IN THE SUPREME COURT OF THE STATE OF NEVADA

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.,

Appellant,

v.

NEVADA LABOR COMMISSIONER, et al.,

Respondents.

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Supreme Court Case No.: 71101

RESPONDENT BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, counsel for Bombardier Transportation (Holdings) USA, Inc. identifies the following entity and persons which must be disclosed pursuant to NRAP 26(1)(a):

1) Petitioner Bombardier Transportation (Holdings) USA, Inc. is a subsidiary of Bombardier, Inc. Bombardier, Inc. is publicly traded on the Toronto Stock Exchange, symbol BBD.B.
2) Petitioner has been represented throughout the proceedings below by Gary C. Moss and Paul T. Trimmer of Jackson Lewis P.C., and Mr. Moss and Mr. Trimmer will continue to represent Bombardier in the proceedings before this Court.

DATED: November 30, 2017

/s/ Paul T. Trimmer

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I. JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to NRS 233B.130. The Labor Commissioner issued his Final Order within the meaning of NRS 233B.130(1)(b) on March 6, 2014. Bombardier Transportation (Holdings) USA, Inc. ("Bombardier") filed a petition for judicial review (the "Petition") on April 4, 2014. The Eighth Judicial District Court denied Bombardier's Petition on July 11, 2016 (the "2016 Order"). Bombardier appealed on August 16, 2016. The Labor Commissioner moved to dismiss the appeal for lack of jurisdiction on March 14, 2017. The Court denied the Labor Commissioner's motion on July 17, 2017 and held that the matter was properly before the Court for resolution.

II. STATEMENT OF THE ISSUES

This case arises out of the International Union of Elevator Constructors' (the "Union") claim that Bombardier's Maintenance Technicians are entitled to prevailing wage rates for work performed under Clark County's contract with Bombardier for the maintenance of the automated train system ("ATS") at McCarran International Airport ("Airport"). That contract, which is designated CBE-552, was executed in June 2008, but it was merely a continuation of the maintenance work that Bombardier had been performing since 1982. Like the County's other maintenance contracts, including contracts for the

maintenance of its buses and elevator systems, CBE-552 has never been considered a public works project which requires the payment of prevailing wages under NRS Chapter 338.

When the Complaint came before the Labor Commissioner for hearing in the summer and fall of 2013, Bombardier and Clark County argued that the prevailing wage requirements of NRS Chapter 338 do not apply to CBE-552 because it is a maintenance contract, not a public works project –within the meaning of NRS 338.010(16).

Because NRS 338.011(1)[1] specifically exempts contracts which are "directly related to the normal operation … or the normal maintenance" of a public facility like the Airport, Bombardier and Clark County also argued that even if CBE-552 was otherwise considered to be a public works project, it is nonetheless outside the scope of Chapter 338's coverage. Indeed, it is hard to imagine a contract more in line with the Legislature's intention for the exemption: the ATS is the *only* way to ensure the timely transport of passengers between Terminal 1 and the C and D

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[1] **NRS 338.011 Applicability: Contracts related to normal operation and normal maintenance; contracts related to emergency.** The requirements of this chapter do not apply to a contract:

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.

Concourses. The ATS' successful operation – which requires its successful maintenance – lies at the core of the Airport's ability to service the millions of individuals who visit the Las Vegas Valley each year.

Finally, Bombardier argued that CBE-552 was exempt under NRS 338.080(1) because Bombardier is a "railroad company" which manufactures, installs, and operates railroad equipment and systems around the globe, and under Nevada law, railroad companies are excused from Chapter 338's requirements.

The Labor Commissioner rejected these contentions. His reasoning, however, was arbitrary and capricious, and his interpretations of NRS 338.010(16), NRS 338.11(1) and NRS 338.080 are both contrary to law and not supported by substantial evidence. Accordingly, the issues before the Court are:

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

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

3. Whether the Labor Commissioner's conclusion that CBE-552 is not directly related to the normal maintenance of the Airport,

and that NRS 338.011(1) therefore does not apply, should be vacated because it is both contrary to the plain meaning of the statute and not supported by substantial evidence.

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

If the Court does not vacate the Labor Commissioner's decision on the grounds set forth above, there are additional issues to consider with respect to the Labor Commissioner's remedy. For the sake of clarity, the issues presented by the remedy are discussed below in Section IX.

III. STATEMENT REGARDING ROUTING OF THE APPEAL

Bombardier is appealing a final order issued by an administrative agency: the Nevada Labor Commissioner. Although such matters are presumptively appropriate for assignment to the Court of Appeals under NRAP 17(b)(4), the Court should hear this case in the first instance. It has primary jurisdiction over matters which present questions of first impression as well as matters which preset questions of statewide importance. *See* NRAP 17(a)(13) and (14). This case meets both requirements. It presents issues of first impression regarding the interpretation and meaning of several provisions within NRS Chapter 338.

The Court has not previously considered whether work performed under a maintenance contract like Bombardier's contract with Clark County is a public works project within the meaning of NRS 338.010(16). It has not previously considered NRS 338.011(1) and the applicability of its exceptions for contracts which relate directly to the normal operation or normal maintenance of a public body like Clark County or public property such as the Airport and its ATS system. And, not surprisingly, the Court has not previously considered a dispute which required it to interpret the meaning of NRS 338.080's exemption for railroad companies.

These issues of first impression are not merely of legal importance. Their resolution will have enormous practical implications for county and municipal governments, their contracting practices, and their budgets. As the County has argued from the case's inception, the financial impact of requiring prevailing wage rates for normal, everyday maintenance required to keep critical systems operational and in good working order could be crippling for both the County and its tax payers.

The Court may of course find that the Labor Commissioner's interpretation of the aforementioned statutes is correct and deny Bombardier's appeal. But given the matter's legal novelty as well as its statewide importance, this appeal should be heard by this Court pursuant to NRAP 17(a)(13) and (14).

IV. STATEMENT OF THE CASE

As noted above, the Union initiated the Complaint process by letter dated October 9, 2009. The Deputy Labor Commissioner issued the Complaint on October 13, 2009. He directed the Clark County Department of Aviation ("DOA") to conduct an investigation into the Union's allegations and determine whether Bombardier had committed a violation. On November 24, 2009, the DOA announced its determination. EOR02812-02814. It had conducted an investigation into the work performed under the Contract, reviewing both 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:

> 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 EOR02813. 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 EOR02814.

The Union objected to the DOA's findings. Its objection was based on a clear misapprehension of the meaning of NRS 338.011(1), which exempts work not only because of the type of work performed but also because of its immediate relationship to a local government's normal operations or the maintenance of its property. The Deputy Commissioner nonetheless sent the Union's objection to the DOA on December 31, 2009, instructing the DOA to 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(1) is written in the disjunctive, the Deputy Commissioner said *nothing* about analyzing whether the work was directly related to the Airport's normal operations. *Id.*

On March 30, 2010, the DOA affirmed its decision that CBE-552 was exempt. EOR02815-02817. 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." *Id.*

The Labor Commissioner ultimately conducted a hearing in June and September 2013. He issued his final decision on March 6, 2014. EOR3939-3952. He held that CBE-552 is a public works project covered by NRS Chapter 338's prevailing wage requirements and that certain work performed under its terms must be compensated at prevailing wage rates. EOR3941.

The Labor Commissioner rejected Bombardier and Clark County's arguments that the work was exempt under NRS 338.011(1), asserting that CBE-552 was not directly related to the normal operation of the Airport because it was possible for the Airport to "function" without the ATS. EOR3942. He found that CBE-552 was not directly related to the normal maintenance of the ATS because employees were occasionally responsible for doing repair work. EOR3942-43. The Labor Commissioner rejected Bombardier's contention that it was exempt as a "railroad company" because he believed NRS 338.080(1) was intended to exempt only those railroad companies which operate exclusively in Nevada. EOR3944-45. Lastly, the Labor Commissioner determined that Bombardier's maintenance

technicians should be classified as elevator constructors and that 20% of the work performed under CBE-552 required compensation at prevailing wage rates. EOR3946-51.

