

IN THE SUPREME COURT OF THE STATE OF NEVADA

BOMBARDIER TRANSPORTATION,	)	
(HOLDINGS) USA, INC.,	)	
Appellant,	)	Electronically Filed
	)	Feb 15 2018 03:43 p.m.
vs.	)	Elizabeth A. Brown
	)	Clerk of Supreme Court
	)	Supreme Court No. 71101
NEVADA LABOR COMMISSIONER;	)	
THE INTERNATIONAL UNION OF	)	Appeal from
ELEVATOR CONSTRUCTORS; AND	)	Clark County District Court
CLARK COUNTY,	)	Case No. A698764
Respondents.	)	
_____	)	

RESPONDENT CLARK COUNTY'S APPENDIX

MARK J. RICCIARDI, ESQ. (SBN 3141)
HOLLY E. WALKER, ESQ. (SBN 14295)
FISHER & PHILLIPS LLP
300 S. Fourth Street
Suite 1500
Las Vegas, Nevada 89101
(702) 252-3131
mricciardi@fisherphillips.com
hwalker@fisherphillips.com
Attorneys for Respondent Clark County

Bombardier Transportation v. Clark County, et al.
Nevada Supreme Court Case No. 71101

ALPHABETICAL AND CHRONOLOGICAL APPENDIX INDEX

Date Filed	Document	RCCA Number
11/21/14	Respondent Clark County's Memorandum of Points and Authorities	0001-0029

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 15th day of February, 2018, Electronic service of the foregoing **RESPONDENT CLARK COUNTY'S APPENDIX** shall be made in accordance with the Master Service List as follows:

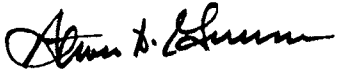
Electronic Notification List:

Robert E. Werbicky, Esq.
Deputy Attorney General
Adam Paul Laxalt, Esq.
Bureau of Business and State Services
Business and Taxation Division
100 North Carson Street
Carson City, NV 89701
*Attorneys for State of Nevada Office of
the Labor Commissioner*

Paul T. Trimmer, Esq.
Jackson Lewis P.C.
3800 Howard Hughes Pkwy.
Suite 600
Las Vegas, NV 89169
*Attorneys for Appellant
Bombardier Transportation*

Richard G. McCracken, Esq.
Andrew J. Kahn, Esq.
McCracken, Stemerman & Holsberry
1630 South Commerce Street
Suite A-1
Las Vegas, NV 89102
*Attorneys for The International Union
of Elevator Constructors*

By: /s/ Sarah J. Griffin
An employee of Fisher & Phillips LLP


CLERK OF THE COURT

STEVEN B. WOLFSON
District Attorney
CIVIL DIVISION
State Bar No. 001565
By: **E. LEE THOMSON**
Deputy District Attorney
State Bar No. 001057
500 South Grand Central Pkwy.
P. O. Box 552215
Las Vegas, Nevada 89155-2215
(702) 455-4761
Fax: (702) 382-5178
E-Mail: E.Thomson@ClarkCountyDA.com
Attorneys for Respondent
Clark County

DISTRICT COURT
CLARK COUNTY, NEVADA

BOMBARDIER TRANSPORTATION
(HOLDINGS) INC.,

Petitioner,

vs.

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

Respondents.

Case No: A-14-698764-J
Dept No: XXVI

RESPONDENT CLARK COUNTY'S MEMORANDUM OF POINTS AND
AUTHORITIES

STEVEN B. WOLFSON
DISTRICT ATTORNEY

By: 
E. LEE THOMSON
Deputy District Attorney
State Bar No. 001057
P. O. Box 552215
Las Vegas, Nevada 89155-2215
Attorney for Defendant Clark County

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
I. INTRODUCTION	1
II. STATEMENT OF THE ISSUES	4
A. Bombardier has identified four issues	4
III. STATEMENT OF THE CASE	5
IV. STATEMENT OF FACTS	8
A. History Of ATS Construction And Maintenance And Transit System Maintenance At McCarran International Airport	9
B. Contract CBE-552 And Facts Related To The Exemption Provided By NRS 338.011(1)	11
1. CBE-552 Was Awarded In Compliance With NRS Chapter 332.....	11
2. Evidence That CBE-552 Was Related to The Normal Operation of the Airport or The Normal Maintenance of Its Property	13
3. Evidence That Other Equipment Maintenance Agreements Which Require Repair And Replacement of Parts and Components Are Not Treated As Public Work By Public Entities in Nevada.....	13
4. Evidence That the Warranty Coverage on the New ATS Trains and Wayside Equipment Provided Under Contract 2305 Should not be Addressed in a Wage Claim Concerning Contract CBE-552.....	15
V. STANDARD OF REVIEW.....	16
VI. ARGUMENT	16
A. Bombardier Issue #1: CBE-552 and the work performed under its terms was not a Public Work within the meaning of NRS 338.810(16).....	16
B. Bombardier Issues #2 and #3: 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.....	17
1. The plain meaning of NRS 338.011(1) is readily ascertainable	17
2. CBE-552 is directly related to the normal operation of the Airport	20
3. CBE-552 is directly related to the normal maintenance of County Property	22

1	VII. CONCLUSION.....	23
2	CERTIFICATE OF MAILING.....	25
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Cases

<i>State v. City of Fallon</i> , 100 Nev. 509 (1984)	22
<i>State v. State of Nev. Employees Ass'n, Inc.</i> , 102 Nev. 287, 720 P.2d 697 (1986).....	20
<i>Thomas v. Nevada Yellow Cab Corp.</i> , 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014).....	20

Statutes

NRS 332.065	14
NRS 332.115	11, 14, 16, 19, 23
NRS 332.115(1).....	11, 16, 19, 23
NRS 332.115(1)(a)	11
NRS 338	1, 2, 3, 4, 5, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23
NRS 338.010(16).....	4, 16
NRS 338.010(17).....	17
NRS 338.011	1, 2, 3, 4, 5, 9, 10, 11, 17, 18, 19, 20, 21, 22, 23
NRS 338.011(1)	1, 2, 3, 4, 5, 6, 9, 10, 11, 17, 18, 19, 20, 21, 22, 23
NRS 338.011(1).....	1, 2, 3, 4, 5, 6, 9, 10, 11, 17, 18, 19, 20, 21, 22, 23
NRS 338.070(1).....	5
NRS 338.080	4, 23
NRS 338.11(1).....	4
NRS Chapter 332.....	1, 3, 4, 6, 9, 11, 14, 15, 16, 17, 18, 19, 20
NRS Chapter 338.....	1, 2, 4, 6, 9, 13, 15, 16, 17, 18, 19, 23

