiding a process from the initial idea through to completion. And my continuous interest in new challenges.

I have been the General Manager in Kassel since 2001, before which I was production manager for new-built locomotives at the Kassel site, after completing my studies in machinery construction in Kassel. Everything has changed here during the course of my employment: the customers, the products, the plant itself – because this was built around the new requirements of new customers and the resulting new products. This for example paved the way for the vision of producing 100 locomotives per year becoming a reality – a reality which occasionally exceeds the original vision.

What does "Moving into High Gear" mean to me? It is an encouragement, to move beyond conventional thinking and to think about what the future should look like. Creativity within the realm of feasibility – this is a rare skill today which requires generalists with a desire for implementation. And this is the way I am in my private life: model-building is not my only passion. When I am not spending time with my family, I take to the road on my racing cycle. Or I read, from novels through autobiographies to non-fiction works.

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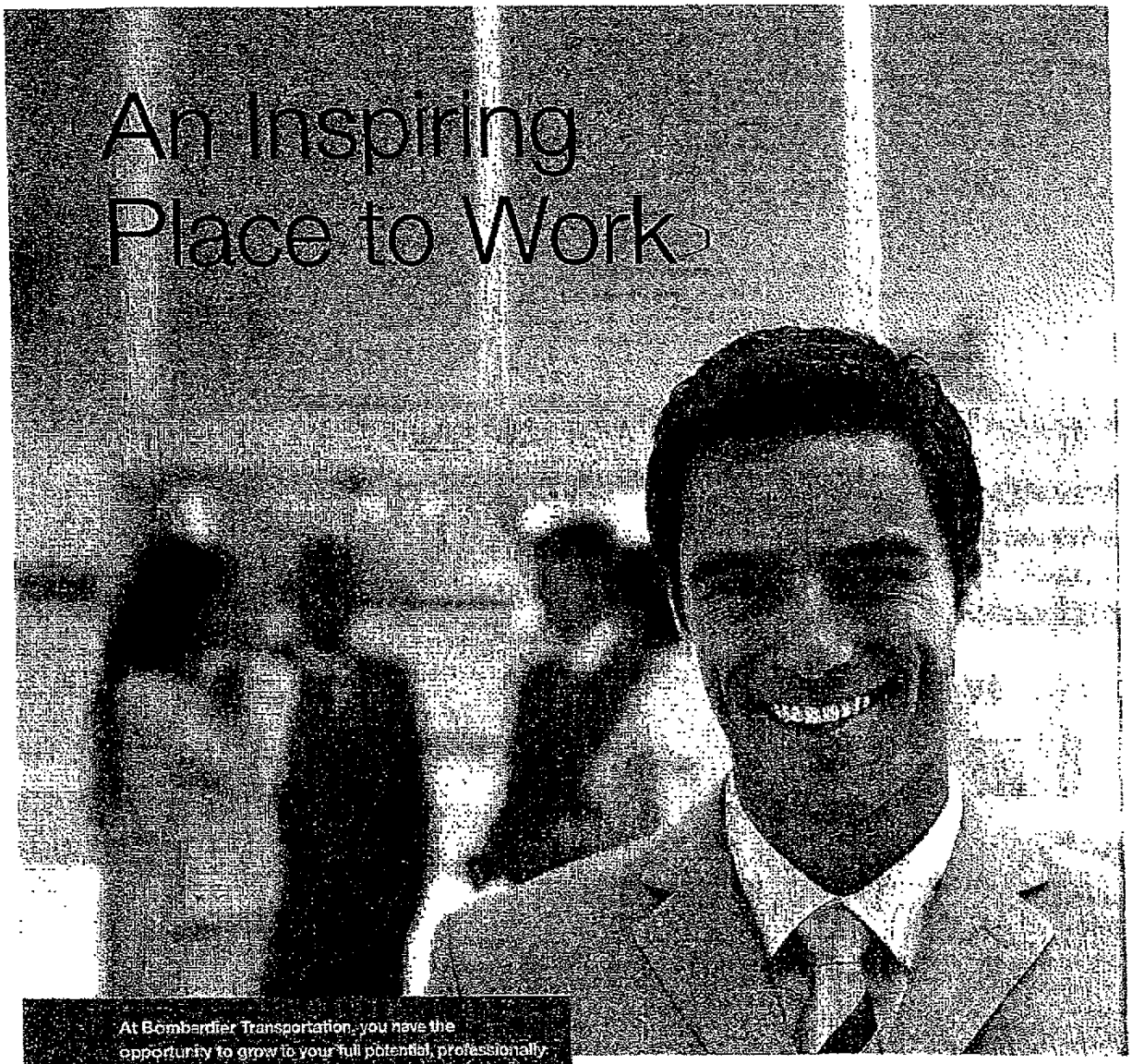
An Inspiring Place to Work



At Bombardier Transportation, you have the opportunity to grow to your full potential, professionally and personally.

Everywhere we operate, we reward effort and initiative. You are encouraged to ask questions and empowered to make decisions. As an equal opportunity employer, we strive to create a stimulating and open workplace which fosters teamwork, fairness, respect and diversity.

Simply put, we put people first.

The Climate is Right for Trains

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Welcome to the Best Choice for Rail Solutions

Rail Vehicles

- Light rail vehicles
- Metros
- Commuter trains
- Regional trains
- Intercity trains
- High-speed trains
- Very high-speed trains
- Locomotives

Propulsion & Controls

- Traction converters
- Auxiliary converters
- Traction drives
- Train control and management systems

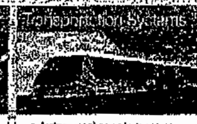
Bogies

- Portfolio of products to match the entire range of rail vehicles
- Full scope of services throughout the life cycle of bogies

Services

- Fleet management
- Technical support
- Materials and logistics management
- Vehicle refurbishment and modernization
- Component overhaul

Transportation Systems



- Automated people movers
- Automated monorails
- Light rail transit
- Advanced rapid transit
- (Automated) metro systems
- Intercity systems
- Turnkey systems
- Operations and maintenance

Rail Control Solutions

- Integrated control systems
- Computer and relay based interlocking systems
- Automatic train protection and train operation systems
- Radio based rail control and signalling systems
- Wayside equipment
- Services and training

Transit Security Solutions

- Integrated on-board passenger security and safety systems

Bombardier Transportation entered the mass transit market in 1974 with a contract linked to the expansion of Montreal's metro system in Canada. Some 30 years later, we lead the world's rail equipment manufacturing and servicing industry.

Truly global leader

With an impressive track record of producing high performance trains and equipment, we offer the broadest portfolio in the global rail industry.

Our innovative solutions and services include:

- Rail vehicles
- Propulsion & Controls
- Bogies
- Services
- Transport Systems
- Rail Control Solutions
- Transit Security Solutions

Our advanced rail transportation solutions range from metros, trams and commuter trains, to passenger coaches, locomotives and high-speed trains. We provide high-performance bogies, propulsion and controls and rail control solutions, as well as fleet services such as maintenance, logistics and vehicle overhauls. More information on our products are available in the Product Book or on the products section on our company intranet ExpressNet.

Challenging and dynamic

We help develop people and ideas.
Bombardier is an exciting place to work where people and their ideas are developed to their full potential. The well-being of our employees comes first. Investing in our employees' development and growth is the best way to ensure ours.