Bombardier filed its Petition for Judicial Review on April 4, 2014. The Eighth Judicial District Court denied Bombardier's Petition on July 11, 2016. The Court noted that it may have ruled differently had it heard the case in the first instance, but nonetheless affirmed the Labor Commissioner's decision.[2] Bombardier filed a timely appeal on August 16, 2016.

V. STATEMENT OF FACTS

A. McCarran's ATS System.

Approximately 40 million travelers utilize McCarran Airport each year. The vast majority of those travelers pass through the C and D concourses, and both concourses depend on the ATS to transport passengers to and from their gates.

Bombardier installed the original ATS train in 1985 during the construction of the C Concourse. EOR01587:11-01588:22. At the time, the only way to access the C Concourse was by train. *Id.* Even now, after the Airport constructed a new

[2] The District Court's Order adopts arguments and reasoning from Respondents' briefs. It is entitled to no deference here. *See Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006).

walking ramp to the C Concourse, at least 30% of departing travelers take the ATS to the C Concourse, and virtually all arriving passengers take the ATS from the concourse to the terminal. *Id.*

The Airport's next major expansion occurred in 1998 with the construction of the D Concourse. EOR01982-01988. Almost half of the gates currently open for operation are located there, and like the C Concourse, the ATS is the only direct link between it and the terminal. *Id.* 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[.]" EOR01588:9-20.

Unlike the C Concourse, the D Concourse has never been physically connected to Terminal 1. *Id.*; *see also* EOR2584. Nor is it physically connected to the recently constructed Terminal 3. *Id.* Passengers flying airlines which maintain ticketing facilities at Terminal 3 but fly from the D Concourse must use the ATS to access their departure gate. *Id.*; EOR01596:13-EOR01597:8; *see also* EOR01989-01990.

For these reasons, the maintenance of the ATS system is critical to the Airport's operation. As Mr. Walker explained:

> 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.

EOR01596:13-EOR01597:8; *see also* EOR01989-01990 (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." EOR01597:12-17.

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.

The County selected Bombardier to install the ATS system utilized for the C and D Concourses – as well as the T3 terminal – after the completion of a competitive design process. EOR01591:16-:4. Upon the completion of each installation, Bombardier's innate capacity to offer competitively priced services on its own equipment led the County to enter into a series of maintenance contracts which culminated with its most recent iteration, CBE-522, in 2008. *Id.*; EOR1991-

01992. As Mr. Walker explained, Bombardier's ability both to deliver reliable service and provide technical expertise was crucial to the ATS system's success. EOR01588:23-EOR01591:9; EOR01991-01992.

Clark County approved CBE-552 on June 3, 2008 and it terminated on May 2012.[3] EOR1991-01992. The contract was awarded in accordance with NRS 332.115(1)(a) and (c). *Id.*; EOR01591:16-1592:4. Mr. 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:

> 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.

EOR01591:16-:4.

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[3] Clark County treats all of its major maintenance contracts as exempt from prevailing wage under the same rationale. *See* EOR01993-02055; EOR01595:22-:15. 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. *Id.* The contract is virtually identical to the one at issue. It is *not* covered by Chapter 338 and the Union has not filed a complaint regarding its coverage. *Id.*

As both Bombardier and County witnesses testified during the hearing, CBE-552 is a *maintenance contract*. *See, e.g.,* EOR01482:5-:16; EOR01486:7-21. It is designed around an "availability requirement," which is another way of saying that CBE-552 obligated Bombardier to ensure that the ATS was available for passenger service 99.65% of the time. To that end, the contract called for preventative and corrective maintenance of the system. *Id.*

Both aspects of Bombardier's maintenance strategy were memorialized in a written maintenance plan. EOR02550-02253; EOR02599-02602; EOR01486:2-12; EOR01494:22-EOR01496:25. Preventative maintenance was 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.

EOR01482:21-EOR01483:13.

Each procedure required was identified with a Preventative Maintenance ("PM") code. Most PM procedures were performed on a daily or weekly basis, requiring little more than visual and/or light instrument inspection. *Id.* Other procedures were performed less frequently because they involved both inspections and installation of replacement parts in accordance with predetermined time cycles or mileage. *Id.* Due to the Company's focus on availability and preventative maintenance, the ATS system very rarely experienced an unexpected equipment breakage that interrupted service and caused downtime. EOR01900:12-EOR01905:8. Maintenance Technician's workdays consisted of these well-defined sequences of tasks. They were very much like a Maytag repairman: upwards of 40% of their workday was dedicated to "recovery," which was nothing more than standby time. EOR2231-02249; EOR1507:1-EOR1508:25.

Bombardier tailored the time periods during which preventative and corrective maintenance was performed to the Airport's operational practices. The ATS is a "shuttle system" – meaning that the trains travel on two tracks, back and forth from the gates. There is therefore no way to remove a train from active

service and replace it with another while maintenance employees perform service work. EOR1488:10-EOR1489:22; EOR2584. As such, employees who worked during the day waited in standby in case something went wrong. Night shift employees performed a larger amount of preventative and corrective maintenance tasks during a concentrated nightly maintenance window when the trains were on a reduced operational schedule. *Id.*; EOR2250-02553; EOR2582-02598; EOR1497:13-EOR1498:14.

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 required its employees to track their labor hours using a computer program called SIMS. EOR1520:2-EOR1527:5. According to the records personally completed by the claimant employees 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.*; EOR2231-02249 and EOR2254-02461.

VI. SUMMARY OF ARGUMENT

NRS Chapter 338 requires employers to pay their employees prevailing wage rates only when an employee is (1) performing covered work on a public works project within the meaning of NRS 338.010(16), and (2) the work is not otherwise subject to exemption, such as NRS 338.011(1)'s exceptions for work

directly related to either normal operations or normal maintenance. Given that CBE-552 was a *maintenance* contract designed to ensure the continuous operation of the ATS – the lifeline which connects the Airport's ticketing and baggage area with the gates at the C and D Concourse – it is self-evident that Chapter 338's requirements do not apply. The Labor Commissioner's determination to the contrary is indefensible.

First, the Labor Commissioner was wrong to find that CBE-552 was covered by the Act. EOR3941:2-25. Under NRS 338.010(16), work is presumptively subject to prevailing wage only if: 1) the work concerns a project, and 2) the project is "*for* the new construction, repair or reconstruction of" a *public work*. CBE-552 does not satisfy either condition. The contract is not a project for the construction of a building or other "public work" as that term would have been understood when the prevailing wage law was enacted in 1937.[4] *See Thomas v. Nev. Yellow Cab Corp*., 130 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014) ("The goal of … interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification.") (quotations omitted). In 1937, it was well understood that prevailing wage laws were intended to protect local construction worker wage rates and preclude itinerant contractors

[4] Prevailing wage laws were passed in the 1930's, first at the federal level and then in Nevada "in response to complaints about contractors importing low-wage workers. Background Paper 85-4, available online at: https://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP85-04.pdf.

and workers from initiating a "race to the bottom" by using cheap labor to underbid local contractors for public construction contracts. *See,* Background Paper 85-4. And, while members of Nevada's Legislature in 1937 likely did not imagine the scope and size of a modern international airport like McCarran, the text of the statute as enacted, the legislative history, and the historical context do not suggest that the members intended to require prevailing wage payments for maintenance contracts which, by their ongoing and continuous nature, are not susceptible to predatory pricing by out of state contractors.

Just as critically, even if the traditional definition of a public works project could be stretched beyond buildings and structures to include non-construction work, CBE-552 is not encompassed within the text of the prevailing wage law. A public works project is subject to prevailing wage *only if* it is "*for*" construction, repair or reconstruction as required by NRS 338.010(16). The Labor Commissioner's decision fails to address this statutory requirement. Indeed, it appears that he did not even consider that portion of the statute because his factual findings – he held that 80% of the contract concerned maintenance and that no more than 20% of the work performed under the contract could constitute repair – confirm that CBE-552 was *for* the maintenance of, not the construction, reconstruction or repair of the ATS.