Other Authorities

<i>Anatomy of the Law 18</i> (Greenwood Press 1976)	20
---	----

1 **I. INTRODUCTION**

2 This case involves the County's maintenance contract for its Automated Transit
3 System ("ATS") at McCarran International Airport ("Contract CBE-552"). The ATS utilizes
4 large, rubber-tired passenger vehicles pulled in multiple-car trains along a dedicated roadway
5 without the use of a driver. Each ATS car can carry up to 100 passengers. During the time
6 period that CBE-552 was in effect, July 1, 2008-May, 2009, the ATS was used to convey
7 passengers at the Airport between Terminal 1 and the "C" and "D" Gates.¹

8 Bombardier has sought judicial review of the Labor Commissioner's Order which
9 ruled that 20% of the work performed under the County's maintenance contract CBE-552 for
10 its ATS at the Airport constituted "repair" work that is covered under the prevailing wage
11 requirements of NRS Chapter 338.

12 Clark County agrees with Bombardier's arguments that the Labor Commissioner's
13 Order is based upon an arbitrary and capricious interpretation of NRS 338.011(1) which is
14 contrary to the plain meaning of the words selected by the legislature and is in excess of the
15 Commissioner's statutory authority and, further, is clearly erroneous in view of the reliable,
16 probative and substantial evidence on the whole record.

17 NRS 338.011 provides, in pertinent part:

18 *The requirements of this chapter do not apply to a contract:*

19 *1. Awarded in compliance with chapter 332 or 333 of NRS which is directly*
20 *related to the normal operation of the public body or the normal maintenance of its*
21 *property.*

22 In enacting NRS 338.011(1), the Legislature established a safe harbor to protect
23 public bodies from a multitude of obligations placed upon public works projects by NRS
24 Chapter 338. The statute ensures that contracts awarded under NRS Chapter 332 which are
25 related to normal operations of the public body or normal maintenance of its property are
26 exempt from NRS Chapter 338 requirements even if work under such a contract could
27

28

Today, the ATS also operates between Terminal 3 and Satellite "D," which opened in June, 2012. The County
terminated CBE-552 and took maintenance in-house before this part of the ATS became operational.

1 otherwise be defined as public work. It is a complete and total exemption from the entire
2 chapter, not just from the prevailing wage laws.²

3 The Commissioner arbitrarily and capriciously defined "directly related to normal
4 operations" as being "part of normal operations," which he limited to planes taking off and
5 landing and passengers making it to their destinations. See: TR3942 (Order 4:9-22). The
6 Commissioner cited no legal authority for this definition, which also interjects his personal
7 opinion as to how an airport can operate. His legal opinion essentially states that something
8 cannot be "directly related to normal operations" unless a public body's operation will shut
9 down without it because there is no alternative method for continuing operation. This is an
10 extreme and unsupportable interpretation of the term. It also demonstrates a complete lack of
11 understanding about what it takes to normally operate the Airport. The Commissioner made
12 no effort to refer to the plain meaning of the words, which are easily ascertained by reference
13 to a dictionary and Nevada case law. And, in this case, the Commissioner also ignored
14 overwhelming, uncontroverted evidence in the record of the absolute necessity of the ATS in
15 order for the Airport to function. The Commissioner made a clearly erroneous decision that
16 CBE 552 is not directly related to the normal operations of the Airport and, therefore, not
17 eligible for exemption under NRS 338.011(1)

18 The Commissioner also arbitrarily and capriciously dealt with the phrase, "directly
19 related to normal maintenance." The Commissioner ignored the opinion of the Attorney
20 General (which was accepted and applied by the Governor and a previous Labor
21 Commissioner when they had to deal with the issue) that the definition of "maintenance" is
22 "to hold or keep in any particular state or condition." AGO 171. Instead of using the plain
23 meaning of the word, as done by the Attorney General, the Commissioner created his
24 definition of "normal maintenance," relegated to a footnote stating, "[n]ormal maintenance
25 generally means work that does not require a lot of skill or training (i.e. janitorial services),
26 not work that requires training and technical skills. Id., fn4. To hold or keep a complex
27

28 ² For example, NRS Chapter 338 has unique requirements for not only the payment of prevailing wages and the monthly
filing of certified payrolls, but also a multitude of others, including: bidding; bidder's preferences; bidder and

1 equipment system in an operable state or condition clearly requires more than dusting and
2 sweeping by low skill janitors. Obviously, as is implicit in the Attorney General's Opinion,
3 maintenance inherently includes repair activities in order to keep an equipment system
4 running. The Labor Commissioner cited no legal authority to support his definition of what
5 "normal maintenance" meant in the context of NRS 338.011(1) and he failed or refused to
6 address whether or not Contract CBE 552 was directly related to normal maintenance of the
7 ATS. Instead, he proceeded to rule that "corrective maintenance, major maintenance, heavy
8 maintenance and overhaul, repair or replacement" done within CBE 552 should be
9 considered to be repair work covered by prevailing wage laws. TR3949 (Order 11:23-24).
10 He moved on to pick and choose what, in his opinion, constituted "repair" without citing any
11 legal authority for his unilateral definition. In other words, without any legislative authority,
12 the Commissioner has ruled that he can separate out a portion of any maintenance contract
13 which he thinks constitutes "repair," as he defines it, and apply the prevailing wage
14 requirements of Chapter 338 to that portion despite the express language of NRS 338.011(1)
15 which exempts an entire contract if it complies with one of the two possible exempting
16 conditions. He also ruled that he can include work that was not included in the scope of the
17 maintenance contract in his determination that the contract is not directly related to normal
18 maintenance. The Commissioner made a clearly erroneous decision that CBE 552 is not
19 directly related to the normal maintenance of the ATS and, therefore, not eligible for
20 exemption under NRS 338.011(1).

21 As Bombardier has stated, the Commissioner's definitions are completely illogical
22 and conflict with the plain meaning of the statute. OB 45-46. If the Labor Commissioner's
23 extreme interpretation of the law is upheld, it would render NRS 338.011(1) meaningless.
24 The Commissioner's ruling leads to absurd results. It would require any public body entering
25 into a maintenance contract under NRS Chapter 332 to examine each possible task necessary
26 to keep its equipment operating for the possibility that the Commissioner would deem it to
27 be "repair" requiring the payment of prevailing wage and subjecting at least a portion of the

28 subcontractor listing and pre-qualification; prompt payment; and retention which either contradict how contracts are

1 maintenance contract to all other requirements of NRS Chapter 338. The maintenance
2 company would have to keep double books tracking each activity as it occurs and prepare
3 monthly certified payroll reports. It would also create chaos in how public bodies can award
4 maintenance contracts. This is clearly not the result intended by the legislature when it
5 enacted NRS 338.011(1).