We focus on quality, strive to promote and protect diversity, and motivate our employees to do their best. Another key objective is eliminating boundaries that prevent the exchange of ideas, knowledge and talent across our organization.

Key figures – at a glance

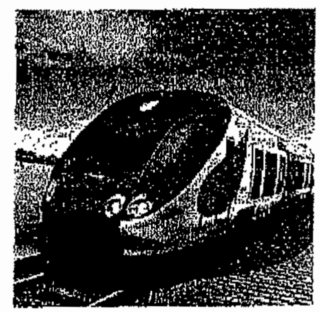
- 34,000 employees
- Employees of 75 nationalities and speaking 20 different languages are employed in 36 countries
- Teams in 20 countries (77% Europe, 20% North America, 3% Other)
- We operate 65 production and engineering sites and 21 service centres in 25 countries
- Over 100,000 vehicles in operation in over [illegible] countries

The engine of sustainable mobility

We make a strong commitment to sustainability.
A strong commitment to sustainable mobility is essential for managing the challenges of a rapidly changing global environment. At Bombardier Transportation, we place environmental sustainability firmly at the top of our agenda.

High-speed and cross-border rail connections are forging ahead in many regions; large-scale rail system modernization projects are underway in developing markets, and urbanization is on the increase worldwide. With the added issue of global climate change, rail transportation faces major challenges and opportunities.

Bombardier Transportation provides innovative, future-oriented solutions for modern railways. We help millions of people every day to reach their destinations in comfort and style. Our passion for excellence in safety, reliability and forward thinking design, together with an industry-leading commitment to sustainable mobility, makes us the partner of choice for rail operators around the globe.



At Bombardier Transportation, we recognize that we can make a difference. To maximize our products' environmental advantages, we build energy efficiency into the design phase and set challenging targets that help us continuously improve environmental efficiency of our products.

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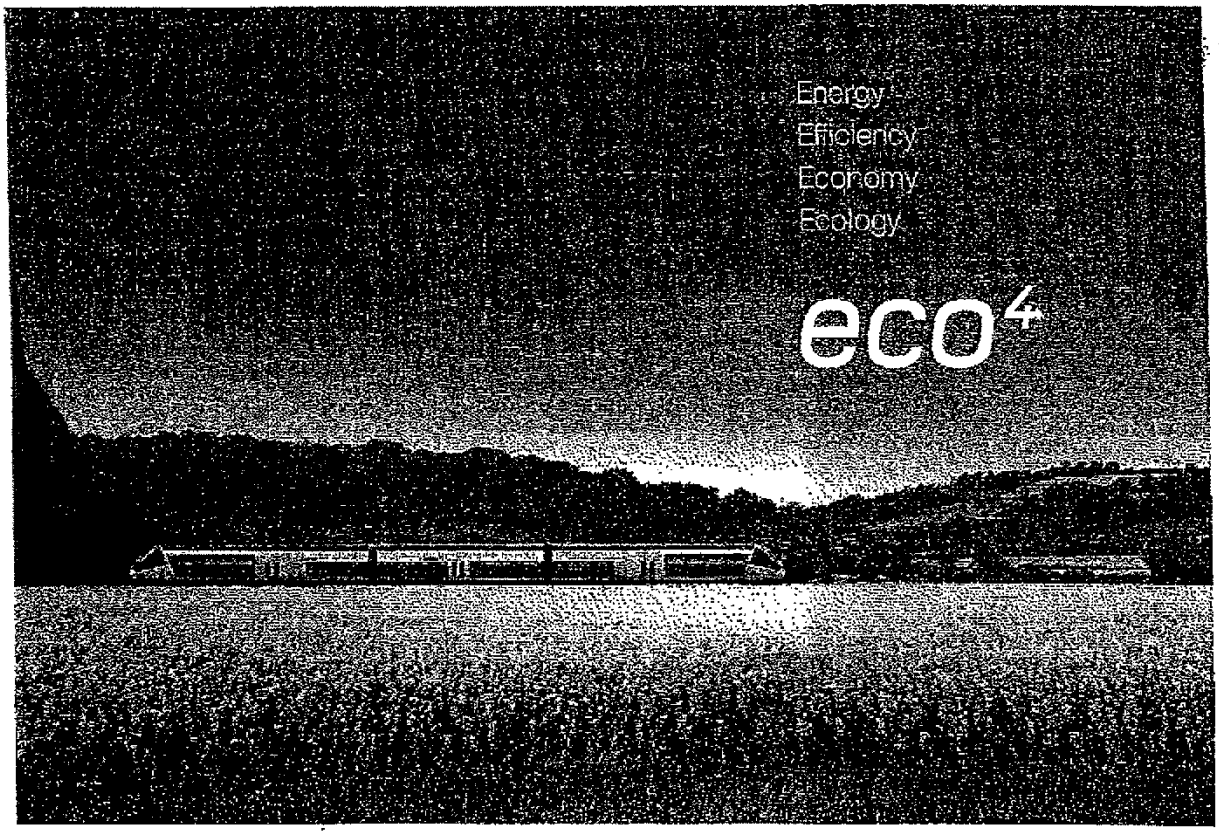

ECO4 – the formula for energy-saving performance

We are helping create a better world.
By making a difference today, we are helping create a better world for future generations. Having pioneered the philosophy of "The Climate is Right for Trains"*, we demonstrate this rationale by offering vehicles with practically zero emissions that are almost fully recyclable.

With our revolutionary *ECO4** energy-saving technologies we go even further: Built on the four cornerstones of Energy, Efficiency, Economy and Ecology, *ECO4* products incorporate a combination of new and proven technologies that help reduce energy consumption and minimize the carbon footprint.

Our integrated approach ensures that we provide well designed, innovative products that enhance the reputation of rail transportation and add value for our customers – creating true sustainable mobility.