Second, even if CBE-552 theoretically was subject to Chapter 338, the Labor Commissioner committed reversible error where he failed to find that CBE-552 is nonetheless exempt under NRS 338.011(1), which exempts from Chapter 338's requirements all contracts that are "directly related to the normal operation of the public body or the normal maintenance of its property."

CBE-552 satisfies both of these independent and adequate grounds for exemption. The ATS' direct connection to the normal operation of the Airport is self-evident. The C and D Concourses were designed to use the ATS as the principal means of transporting passengers between the boarding and the baggage/ticketing areas. Seventy-eight percent of the Airport's gates rely on the ATS for access and the D Concourse cannot be accessed by the public during normal operations without the ATS. EOR1596:13-EOR1597:8. If the automated train system does not function at 99.65% reliability – a figure which can be achieved only through the work performed under the Agreement – the Airport cannot fulfill its "principal requirement." EOR1597:12-17.

Despite these undisputed facts the Labor Commissioner substituted his own personal judgment. He asserted that the Airport could still "function" without the automated train system and on that basis refused to apply the exemption. EOR3942. This interpretation of NRS 338.011(1), which equates "normal operation" with the ability to "function" is more than arbitrary and capricious. It is

completely illogical. Moreover, the conclusion that the Airport can "function" without the ATS is neither supported by substantial evidence nor consistent with his finding that the ATS is the "primary method of transporting passengers around the Airport property." EOR3942.

Third, the Labor Commissioner should have found that CBE-552 is exempt because it is directly related to the normal maintenance of Clark County's property. *All* ATS maintenance was performed under the auspices of the Contract. His conclusion that NRS 338.011(1)'s "normal maintenance" exception does not apply because – in his view – 20% of the work performed under CBE-552 is repair work, cannot be justified. TR3943. It conflicts with the plain meaning of the statute. Repair is often incidental to normal maintenance tasks. If the presence of any repair were sufficient to preclude the operation of the exemption, NRS 338.011(1) would be meaningless. No contract would qualify. In enacting NRS 338.011(1), the Legislature established a safe harbor to protect local governments from the profound recordkeeping obligations and labor costs imposed by the prevailing wage law when they are contracting for core operational and maintenance services. The Airport is one of the most important public buildings in Clark County. The ATS is integral to its operation. It fits *exactly* within the statute's purpose, and in failing to give NRS 338.011(1) effect, the Labor Commissioner exceeded his statutory authority.

Indeed, the Labor Commissioner engaged in little to no reasoning when he dismissed application of NRS 338.011(1), and his effort to defend the decision below in the District Court consisted of self-aggrandizing claims that he – as opposed to an internationally renowned expert in airport operations like Randy Walker – was best situated to determine whether the ATS is directly related to the *normal* operation or maintenance of the Airport. But his contentions only underscore the fact that the emperor has no clothes. An administrative official cannot invoke the doctrine of administrative deference as if it were a magic incantation that shields an indefensible interpretation of the statute from judicial review. The Labor Commissioner's construction of NRS 338.011(1) is considered *de novo*. The Court should apply the statute according to its plain meaning and grant Bombardier's petition for judicial review.

Fourth, the Labor Commissioner should have found that the work performed pursuant to CBE-552 is exempt because Bombardier is a "railroad company." 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. EOR3943-44. 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 and sale of steel-wheel railroad

equipment. Every phase of its operations is dedicated to railroads and railroad equipment. The Labor Commissioner rejected the application of the exemption because in his opinion "the exemption provided by NRS 338.080(1) is intended to exempt a company acting in the capacity of a railroad company in the state of Nevada[.]" *Id.* There is, however, absolutely no basis for that proclamation. The statute contains no such limitation and the Labor Commissioner set forth no support other than his own opinion. Manufacturing "legislative intent" to support a results driven interpretation of a statute is a hallmark of arbitrary and capricious reasoning, and under recent Supreme Court precedent, the Labor Commissioner's construction of NRS 338.080(1) cannot be sustained. *See Thomas*, 327 P.3d at 522 ("The issue ought to be not what the legislature … meant to say, but what it succeeded in saying.").

VII. STANDARD OF REVIEW

The standard of deference accorded to an administrative decision depends on whether the issues raised by the decision are questions of law or of fact. *State Bus. & Indus. v. Granite Constr.*, 118 Nev. 83, 86, 40 P.3d 423, 426 (2002); NRS 233B.135. The Labor Commissioner's conclusions of law, including questions of statutory interpretation, are subject to "independent review" without deference. *So. Nev. Op. Engineers Contract Compliance Trust v. Johnson (Labor Commissioner)* 121 Nev. 523, 119 P.3d 720 (2005); *Nassiri v. Chiropractic Physicians' Bd. of*

Nev., 327 P.3d 487, 489 (Nev. 2014) ("[T]he administrative construction of statutes" is subject to de novo review); *UMC Physicians' Bargaining Unit v. Nev. Serv. Emp. Union/SEIU Local 1107*, 124 Nev. 84, 89, 178 P.3d 709, 712 (2008) (deference is given to an administrative agency's "interpretations of its governing statutes or regulations only if the interpretation is within the language of the statute."). Factual determinations will be reversed if they are not supported by substantial evidence or are otherwise contrary to the "reliable, probative and substantial evidence on the whole record." NRS 233B.135(3).

VIII. ARGUMENT

A. CBE-552 And The Work Performed Under Its Terms Was Not A "Public Work" Within The Meaning Of NRS 338.010(16).

Nevada law requires employers to pay prevailing wages only to those individuals who are employed on covered "public work." 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).

According to NRS 338.010(16)'s plain meaning, a publicly financed contract must satisfy two conditions before it can be considered "public work." First, it must constitute a "project." Second, it must be "for the new construction, reconstruction or repair" of a public work. CBE-552 does not satisfy either condition.

1. CBE-552 is not a "project" within the meaning of the prevailing wage law.

The Legislature did not define the term "project." But the absence of a specific definition does not establish that the term is indecipherable or that the Labor Commissioner is free to imbue it with whatever meaning he might personally feel is appropriate. To the contrary, the meaning of "project," when considered within the context of the statute and the circumstances of the statute's enactment in 1937, is "facially clear." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 456 (2009). The Labor Commissioner found that CBE-552 is a "project" simply because, in his opinion, it fit within an abstract dictionary definition, EOR3941: his finding was wrong. It divorced the term from the phrase

"public work" and failed to consider what the Legislature would have considered to be a public works project when NRS Chapter 338 was enacted eighty years ago.

a. The Labor Commissioner's interpretation of project is contrary to its plain meaning.

As set forth in NRS 338.010(16), the Act is limited to "projects," which are plans or schemes to complete a particular objective in accordance with a defined schedule, for the new construction, repair or reconstruction of public buildings, roads, highways, utilities, parks, public convention facilities, and all other publicly owned works.[5] The Merriam-Webster Dictionary uses the example of a "development project" to exemplify the meaning of the term and convey its programmatic and finite nature. *See id.* 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 lists "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).

Clearly, Bombardier maintained the ATS in accordance with its maintenance plan. The ATS is a complicated system. Such a plan was required. But CBE-552 is not a project. The maintenance work performed pursuant to CBE-552 was

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[5] MERRIAM-WEBSTER DICTIONARY, *available online at http://www.merriam-webster.com/dictionary/project* (accessed on December 30, 2010).

ongoing and perpetual in nature. It lacked a singular, defined end point. It lacked a schedule with substantial completion dates or other defined objectives. It is *nothing* like the contextual examples referred above.

