IN THE SUPREME COURT OF THE STATE OF NEVADA

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.,

Appellant,

v.

NEVADA LABOR COMMISSIONER, et al.,

Respondents.

Electronically Filed
Apr 03 2018 09:28 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No.: 71101

APPELLANT BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC.'S REPLY BRIEF

GARY C. MOSS
State Bar No. 4340
PAUL T. TRIMMER
State Bar No. 9291
JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169

Attorneys for Petitioner/Appellant

TABLE OF CONTENTS

Page

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Page

Statutes

Regulations

Other Authority

Bombardier Transportation (Holdings) USA, Inc. ("Bombardier") submits the following Reply Brief in response to the Answering Briefs filed by the Labor Commissioner and the International Union of Elevator Constructors ("the Union") (collectively "Respondents").

I. SUMMARY OF ARGUMENT

Bombardier petitioned for judicial review because adopting the Labor Commissioner's interpretations of three different provisions in Chapter 338 – NRS 338.010(16), NRS 338.011(1) and NRS 338.080 – would require the Court to ratify constructions of those statutes which are contrary to both the text of the statutes and the Labor Commissioner's own factual findings.

In their Answering Brief, Respondents essentially ignore the text of the aforementioned statutes. They fail to provide any justification for the Labor Commissioner's failure to consider NRS 338.010(16)'s requirement that CBE-552 be *for the purpose of* construction, reconstruction or repair of a public work. They also fail to explain how the Commissioner's holding that CBE-552 is a public works project can be squared with his finding that no less than 80% of the work performed under the contract is maintenance. Even now, they have not conceived of any reasonable analysis that could show that the Labor Commissioner applied NRS 338.011(1) correctly. Defying common sense and the testimony of Randy Walker, they stubbornly insist that the "normal operation" of McCarran Airport

allows for the ATS System *not* to run. They continue to argue that the Labor Commissioner had the authority to disregard the plain meaning of NRS 338.011(1)'s maintenance exemption, which explicitly exempts the *entire contract*, and distinguish between repair work and maintenance, even though their argument (which includes a contention that *all* maintenance includes repair) would necessarily render that portion of NRS 338.011(1) completely void. Respondents seem to believe that the Labor Commissioner was empowered to simply make up legislative intent to support what he believed the legislature intended when it enacted NRS 338.080's railroad company exemption. This is a case of statutory construction. Whether the Labor Commissioner's decision should be affirmed or vacated depends on the reasoning *he* provided *at the time the decision was issued.*[1]

The legislature enacted Chapter 338 more than seventy years ago to equalize competition among contractors for public works and prevent a race to the bottom in the labor market whereby itinerant workers from out of state would agree to work for substandard wages, undercutting resident laborers and pushing those

[1] To the extent the Labor Commissioner and Union's Answering Brief's contain argument or reasoning outside of the Labor Commissioner's order, they must be rejected. *See McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1188 (D.C. Cir. 2004) ("we do not typically remand to permit the agency an opportunity to adopt an entirely new explanation first suggested on appeal."). Agencies are not entitled to delay explaining themselves until *after* an aggrieved party has sought judicial review. *Id.*; *Coastal Tank Lines, Inc. v. Interstate Commerce Comm'n*, 690 F.2d 537, 543 (6th Cir. 1982) ("Post-hoc rationalization is not a suitable substitute for reasoned rulemaking, and support for the agency's action must exist in the rulemaking record.").

Nevada residents out of the market. To the extent that Chapter 338 is a remedial statute rather than a scheme for economic distribution of public funds, *none* of those concerns apply here. Bombardier had been maintaining the ATS System since it was constructed in 1985. CBE-552, like the maintenance contract before it, had a five year term. The project was staffed by long term employees who live in Clark County.

The Union pointed out in its brief that the County terminated the maintenance agreement and brought the work in house. It presumably did so because it believes that the County's decision to terminate an outsourcing agreement places Bombardier in a negative light. But consider the following questions: 1) how many "public works projects" require renewal on a consistent five year basis with no appreciable change in the scope of work, materials, or new construction? 2) how many "public works projects" can be simply "lifted and shifted" from private contractors to an internal County operations and maintenance department? 3) did the "public works project" suddenly cease to exist when CBE-552 was terminated?