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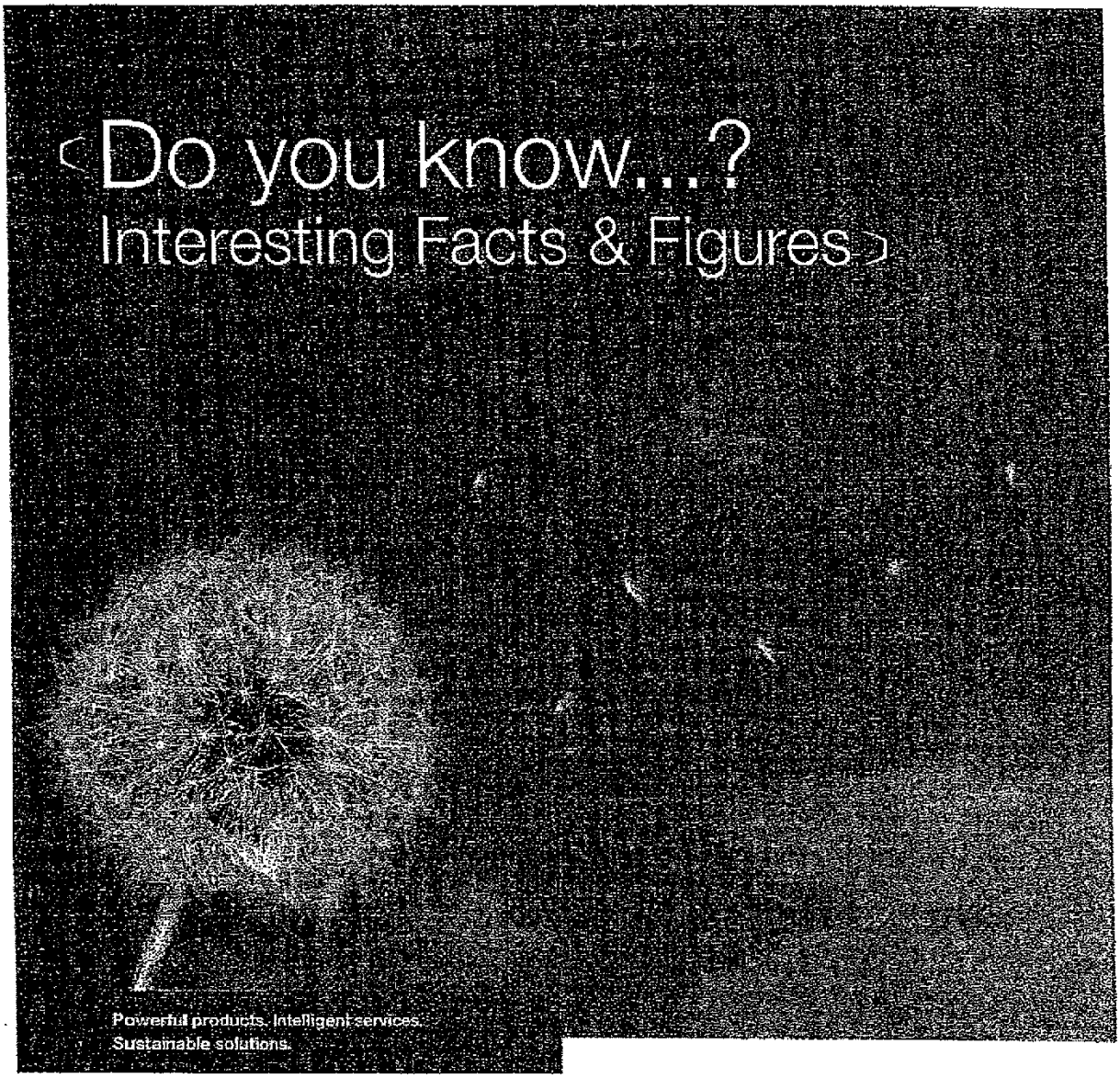

Bombardier Transportation represents a wide array of experience, skills and innovative solutions. Here are some examples which show just how interesting it is to discover our inspiring world.

The Climate is Right for Trains

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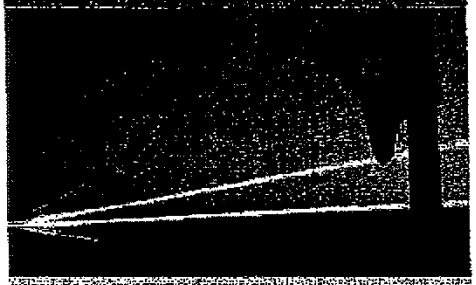
Do you know...?
Bombardier 000109
Interesting Facts & Figures

... that Rail Control Solutions (RCS) products are tested in adverse conditions such as lightning?



Working with the Lightning Research Centre at Uppsala University in Stockholm, one of only three in Europe, tests are performed where it is possible to generate up to a million volts of electricity and create a simulated lightning strike indoors. RCS systems and products are installed overcast geographical areas and are exposed to many different weather conditions which can have a real impact on our electronic signalling systems.

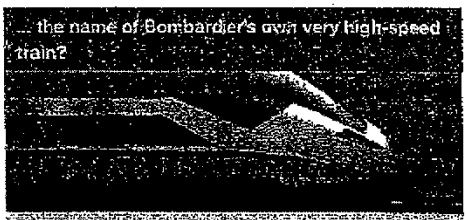
... how many people our MOVIA metro vehicles can transport per hour?

BOMBARDIER MOVIA** metro vehicles have a capacity of 10,000 to 80,000 people per direction and per hour.

... where Bombardier won a breakthrough contract in 1982 to build 825 subway cars?

It was in New York City. The contract was valued at one billion US dollars and established Bombardier Transportation as a major player in North America.

... the name of Bombardier's own very high-speed train?



BOMBARDIER ZEFIRO**: its design addresses the need for additional operational flexibility, offering a speed range of 200-350 km/h, higher seating capacity and universal cross-border mobility. ZEFIRO trains are compatible with different power supply systems, signalling and train control equipment achieving true interoperability across national borders.

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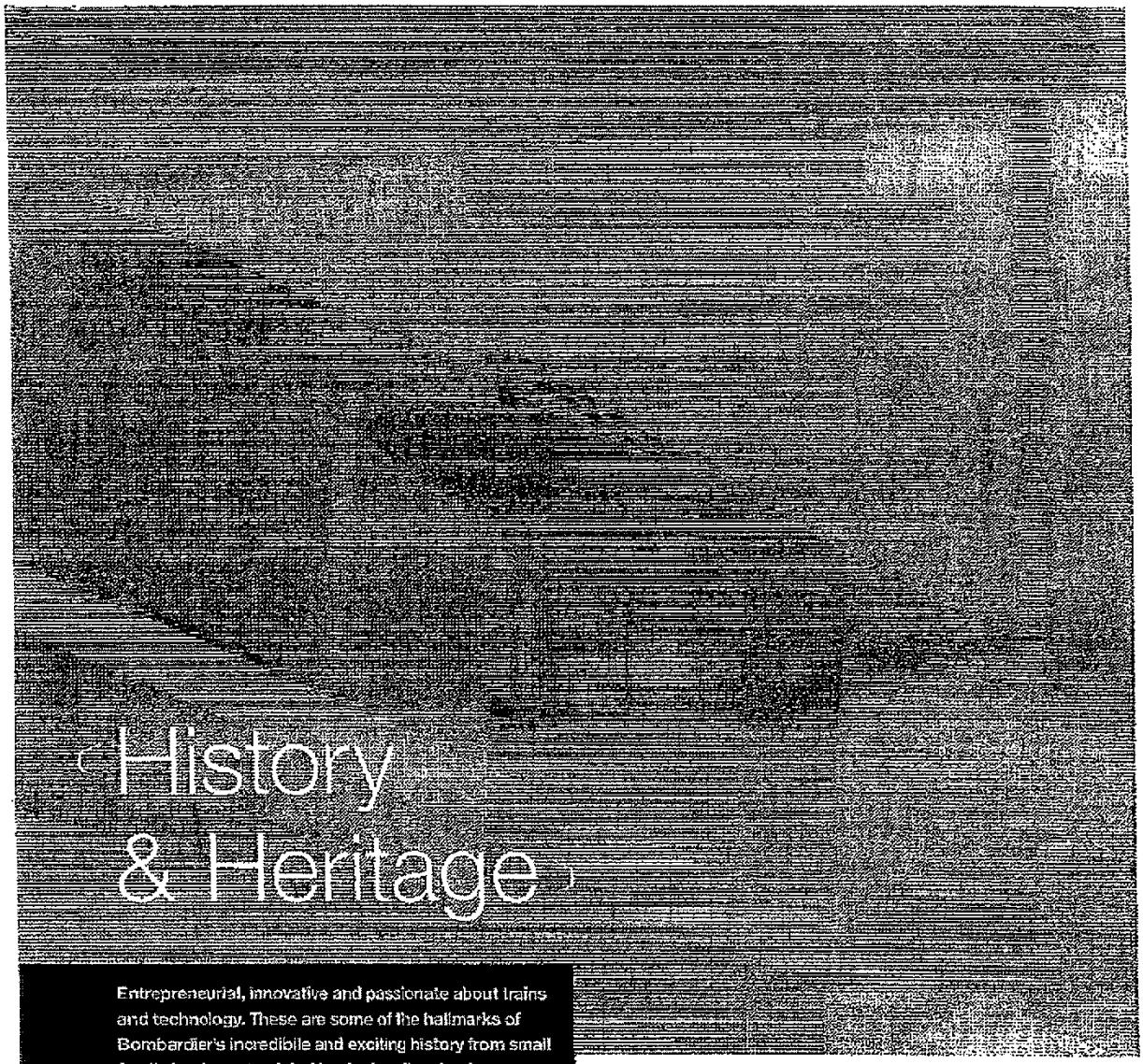