The Labor Commissioner cited portions of two dictionary definitions in support of his determination that a maintenance contract like CBE-552 can constitute a project, but in doing so, he omitted the dictionary drafter's efforts to provide contextual meaning. EOR3941. Put another way, he arbitrarily picked those aspects of the dictionary entry that fit within his analysis, capriciously ripping "project" from its historical moorings.

The Labor Commissioner's construction of "project" makes even less sense when the term is considered within the context of the other subsections of NRS 338.010(16) and the term's connection with the phrase "public work." The meaning of the phrase "public work" has been well-established since Chapter 338 was enacted in 1937. "Public work" refers to "structures, as roads, dams, or post offices, paid for by government funds for public use." DICTIONARY.COM UNABRIDGED BASED ON THE RANDOM HOUSE DICTIONARY, *available online at http://dictionary.reference.com/browse/public+ works?s=t* (accessed on March 27, 2013). The NEW OXFORD AMERICAN DICTIONARY, THIRD EDITION, at p. 1411, provides that public work is "[t]he work of building such things as roads, schools, and reservoirs, carried out by the government for the community." The Cambridge

University Dictionary, which is cited in the Labor Commissioner's Order, defines "public works" as "the building of roads, hospitals, etc. that is paid for by the government." CAMBRIDGE UNIVERSITY BUSINESS ENGLISH DICTIONARY, *supra*. BLACK'S LAW DICTIONARY, NINTH EDITION, confirms that a "public work" involves the *construction and physical modification* of buildings. "Public works" are "structures (such as roads or dams) built by the government for public use and paid for by public funds." *Id.* at 1352.

NRS 338.010(16) requires "project" and "public work" to be construed together. *See Buckwalter v. Eighth Judicial Dist. Court*, 234 P.3d 920, 922 (Nev. 2010) ("Statutes must be construed together so as to avoid rendering any portion of a statute immaterial or superfluous."). Given both the current understanding of "public work" as well as the understanding that the Legislature would have possessed at the time of NRS 338.010's enactment, it is inconceivable that the 1937 Legislature intended for maintenance contracts like CBE-552 to be covered by the prevailing wage law. *Thomas*, 130 Nev. Adv. Op. 52, 327 P.3d at 522.

b. The Labor Commissioner's interpretation of project cannot be reconciled with the statutory scheme.

The Labor Commissioner's overly broad interpretation of "project" also cannot be reconciled with the other provisions of Chapter 338. *See State v. Fallon*, 100 Nev. 509, 515-517 (1984) (courts must interpret provisions within a common statutory scheme harmoniously with one another).

First, all of the enumerated examples of public work projects in NRS 338.010(16) fit within the traditional definition which prevailed at the time of Chapter 338's enactment. They concern the construction of buildings and structures, *see* NRS 338.010(16)(1)(1)-(10), and "project" must be interpreted in accordance with the doctrine of *noscitur a sociis* "words are known by – acquire meaning from – the company they keep." *Bldg. Energetix Corp. v. EHE, LP,* 294 P.3d 1228, 1238 (Nev. 2013).

Second, 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.*, EOR1991-01992 (contract approval); EOR2562-02570 (Kone contract approval).

Third, Chapter 338's definitions of "workers," "contractor," and "subcontractor" support the fact that a "project" is a construction project, not a maintenance contract. Under NRS 338.040, only statutory "workers" who are employed on "public works" are entitled to prevailing wages. NRS 338.010(25) provides that a "worker" is an individual who is employed in the service of a "contractor or subcontractor." Those terms are also defined. Under NRS 338.010(3), a "contractor" is an entity who is performing work under NRS Chapter

624, *i.e.*, a "builder." NRS 624.020(1) ("Contractor is synonymous with builder") and (2)("A contractor is any person … who … undertakes 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, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith."); *see also* NRS 338.010(15) (defining "prime contractor" as a "contractor who…contracts to *construct* an entire project") (emphasis added).

Fourth, Chapter 338's definition of "contract" is imbued with the characteristics of a construction relationship. NRS 338.010(2) provides that "[c]ontract means a written contract entered into between a *contractor* and a public body for the provision of labor, materials, equipment or supplies for a public work."

Fifth, 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.

Obviously, CBE-552 is not "completed" in the sense described here. 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 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.

c. The Labor Commissioner's interpretation of project is inconsistent with the manner in which NRS 338.010(16) has been applied since its enactment.

"Custom and usage control in the interpretation and construction of the statute." *In re Estate of Hegarty*, 45 Nev. 145 (1921). Here, custom and usage demonstrate that CBE-552 is not a public works project. Both Mike Moran, the County's investigator and Mr. Walker, the former Clark County Director of Aviation, testified at length about the nature of CBE-552 and explained that such maintenance arrangements are not considered to be prevailing wage projects because they do not involve traditional construction.

Other maintenance contracts in the record, such as the Kone Elevator Maintenance Contract, and Clark County's landscaping maintenance contract were *not* treated as prevailing wage contracts and have never been challenged as such. EOR994:18-996:6. Given that the Kone Elevator Constructor employees are represented by the Union, the Union's failure to bring a complaint on their behalf is strong evidence that the claims in this case lack merit.

Similarly, *all* of the Nevada Supreme Court's reported decisions regarding Chapter 338 concern contracts for the construction or improvement of structures and real property, not service and maintenance contracts like CBE-552. *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) (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); *Garvin v. Ninth Judicial Dist. Court*, 118 Nev. 749, 765 (2002).

2. Even if CBE-552 constituted a "project," it was not a project "for the new construction, reconstruction, or repair" of a public work and therefore NRS 338.010(16) does not apply.

Under NRS 338.010(16) a contract cannot be a public work unless it is both (1) a project, and (2) "for new construction, reconstruction, or repair." The critical word is *for*, which is a preposition and must be interpreted according to its plain

meaning. *See, e.g., Ten Local Citizen Group v. New England Wind, LLC*, 457 Mass. 222, 229, 928 N.E.2d 939 (2010).

"For" is a "function word to indicate purpose … or an intended goal." MERRIAM-WEBSTER NEW COLLEGIATE DICTIONARY at p. 481; *New Orleans Redevelopment Auth. v. Johnson*, 16 So. 3d 569, 581 (La. App. 4 Cir. 2009) (The "normal and common meaning" of "for" is a preposition indicating "in order to," or "with the purpose of."). In application, it requires that a project is *for the purpose of* construction, reconstruction or repair. Those aims – construction, reconstruction, or repair – must predominate rather than be incidental to the underlying purpose of the project. *See generally Gruber v. PPL Ret. Plan*, 520 Fed. Appx. 112, 117 (3d Cir. Pa. 2013) (for is used "to indicate purpose"); *PHL Variable Ins. Co. v. Hersko*, Case No. 09 cv 1223, 2011 U.S. Dist. LEXIS 100246, at *12 (E.D.N.Y. Sept. 6, 2011) ("the preposition for is used as a function word to indicate purpose . . .[or] an intended goal."); *Riley-Stabler Constr. Co. v. Westinghouse Electric Corp.*, 396 F.2d 274, 276 (5th Cir. Ala. 1968) (use of the word "for" is evidence that the legislature intended for coverage to depend on the "purpose for which [the materials] were supplied."); *SourceOne Global Partners, LLC v. KGK Synergize, Inc.*, Case No. 08 C 7403, 2010 U.S. Dist. LEXIS 55015, at *17-21 (N.D. Ill. June 3, 2010) ("for" serves an important limiting function and

requires the court to determine the purpose for the activity rather than whether the activity has incidental effects).

The Legislature's inclusion of the phrase "for the new construction, reconstruction, or repair" is integral to the statutory scheme. It places an important limitation on prevailing wage coverage, ensuring that it applies only to publicly funded projects which concern construction or reconstruction of public works. Here, the Labor Commissioner found that 80% of the work constitutes maintenance. EOR3947-49. He also noted that "CBE-552 called *for* routine preventative and corrective *maintenance* of the ATS to ensure no less than 99.65% reliability in service to [the] Airport for the duration of the contract, a period of five years." EOR3941 (emphasis added). In short, if the Labor Commissioner had considered the full text of NRS 338.10(16), his own factual findings required dismissal of the complaint. Maintenance was not merely the predominate purpose of CBE-552. It was the overarching objective.