Neither the Labor Commissioner nor the Union can provide satisfying answers to any of these questions because their position – that CBE-552 is a public works project outside the exemptions set forth in NRS 338.011(1) – is fundamentally incoherent. Bombardier's position, in contrast, is consistent with

common sense. CBE-552 required renewal on a specified term because it is a *maintenance* contract. It was capable of being brought in-house to the County's operations and maintenance department because it is a *maintenance* contract directly related to McCarran's normal operation and the ATS System's normal maintenance. And doing so did not terminate the "public works project" because it was never a "public works project" to begin with.

According to both the Commissioner and the Union, repair is inherent in maintenance: it is a logical necessity. And to that end, Respondents' case depends completely on the holding that a small amount of "repair" work was incidental to the preventative and corrective maintenance performed under CBE-552. But the language of NRS 338.010(16) and 338.011(1) is clear: the presence of such incidental repair work does not change a contract's essence. It neither converts a maintenance contract into a prevailing wage project *for the purpose of repair* nor severs CBE-552's direct relationship to normal operations and maintenance or any more than replacing some of the planks within Theseus' ship transforms it into the Titanic or otherwise changes its identity.

Nor does this case create a risk of systemic prevailing wage violations. Despite ample opportunity, the Union was unable to introduce into the record a single example of a prevailing wage contract which would suddenly become exempt if CBE-552 were deemed exempt as the plain language of the statutes

requires. Only the Labor Commissioner's interpretations of NRS 338.010(16) and 338.011(1) undermine administration of Chapter 338's prevailing wage laws. They make the statutory definition of NRS 338.010(16) overly broad and eviscerate NRS 338.011(1)'s exemptions, rendering them meaningless. His factual findings and legal reasoning cannot be reconciled with each other. His speculation about legislative intent is manufactured; the multi-page discussion within his Answering Brief proves nothing and does not refute Section VIII.B.4 of Bombardier's Opening Brief. His fear of bundling and loopholes is contradicted by the record and does not justify his departures from the statutory text. Even if the doctrine of agency deference were applicable, the fiction that a political appointee possesses legal and substantive expertise to which the Court should defer does not excuse all sins. Bombardier's petition for review should be granted.

II. ARGUMENT

Although this case focuses on the Labor Commissioner's interpretation of three different statutory provisions – NRS 338.010(16), NRS 338.011(1) – Respondents have not formulated an interpretation for any of them. The bulk of both the Labor Commissioner and the Union's briefs are devoted to arguing for the application of a deferential standard of review and the application of the remedial purpose canon. Bombardier's Opening Brief was extensive, and rather than

reiterate each point that Respondents failed to address, this Reply will focus on the arguments actually set forth in their respective Answering Briefs.

A. Deference Does Not Apply To This Case.

Neither the Labor Commissioner nor the Union made any serious effort to defend the Commissioner's analysis of the text of NRS 338.010(16), NRS 338.011(1) or NRS 338.080. The Commissioner's final order in this case does not contain any suggestion that those statutes are ambiguous. He did not engage in rigorous analysis and formal administrative rulemaking – the typical cornerstones of any deference analysis. Nor was he engaging in thoughtful policymaking, a point made exceptionally clear when one considers that both the Commissioner and the Union filed Answering Briefs nearly twice the length of the original final order but which remain unable to present a textual analysis in support of the Labor Commissioner's construction of the statutory provisions.

In short, the condition precedents for deference are not present. Indeed, if the Court were to adopt the Respondents' formulation of administrative deference, it would stand existing law on its head. When it comes to agency adjudicative decisions, like the case here, this Court has repeatedly held that the agency's construction of a statute is subject to *de novo* review. *See infra* Section II.A.2. Moreover, even in cases where the Court has considered the deference it should afford to formal agency rulemaking, it has stated clearly that 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." *UMC Physicians' Bargaining Unit v. Nev. Serv. Emp. Union/SEIU Local 1107*, 124 Nev. 84, 89, 178 P.3d 709, 712 (2008).