History & Heritage

Entrepreneurial, innovative and passionate about trains and technology. These are some of the hallmarks of Bombardier's incredible and exciting history from small family business to global leader in rail technology.

From the invention of record-breaking new products, diversification into new markets, mergers and acquisitions and expansion around the globe, Bombardier has now become a world leader in innovative transportation solutions. Here are just some of the key moments in the organization's rich history.

The Climate is Right for Trains

BOMBARDIER

‹Bombardier Transportation History & Heritage›
Our Innovations
Our Company
Our Milestone Orders

BOMBARDIER

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Attorneys for Respondent
Bombardier Transportation (Holdings) USA, Inc.

BEFORE THE NEVADA STATE LABOR COMMISSIONER

LAS VEGAS, NEVADA

IN THE MATTER OF:

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Claimant,

v.

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.,

Respondent.

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

BOMBADIER TRANSPORTATION (HOLDINGS) USA, INC.'S UNOPPOSED MOTION TO SEAL THE RECORD

Bombardier Transportation (Holdings) USA, Inc. ("Bombardier") submits the following Motion to Seal the Record. Specifically, Bombardier requests that the Labor Commissioner confirm, prior to the commencement of the June 25, 2013 hearing, that the terms of the November 7, 2012 Stipulated Protective Order will be enforced and that documents which are marked as "Confidential," "Highly Confidential," or which otherwise should not be made available for public view, will be sealed. This Motion is made in accordance with the Nevada Rules for Sealing and Redacting Court Records, the following Points and Authorities, exhibits, all

pleadings and documents on file with the Labor Commissioner, and any oral argument the Labor Commissioner deems proper. Bombardier has conferred with counsel for both the IUEC and the County, and they have no opposition to this Motion.

I. ARGUMENT

It is clearly established that courts have the "inherent authority" to seal the record where the "public's right to access is outweighed by competing interests." *Howard v. State*, 291 P.3d 137, 141 (Nev. 2012). Nevada courts retain "supervisory power over [their] records and [possess] inherent authority to deny public access when justified." *Id.* at 142. The Nevada Rules for Sealing and Redacting Court Records provide that a court may order the court files and records in a civil action to be sealed or redacted "provided the court makes and enters written findings that the specific sealing or redaction is justified by identified *compelling privacy or safety interests that outweigh the public interest in access to the court record.*" Nev. R. for Sealing and Redacting Court Records (SRCR) 3 (4) (emphasis added). Privacy and safety interests that outweigh the public interest in open court records include findings that:

> (a) The sealing or redaction is permitted or required by federal or state law;
> (b) *The sealing or redaction furthers an order entered under NRCP 12(f) or JCRCP 12(f) or a protective order entered under NRCP 26(c) or JCRCP 26(c);*
> (c) The sealing or redaction furthers an order entered in accordance with federal or state laws that serve to protect the public health and safety;
> (d) The redaction includes only restricted personal information contained in the court record;
> (e) The sealing or redaction is of the confidential terms of a settlement agreement of the parties;
> (f) The sealing or redaction includes medical, mental health, or tax records;
> (g) *The sealing or redaction is necessary to protect intellectual proprietary or property interests such as trade secrets as defined in NRS 600A.030(5);* or
> (h) *The sealing or redaction is justified or required by another identified compelling circumstance.*

SRCR 3 (4)(a)-(h) (emphasis added).

A Stipulated Protective Order has already been ordered in this case which protects "Confidential" and "Highly Confidential" documents, materials, and information from disclosure

or use for purposes other than preparing for and conducting the litigation.[1] Bombardier, the County and the Union produced a significant amount of documentation in reliance on that Order, and in Bombardier's case, it expressly conditioned the production of certain documents containing extremely sensitive trade secret and financial data on the existence and enforcement of the Order. Indeed, the County also produced certain documents in reliance on the Order, which, without the Order, would have been a breach of their contractual licensing agreement with Bombardier. In accordance with the aforementioned Protective Order executed by the Labor Commissioner on November 7, 2012, Bombardier brings this Unopposed Motion to Seal the Record to protect the "Confidential" and "Highly Confidential" documents, materials, and information that will be used at trial. The nature of the documents, materials, information in the record, and the existence of the Protective Order already in place, provides a compelling privacy and safety interest which outweighs any minimal public interest in access to the records.[2]

It is well-established that courts have broad authority to prevent unauthorized dissemination of confidential and proprietary information to the public or competitors. *See, e.g., Frantz v. Johnson*, 999 P.2d 351, 359 (Nev. 2000) (noting that unauthorized use and disclosure of confidential and proprietary information can also constitute misappropriation of a trade secret under the Nevada Uniform Trade Secrets Act). The record in this case is replete with confidential and propriety documents, materials, and information. Some of these documents are technical and repair manuals which contain propriety information that warrants protection. Further, disclosure of these documents, materials, and information would be extremely harmful to Bombardier because it would allow competitors to use the information to provide services to Bombardier

[1] The Stipulated Protective Order is attached hereto as Exhibit 1.

[2] The only provisions in the Labor Code which refer to public access to labor proceeding records are directed specifically at making Labor Commissioner hearing audio *recordings* available (NRS § 607.207), or making terms and conditions of settlements approved by the Labor Commissioner available to the public (NRS § 607.185). Nothing in the Labor Code evidences intent to make other documents, materials, or information available to the public, especially when there are compelling reasons for not disclosing such documents, materials, or information.

trains without the proper service agreements by essentially providing a blueprint for a cost effective maintenance program. Under such circumstances, the Labor Commissioner has the authority to seal the record in order to prevent harm.

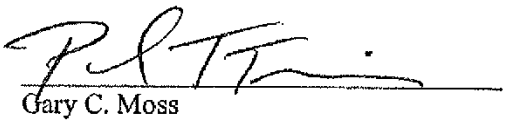
An order sealing the record would also further the Protective Order which is already in place. Accordingly, an Order sealing the record is necessary and appropriate in this case.

II. CONCLUSION

For the reasons set forth above, Bombardier respectfully requests that this Unopposed Motion to Seal the Record be granted.

Dated this 13th day of June, 2013.