6 The County agrees with Bombardier that the Commissioner's Order should be
7 vacated.

8 9 II. STATEMENT OF THE ISSUES

10 A. Bombardier has identified four issues:

- 11 1. Whether the Labor Commissioner's conclusion that the work performed
12 pursuant to CBE -552 is a "project" within the meaning of NRS
13 338.010(16) should be vacated because it is contrary to the plain
14 meaning of the statute and not supported by substantial evidence.
- 15 2. Whether the Labor Commissioner's conclusion that the CBE-552 is not
16 directly related to the normal operation of the Airport because it is
17 possible for the Airport to "function" without the automated train
18 system, and that NRS 338.011(1) therefore does not apply, should be
19 vacated because it is both contrary to the plain meaning of the statute
20 and not supported by substantial evidence.
- 21 3. Whether the Labor Commissioner's conclusion that CBE-552 is not
22 directly related to the normal maintenance of the Airport, and that NRS
23 338.11(1) therefore does not apply, should be vacated because it is both
24 contrary to the plain meaning of the statute and not supported by
25 substantial evidence.
- 26 4. Whether the Labor Commissioner's determination that Bombardier is
27 not a "railroad company" and therefore exempt under NRS 338.080,
28 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.

Bombardier's Opening Brief ("OB"):2-3.

III. STATEMENT OF THE CASE

In addition to Bombardier's statement of the procedural history of the case (OB 3-7), the County submits the following additional facts related to the investigation and determinations made by the Clark County Department of Aviation ("CCDOA") which shows the County complied with its obligation to investigate the Union's complaint and properly concluded that the work done under CBE-552 was not subject to the prevailing wage laws.

CCDOA conducted its investigation of the IUEC's Complaint concerning CBE-552, as mandated by NRS 338.070(1). County staff issued its First Determination Letter to the Labor Commissioner, dated November 24, 2009 which found the work done under the Contract to be properly exempted from prevailing wage requirements under NRS 338.011(1). TR2812-2814. After meeting with Deputy Labor Commissioner Sakelhide, the County went to the extraordinary measure of retaining the services of Michael Moran, an experienced and trusted analyst of wage claims, from Richardson Construction Company. See: TR3533 (CX 44, Moran resume).

Mr. Moran conducted his own investigation which involved a comprehensive review of the Contract, interviews with Bombardier's employees, interviews with Bombardier's site managers, and observations of the work itself. TR1612-1616. He also conducted a thorough examination of the relevant parts of CBE-552, in particular, Section 2.1.2, "Owner Provided Work and Services" and Section 2.2 "Subsystem Maintenance." See: TR1953-1962 (BX1). He learned that care for the fixed guideway structure was the County's responsibility and was not in the scope of CBE-552. TR1616. Neither was overhaul. TR1615. Moran also obtained additional information from Bombardier breaking down what hours were spent doing particular classes of tasks, consulted with Deputy Labor Commissioner Sakelhide, and he familiarized himself with NRS 338.011. He found that normal maintenance inherently

1 includes some repair work as needed or as specified in the Preventative Maintenance
2 Schedule. He also found that repairs and replacements were done under CBE-552 on
3 individual bases and not as a systemic upgrade. He concluded that the Contract was awarded
4 in compliance with NRS Chapter 332 and was not subject to NRS Chapter 338 pursuant to
5 the exemption in NRS 338.011(1). TR *Id.* The County then issued its Second Determination
6 Letter, dated March 30, 2010 (TR2815-2817, CX4).

7
8 Former Labor Commissioner Tanchek issued his Interim Order, dated June 7, 2011,
9 directing the County to reopen its investigation and assess the work performed under DOA
10 Contract CBE-552 to further investigate the cost of repairs to what he had determined were
11 the "fixed works" areas of the ATS, such as the guideway, stations, power distribution
12 systems and automatic training control systems, but not the ATS vehicles, which he held
13 were exempt from prevailing wage requirements. TR0264-0271. Mr. Moran dutifully
14 investigated, as directed by the Labor Commissioner, and determined the work performed by
15 Bombardier's workers consisted of routine maintenance and adjustments along with the
16 repairs that are inherent to the maintenance of the ATS. TR1617-1621.

17
18 Moran's focus on the "fixed works" drew his attention to the guideway and wayside
19 systems. He learned that work on the guideway and associated electrical components of the
20 guideways were contracted out and paid directly by the County under purchase orders.
21 Moran identified the six purchase orders for this work: five made out to Truesdale
22 Corporation and one to Morse Electric TR1618-1620, referring to County Exhibits 33,
23 34,35,36,37,& 38 (TR3457, 3460, 3464, 3466, & 3470). The total amount of all six
24 purchase orders was \$62,509.00. Further, as previously noted, the work done by these
25
26
27
28

1 contractors related to the County-controlled guideway and was outside the scope of CBE-
2 552. *TR Id.*

3 Moran was also aware of Department of Aviation Contract 2305, Automated Transit
4 System (ATS) Leg C and D Rehabilitation, a public works project for which prevailing
5 wages were paid. Contract 2305 did a wholesale rehabilitation of the ATS and provided new
6 ATS vehicles. Moran's attention was called to problems with the new vehicles and wayside
7 doors which had been put into service in 2008 and 2009 under Contract 2305, during the
8 time CBE-552 was in effect by the employees during his initial interviews and confirmed by
9 Joel Middleton. *TR Id.* Moran was uniquely able to understand the interconnection between
10 CBE-552 and Contract 2305 because of his involvement in another IUEC prevailing wage
11 complaint.³

14 Moran reviewed the warranty obligations under Contract 2305 *TR Id.* Moran also
15 researched the records of Contract 2305 and determined when the new equipment came into
16 service. The general one year warranty extended from at least December 19, 2008 to
17 December 19, 2009 on C leg vehicles, etc.; May 7, 2009 to May 7, 2010 on D leg vehicles,
18 etc.; and September 15, 2010 to September 15, 2011 on Central Control. The 5-year
19 warranty on the vehicle structures and bogies commenced on December 19, 2008 and May 7,
20 2009 and ran throughout the remainder of the term of CBE-552. See: CX 15, 16, 17, 18, 19,
21 20, 20A, & 20B (TR 3027, 3031, 3032, 3035, 3045, & 3047).