Respondents appear to believe that deference means that the Court should do little more than dip its toes in the water to see if it is too hot or too cold, and then bless the Labor Commissioner's reasoning so long as it is not offensively unreasonable. But the Court's precedent mandates that the Court construe the statute in the first instance, and then depending on the standard of review which applies, either implement its interpretation through *de novo* review, or consider whether the agency's interpretation of the statute fits within the statutory text as determined by the Court. *Id.*

While both the Labor Commissioner and the Union have, for transparent strategic reasons, attempted to shield the Labor Commissioner's construction of the relevant statutory provisions from *de novo* review, that simply is not the law. It is well-established that the interpretation of a statute is a purely legal question. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). The rise of the modern administrative state has not changed that duty. The Administrative Procedure Act provides that courts, not agencies, decide questions

of law, including questions of statutory coverage and agency jurisdiction. *See* NRS 233B.135(3); *Division of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293-94 (2000).

1. Deference Does Not Apply Because The Legislature Did Not Delegate Sole Authority To Construe Chapter 338 To The Labor Commissioner.

Before the Court can consider an agency's claim that a statute is ambiguous and that the agency's interpretation is therefore subject to deference, it must first conclude that the Legislature clearly delegated authority to that agency. *See, e.g.*, *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

Here, the Labor Commissioner's claim of deference is undermined by the Legislature's express delegation of authority under NRS 338.070(1)(a) to contracting bodies, in this case Clark County, to investigate potential violations of the prevailing wage statutes and "determine if a violation has been committed." This indicates first, that deference is owed to the contracting body's findings, particularly in a case like this, where the contracting body is in the best position to determine whether a contract constitutes a public works project and whether work performed under a maintenance contract is "directly related to" its normal operations or normal maintenance; and, second, that to the extent Chapter 338 contains ambiguity, it requires judicial rather than agency clarification. *See id.*

2. The Labor Commissioner's Construction Of NRS 338.010(16), NRS 338.011(1) and NRS 338.080 Is Subject To *De Novo* Review.

It is well-established that conclusions of law, like questions of statutory interpretation, are subject to "independent review" without deference. *South. Nev. Op. Engineers Contract Compliance Trust v. Johnson (Labor Commissioner),* 121 Nev. 523 (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). This Court has explained that it "will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious." *The Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 636 (2003). "Mantra-like incantations of deference," do not insulate administrative agencies from appellate review. *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

The parties cited several cases in which the Labor Commissioner was a party. In each of those cases, this Court conducted a *de novo* review of the Labor Commissioner's construction of statutes and gave no deference to the Commissioner's legal analysis of statutory text. *See, e.g., Johnson, supra*, 121 Nev. at 523; *Coast Hotels v. State, Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001) (reversing because he ignored the disjunctive meaning of "or" and therefore failed to "give meaning to all of [the statute's] parts and language."); *City*

of Reno v. Bldg. & Constr. Trades Council of Northern Nev., 251 P.3d 718, 719 (Nev. 2011) (construction of retail store with public funds is public work); *City Plan Dev. v. Office of the Labor Comm'r*, 121 Nev. 419, 423 (2005) (holding that the construction of a fire station was a public works project); *Citizens for a Pub. Train Trench Vote v. City of Reno*, 118 Nev. 574, 584 (2002) (discussing construction project); *Garvin v. Ninth Judicial Dist. Court*, 118 Nev. 749, 765 (2002) (construction project). As this Court has explained, "even a reasonable agency interpretation of an ambiguous statute may be stricken by a court when a court determines that the agency interpretation conflicts with legislative intent." *State Farm Mut. Auto. Ins. Co*., *supra,* 116 Nev. at 293-94 (citing *Hotel Employees v. State, Gaming Control Bd*., 103 Nev. 588, 591, 747 P.2d 878, 880 (1987)).