JACKSON LEWIS LLP



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Paul T. Trimmer
3800 Howard Hughes Pkwy., Ste. 600
Las Vegas, NV 89169
Attorneys for Respondent,
Bombardier Transportation (Holdings) USA, Inc.

CERTIFICATE OF SERVICE

Pursuant to NAC 607.160, I hereby certify that **Bombardier Transportation (Holdings) USA, Inc.'s Unopposed Motion to Seal the Record** was served on the 13th day of June 2013 via hand delivery and email to the following:

Commissioner Thoran Towler
Office of the Labor Commissioner
555 E. Washington Ave., Ste. 4100
Las Vegas, NV 89101

In addition, a copy of the Unopposed Motion was served on the following on the 13th day of June, 2013 via U.S. mail to the following:

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

Copies of the the Unopposed Motion were served on the following on the 13th day of June, 2013 via electronic mail to the following:

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ajk@dcbsf.com

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Office of the District Attorney
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Las Vegas, NV 89155
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An Employee of Jackson Lewis LLP

EXHIBIT 1

01300

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Attorneys for Respondent
Bombardier Transportation (Holdings) USA, Inc.

BEFORE THE NEVADA STATE LABOR COMMISSIONER

LAS VEGAS, NEVADA

IN THE MATTER OF: INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, Claimant, v. BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC., Respondent. Clark County Department of Aviation Automated Transit Systems Equipment – DOA Contract CBE-552	**STIPULATED PROTECTIVE ORDER**

Upon the showing of good cause in support of the entry of a protective order to protect the discovery and dissemination of information alleged by Respondent to be highly confidential or , confidential information, or information which will improperly annoy, embarrass, or oppress any party, witness, or person providing discovery in this case, pursuant to the stipulation of all parties to the case, IT IS HEREBY ORDERED:

1. This Protective Order shall apply to all documents, materials, and information, including, without limitation, documents produced, answers to interrogatories, responses to requests for admission, deposition testimony, and other information, whether in oral, written,

paper or electronic form, and whether disclosed or exchanged pursuant to the early disclosure requirements and the discovery duties created by the Nevada Rules of Civil Procedure or voluntarily between the parties during early mediation or otherwise.

2. As used in this Protective Order, "document" is defined as provided in FRCP 34(a). A draft or non-identical copy is a separate document within the meaning of this term.

3. Any party, or any third party subject to discovery in this action ("the Litigation") may designate as "Confidential" or "Highly Confidential" any document or other material that such party believes to contain "Confidential Information" or "Highly Confidential Information" as defined below, including without limitation, any information voluntarily produced by a party or non-party, any information produced pursuant to a discovery request (whether in paper or electronic form), any document marked as an exhibit at any deposition taking in this proceeding, any information given orally at a deposition or otherwise, or the transcript of any deposition taken in this proceedings, any information provided in writing in response to any interrogatories, any documents produced in response to an inspection demand or subpoena, or otherwise, if it reflects, refers to or evidences any "Confidential Information" or "Highly Confidential Information."

4. All "Confidential" or "Highly Confidential" documents produced by any party or non-party in the Litigation shall be used by the party or agent receiving or reviewing such documents only for the purposes of preparing for a conducting the Litigation.

5. For purposes of this Protective Order, the term "Confidential Information" means information that counsel of record for the designating party has determined, in good faith, constitutes non-public confidential proprietary data, proprietary business information, and/or research, development, personnel, or commercial information. Information shall be designated as "Confidential" only upon the good faith belief that the information falls within the scope of confidential information under the Federal Rules of Civil Procedure and the precedents thereto.

6. For purposes of this Protective Order, the term "Highly Confidential Information" means information that counsel of record for the designating party has determined, in good faith, constitutes or refers or relates to non-public highly sensitive commercial and/or competitive information such as, but not limited to: (a) trade secrets; (b) information about new services or

products that are in the planning stage or that the designating party plans to introduce but that are not yet offered for sale; (c) the designating party's current or future marketing plans for any of its services or products; (d) information concerning the pricing of services or products, sales volumes and advertising expenditures; (e) financial information; (f) consumer and marketing research and documents that refer or relate thereto (except those conducted specifically for the Litigation); (g) technical information about Bombardier's automated people mover system and information related to its installation, repair, operation and maintenance; and (h) software related to Bombardier's automated people mover system and information related to its installation, repair, operation and maintenance. Nothing in the foregoing list constitutes an admission by any party that such information is confidential under the law, but merely constitutes a recognition that it will be treated as such under this Stipulation.

7. "Confidential Information" or "Highly Confidential Information" shall be designated specifically by marking the thing and/or each page of a document produced as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL." In lieu of marking and producing the original of a document, a marked copy thereof may be produced, provided that the unmarked original is kept available by the producing party for inspection. If a document is produced electronically, such document may be designated by appending the label "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" to the media on which the document is produced, or to any image of such document.

8. In the event that an original copy of a document is designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" as set out in Paragraph 7, and one or more copies of the document or the original are also produced but not so designated, the copies or original shall also be treated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" if the receiving party is actually aware of such fact.

9. Such "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation shall be made at the time documents or materials are produced or within fifteen (15) days thereafter. In the case of depositions, the designations shall be made by so stating on the record of the deposition. Notwithstanding the foregoing, documents, materials or deposition testimony that are

not designated "Confidential" or "Highly Confidential" at the time of production or deposition may subsequently be designated as "Confidential" or "Highly Confidential" within 15 days of the date of production, or within such other time period allowed by the Labor Commissioner upon motion, by the disclosing party in a letter to the receiving party that specifically describes each documents materials, or testimony so designated, and the receiving party shall treat those documents as "Confidential" or "Highly Confidential" as of the date of their designation.

10. Documents or materials marked as "CONFIDENTIAL" pursuant to the terms of the Protective Order, and any information contained therein or derived therefrom shall not be disclosed to anyone other than to "Qualified Persons – CONFIDENTIAL," who are defined to consist of:

(a) Counsel to the parties to the Litigation, and clerical, secretarial and paralegal staff employed by such counsel, but not including in-house counsel for the parties;

(b) Any outside expert or consultant and their staff retained by counsel to assist in the prosecution or defense of this action after being advised of the terms of this Stipulated Protective Order and agreeing in writing to abide by its terms to not disclose any Confidential material to any persons not included in this paragraph;

(c) Any witness at deposition or at trial who is employed or was previously employed by the producing party at the time the Confidential document was prepared or disseminated (which shall be deemed to include the individuals identified in paragraph 11(g)), as well as any person who created, sent or received the document in the ordinary course of business as demonstrated by the evidence, provided that any such witness or person is advised of the terms of this Stipulated Protective Order and agrees in writing or in transcribed testimony while under oath to abide by its terms to not disclose any Confidential material to any persons not included in this paragraph;

(d) Any person noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify, provided that any such witness or person is advised of the terms of this Stipulated Protective Order and agrees in writing to abide by its terms to not disclose any Confidential material to any persons not included in this paragraph;

(e) Any court reporter or typist recording or transcribing testimony;

(f) The Labor Commissioner and Labor Commissioner personnel and counsel;

(g) Such other persons agreed to by all parties in writing or ordered by the Labor Commissioner; and

(h) Names parties to this litigation (or their representatives) who have a need to know the information, after being advised of the terms of this Stipulated Protective Order and agreeing in writing to abide by its terms to not disclose any Confidential Material to any persons not included in this paragraph.