24 Moran determined that all of the enhancements, upgrades and rehabilitation were
25 performed on Contract 2305. Mr. Moran also stated that all of the "repair" work he
26 witnessed was on the defective upgraded ATS vehicles and wayside doors and was
27
28

1 considered warranty work. He also found that no repairs exceeding \$100,000.00 had
2 occurred to the "fixed works" areas under CBE-552. TR *Id.* The County then issued its
3 Third Determination Letter, dated July 25, 2011 TR 2818 (CX 5).

4 The Commissioner ignored the substantial and un rebutted evidence that the express
5 terms of CBE-552 did not include heavy maintenance or overhaul in its scope and that
6 "repairs" related to the ATS vehicles and other equipment provided by Bombardier were
7 covered by the warranty obligations of the separate Contract 2305 ATS rehabilitation
8 project. Instead of segregating out these various work items and dealing with them properly
9 as being outside the scope of CBE-552, the Commissioner lumped them all together as a
10 basis for his decision.
11
12

13 IV. STATEMENT OF FACTS

14 In addition to Bombardier State of Facts, the County submits the following
15 clarifications and additional relevant facts:

16 Regarding Bombardier's discussion of the ATS connection to the Airports' "C"
17 Gates, (OB:7) at the time the "C" Gates were constructed in 1985, that building was a
18 satellite isolated from Terminal 1. Later Airport capacity needs caused construction of
19 additional gates which connected Terminal 1 to the "C" Gates structure. Nevertheless, the
20 ATS serving the "C" Gates remains heavily utilized, especially to transport passengers from
21 the gates to the baggage claim area. TR 1587:11-1588:22.

22 Regarding Bombardier's discussion of access to Satellite D through Terminal 3, (OB
23 8), it must be remembered that Terminal 3 did not open until June, 2012. Contract CBE-552
24 was terminated in May, 2012. CBE-552 never covered maintenance of the ATS between
25
26
27

28 ² Moran was also retained to investigate another IUEC complaint that Bombardier had used workers normally assigned to CBE-552 to perform work on Contract 2305. In that case, Moran found IUEC's complaint to be valid in that prevailing wages should be paid for the time spent working on Contract 2305.

1 Terminal 3 and Satellite "D." Further, there was never any possible public access to
2 Satellite D from Terminal 3 by ATS, bus or walking during the relevant time period.

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

5 Randall H. Walker, former Director of the Clark County Department of Aviation,
6 presented unrefuted testimony of these facts. Mr. Walker's testimony established that the
7 County has found the language in NRS 338.011(1) to be clear as to what is and is not exempt
8 from the prevailing wage requirements of NRS Chapter 338. In every case when the County
9 has contracted for the on-site construction or major rehabilitation of its ATS, the County has
10 required that prevailing wages apply to workers doing work at the Airport site. In every case
11 when the County has contracted for maintenance of the ATS, it has determined the
12 procurement of the services, supplies, materials and equipment necessary to the normal
13 operation and normal maintenance of the ATS to be a contract properly awarded pursuant to
14 NRS Chapter 332.

15 Walker testified that, since 1982, the CCDOA has had multiple contracts with
16 Bombardier for either complete ATS design, manufacture and installation or for
17 comprehensive ATS upgrades, expansions, and refurbishments. These included the original
18 ATS contract, dated September, 1982; Contract 2013, for the Satellite D ATS, dated
19 October, 1994; Contract 2131, for expansion of the Satellite D ATS, dated December, 1999 ;
20 Contract 2273, for the Terminal 3 ATS, dated May, 2006; and Contract 2305 for the
21 rehabilitation of the C and D legs of the ATS, dated November, 2006. He described the
22 scope of work in each contract and referred the Labor Commissioner to the prevailing wage
23 requirements in each contract. TR 1604-1605.

24 Bombardier, or its predecessors, had contracts to maintain the ATS at McCarran
25 International Airport for nearly 27 years beginning in 1985 (when the first ATS leg
26 commenced operation at the Airport). No assertion was made during that time that prevailing
27 wages had to be paid on the scope of the maintenance contract work until IUEC raised the
28 issue and filed the instant Complaint on October 9, 2009. Walker testified that there has

1 never been confusion between the scope and purpose of the ATS construction and
2 rehabilitation contracts and the ATS maintenance contracts and that prevailing wage has
3 never been paid on any maintenance contracts. In fact, not a single maintenance contract at
4 the Airport has required prevailing wages. TR 1606.

5 Undisputed evidence also showed that the Airport has two passenger shuttle systems
6 with similar maintenance requirements which include elements of repair. An examination of
7 the Airport's two shuttle system contracts shows a consistency in the County's application of
8 the exemption given in NRS 338.011(1). The ATS utilizes rubber-tired passenger vehicles
9 pulled in multiple-car trains along a dedicated roadway without the use of a driver. The
10 evidence indicates that the size, construction and purpose of the ATS has more in common
11 with buses than sideways elevators or railroads. The second passenger transportation system
12 utilizes shuttle buses between the Airport Terminals and its Consolidated Car Rental
13 Facility. The shuttle bus contract, "Shuttle Bus Operations and Maintenance for the
14 Consolidated Car Rental Facility at McCarran International Airport," has been in force since
15 September, 2006 TR 3000-3026 (CX 14).

16 Both passenger shuttle systems are critical to the normal operations of the Airport.
17 TR 1594. Both CBE-552 and the Shuttle Bus Contract are consistent in their interpretation
18 of what needs to be done on an ongoing basis to keep these two shuttle systems operational.
19 Article 5 of the Shuttle Bus Contract, "Bus Maintenance and Repair," contains an extensive
20 recitation of the types of work activities, including what IUEC would characterize as "heavy
21 duty" repairs which are necessarily related to the normal operation and normal maintenance
22 of the shuttle bus system. TR 3011-3013. None of this work has ever been considered to be
23 public work subject to prevailing wages. TR 1594.

24 Notably, there was no evidence presented that any maintenance and repair, including
25 "heavy repair" such as refurbishing motors or axles, of the bus, truck or other vehicle fleets
26 of regional transportation commissions and school districts, or of the state and local
27 government motor pools, was considered to be public work and subject to prevailing wages.
28 The evidence presented concerning the ATS system and the Shuttle Bus system, along with

1 the absence of any evidence of a different interpretation concerning the applicability of
2 prevailing wages to this type of work on publicly owned vehicles compels the conclusion
3 that, statewide, contracts which provide for maintenance and repair of the ATS and its
4 vehicles are not considered public work and do not require the payment of prevailing wages.