3. Bombardier's Petition for Judicial Review should be granted because CBE-552 was not covered by the Act.

When all of the interpretive evidence is taken into account, the meaning of NRS 338.010(16) is clear: it does not cover maintenance contracts like CBE-552. The Labor Commissioner's conclusion to the contrary was premised on his own subjective views about legislative intent and misguided policy concerns. Neither of those "reasons" permits him to depart from the statutory text however, because

in applying a statute, the issue is not what an administrative agency believes the legislature "meant to say, but what it succeeded in saying." *Thomas*, 327 P.3d at 522. His construction of the term "project" did not correctly ascertain its plain meaning, paid no mind to its statutory context, did not consider the historical context of the provision's enactment, and ignored the related statutory provisions in Chapter 338 as well as other chapter of the Nevada Revised Statutes.

The Labor Commissioner also failed to account for NRS 338.010(16)'s requirement that the contract must be *for* the purpose of repair – a conclusion that his own factual finding essentially mandates. Indeed, he did not even attempt to construe that part of the statute in his decision. Because his interpretation of NRS 338.010(16) fails to "give meaning to all of [its] parts and language," it must be rejected. *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").

B. CBE-552 Is Exempt Pursuant To NRS 338.011(1) Because It Is Directly Related To Both The Normal Operation Of The Airport And The Normal Maintenance Of The ATS.

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). The focus of any interpretation is the text of the statute itself. *Davis v. Beling*, 278 P.3d 501, 508-509 (Nev. 2012).

The scope of the exemption set forth by NRS 338.011(1) is plain on its face. 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.[6]

2. 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 essential to McCarran's operations and expansion since 1982, when the Company installed the first ATS system at the airport to transport passengers to and from Concourse C. 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 the ATS system.

No one is in a better position to describe the Airport's normal operations, and the ATS system's role in those operations, than Randy Walker. His testimony incontrovertibly established that the ATS system is an integral element of McCarran's daily operations and that CBE-552 is therefore directly related to those normal operations. The Airport's primary function is to facilitate travelers coming

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[6] 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*, 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.").

to and leaving Las Vegas, and 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. These objectives cannot 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.

There is no reported authority defining what constitutes the normal operation of an airport, but other Nevada Supreme Court decisions confirm Bombardier's common sense reading of the phrase. For example, the Court has explained that interfering with the random nature of a slot machine disrupts its normal operation, even if the slot machine reels still spin, *Childs v. State,* 109 Nev. 1050, 1056-1058 (1993), and that picketing at the office and premises of a union local interfered with the "normal operations of the union." *Berryman v. International Bhd. of Elec. Workers*, 82 Nev. 277, 278-279 (1966). Similarly, 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.").

Taken together, the evidence in the record confirms what is obvious to any individual who has flown through McCarran International Airport. The normal operation of the Airport *requires* the ATS system, and because all work under CBE-552 is performed for the sole purpose of enabling the ATS system's continuous operation, the Labor Commissioner should have concluded that the maintenance agreement 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. EOR1950. 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. *Id.*

Bombardier's fundamental obligation is to perform all work to "assure that [the ATS] 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.

EOR1953 and EOR1955. 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.**" EOR1961 (emphasis added). 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." EOR1953.

c. The Labor Commissioner's determination that CBE-552 and the maintenance and repair of the ATS is not directly related to the normal operation of the Airport is arbitrary and capricious.

The Labor Commissioner observed that "no one disputes that the ATS is important to [the Airport], and in certain circumstances makes transporting

passengers around the airport property more efficient." EOR3942. Despite that observation, and contrary to the overwhelming evidence, he rejected the application of NRS 338.011(1) because, according to him, the "Airport could, and has, operated as an airport without a fully functioning ATS." *Id.* He went on to assert that

> while the ATS may be the primary method of transporting passengers around the airport property, it is not the only method. There are alternatives for transporting passengers to and from the gate areas; for example passengers could walk or be bused. … These alternative methods may require more personnel and may result in additional costs, but would by no stretch of the imagination prevent [the Airport] from operating as an airport.

Id.

This reasoning is both arbitrary and capricious and inconsistent with the plain meaning of the statute.[7] The issue is not whether CBE-552 and the ATS is absolutely necessary for the Airport to operate in any capacity. The issue is whether it is directly related to *normal* operations. Given the importance of the ATS to the Airport, the Labor Commissioner's assertion that the ATS was merely more efficient is nonsensical. It is tantamount to saying that a human's heart and lungs are important, but not directly related to the body's normal operations because a ventilator and heart bypass machine can fulfill the same functions. By

[7] 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. EOR1598:10-EOR1599:14.

finding that only those contracts which are absolutely necessary for the Airport to operate in any capacity – and, frankly, CBE-552 easily satisfies that stringent standard – the Labor Commissioner artificially constricted the scope of the exemption and effectively read the phrase "directly related to" and the term "normal" out of the statute.

Indeed, the Labor Commissioner's interpretation essentially amends NRS 338.011(1) to provide that a contract will be deemed exempt only if it is *absolutely necessary* (rather than directly related to) to the Airport's *fundamental ability to operate* (rather than normal operation). The Labor Commissioner has no authority to adopt such an interpretation. Applying some parts of NRS 338.011(1) "while ignoring others would result in the type of lawmaking that must be left to the Legislature." *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council*, 122 Nev. 218, 221 (2006).

The Labor Commissioner's assertions also are not supported by substantial evidence. Given his findings that the absence of the ATS means that the Airport is unable to rely on its "primary" method of transporting passengers and must instead utilize transportation that require more personnel and costs, the Airport is by definition no longer engaged in "normal operations." EOR3942. As Mr. Walker explained, the ATS system is crucial to the Airport's normal operation; without it, the Airport cannot satisfy its "principle requirement."

Walker underscored his conclusion with testimony about a then-recent situation which proved that the Airport cannot function without the ATS. On May 25, 2013 the ATS had a "complete failure." EOR1601:10-EOR1602:5. The results were disastrous. Although the system was down for less than a day, hundreds of travelers missed flights, and the problem became worse with each passing hour. *Id.* The Airport processes more than 40 million travelers each year. That amount of traffic simply cannot be accommodated with shuttle buses and SUV's. *Id.* Given these facts, the Labor Commissioner's holding that the Airport can still "function" without the ATS is astonishing.

In *State v. Fallon*, 100 Nev. 509, 685 P.2d 1385 (1984), the Supreme Court reversed the Labor Commissioner's interpretation of Chapter 338 because it was not supported by the statutory text. It explained that in failing to adhere to the plain language of the statute, the Labor Commissioner's decision was arbitrary and capricious. *Id.* The Court should reach the same conclusion here. There is neither rhyme nor reason to the Labor Commissioner's interpretation of NRS 338.011(1)'s normal operations exception. It is not supported by the statute's text. It is not supported by the record. And, it is inconsistent with the Labor Commissioner's own factual findings.

3. CBE-552 is directly related to the normal maintenance of county property.

NRS 338.011(1) contains a second, independent and adequate basis for finding that CBE-552 is exempt from Chapter 338's prevailing wage requirements. It provides that contracts which are directly related to the "normal maintenance" of public property, like the Airport, do not require payment of prevailing wage.

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

Like "normal operations," the phrase "normal maintenance" is not defined in Chapter 338, but its meaning is plain. Normal means standard or regular, and maintenance is the upkeep of property or equipment. The text of NRS 338.011(1) contains no other limitations. Without reiterating the facts set forth above, CBE-552 is unquestionably "directly related to the normal maintenance" of the 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, and the contract called for no other work. The Labor Commissioner should not have gone any further.

b. CBE-552's terms confirm 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* EOR1952-EOR1956; *see also* EOR1964-01965. 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. *Id.*

c. The Labor Commissioner's determination that CBE-552 is not directly related to the normal maintenance of the Airport should be vacated.