11. Documents or materials designated as "HIGHLY CONFIDENTIAL" pursuant to the terms of the Protective Order, and any information contained therein or derived therefrom shall not be disclosed, summarized, described, or otherwise communicated or made available in whole or in part to anyone except "Qualified Persons – HIGHLY CONFIDENTIAL," who are to consist of:

(a) Counsel to the parties to the Litigation, excluding in-house counsel, and clerical, secretarial and paralegal staff employed by such counsel;

(b) Any outside expert or consultant and their staff retained by counsel to assist in the prosecution or defense of this action after being advised of the terms of this Stipulated Protective Order and agreeing in writing to abide by its terms to not disclose any Highly Confidential material to any persons not included in this paragraph;

(c) Any person who created, sent or received the document in the ordinary course of business as demonstrated by the evidence, provided that any such witness or person is advised of the terms of this Stipulated Protective Order and agrees in writing to abide by its terms to not disclose any Highly Confidential material to any persons not included in this paragraph;

(d) Any court report or typist recording or transcribing testimony;

(e) The Labor Commissioner and Labor Commissioner personnel and counsel; and

(f) Such other persons agreed to by all parties in writing or ordered by the

Labor Commissioner.

(g) In an effort to accommodate the Claimant's ability to review certain documents that would otherwise be designated as Highly Confidential, the Parties agree that Claimant's counsel may designate a total of three (3) individuals that he represents to assist him with review of Highly Confidential material except as noted below. This person, hereinafter the "Designee," shall be identified and his/her name shall be disclosed to Bombardier and the County. The Designee must satisfy the following conditions: (1) he/she must be a current employee of Clark County who has access to ATS documentation pursuant to his/her existing employment; (2) must be a former Bombardier employee who executed and is bound by a Bombardier non-disclosures agreement; and (3) must agree to be bound by and comply with the requirements set forth herein. The Designee may discuss, describe, or otherwise share Highly Confidential information with Claimant's counsel, and only Claimant's counsel. The parties agree that Claimant's representative Bill Stanley may not serve as the Designee and that Mr. Stanley is not permitted to review, discuss, see compilations of, or otherwise have access to Highly Confidential material without the express consent of Bombardier's counsel or further order of the Commissioner. Bombardier will meet and confer in good faith regarding restrictions on the disclosure of such documents. This paragraph shall not apply to the documents requested by Claimant concerning the costs of moving and installation of ATS vehicles, which documents will be treated by Claimant's counsel as Highly Confidential.

12. Suring a duly noticed deposition, documents or materials designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" may be disclosed to any witness designated by the party that produced those documents or materials. At the request of any party, attendance at depositions may be restricted to the persons designated in Paragraph 10 or 11, as applicable.

13. A party may object to the designation of particular "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" information by giving written notice to the party designating the disputed information within 30 days of its designation. The written notice shall identify the information to which the objection is made. If the parties cannot resolve the objection within ten (10) business days after the time the notice is received, it shall be the obligation of the party objecting to designating the information as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" to file an appropriate motion requesting that the Labor Commissioner determine whether the disputed information should be subject to the terms of this Protective Order. During the pendency of any such motion, the disputed information shall be treated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" under the terms of this Protective Order until the Labor Commissioner rules on the motion.

14. In connection with a motion filed under this provision and provision 13, the party designating the information as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall bear the burden of establishing that good cause exists for the disputed information to be treated as such.

15. Inadvertent disclosure and/or production of documents claimed to be subject to either the attorney-client privilege or work product doctrine does not waive the applicability of such privilege or doctrine either generally or relative to the inadvertently disclosed and/or produced documents. If any such documents are inadvertently disclosed to the receiving party return such documents to the producing party, and the receiving party must immediately comply by, to the extend reasonably practicable and consistent with the technology used by the producing party to produce the documents, returning such documents and destroying any copies, notes or memoranda concerning the privileged information. If, however, the receiving party disagrees with the claim of privilege or work-product protection as to an inadvertently disclosed and/or

produced document, the receiving party may object to the return of the document by giving written notice to the party claiming the privilege. The written notice shall identify the document to which the objection is made. If the parties cannot resolve the objection within ten (10) business days after the time the notice is received, it shall be the obligation of the party claiming the privilege or protection to file an appropriate motion requesting that the Labor Commissioner determine the validity of the privilege or protection claim. If the party claiming the privilege or protection fails to file such a motion within the prescribed time, the receiving party may retain the disputed document, which shall not thereafter be treated as privileged or protected. In connection with a motion filed under this provision, the party claiming the privileged or protection shall bear the burden of establishing that good cause exists for the disputed document to be treated as privileged or protected. The disputed document shall be treated as privileged or protected until either the Labor Commissioner rules on the motion filed under this provision, or the time for filing such a motion has expired. The parties acknowledge that issues of privilege may also arise under foreign law and/or may be litigated in the foreign proceedings. Nothing in this agreement is intended to affect any party's right to claim privilege or work product protection in the foreign proceedings, or any counter argument of waiver in respect of any such claim.

16. In the even a party seeks to file any material that is subject to protection under this Protective Order with the Labor Commissioner, that party shall take appropriate action to ensure that the information receives proper protection from public disclosure including: (1) filing a redacted document with the consent of the party who designated the documents as Confidential or Highly Confidential; (2) where appropriate (e.g. in relation to discovery and evidentiary motions)j, submitting the information solely for in camera review; or (3) where the preceding measures are not adequate, seeking permission to file the information under seal pursuant to the procedural rules set forth in the applicable Rules of Court or Nevada Rules of Civil Procedure, or

such other rules or procedures as may apply. Absent extraordinary circumstances making prior consultation impractical or inappropriate, the party seeking to submit the information as Confidential or Highly Confidential to determine if some measure less restrictive than filing the information under seal may serve to provide adequate protection. This duty exists irrespective of the duty to consult on the underlying motion.

17. If a document containing "Confidential" or "Highly Confidential" information is filed with the Labor Commissioner, it shall be filed in a sealed envelope marked with the caption of the case, a schedule of the contents of the envelope, and the following notation:

[Conditionally] Filed Under Seal
Contains CONFIDENTIAL INFORMATION
To be Opened Only By or As Directed by the Labor Commissioner

18. Should any party need, during the trial or any hearing before the Labor Commissioner, to disclose "Confidential" or "Highly Confidential" information, the party may do so only after appropriate in camera inspection or other safeguards are requested of the Labor Commissioner or are otherwise ordered by the Labor Commissioner.

19. At the conclusion of this case, unless other arrangements are agreed upon, and excluding those documents in the possession of the Labor Commissioner, each document and all copies thereof which have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" shall, upon written request, be returned to the party that designated it "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," or the parties may elect to destroy such documents. Where the parties agree to destroy "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" documents, the destroying party shall provide all parties with an affidavit confirming the destruction. The provisions of this Paragraph shall not apply to the Labor Commissioner or Labor Commissioner personnel.

20. This Protective Order may be modified by the Labor Commissioner at any time for

good cause shown following notice to all parties and an opportunity for them to be heard. The Labor Commissioner and his personnel are not subject to the terms of this Protective Order.

IT IS ~~FOR~~ ORDERED.