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

7 **1. CBE-552 Was Awarded In Compliance With NRS Chapter 332**

8 Contract CBE-552 became effective July 1, 2008, for the operation and maintenance
9 of both the existing Automated Transit System ("ATS") legs that connect Terminal 1 to
10 Satellites "C" and "D." The County Agenda Item #36, dated June 3, 2008 TR 1992 (BX5),
11 shows the Contract was awarded pursuant to NRS 332.115(1)(a) (sole source) and
12 332.115(a)(c) (maintenance of equipment can be performed more efficiently by a certain
13 company). The term of the Contract was for five years.

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

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

19 In addition to the evidence cited by Bombardier, including the testimony of Randall
20 H. Walker, former Director of Aviation, others, including IUEC witnesses testified to how
21 important the work done under CBE-552 was necessary in order for the ATS trains to
22 operate. Ken DePiero testified that the activities done under CBE-552 that he had
23 characterized as "repair" were necessary to keep ATS "Up—safely up and running." TR
24 1717. DePiero also testified that parts needed to be replaced before they failed to prevent a
25 train outage and interruption of service. He explained the purpose of such activities was for
26 "...keeping the passengers safe, and...the availability for Bombardier's contract within the
27 window." TR 1722. DePiero justified calling activities "repair" numerous times based on
28 "safety of the train" and "passenger safety."

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

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

9 TR 1734.

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

12 Q...A couple of times in your testimony...you were talking about
13 the necessity of doing the work because it was essential to the safety
14 of the [ATS] system.

15 A. Yes, sir.

16 Q. Would you say the activities you performed in your work for
17 Bombardier during this time period was essential to keep the ATS up
18 and running?

19 A. Yes, sir.

20 TR 1797.

21 The contract language of CBE-552 is clearly written to cover normal operation and
22 maintenance requirements. Section 1.3.5. of CBE-552 required Bombardier maintain
23 system availability of at least 99.65% in order to meet the Airport's needs to provide reliable
24 transportation on a nearly 24/7/365 basis.⁴ Under Section 2.2, the work was broken down
25 into three subcategories "sufficient to maintain system performance characteristics at the
26 levels specified in the ATS contract": Routine Maintenance; Scheduled Maintenance; and
27 Non-Scheduled Maintenance. Subsection 2.2.6 additionally contemplated possible "Heavy
28 Maintenance and Overhaul," but any such work required Bombardier to submit a separate

⁴ As testified to by Walker, Ryan, Banas and others, a serious failure of the ATS on Sunday, May 19, 2013, proved how vital the ATS is to the normal operation of the Airport.

1 proposal, which had to include the additional fixed cost for performing the work, and the
2 work could not be performed without express written approval from the County. In other
3 words, the Contract provided for this type of work to be identified and quantified but, before
4 any of the work could be done, it had to be approved and it had to be paid for separately.
5 There was no agreement as to the scope or payment terms of any such particular work
6 proposal, if any, were to be later identified as being necessary to be performed, at the time
7 of the formation of the contract. During the term of CBE-552, the County received and
8 approved only one proposal from Bombardier requesting performance of Heavy
9 Maintenance or Overhaul for overhaul of a traction motor under Subsection 2.2.6, which
10 was done by a third party. TR 1500-1501.

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

16 CBE-552 was not the only maintenance contract which includes repair in its scope of
17 work and which is not subject to NRS Chapter 338. Walker testified that CBE-552 was
18 only one of many maintenance contracts at the Airport and that all maintenance contracts
19 involve an element of repair. TR 1592, 1606. Airport maintenance contracts he listed
20 included the badge control system maintained by Johnson Controls, the fire and life safety
21 system maintained by Honeywell, landscaping maintained by Sedillo, chillers maintained by
22 York or another company, elevators maintained by Kone TR 1993 (BX7), some heating,
23 ventilation and air condition ("HVAC") maintenance work, as well as the bus maintenance
24 done by First Transit. TR 3000 (CX14). None were awarded pursuant to NRS Chapter 338
25 and none require prevailing wages. TR 1606.

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

1 City of Las Vegas contract with Progressive Elevator, Inc. was awarded pursuant to a
2 request for proposals under NRS Chapter 332 and had an award amount of \$60,000 for one
3 year, with four one-year options. The Statement of Work calls for "full preventative
4 maintenance and corrective repair." TR 3051 (CX22, RFP p. 8.)

5 University Medical Center's ("UMC") contract with Honeywell Building Solutions
6 for HVAC control, fire alarm and security system maintenance was awarded pursuant to
7 NRS 332.115 and had an award amount of \$614,000/year for five years (\$3,070,000). TR
8 3116 (CX23, Attachment "A," "Scope of Services Offered," Sections 1.3, 1.9 and 1.15,
9 requires a broad range of "repairs.")

10 UMC's contract with Kone, Inc., for elevator maintenance was awarded pursuant to a
11 bid under NRS Chapter 332 for \$79,560/year for two years (\$159,120) and included
12 "examinations, cleaning, painting, lubrication, adjusting, parts replacement, repairs, testing,
13 etc." TR 3134 (CX25, pp.2-3, UMC Agenda Item.)

14 Clark County's contract with Lloyd's Refrigeration, Inc. for HVAC maintenance was
15 awarded pursuant to a bid under NRS 332.065 for \$772,645.50 TR 3209 (CX26, pp.2-3
16 "Agenda Item"). Its "Instructions to Bidders," p. 1-1, defines "repair" as "corrective actions
17 required to ensure proper operation of existing equipment, up to and including replacing of
18 said equipment," and its "IV-Service Specifications" provides an extensive list of HVAC-R
19 equipment to be repaired and serviced and states: "The repairs will be scheduled and
20 unscheduled work required in order to prevent a breakdown of HVAC-R equipment, related
21 systems; . . . to ensure HVAC-R services are restored in a timely/efficient manner after a
22 failure or breakdown has occurred."

23 Clark County's contract with Carrier Corp. for chiller maintenance was awarded
24 pursuant to a bid under NRS Chapter 332 (General Provisions, p. 1-1, Sections 20 and 23),
25 and had an award amount of \$240,163 for one year subject to option years that was later
26 amended to increase the amount to \$278,246. Its "performance requirement" states:
27 "Preventative maintenance and remedial maintenance shall include the replacement of parts
28

1 and materials . . ." and also refers to "non-emergency repair" and "emergency service." TR
2 3257 (CX27; Special Conditions, p. II-3).

3 Las Vegas Convention and Visitors Authority contract with Schindler Elevator Corp.
4 for elevator maintenance was awarded pursuant to a bid under NRS Chapter 332. TR 3344
5 (CX30; See: Clauses, p. 14 of 26) and had an award amount of \$193,948 for one year with
6 three one-year options. Its "Scope of Work" includes "full-preventative maintenance,
7 adjustment and repair service . . ." including replacing elevator guide shoe jibs or rollers and
8 elevator cables (Technical Specs. pp. 21-24).