In his decision, the Labor Commissioner held that CBE-552 could not be exempt because it contained some elements of repair, and according to him, "[r]epair work requires the payment of prevailing wage." EOR3492-93.

This approach is irrational and incoherent, exposing every maintenance contract to the risk that the Labor Commissioner may order the payment of prevailing wage if even one task could be deemed repair. It also is not supported by the text of the statute. NRS 338.011(1) contains no caps or limitations. NRS 338.011(1) exempts the *entire contract*, not just those portions of the contract which involve normal maintenance and there is *no* other reasonable way to read the statute. It provides:

> **NRS 338.011 Applicability: Contracts related to normal operation and normal maintenance; contracts related to emergency.** The requirements of this chapter do not apply to a contract:
>
> 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.

The Labor Commissioner's interpretation of NRS 338.011(1), in contrast, amends NRS 338.011(1) to provide:

> **NRS 338.011 Applicability: Contracts related to normal operation and normal maintenance; contracts related to emergency.** The requirements of this chapter do not apply to ***the normal maintenance work performed in accordance with*** a contract:
>
> 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. ***Work which constitutes repair must be paid at the prevailing wage rate.***

(Alterations in italics and bold). In failing to apply the statute as written, which would require *all* of CBE-552 to be deemed exempt, the Labor Commissioner has exceeded his authority. *See Fallon*, 100 Nev. at 515-517.

This artificial limitation on the scope of NRS 338.011(1) also improperly interferes with the Legislature's intent 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 Missouri v. City Utilities of Springfield*, 910 S.W.2d 737, 744 (1995) (rejecting contention that supposed remedial purpose of prevailing wage laws required broad coverage). Indeed, constricting the scope of the exemption "contradicts the statutory scheme and attempts to broaden the coverage of the Act." It makes NRS 338.011(1) meaningless. Maintenance work,

in and of itself, is already exempt from Chapter 338's requirements because it is not referenced in NRS 338.010. If the presence of any repair defeats the application of NRS 338.011(1) – which is what the Labor Commissioner's interpretation requires – the statute is null and void.

The Labor Commissioner's interpretation also leads to absurd results. Regardless of whether NRS 338.011(1) were to apply, a local government seeking to enter into a maintenance contract would be required to review each individual task and determine if it could be considered "repair," and if so, which prevailing wage should be used for each task. Such a requirement is for all practical purposes impossible, and it would frustrate the purpose of the exemption. The Legislature obviously did not draft NRS 338.011(1) with such a requirement in mind.

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. Interpreting it in a manner that would require local governments to pay multiple wage rates to the same employees, and that the wage rate depends on the nature of particular maintenance or repair tasks at any given time, which are inherently unpredictable, would frustrate local government discretion and nullify the exemption. If the

legislature intended only for maintenance work to be exempt, it would have said so rather than exempting any contract which is "directly related to" normal maintenance.

4. Application of NRS 338.011(1) to CBE-552 is consistent with legislative intent.

There is no reason for the Court to look beyond the statutory text of NRS 338.011(1). It is facially clear and unambiguous. Should the Court do so, however, the legislative history also supports Bombardier's position.

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 frustrated the local government's right to opt-out of competitive bidding requirements when it best served the public interest. *See* EOR0579-EOR0598 (legislative history); *see also* EOR3953-4005 (complete legislative history). Consistent with its text, legislators repeatedly stated that the purpose of Section 338.011 was to ensure that critical local government operational and maintenance needs were not held hostage by prevailing wage laws. *See, e.g.,* EOR3960.

This is not surprising. Chapter 338's record keeping obligations are onerous for both the contractor and the public body required to monitor compliance. *See* NRS 338.070(5) (records and investigations); NAC 338.092-338.100 (records); NAC 338.105-338.116 (local government investigations). Chapter 338's stringent bidding requirements, including the pressure to contract with the lowest bidder as

opposed to the bidder who may be best qualified to supply key goods and services, interfere with local government prerogatives. *See* NAC 338.130-338.450 (bidding procedures).

As the Legislature also noted in 1981, the increased labor costs associated with prevailing wage projects should not be borne by local governments when contracting for critical services. EOR0579-EOR0598. It is inefficient and given that operation and maintenance expenses are paid out of the local government's general fund rather than through bonds or other financing measures – CBE-552 was paid for from Clark County's operating fund – the Legislature's interest in helping local governments manage cost by avoiding the pernicious impact of an overly broad Attorney General opinion is clear. *See, e.g.,* EOR3960.

In short, compliance with prevailing wage creates significant potential obstacles, and although the Labor Commissioner and Union have argued that NRS 338.011(1) is limited to low-skill, low-value contracts, that assumption simply is not borne out by the text of the statute. It contains *no* financial limitations (the history shows that limitations were proposed and rejected) and the Legislature saw a need for NRS 338.011(1) even though, pursuant to NRS 338.080, contracts for $100,000.00 or less were *already exempt.*

In 2003, the Legislature confirmed that it meant exactly what it said. That year, the Legislature enacted a comprehensive amendment of Chapter 338,

including certain parts of NRS 338.011. *See* 2003 Statutes of Nevada, Page 2414 (Chapter 401, AB 425), *available online at:* https://www.leg.state.nv.us/Statutes/72nd/Stats200319.html#Stats200319page2414. The Legislature made no change whatsoever to the relevant language of subsection (1). *Id.* It reaffirmed that the purpose of NRS 338.011(1) was to give local governments' broad discretion in managing their affairs and contracts which relate directly to their operations. 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).

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

Finally, Bombardier is entitled to relief under NRS 338.080(1). Under that section, 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 evidence at the hearing established that Bombardier is a railroad company. EOR1478:10-EOR1479:21. It is the primary subsidiary through which Bombardier Transportation conducts U.S. operations including the sale of heavy rail equipment, signaling technology, locomotives, and "turnkey systems" which can include a complete railroad system. EOR1479:24-:21; EOR2167-2266. 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. EOR1479:8-EOR1481:2; EOR2227-02230.

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 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. *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.[8]

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[8] The Federal Transportation Administration has issued proposed administrative regulations that deem automated guide way 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.

EOR1481:8-EOR1482:12. Finally, the ATS itself is a high volume rail transit system, transporting millions of passengers each year. EOR1596:17-EOR1597:8.

A company's nature is defined by what it makes and how it generates revenue. In the case of Bombardier, 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 is for a steel-wheel commuter line that runs through JFK airport. 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(1).

The Labor Commissioner rejected application of NRS 338.080(1) for two reasons. First, he asserted that Bombardier cannot call itself a railroad company because the ATS itself is not a traditional railroad and Bombardier is bound by the position that its predecessor took in a Georgia lawsuit in 1984 regarding the Railing Labor Act. EOR3943-44. There is no basis for this conclusion. NRS 338.080(1) exempts railroad companies, not railroads; and, the fact that Bombardier acquired assets from Daimler Chrysler, which purchased assets from Westinghouse, does not create a relationship whereby Bombardier is subject to

issue preclusion. *See Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 916 (2014) (issue preclusion requires the same issues, same parties, and that the issue was actually and necessarily litigated).

Second, the Labor Commissioner asserted that NRS 338.080(1) "is intended to exempt a company acting in the capacity of a railroad company in the state of Nevada" and that Bombardier is therefore disqualified. EOR3944. This is inaccurate because the record establishes that during the relevant time period, Bombardier was performing, through a joint venture, the work to design and build the Desert Express / Xpresswest train from Nevada to Southern California. Moreover, this assertion of intent is little more than speculation. NRS 338.080(1) has no legislative history and the statutory text does not limit the exemption to railroad companies operating railroads in the state. The Labor Commissioner may believe that application of the exemption in this manner is inappropriate, but 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. 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. Our task is to apply the text, not to improve upon it.