Nevada Labor Commissioner

DATED: 11-7-12

Dated this ____ day of August, 2012.

McCRACKEN, STEMERMAN & HOLSBERRY

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JACKSON LEWIS LLP

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Attorneys for Respondent

CLARK COUNTY DISTRICT ATTORNEY'S OFFICE

Eldon Lee Thomson
500 S. Grand Central Parkway
Suite 5075
Las Vegas, Nevada 89106

4828-7166-5936, v. 1

BEFORE THE NEVADA LABOR COMMISSIONER

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, Complainant, v. BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC., Respondent. Contract CBE-552	)	BOMBADIER TRANSPORTATION (HOLDINGS) USA, INC.'S SUPPLEMENT TO ITS UNOPPOSED MOTION TO SEAL THE RECORD AND REQUEST FOR EXPEDITED RULING

Bombardier Transportation (Holdings) USA, Inc. ("Bombadier") submits the following Supplement to its Unopposed Motion to Seal the Record and Request for Expedited Ruling. Specifically, Bombardier requests that the Labor Commissioner confirm that the terms of the Stipulated Protective Order will be enforced and rule on Bombardier's request to seal portions of the record containing confidential information, specifically Union Exhibits 1, 5, and 6, as well as Bombardier Exhibit 21, Nebeker 1, 2 and 3, the summary provided on June 12, 2013, before the June 25, 2013 hearing commences. A ruling on the Motion is necessary so that the parties can determine how to proceed; and, for the reasons set forth below and in the Motion, the unopposed Motion should be granted.

I. ARGUMENT

A. The Parties' Stipulated Protective Order should be Enforced.

First, as you know, the Labor Commissioner has already signed the parties' stipulated protective order. The protective order delineates detailed procedures for maintaining the confidentiality of documents produced during the litigation, including procedures for sealing

documents that may be used for trial but which have been designated confidential or highly confidential because they contain sensitive data and trade secrets. A significant amount of documents were produced in reliance on that order – documents which would have been withheld without assurances of protection. Op. Nev. Att'y Gen. No. 89-18 (November 30, 1989) (individuals have reasonable expectation of privacy in documents produced with assurances of confidentiality). Refusing to seal the record in accordance with that order is inappropriate and denies Bombardier its right to due process, essentially forcing it to relinquish confidential and proprietary data if it wishes to defend this action. Litigants have a fundamental right to defend themselves in administrative and court proceedings. *See, e.g., BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (defense of lawsuits involves the right to petition courts for redress which is "one of the most precious liberties safeguarded by the Bill of Rights."). Conditioning Bombardier's ability to mount a defense on the relinquishment of significant property rights – property rights protected by Nevada Uniform Trade Secrets Act and NRS 49.325 – is wrong.

B. The Confidential and Proprietary Information Constitutes Trade Secrets and Must be Protected.

Second, Nevada courts have long held that protective orders and injunctive relief are appropriate to protect confidential and proprietary information. The Nevada Uniform Trade Secrets Act expressly authorizes injunctive relief to prevent disclosure of trade secrets, *see* NRS 600A.040, and, in *Frantz v. Johnson*, 999 P.2d 351, 359 (Nev. 2000), the Nevada Supreme Court held that confidential competitive information, including pricing, internal costs, and other information is eligible for the protections established by the UTSA.[1] Union Exhibits 1, 5, and 6,

[1] A trade secret is information that "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public," as well as information that "[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Finkel v. Cashman Prof'l, Inc.*, 270 P.3d 1259,

as well as Bombardier Exhibit 21, Nebeker 1, 2 and 3, the summary provided on June 12, 2013, contain confidential pricing, part costs, labor costs and maintenance protocols – information which Bombardier protects through password protected databases and confidentiality agreements with all employees, and which the parties have expressly stipulated as being confidential and proprietary – and therefore constitute trade secrets. *See Finkel*, 270 P.3d at 1264; *see also Frantz*, 999 P.2d at 359.

Further, the Labor Commissioner is obligated to comply with the Nevada laws of privilege, and under those statutes, individuals have "a privilege ... to refuse to disclose and to prevent other persons from disclosing a trade secret" and if disclosure is necessary, "the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require." NRS 49.325. The above referenced exhibits are therefore documents that are "declared by law to be confidential" within the meaning of NRS 239.010(1) and NRS 49.325, and are exempt from disclosure under the Public Records Act.

C. The Nevada Supreme Court And The Nevada Attorney General Have Held That The Public Records Act Permits Nevada Administrative Agencies To Issue Orders Which Protect The Confidentiality Of Certain Records, And Bombardier Has Met the Tripartite Balancing Test That They Have Adopted.

Third, the Nevada Attorney General has consistently advised state agencies that they may restrict access to confidential personal and business information without violating the Public Records Act. As the Attorney General explained in Opinion No. 90-15:

> Chapter 239 of the Nevada Revised Statutes does not define public records. As a result, since 1980 the Office of the Attorney General has been called upon to answer numerous inquiries relating to the

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1264 (Nev. 2012) (quoting NRS 600A.030(5)(a)-(b) and holding that contracts, customer lists, processes, prices, and other business-related confidential information are trade secrets under Nevada law).

> application of chapter 239 to requests for release of documents in the custody of governmental agencies. In Opinion Number 86-7, this office ... adopted a case-by-case balancing test as a method of analysis of the sufficiency of the justification offered for nondisclosure where the document is not defined as a public record. This evaluation includes a balancing of (1) the document's content and function; (2) the interest and justification of either the agency or the public in general in maintaining the confidentiality of the document; and (3) the extent of the interest or need of the public in reviewing the document.

Op. Nev. Att'y Gen. No. 90-15 (October 15, 1990).[2]

The Nevada Supreme Court has approved the use of this tri-partite balancing test in several cases, including *Reno Newspapers, Inc. v. Gibbons*, 266 P.3d 623, 626-627 (Nev. 2011), *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990), and *DR Partners v. Board of County Commissioners*, 116 Nev. 616, 6 P.3d 465 (2000). And, applying the reasoning employed in those decisions to this case, it is clear that the Labor Commissioner can and should maintain the confidentiality of Union Exhibits 1, 5, and 6, as well as Bombardier Exhibit 21, Nebeker 1, 2 and 3, the summary provided on June 12, 2013.