9 None of the above contracts operate pursuant to NRS Chapter 338 in any way and
10 none require prevailing wages. There was no evidence presented that any local government
11 in the state believes NRS 338 or prevailing wage apply to these types of equipment system
12 maintenance contracts, all of which include what the Commissioner has defined as "repair."

13 **4. Evidence That the Warranty Coverage on the New ATS Trains and**
14 **Wayside Equipment Provided Under Contract 2305 Should not be**
15 **Addressed in a Wage Claim Concerning Contract CBE-552.**

16 A key fact related to CBE-552 was that Contract 2305 for the rehabilitation of the C
17 and D legs of the ATS, dated November, 2006 resulted in the delivery of new ATS vehicles
18 and wayside equipment during the time the maintenance contract was in effect. Section 10
19 of Contract 2305 required Bombardier to provide warranties. TR 3027. The warranty
20 provision of Contract 2305 provided for a general warranty for one year from the date of
21 substantial completion for each phase of the work, except that the warranty on the vehicle
22 body structure and bogie consisting of the drive, friction brake, suspension and guidance
23 systems (see: TR 3508, CX40, 1-9, 2-43 and Figure 2-10) remained in effect for five years
24 following the date of substantial completion for Phases I and II. TR 3027 (CX16.)

25 County Exhibits 17-20B all addressed the commencement and duration of the
26 warranties under Contract 2305. TR 303-3047. CX17 contains a useful graph which shows
27 the warranty durations. TR 3031. For Leg C vehicles, the warranty period started December
28 19, 2008 (approximately five months after CBE-552 began), with the one year period
ending December 19, 2009 and the five year warranty period for the vehicle body structure

1 and bogie ending December 19, 2013. For Leg D, the warranty period started May 7, 2009
2 (approximately 10 months after CBE 552 began), with the one year period ending May 7,
3 2010 and the five year warranty period for the vehicle body structure and bogie ending May
4 7, 2014.

5 Numerous witnesses testified that there were significantly more repairs required on
6 the new equipment, e.g., TR 1504; (Ryan, wayside doors); TR 1516, 1905 (Smith, vehicle
7 and station doors most common repairs, also leaf springs, pinion seals and CCTV); and TR
8 1578-1579 (Middleton, pinion seal leaks, wayside door autolocks and motors).

9 Despite the obvious fact that this work related to warranty obligations under Contract
10 2305, the Commissioner arbitrarily and capriciously lumped this work into CBE-552.

11 **V. STANDARD OF REVIEW**

12 Bombardier has properly set forth the standard of review to be applied by this Court
13 to the Commissioner's findings of fact and conclusions of law.

14 **VI. ARGUMENT**

15 **A. Bombardier Issue #1: CBE-552 and the work performed under its terms** 16 **was not a Public Work within the meaning of NRS 338.010(16).**

17 Bombardier presents a compelling argument that a maintenance contract intended to
18 ensure the continuous operation of publicly owned equipment, such as CBE-552, is not
19 intended to be included in the definition of "public work" as defined in NRS 338.010.
20 OB:24. The County submits the following additional points.

21 NRS 332.115, which provides exemptions to the competitive bidding requirements of
22 NRS Chapter 332 for certain contracts, includes an exemption for "[a]dditions to and
23 repairs and maintenance of equipment which may be more efficiently added to,
24 repaired or maintained by a certain person." NRS 332.115(1)(c) (emphasis added).
25 Clearly, the legislature did not intend to apply NRS Chapter 338 to contracts for the addition
26 to, repair and maintenance of equipment when it permitted such contracts to be awarded
27 pursuant to NRS Chapter 332. The ATS consists of equipment, including its large, rubber-
28 tired passenger vehicles.

1 The definition of "public work" in NRS 338.010(17) does not cover construction,
2 repair or reconstruction of publicly owned vehicles. Chapter 338 has never been applied to
3 the maintenance work performed on the hundreds, if not thousands, of publicly owned buses,
4 fire trucks, snowplows, road graders, vans, cars and other vehicles throughout the state
5 which necessarily includes elements of "repair" work on engines, axles, transmissions, etc.
6 Former Commissioner Tanchek was correct in concluding in his Interim Order that NRS
7 Chapter 338 and the prevailing wage laws have never applied to public vehicles, including
8 the ATS vehicles. TR0266.

9 As an additional point related to Bombardier's Issues #2 and #3, it should be noted
10 that in explaining his rationale for ruling that CBE-552 is a "project," the Commissioner
11 stated, "NRS 338 does not define 'project' for purposes of interpreting its provisions.
12 Therefore, the Labor Commissioner must look to other sources to establish its meaning."
13 TR3941. He then made reference to a couple of the "differing definitions for 'project'"
14 found in two dictionaries. Glaringly, the Commissioner failed to refer to a dictionary, or any
15 other authoritative source, for a definition of any of the terms in NRS 338.011(1).

16 **B. Bombardier Issues #2 and #3: CBE-552 is exempt pursuant to NRS**
17 **338.011(1) because it is directly related to both the normal operation of**
18 **the Airport and the normal maintenance of the ATS.**

19 Bombardier has briefed these issues thoroughly. The County submits the following
20 supplemental arguments to those made by Bombardier.

21 **1. The plain meaning of NRS 338.011(1) is readily ascertainable.**

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

26 NRS 338.011 is a unique statute. It was enacted in 1981 with the apparent purpose of
27 preventing a 1944 Opinion of the Attorney General, AGO 171, from forcing all government
28

1 maintenance work to be under the definition of "public work" and subject to prevailing
2 wages. AGO 171 states:

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

7 AGO 171, P. 2 (1944).

8 The conclusion made in AGO 171 was accepted and was being enforced by the
9 Governor and the Labor Commissioner, as is evidenced in the letter signed by the
10 Honorable Robert List, Governor, dated November 3, 1980, to the City of Sparks wherein
11 he stated that, based upon another opinion of the Attorney General, dated September 2,
12 1980,³ all contracts, including those for minor repair and maintenance, were considered to
13 be public work and had to comply with the prevailing wage and reporting requirements of
14 NRS Chapter 338, TR 1047.

15 Curiously, the Commissioner failed to acknowledge this definition in his Order.
16 Without addressing the existence of the Attorney General's Opinion, which was adopted
17 and applied by the Governor and the Labor Commissioner, the Commissioner has
18 unilaterally decided that "repair" does not cover "maintenance" without providing any legal
19 basis for reversing AGO 171. Also, by failing to address the implication and application of
20 AGO 171, the Commissioner misunderstands that the legislature decided to come up with a
21 solution which recognized that repair is inherent in maintenance contracts by choosing the
22 wording it did when it enacted NRS 338.011(1).