The Labor Commissioner cites *State v. Granite Constr. Co*., 118 Nev. 83, 86 (2002) as support for his position, but that case confirms that *de novo* review is appropriate. LC Brief at 2-5. The Commissioner also cited *Wynn Las Vegas, LLC v. Baldonado*, 311 P.3d 1179, 1183 (2013), but that case also does not support his position. There, the Court deferred to the Labor Commissioner's interpretation of his own regulations. *Id.* This case, however, does not involve the Commissioner's own regulations. It concerns the statutory construction of NRS 338.010(16), NRS 338.011(1) and NRS 338.080, an issue which, as the *Wynn* court observed, is reviewed "*de novo*." 311 P.3d at 1181.

The Commissioner also cites *State ex rel. List v. Mirin*, 92 Nev. 503, 508 (1976), and contends that the Court should apply the deferential standard of review that was applied there. LC Brief at 2-5. *Mirin* could not be more different from the case at bar. That case considered whether an applicant for a grant submitted sufficient evidence to satisfy a well-established "financial ability" standard. *Id.* This case, in contrast, involves three matters of first impression for both the Labor Commissioner and the courts. The Labor Commissioner could not have considered the evidence relating to the various exemptions at issue until he had first resolved the antecedent questions regarding how NRS 338.010(16), NRS 338.011(1) and NRS 338.080 were to be interpreted.

Finally, Respondents contend that the Labor Commissioner's interpretation of NRS 338.011 must be reviewed as a "factual conclusion" because it is included in the section of his final order labeled "findings of fact." LC Answering Brief at 15 and 17. This argument was not made below. It is also meritless. Whether the presence of incidental repair mandates a finding that CBE-552 was a public works project for the construction, reconstruction or repair of public property and whether the presence of *any* repair work precludes application of the operation and maintenance exemptions contained in NRS 338.011(1) are not *factual issues*. They are legal conclusions about the meaning of a statute. Nothing in the record or the law suggests that a political appointee with limited experience is better suited to

conduct a textual analysis than the Court, and that is particularly true in this case, where the Labor Commissioner arrived at his interpretation through adjudication, not formal rulemaking, and the Legislature delegated adjudicative authority to both the contracting body and the Labor Commissioner.

B. Respondents' Reliance On The Supposed Remedial Purpose Of The Prevailing Wage Laws Does Not Justify The Labor Commissioner's Departure From The Statutory Text.

In response to Bombardier's contention CBE-552 is not a project for the new construction, repair or reconstruction of a public work, and therefore is not subject to NRS Chapter 338's prevailing wage requirements, Respondents argue that the remedial purpose of the prevailing wage laws require them to broadly construed and applied.[2] There is considerable doubt that the remedial purpose canon has an probative value. As Justice Scalia stated in his book, *Reading Law: The Interpretation of Legal Texts*, Scalia, Antonin & Garner, Bryan, at p. 364-66 (2012), the claim that "remedial statutes should be liberally construed" is a "false notion." "Identifying what a 'liberal construction' consists of is impossible – which means that [application of the canon] is an open invitation to engage in

---

[2] The Union also argued that NRS 338.011(1) should be narrowly construed because it exempts contracts from bidding requirements. This argument is meritless. Application of NRS 338.011(1) does not necessarily exempt a contract from competitive bidding. To the contrary, it requires that the no-bid requirements of NRS 332.115 are satisfied before the exemption can be applied. In their Answering Briefs, neither the Labor Commissioner nor the Union deny that CBE-552 was awarded in compliance with NRS 332.115.

'purposive' rather than textual interpretation, and generally to engage in judicial improvisation. … The canon is therefore today either incomprehensible or superfluous." *Id.* at 366.

To the extent that the Court considers the argument, Respondents' assertion that is applies in this case is incorrect.[3] Under Nevada law, the Court's primary focus is the text of the statutory provisions and their placement in the statutory scheme. As recently explained in *Thomas*, courts should not resort to interpretive canons when the text of the statute is sufficiently clear. 327 P.3d at 522 (relying on text and rejecting application of the canon against implied repeal). Citation to Davis-Bacon cases is similarly inappropriate given NRS 338.011(1)'s clear textual departure from any similar provision in the federal statute. *See Granite Constr. Co*., 118 Nev. at 89-90 (holding that when the "statutory provisions of the federal act and Nevada's act are not substantially similar," Davis-Bacon should not be used as a guide).