The documents are not public agency records. They are business records, and Bombardier has a compelling basis for maintaining their secrecy. The exhibits depict *all* of the labor performed under Contract CBE-552. They contain an extraordinary wealth of information

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[2] The Attorney General has issued several opinions on this issue. The authority of agencies to issue these kinds of orders cannot be disputed. The only issue is whether the authority is properly exercised in a particular case. *See, e.g.*, Op. Nev. Att'y Gen. No. 90-8 (April 27, 1990) (Office of Vital Statistics sealing records); Op. Nev. Att'y Gen. No. 89-18 (November 30, 1989) (Housing Authority of the City of Reno sealing records); Op. Nev. Att'y Gen. No. 89-1 (February 6, 1989) (Nevada Department of Wildlife sealing records); Op. Nev. Att'y Gen. No. 87-5 (January 26, 1987) (Nevada Department of Education sealing records); Op. Nev. Att'y Gen. No. 86-7 (May 12, 1986) (Nevada State Contractor's Board sealing records); Op. Nev. Att'y Gen. No. 83-3 (May 2, 1983) (Law enforcement agencies sealing records); Op. Nev. Att'y Gen. No. 82-12 (June 15, 1982) (County Coroner sealing records); Op. Nev. Att'y Gen. No. 82-7 (May 24, 1982) (Nevada State Fire Marshall sealing records); Op. Nev. Att'y Gen. No. 80-6 (March 10, 1980) (Nevada State Library sealing records).

regarding the procedures that Bombardier used to move ATS cars and maintain the ATS System. Bombardier derives a significant competitive advantage from its experience in the marketplace, and this experience manifests itself during the contract bidding process. Accurately predicting labor costs and the elements of the maintenance program, including the periodicity of certain inspections – all of which can be derived by mining this data – is Bombardier's "secret sauce."[3] If a competitor had access to both the maintenance regime and the labor costs associated with it, Bombardier's business interests would be irreparably harmed. Persons with access as to labor tasks and the materials and hours necessary to perform them on a particular type and size of system could conceivably use the data to predict Bombardier's pricing on future competitive bids, reduce its price accordingly and thereby circumvent the protections Bombardier takes to protect its proprietary information. This information comprises the very heart of the operations and maintenance business.[4]

Considering that the Claimants' allegations can be addressed, and if ultimately successful, remedied without public disclosure of the aforementioned exhibits, a protective order is warranted and complies with the principles of the Public Records Act. Indeed, the Ninth Circuit Court of Appeals has considered the Nevada Public Records Act's requirements and

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[3] Entering the order would not be a novel exercise of administrative power. In addition to the various agencies identified in Footnote 2, the Nevada Public Utilities Commission also frequently issues protective orders – which would be identical to the kind of order sought here – to preclude disclosure of confidential business information provided to the agency. *See, e.g., In re Central Telephone*, Docket No. 05-8032, Nevada Public Service Commission, 2005 Nev. PUC LEXIS 226 (September 8, 2005); *In re Nevada Power*, Docket No. 98-7023, Nevada Public Service Commission, 1998 Nev. PUC LEXIS 67 (November 2, 1998); *In re Federal Communications Commission Triennial Review Order*, Docket No. 03-2019, Nevada Public Service Commission, 2003 Nev. PUC LEXIS 423 (November 10, 2003).

[4] Nothing in Chapters 233B, 338 or 607 requires a different result. Although NRS 607.207 does require audio recordings to be made publicly available, that provision specifically omits any reference to the availability of documentary evidence.

upheld an injunction against the Nevada Dairy Commission for that and other reasons, prohibiting it from releasing pricing data and other confidential and proprietary data of a competitive nature, because releasing it would irreparably harm a business' competitive position. *See Knudsen Corp. v. Nevada State Dairy Commission,* 676 F.2d 374 (9th Cir. 1982).

D. Public Interest Does Not Support Disclosure.

Fourth, there is no need for the public to have access to the documents and the Motion is unopposed. The documents are relevant to the parties' claims and defenses. They do not record governmental activities or the activities of government officials. They are proprietary records of work performed by private individuals and are noteworthy only to Bombardier and its competitors. As such, disclosure would not enhance the ability of the public to monitor the manner in which public officials carry out their duties. Nor would it enhance the public's understanding of the process or otherwise vindicate a public interest in any way, especially when the remaining portions of the record will be available for public inspection.

E. This Proceeding Does Not Affect the Confidentiality of the Documents.

Fifth, the mere fact that Bombardier has been sued should not mean that it is forced to choose between defending itself and relinquishing critical competitive information to competitors. But for the litigation, none of this information would have been subject to disclosure, and it is clear that if one of the individual employees sought to disclose the information set forth in the documents, they would be liable for misappropriation under the UTSA and Nevada law. Bombardier would be entitled to an injunction precluding disclosure. The fact that this litigation is now before an administrative agency, and not a court, should not have an impact on that issue. Indeed, if an administrative agency adopted a contrary approach, it

would inhibit the ability of administrative agencies to obtain cooperation with members of the public when conducting investigations and adjudicating contested cases.

The Public Records Act serves an important purpose. However, the balancing test formulated by the Attorney General has been satisfied in this case. Bombardier requests that the Labor Commissioner enter an order sealing from or redacting from the Record, IUEC Exhibits 1, 5, and 6, and the documents that Bombardier has previously identified as Exhibits 21 and Nebeker 1, Nebeker 2, Nebeker 3 and the summary provided on June 12, 2013.[5]

F. An Expedited Ruling is Necessary to Protect the Confidentiality of the Documents.

Finally, Bombardier respectfully requests that the Labor Commissioner issue an expedited ruling. Given that a Stipulated Protective Order had already been issued in the case, the parties did not anticipate that the matter of sealing portions of the record to protect information would be in dispute. The exhibits at issue go to the core of the Claimants' case and Bombardier's factual defenses. An expedited ruling which clarifies this issue before the hearing commences is necessary to ensure that the record at the hearing is complete and no party's rights are prejudiced.

[5] In light of the stipulation among the parties that has obviated the need for certain files, Bombardier will be withdrawing other confidential and proprietary information, including but not limited to the SIMS Export file that was filed electronically. To that end, Bombardier will be filing a revised exhibits folder (3 copies in Vegas, 1 to Carson City, and one served on all parties). This revised folder will omit a significant amount of documentation that, pursuant to the parties' stipulation, is not needed to establish foundation for the different evidentiary summaries that both the Union and Bombardier submitted.

II. CONCLUSION

For the reasons set forth above, Bombardier respectfully requests that its Motion to Seal the Record be granted.

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CERTIFICATE OF SERVICE

Pursuant to NAC 607.160, I hereby certify that Bombardier Transportation (Holdings) USA, Inc.'s Supplement To The Motion to Seal the Record was served on the 17th day of June 2013 via E- Mail to the following:

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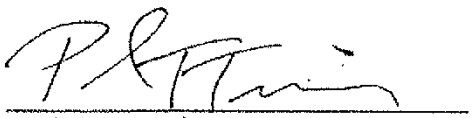

An Employee of Jackson Lewis LLP

4840-7959-9892, v. 1

BEFORE THE NEVADA LABOR COMMISSIONER

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, Complainant, v. BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC., Respondent. Contract CBE-552	**CLARK COUNTY'S POST-HEARING BRIEF** **FILED** DEC 1 0 2013 NEVADA LABOR COMMISSIONER - CC

The evidence presented during the six day hearing on the Complaint filed by the International Union of Elevator Constructors ("IUEC") in this matter served to reinforce the correctness of the determinations made by Clark County ("County") and its experienced prevailing wage investigator, Michael Moran, that the disputed work allegedly performed under Clark County Department of Aviation Contract CBE-552 (Bombardier Exhibit ("BX") 1) for the maintenance of the Automated Transit System ("ATS") located at McCarran International Airport ("Airport") was not covered under NRS Chapter 338 and was not subject to payment of prevailing wages. The testimony and documentary evidence clearly demonstrated that CBE-552 was entered into under NRS Chapter 332 and that the workers' activities done under the Contract were not only directly related to but were, in fact, absolutely necessary for the normal operation or normal maintenance of the ATS at the Airport, which made the work exempt from all public works provisions in NRS Chapter 338 pursuant to NRS 338.011(1).