23 The legislature obviously enacted NRS 338.011 in 1981 in response to the Attorney
24 General's opinion, which has never been revised or superseded. The legislature decided that
25 local governments had to be protected from the dilemma identified by the Attorney General.
26 The legislature in 1981 was completely aware of the language in NRS Chapter 332,

27
28 ³ The letter refers to an opinion written September 2, 1980. A search of the archives of the Attorney General's Office
could not locate that opinion. However, the context of the letter makes it clear that the opinion still interpreted the word
"repair" broadly to include "maintenance" just as AGO 171 did.

1 including NRS 332.115 (which had been enacted in 1975). In enacting the statute, the
2 legislature did not choose to differentiate between what was "maintenance" and what was
3 "repair" or "heavy maintenance," even though it was aware of the opinion of the Attorney
4 General in AGO 171. It did not set a dollar limit or differentiate based upon difficulty of the
5 work, the time it took to do the work, or the skill of the people performing the work.
6 Whether it was a good idea or not, the legislature left local governments with two different
7 chapters in the statutes which, at times, overlap in the areas of maintenance and repair (and
8 defined by the Attorney General to be synonymous) and with a specific exemption from the
9 requirements of NRS Chapter 338 if a contract is awarded in compliance with NRS Chapter
10 332 "...which is directly related to the normal operation of the public body or the normal
11 maintenance of its property." NRS 338.011(1). Therefore, even if some work might
12 otherwise be determined to be covered as "public work" and subject to NRS Chapter 338
13 because it involves repair, the provisions of that chapter do not apply if the work is in a
14 contract awarded according to either of the criteria provided in NRS 338.011(1). If the
15 legislature had not considered repair to be a necessary part of local governments' contracts
16 for maintenance or operation, there would have been no need to create the exemption in
17 NRS 338.011.

18 Contract CBE-552 is exempt under NRS 338.011(a) because it was legally awarded
19 pursuant to the provisions of NRS 332.115(1). The purpose of the Contract was to ensure
20 the existing Automated Transit System ("ATS") performed on a virtually 24/7, 365 days per
21 year basis with a 99.65% availability and was directly related to the normal operation of
22 McCarran International Airport to serve the large majority of its approximately 40 million
23 passengers a year. TR1596-1597. There was unrefuted testimony by numerous witnesses
24 concerning the necessity of these activities in order to maintain and operate the ATS and the
25 Airport. Numerous witnesses testified that normal maintenance inherently includes some
26 repair work. Since the plain meaning of "maintenance" is "to hold or keep in a particular
27 state or condition," it is obvious that mere dusting or sweeping by low skill janitors cannot
28

1 accomplish what is necessary to keep a complex equipment system like the ATS in its
2 operational condition.

3 Further evidence that the Commissioner misinterpreted and misapplied NRS
4 338.011(1) is the fact that the Order dismisses the need to evaluate whether CBE-552 was
5 awarded in compliance with NRS Chapter 332. See: TR 3943. It is the fact that a contract for
6 the maintenance of an equipment system is supposed to be awarded under Chapter 332 that
7 is key to how the legislature chose to limit what contracts would be exempt from the
8 requirements of Chapter 338 even though such contracts include elements of repair.

9 It is a standard rule of statutory construction that, if the statute's language is plain and
10 unambiguous, it must be given effect and that resort to legislative history is unnecessary to
11 interpret its meaning. *State v. State of Nev. Employees Ass'n, Inc.*, 102 Nev. 287, 720 P.2d
12 697 (1986). In *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518
13 (2014) the Nevada Supreme Court rejected an attempt to trump the clear textual meaning of
14 the words of a voter-passed amendment by reference to the intent of the provision's drafters
15 and, instead, agreed with common-sense: "The issue ought to not be what the
16 legislature...meant to say, but what it succeeded in saying." *Id.* 327 P.3d at 522, quoting
17 Lon L. Fuller, *Anatomy of the Law* 18 (Greenwood Press 1976).

18 2. CBE-552 is directly related to the normal operation of the Airport.

19 Bombardier clearly sets out how the testimony and documentary evidence presented
20 at the hearing overwhelmingly demonstrated how crucial CBE-552 is to the Airport's
21 normal operations. These Points and Authorities have supplemented what Bombardier
22 presented. As Bombardier points out, no one is in a better position to describe the Airport's
23 normal operations and the relationship of the ATS to normal operations than Former
24 Director Walker. A review of his entire testimony is recommended.

25 Despite Walker's years of experience, the Commissioner assumed he knew more
26 about the Airport's normal operations than Mr. Walker. The Order acknowledged that "the
27
28

1 ATS and its progeny became important to ensuring the efficient movement of travelers to
2 and from their destinations" (TR 3939:13-14). The Commissioner also agreed that "...no
3 one disputes that the ATS is important to McCarran Airport..."TR 3942:9-11. Yet, the
4 Commissioner arbitrarily and capriciously defined "directly related to normal operations" as
5 being "part of normal operations," which he limited to planes taking off and landing and
6 passengers making it to their destinations. See: TR3942 (Order 4:9-22). The Commissioner
7 cited no legal authority for this definition, which also interjects his personal opinion as to
8 how an airport can operate. He states, without any basis, "[t]here are alternatives for
9 transporting passengers to and from the gate areas; for example, passengers could walk or
10 be bused." TR3942:17-19. His legal opinion essentially states that something cannot be
11 "directly related to normal operations" unless a public body's operation will shut down
12 without it because there is no alternative method for continuing operation. This is an
13 extreme and unsupportable interpretation of the term.