While it is true that the Nevada Supreme Court has, from time to time, referenced the so-called "remedial purpose canon," prevailing wage laws are not remedial laws in the sense that the canon requires. Prevailing wage laws establish wage standards for public works projects. Chapter 338, viewed correctly, is an

---

[3] Given that the Labor Commissioner contends that he engaged in no interpretation of NRS 338.011(1) and NRS 338.080, it is impossible to apply the canon to support the Decision.

economic policy, not a scheme of remedial statutes designed to right specific wrongs. NRS Chapter 338 does not establish minimum wage standards like Nevada's 2006 Minimum Wage Amendment, nor does it provide redress for employment discrimination or other similar injuries.

Acceptance of Respondents' argument requires the Court to sacrifice fealty to the text for the purpose of granting the Union claimants a financial windfall that is not contemplated by NRS 338.010(16), NRS 338.011(1) or NRS 338.080.

C. Respondents' Contention That Bombardier Has A "Burden" Of Demonstrating That The Prevailing Wage Laws Do Not Apply Is Incorrect.

Respondents also argue that Bombardier is obligated to satisfy a "burden" of showing that CBE-552 is not a public works project or is otherwise exempt from prevailing wage coverage. In support of this claim, they cite generic cases regarding exemptions, nothing under Chapter 338. Respondents' claim is wrong for several reasons. With respect to NRS 338.010(16), the Union and the Labor Commissioner have the burden of proof, not Bombardier. Establishing that CBE-552 was a public works project is an element of the Union's prima facie case. There is no presumption that *all* publicly funded projects are public works projects within the meaning of Chapter 338. Imposing a burden of proof on Bombardier was inappropriate and a serious error of law.

Similarly, NRS 338.011(1) is not an exemption. *Compare* NRS 338.080 (identifying exemptions from Chapter 338). NRS 338.010(11) is definitional in nature. Like NRS 338.010(16), it governs the application of the prevailing wage law, narrowing its scope to exclude *contracts* (not merely certain types of work) which are directly related to normal operation or normal maintenance. In short, it is the Labor Commissioner and Union's burden to demonstrate that CBE-552 is *not* directly related to normal operation of McCarran Airport or the normal maintenance of the ATS System. It is another element of the prima facie case, and the Union did not satisfy it.

The Labor Commissioner is correct that Bombardier has the burden of proof as to NRS 338.080. That section of Chapter 338 is explicitly identified as an "exemption." As set forth below, Bombardier met its burden of proof.

Finally, contrary to the assertions in the Labor Commissioner's answering brief, he did not reject application of NRS 338.010(16), NRS 338.011(1), or NRS 338.080 on an evidentiary basis. He concluded that, as a matter of statutory interpretation, they did not apply. In other words, a claim that the burden of proof was not satisfied is a red herring.

D. Neither The Labor Commissioner Nor The Union Set Forth Any Plausible Basis For The Labor Commissioner's Determination That A Maintenance Contract Like CBE-552 Can Be Considered A "Project" *For* The "New Construction, Reconstruction or Repair" Of A Public Work Which Requires Payment Of Prevailing Wages.

1. Respondents did not effectively rebut Bombardier's contention that the Labor Commissioner erred in finding that CBE-552 is a public works "project" within the meaning of NRS 338.010(16).

The Labor Commissioner claims that his conclusion that CBE-552 is a covered public works project should be affirmed because he used well-established rules of statutory construction to reach his result and because CBE-552 contains provisions which provide for repair. As made clear in the actual Decision, however, the Commissioner's "analysis" of the statutory text was neither systematic nor logical. It was limited to consideration of two dictionary definitions of the term "project." LC Brief at 8-10. It did not articulate a coherent interpretation of NRS 338.010(16).