Harbison v. Bell, 129 S. Ct. 1481, 1493-1494 (U.S. 2009) (quotations omitted). Indeed, the Labor Commissioner's concern that companies may "acquire railroad subsidiaries elsewhere" to avoid Nevada's prevailing wage law is the precise kind of speculation that courts must avoid.[9]

Based on U.S. Supreme Court precedent issued before Chapter 338's enactment, Bombardier is no less of a railroad company simply because it is involved in a myriad of railroad related businesses and operates steel-wheel railroads outside of, rather than inside of, Nevada. As the U.S. Supreme Court explained in *County of Randolph v. Post*, a corporation is

> *not* the less a *railroad company* . . . because it is also a coal, or a mining, or a furnace, or a manufacturing company. . . .
>
> [N]o court has authority to say that an operating railroad, is less a railroad, is less valuable to a county through which it passes, because it proposes to *mine and transport coal*, to *manufacture and transport flour*, to *carry on iron foundries, digging or buying the raw materials, employing men to manufacture them into different kinds of iron or articles of use or luxury*, and transporting them as may be required, than if it confined

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[9] The Labor Commissioner's fear is hyperbolic. The average market capitalization of a railroad company exceeds 2.5 billion dollars. It is unlikely that companies will purchase railroads to avoid prevailing wage.

> itself to the business of a carrier. So far as the probable success or advantages of such undertakings are concerned, it is not for us to decide upon it.

93 U.S. 502.

The fact that the Legislature delegated Chapter 338's enforcement to the Labor Commissioner *does not* mean that he has the authority to impose heightened requirements on the application of statutory exemptions. In applying a statute, the issue is not what an agency believes the legislature "meant to say, but what it succeeded in saying." *See Thomas,* 327 P.3d at 522. And, here, the Legislature exempted railroad companies completely from the scope of prevailing wage laws.

IX. REMEDY

A. Issues Presented.

If the Court fails to reverse the Labor Commissioner's Order on the grounds set forth above, Bombardier is still entitled to relief and there are several additional issues that the Court must consider before enforcing the Labor Commissioner's remedial order:

1. Whether the Labor Commissioner erred by excusing the Union from proving damages on the ground that the claimant Maintenance Technicians failed to accurately record their time even though Bombardier required them to do so.

2. Whether the Labor Commissioner erred, and his factual conclusions are not supported by substantial evidence, because he relied on inadmissible evidence – specifically the invalid summaries entered into the record as EOR3540-03722, EOR3839-03843 and EOR3845-03846.

3. Whether the Labor Commissioner erred by considering the Union's contention that the claimant Maintenance Technicians are entitled to be compensated at the Elevator Constructor rate on the ground that he is 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.

4. Whether the Labor Commissioner's determination that the Maintenance Technicians should be treated as Elevator Constructors is contrary to law and whether it is supported by substantial evidence.

5. Whether the Labor Commissioner's finding that 20% of the work performed under CBE-552 constitutes covered "repair" is supported by substantial evidence.

6. Whether the Labor Commissioner's admission of Union Exhibit 1 as a "summary" under NRS 52.275 was erroneous because the document amounted to little more than a summary of the Union witnesses' opinions and therefore did not satisfy the requirements of NRS 52.275.

B. The Labor Commissioner Erred By Excusing The Union From Its Obligation To Prove Damages.

1. The Labor Commissioner wrongly shifted the burden to Bombardier.

Under Nevada law, the Union was obligated 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."[10] *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 Labor Commissioner excused the Union from doing so because Bombardier's records of repair hours – records Bombardier was *never* obligated to have in the first place – were hand recorded by employees and he perceived them to be less accurate than the electronic punch times to which modern employers have become accustomed. EOR3948-49. In support of this contention, the Labor Commissioner cited *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946).

The Labor Commissioner's analysis and legal conclusion was clearly wrong. The records on which Bombardier relied and introduced into evidence were completed by the employees themselves. How could they be inaccurate in a way

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[10] This obligation is consistent with an employee's burden of proof under the Fair Labor Standards Act. *See, e.g., Davis v. Food Lion*, 792 F.2d 1274 (4th Cir. 1986). Indeed, a plaintiff fails to meet her burden where she proves unable "to provide specific facts establishing when, and for how long, [she] performed the off-the-clock tasks for which [she] now seek[s] compensation" and where "the undisputed fact [is] that plaintiff[never reported this work on [her] timesheets, and . . . that plaintiff['s] allegations rest solely upon [her] own bare recollections." *Joza v. WW JFK LLC*, 2010 U.S. Dist. LEXIS 94419 (E.D.N.Y. Sept. 9, 2010).

that is unfavorable to those same employees? In shifting the burden of proof, the Labor Commissioner exceeded his authority under the law. Unlike the Fair Labor Standards Act, with which all employers must comply, Bombardier was never on notice of its supposed obligation to maintain prevailing wage records under Nevada law, and it had reasonably relied on the absence of that duty since 1982. Moreover, this case does not present the type of factual scenario confronted in *Anderson* and its progeny where an employer has either altered or failed to keep complete time records. *See Seever v. Carrols Corp*., 528 F. Supp. 2d 159, 170-171 (W.D.N.Y. 2007); *see also Forrester v. Roth's I.G.A. Foodliner, Inc*., 475 F. Supp. 630 (D. Ore. 1979) aff'd 646 F.2d 413 (9th Cir. 1981) (holding that plaintiff is estopped from asserting that he worked certain overtime hours, where he failed to accurately report them on his timesheets); *Newton v. City of Henderson*, 47 F.3d 746, 748-749 (5th Cir. 1995) (employee estopped from claiming that she had worked more hours than the hours she claimed in her time sheets). Most of the Union's witnesses conceded that Bombardier's records were reliable and gave only anecdotal examples of potential discrepancies. Those who asserted the records were wrong also admitted, repeatedly, that they ignored their SIMS reporting. The Labor Commissioner has rewarded that prevarication by shifting the burden of proof. That is indefensible, and inconsistent with Nevada's principle of equitable estoppel. *See Hermanson v. Hermanson*, 110 Nev. 1400 (Nev. 1994).

2. The evidence in the record, or rather the lack of it, demonstrates that the Union failed to prove damages and the Complaint should have been dismissed on that basis.

The Union's evidence of damages, and the support for the Labor Commissioner's determination that repair work amounted to 20% of time worked consisted of Union Exhibit 1 (EOR3540-03722) and two additional exhibits which are based on the analysis in Union Exhibit 1 (EOR3839-03843 and EOR3845-03846). The aforementioned Union Exhibits should never have been admitted into the record, and the Labor Commissioner's decision to do so is an error of law which independently warrants granting Bombardier's petition for judicial review. It also proves that the Labor Commissioner's factual finding that the claimant employees performed substantial amounts of repair work is not supported by substantial evidence.

Union Exhibit 1 (EOR3540-03722) is rife with errors. The Labor Commissioner admitted them as summaries in accordance with NRS 52.275, but by the close of the hearing, it was obvious that the documents were not mere summaries of documents exchanged in discovery. They were prepared by two claimant employees, Vernon McClain and Ken DePiero, and replete with those witnesses' personal speculation regarding the amount of time attributed to every task itemized in the document. EOR1694:22-EOR1695:10.