14
15
16 The Commissioner ignored overwhelming, uncontroverted evidence in the record of
17 the absolute necessity of the ATS in order for the Airport to function. The Commissioner
18 made a clearly erroneous decision that CBE 552 is not directly related to the normal
19 operations of the Airport and, therefore, not eligible for exemption under NRS 338.011(1)

20
21 The assumptions made by the Commissioner about what can be done at the Airport
22 demonstrated a complete lack of understanding about what it takes to normally operate the
23 Airport. The best example is access to Satellite "D." The uncontroverted evidence is that
24 Satellite "D" is an island surrounded by active aircraft operations in the Aircraft Operations
25 Area ("AOA"). It is about a mile away from Terminal 1. The only planned and approved
26 means of public access to Satellite "D" is by ATS. There are no passenger walkways
27 between Terminal 1 and Satellite "D" even if it would be acceptable to ask passengers to
28 walk that far. The roads in the AOA are narrow and winding perimeter roads. They were

1 built to accommodate the vehicles that must operate in the area out of necessity, e.g.
2 baggage tugs. There is no evidence in the record that these roads could accommodate the
3 number of bus operations a day it would take to transport passengers to and from Satellite
4 "D." There is no evidence in the record that the FAA or the TSA would accept a plan to bus
5 millions of passengers a year through the high security AOA among moving aircraft.
6 Further, the uncontroverted testimony was that, when the ATS failed for a day, utter disaster
7 occurred, despite an emergency bussing plan.⁶ Despite the Commissioner's claim of
8 expertise, his uninformed ideas stretched beyond what it really takes to operate McCarran
9 International Airport. The Commissioner clearly arbitrarily and capriciously abused his
10 authority to interpret what constitutes "directly related to normal operation."

11 **3. CBE-552 is directly related to the normal maintenance of County**
12 **property.**

13 The Commissioner made no effort to refer to the plain meaning of the words, which
14 are easily ascertained by reference to a dictionary and Nevada case law, as Bombardier has
15 demonstrated. OB 43.

16 The terms of CBE-552 confirm its direct relationship with the Airport's normal
17 maintenance.

18 The Commissioner's definition of the meaning of the "maintenance" in NRS
19 338.011(1) according to cost, difficulty, skill or training was in excess of the
20 Commissioner's authority. It was an unlawful attempt to legislate in place of the legislature
21 to declare that "maintenance generally means work that does not require a lot of skill or
22 training (i.e. janitorial services) not work that requires training and technical skills." The
23 Commissioner simply has no authority to make up a definition of a word in the way done
24 here. In an analogous case, *State v. City of Fallon*, 100 Nev. 509 (1984), the Labor
25 Commissioner was held to exceed his authority to define the term "district" in a manner that
26 was not conforming to the boundaries of a public body or any recognized political

27 _____
28 ⁶ The ATS failure disaster was mitigated somewhat in 2013 by the possibility of having at least some passengers walk to
Satellite "D" from Terminal 3. As stated earlier, Terminal 3 was not open when CBE-552 was in effect.

1 subdivision. In that case, the Nevada Supreme Court did not defer to the Commissioner's
2 interpretation of "district" (which involved simply creating northern and southern districts in
3 the state for prevailing wage determinations). The Supreme Court referred to the dictionary
4 definition of "district" and examined how other courts defined "districts" and disagreed with
5 the Commissioner's unilateral definition of a "district" for the purposes of that statute. *Id.* at
6 515 ("We find nothing in the statute which authorizes the Commissioner to create
7 amorphous 'districts.'").

8 In this case, the Commissioner has created definitions of "related to normal
9 maintenance" without legal authority. He failed to consider the Attorney General's opinion
10 and the context of all the words in NRS 338.011(1). If "maintenance" were a completely
11 separate activity from "repair," there would be no purpose for the statutory exemption from
12 NRS Chapter 338. The Commissioner's definition would render NRS 338.011(1)
13 meaningless. The Commissioner clearly exceeded his statutory authority in this case.

14 VII. CONCLUSION

15 NRS 338.011(1) is clear in what it exempts from the requirements of NRS Chapter
16 338. The County entered into CBE-552 in compliance with NRS 332.115(1), which was
17 directly related to the Airport's normal operations of transporting passengers at the Airport
18 and its normal maintenance of the Airport and its ATS. The contract was entered into in
19 compliance with NRS 332.115(1). The Commissioner arbitrarily and capriciously created
20 artificial definitions of "directly related to normal operations" of the Airport and "directly
21 related to normal maintenance of the ATS." His interpretation of NRS 338.011(1) and the
22 meaning of the legislature's chosen words and phrases are both extreme and unreasonable.
23 They are in contradiction to the overwhelming evidence and clearly erroneous in view of the
24 reliable, probative and substantial, evidence on the whole record.

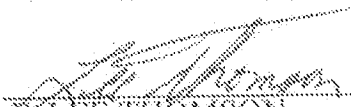
25 If this Order is allowed to stand, it would force governing bodies to review every task
26 in a maintenance agreement to determine if it could be considered to be "repair" and if
27 prevailing wages must be paid. This would force contractors to keep double books on each
28

1 project in order to file certified payrolls if prevailing wages now have to be paid for anything
2 which is considered to be "repair."

3 This Order will have serious implications upon regional transportation commissions
4 and school districts which operate bus fleets as well as any governmental motor vehicle pool.
5 This is a matter for the legislature if changes are to be made.

6 DATED this 22 day of November, 2014.

7 STEVEN B. WOLFSON
8 DISTRICT ATTORNEY

9 By: 

10 E. LEE THOMSON
11 Deputy District Attorney
12 State Bar No. 001057
13 P. O. Box 552215
14 Las Vegas, Nevada 89155-2215
15 Attorney for Respondent Clark County
16
17
18
19
20
21
22
23
24
25
26
27
28

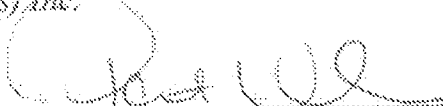
CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Office of the Clark County District Attorney and that on this 21 day November, 2014, I served a true and correct copy of the foregoing RESPONDENT CLARK COUNTY'S MEMORANDUM OF POINTS AND AUTHORITIES (United States District Court Pacer System or the Eighth Judicial District Court Wiznet), by e-mailing the same to the following recipients. Service of the foregoing document by e-mail is in place of service via the United States Postal Service.

Catherine Cortez-Masto
Nevada Attorney General
Scott Davis
Deputy Attorney General
555 E. Washington Avenue, #3900
Las Vegas, NV 89101
sdavis@ag.nv.gov
wiznetfilings@ag.nv.gov
*Attorneys for State of Nevada,
Office of the Labor Commissioner*

Richard G. McCracken, Esq.
Andrew J. Kahn, Esq.
McCracken, Siemerman & Holsberry
1630 S. Commerce St., Ste. A-1
Las Vegas, NV 89102
aik@dchsf.com
(Via U.S. Mail and E-Mail)
Attorneys for Respondent IUEC

Gary C. Moss, Esq.
Paul T. Trimmer, Esq.
Jackson Lewis
3800 Howard Hughes Pkwy, Ste. 600
Las Vegas, NV 89169
moss@jacksonlewis.com
trimmerp@jacksonlewis.com
*Attorneys for Petitioner, Bombardier
Transportation (Holdings) Inc.*


An Employee of the Clark County District
Attorney's Office - Civil Division