Moreover, the Commissioner does not address the fact that Nevada Supreme Court precedent requires him to construe NRS 338.010(16) in a manner that would be consistent with how the legislature would have understood its provisions when it was enacted in 1937. *See Thomas v. Nev. Yellow Cab Corp*., 130 Nev. Adv. Op. 52, 327 P.3d at 522. The Union claims that there is no evidence in the record which could establish legislative intent, but that is not true. The text of the statute itself, along with the dictionary definitions cited in Bombardier's Opening Brief

confirm the original intent. The Labor Commissioner's reliance on cherry picked portions of two dictionary definitions of the term "project," without consideration of the dictionaries' examples (all of which are construction projects), and the definitions of "public work" was improper. *See* Opening Brief at 22-24 (explaining that "public work" refers to "structures, as roads, dams, or post offices").

Bombardier's interpretation of NRS 338.010(16) is not overly narrow, nor would it unduly constrict application of prevailing wage laws, including bidding requirements, in other contexts. To the contrary, it is consistent with the manner that the prevailing wage laws have been applied for decades. Indeed, neither the Labor Commissioner nor the Union has been able to offer *any* example of a maintenance contract that is covered by the prevailing wage law but does not involve traditional construction or otherwise explain why the Union's elevator maintenance contract with the County is *not* subject to prevailing wage. *See* Opening Brief at 20-22 (discussing Kone contract).

2. Respondents did not rebut Bombardier's contention that the Labor Commissioner should be reversed because his finding that CBE-552 is covered under NRS 338.010(16) is contradicted by his factual finding that no less than 80% of the work performed under the Contract is maintenance.

The Labor Commissioner completely ignored NRS 338.010(16)'s requirement that the project be *for* the purpose of new construction, reconstruction

or repair of a public work. Neither the Union nor the Labor Commissioner addressed the argument in any detail. LC Brief at 28-30; Union Brief at 15-20.

The question before the Court is how the legislature which enacted the prevailing wage law in 1937 intended for the statute to be construed. *Thomas,* 130 Nev. Adv. Op. 52, 327 P.3d at 522. Using that approach, it is impossible to believe that when NRS Chapter 338 was enacted the state legislature considered maintenance contracts to be public works so long as they concerned an incidental amount of repair projects.

The Labor Commissioner recognized that the purpose of CBE-552 was to ensure the ongoing maintenance and operation of the ATS system. To that end, he found that 80% of the work under the Contract is maintenance and that 20% of the work consisted of repair work which was incidental to the maintenance operation. The Commissioner's solution to the tension between his statutory approach and factual finding is to apply the term "project" expansively. But there is no basis for that, particularly when doing so is inconsistent with the best reading of the text, the historical application of the statute, and the parallel provisions in Chapter 338, all of which refer to projects whose primary purpose is construction or reconstruction of buildings on land.

3. Bombardier's interpretation does not create an "enormous loophole."

Finally, Respondents claim that Bombardier's interpretation of NRS 338.010(16) is farfetched and would "eviscerate" the statute. Union Brief at 26-28. But this assertion is not supported by any examples, and it begs the obvious question of: how? Indeed, this is yet another example of Respondents making a circular argument: excluding a maintenance contract like CBE-553 from coverage under NRS 338.010(16) only creates an "enormous loophole" if one assumes that CBE-552 should be covered in the first place. The critical issue here is that the Labor Commissioner himself concluded that no less than 80% of the work under CBE-552 is maintenance. A finding that NRS 338.010(16) does not cover such a contract does not mean that contracts in which repair predominates would not require the payment of the prevailing wage.

E. Neither The Labor Commissioner Nor The Union Articulated Any Justification For The Labor Commissioner's Failure To Find That The Contract Was Exempt Under The Normal Operation Exception In NRS 338.011(1).

Respondents' discussion of NRS 338.011(1)'s normal operation exemption is similarly unpersuasive. As noted above, in an attempt to insulate his Decision from review, the Labor Commissioner has taken the unusual position that the meaning of the normal operations exemption in NRS 338.011(1) is clear, but that Bombardier nonetheless failed to satisfy it. LC Brief at 17-18. This is inconsistent

with the position that the Commissioner took in the Decision itself, where he construed NRS 338.011(1) and found that the provision did not apply because the "Airport could, and has, operated as an airport without a fully functioning ATS." TR3942.