McClain was confronted with work records completed by other technicians during cross examination. EOR1786:4-EOR1787:15. Although the technicians had signed reports saying that the work took only two hours to complete, McClain had *tripled* that amount, inflating it by four hours for each technician when he made the entry into Union Exhibit 1 (EOR3540-03722). *Id.* Indeed, McClain did so even though he was not present when the event occurred, had no personal knowledge of the event, and could not point to any basis in the document he was purportedly "summarizing" which would allow him to inflate the amount of time supposedly spent on a "repair" task. **When asked which entries contained time padded in this way, McClain said "they all do." EOR1792:19. McClain then conceded that he and DePiero applied such "judgment" to every single entry in Union Exhibit 1.** *Id.*

DePiero, when confronted from entries from the Maintenance Technicians' passdown log, admitted to similar defects. EOR1699:6-EOR1700:25; *see also* EOR3527-03532. In entry after entry, he 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. EOR1700:12-25; EOR1719:7-:17. In another example, DePiero claimed forty-five hours of repair for software "reboots" even though that task is performed remotely

by someone else, and the technician is merely standing by while the computer is updated. EOR1705:2-EOR1706:9. DePiero repeatedly conceded that his personal computation of the supposed "repair" work included work that had not been performed.[11] *Id.* *All* of the entries were based on subjective criteria, and when asked **"so every hour that you have on this list is made up?" he replied "yes."** *Id.*

Union Exhibit 1 also suffered from fundamental methodological problems. DePiero and McClain did not use a shared, consistent definition of repair.[12] *See* Bombardier Exhibit 30 (EOR2621-02625); EOR1719:12-:6; EOR1793:10-EOR1794:17; EOR1795:12-15. They admitted that they signed declarations under oath certifying the supposed amount of "repair" performed before they ever discussed the definition of the term among themselves. *Id.* Similarly, Union Exhibit 1 (EOR3540-03722) fails even when considered on its own terms. As set forth in Bombardier Exhibits 131 and 132 (EOR2626-02809), 42% of the entries in the report did not conform with the Union's own stated criteria.

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[11] The record contains several other examples of inflated hours entries, including, as pointed out in the testimony of Joel Middleton, entries related to the pass down log. *See, e.g.*, EOR1791:5-17; EOR3527-03532.

[12] Notably, DePiero felt that standby time, simply standing around while another individual remotely reboots a computer, can constitute repair. EOR1706:2-EOR1707:12.

The Labor Commissioner's admission of Union Exhibits 1, 21, 22, and 24 (EOR3540-03722, EOR3839-03843 and EOR3845-03846), as well as his apparent reliance on those documents was clearly erroneous and an abuse of discretion. 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." Here, as was argued during the hearing, virtually all of Union Exhibit 1's (EOR3540-03722) 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.

As such, the exhibits are a transparent effort to bootstrap otherwise inadmissible speculation testimony into the record.[13] 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

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[13] 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. EOR1687:2-4.

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); *Pandelis Constr. Co. v. Jones-Viking Ass'n*, 103 Nev. 129, 131 (1987) (citing federal decision interpreting Fed. R. Evid. 1006 as persuasive authority).

C. The Labor Commissioner's Selection Of The Elevator Constructor Rate, As Opposed To The Electronic Communication Installer / Technician Rate Was Erroneous.

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. EOR1562:4-EOR1571:13; EOR2110-02166. Using his 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 ensured that every possible job classification was considered. *Id.* The Labor Commissioner's decision provides no explanation as to why individuals who work on the ATS system should be deemed elevator

constructors. The paucity of reasoning suggests that had the claimants been represented by the plumbers union, the Labor Commissioner would have concluded they were plumbers, or similarly, if the claimants had been represented by the Carpenters union, he would have adopted a carpentry rate.

The most appropriate existing prevailing wage classification is Electronic Communication Installer / Technician. Should the Court not find in Bombardier's favor on the statutory issues discussed above, it should at a minimum remand the matter for further consideration of the proper classification. The Labor Commissioner's decision sets forth no substantial evidence which would support his application of the elevator constructor rate.

2. The Labor Commissioner committed reversible error because his conclusion that Maintenance Technicians should be classified as Elevator Constructors was barred by the Administrative Procedure Act.

The current elevator constructor job classification does not cover the work performed by maintenance employees pursuant to CBE-552. *See* EOR2110-02166; EOR1563:1-01568:6. There are no references to computer or electrical work like that performed under CBE-552. 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.

Moreover, another existing prevailing wage classification, Millwright, appears to contain at least some of the job duties that the Union and the Labor

Commissioner considered to be work covered by the prevailing wage law, including the repair, assembly and installation of "shafting, conveyors, monorails and tram rails." *See* Labor Commissioner Prevailing Wage Classifications, online at http://laborcommissioner.com/prevailingwage_2009counties.html.

By selecting Elevator Constructor, the Labor Commissioner reallocated portions of the millwright job classification to elevator constructors. He did so *without* public hearing and did not comply with the notice and comment procedures set forth in Chapter 338. By reallocating discrete job functions, as opposed to merely determining the proper classification in a contested case, the Labor Commissioner exceeded his authority under NRS 338 and engaged in unauthorized rulemaking. *See Labor Commissioner v. Littlefield*, 123 Nev. 35 (2007). As the Supreme Court explained in *Littlefield*, under such circumstances, the Labor Commissioner's decision must be vacated. *See id.*; *see also So. Nev. Op. Engineers Contract Compliance v. Johnson*, 121 Nev. 523 (2005); *see also* NAC 338.040.

3. The Labor Commissioner's determination that Maintenance Technicians are Elevator Constructors is based on improper procedure and is not supported by substantial evidence.

The Labor Commissioner's determination that Elevator Constructor is the correct classification is flawed. First, it was based on improper procedure. Even in a contested case, the Labor Commissioner is obligated to utilize Chapter 338's

procedures for determination of the prevailing wage. *See* NRS 338.080. Because Maintenance Technicians and their duties are essentially sui generis, the Labor Commissioner should have focused on the classification that best approximated their work and came closest to the salary received in the private market. Instead he rejected the evidence of the claimants' salaries in the marketplace and more than doubled them. This is inconsistent with both the process required by Chapter 338, which focuses on wage surveys, and the purpose of the statute which is to prevent an anticompetitive race to the bottom, not to grant unionized workers a windfall that cannot be obtained in the open market.

Second, the determination lacks sufficient evidence. It compared Maintenance Technician and Elevator Constructor tool lists, which was, inconclusive at best, because most of the overlap was limited to common hand tools. EOR1735:1-6. It also claimed that Elevator Constructors were adept at acquiring Maintenance Technician job duties, but that fact, true or false, is meaningless. EOR1351-54. 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. EOR1352.

Moreover, 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. EOR1241; EOR1710. 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. EOR1722-24. 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. *Id.*

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, underscores all of the above-referenced distinctions. EOR2517-02561. 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 have awarded 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." EOR2571-02580. 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.

Third, and finally, the Labor Commissioner's reliance on the Service Contract Act's definition of Elevator Constructor was arbitrary and capricious. As Dr. Moss explained, the Service Contract Act definition was not subjected to peer review and comment. EOR1568:20-:12. It should be given little weight. In addition, the actual text of the SCA definition does not prove anything. In the Service Contract Act, the term "automated people mover" or APM is used in conjunction with elevators and dumbwaiters. Those systems are indeed Automated People Movers, and they have nothing in common with the complex ATS system at the Airport. The Service Contract Act's failure to reference train systems like the ATS is conspicuous in its absence, and the Labor Commissioner's complete reliance on that definition was arbitrary and capricious.

X. CONCLUSION

For the reasons set forth above, the Union's Complaint is meritless. In sustaining it, the Labor Commissioner exceeded his authority. His legal conclusions are indefensible. His findings of fact are not supported by substantial evidence. Bombardier's Petition for Judicial Review should be granted.

Dated this 30th day of November, 2017

JACKSON LEWIS P.C.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief, except for its length, complies with all applicable the format requirements of Nevada Rules of Appellate Procedure 28, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. With respect to length, the brief is 14,979 words long and thereby complies with the Court's Order of November 15, 2017. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of November, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Bombardier Transportation (Holdings) USA, Inc.'s **Opening Brief** was served on the 30th day of November, 2017 via U.S. mail to the following:

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