The Labor Commissioner's construction of the statute obliterates the phrases "directly related to" and "normal operations." And, to the extent that the Commissioner's conclusion is couched as a factual finding, it has absolutely no support in the record. The Decision itself cited no authority, *see* TR3942, and the Commissioner's Answering Brief cites to testimony from Randy Walker that confirms Bombardier's position. The fact that the Airport can function for a few hours in a crippled state without the ATS System only confirms that maintenance of the system under CBE-552 is directly related to the Airport's normal operation. Without the ATS, the Airport would fail its "principal requirement" of transporting passengers to and from the C, D, and T3 departure gates. TR01597:12-17. The Commissioner's substitution of his judgment for that of Mr. Walker's demonstrates a lack of careful consideration of the record.[4] The Commissioner's failure to apply

[4] The sections of Mr. Walker's testimony that were cited in the Labor Commissioner's brief recount his statements regarding the critical importance of the ATS to the Airport and refer to a date in June 2013 when the Airport nearly succumbed to the paralysis caused by a breakdown in the ATS software. In fact, the D gates cannot be accessed in any other way, a fact that both the Labor Commissioner and the Union conspicuously fail to address in their briefs. The Labor Commissioner's failure to defer to Mr. Walker's expertise and experience as

NRS 338.011(1) properly warrants relief. *See State v. Fallon*, 100 Nev. 509, 515-517 (1984) (granting petition for judicial review).

The Union makes one additional argument based on the legislative history of NRS 338.011(1). Specifically, that the Labor Commissioner relied on legislative history when he declined to apply the normal operations exemption. But the Commissioner's Decision contains no discussion of the legislative history. *See* TR3942. Moreover, the Union's contention puts the cart before the horse. The Labor Commissioner should have never considered legislative history given that the meaning of NRS 338.011(1) is plain on its face. The best evidence of legislative intent is the words used in the statute. *Exec. Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 51 38 P.3d 872, 875 (Nev. 2002) (quotations omitted). Here, NRS 338.011(1) was adopted *without* limitations and it was enacted into a statutory scheme that *already* exempts projects which have a value of less than $100,000.

To the extent it is considered, it is important to note that Respondents' discussion of the legislative history is inaccurate. It selects certain items and fails to acknowledge that *none* of the supposed limitations advanced by the Union were included in the final statutory text. To the contrary, the excerpts show that a handful of individuals speaking on behalf of organized labor sought to limit the

---

to what is "directly related" to the "normal operation" of the Airport, is inexplicable and arbitrary and capricious. TR1588 and TR1601-1602.

exemption and their efforts were rejected. Speakers rejected adopting the limitations on maintenance and repair found in Davis-Bacon, and confirmed that the purpose of NRS 338.011 is to exempt those contracts which comply with NRS 332 from prevailing wage requirements. The testimony specifically notes that Chapter 332 allows for the award of contracts in excess of $5,000 and that such contracts would be exempt under NRS 338.011(1) if the contracts satisfied the provision's other requirements. The critical purpose behind NRS 338.011 is "restoring competitiveness which should exist, and *reduce operating costs for both state and local governments.*" The Legislature dismissed concerns about overbreadth because Chapter 332 "provide[d] adequate constraints and safeguards against violations[.]" *Id.*

F. Neither The Labor Commissioner Nor The Union Set Forth Any Basis For Affirming The Labor Commissioner's Decision That NRS 338.011(1)'s Normal Maintenance Exemption Does Not Apply.

As with normal operations, there can be no dispute that CBE-552 is directly related to the normal maintenance of the ATS system. *See* Opening Brief at 43-46. The only issue is whether the presence of some repair work (20% under the Labor Commissioner's Decision) is sufficient to bar application of NRS 338.011(1). *See* LC Brief at 22-24; Union Brief at 20-24. Yet, Respondents failed to set forth any way that the Labor Commissioner's original decision could justify parceling out maintenance and repair when the statute exempts the entire contract so long as it is

directly related to (and not exclusively limited to) normal operations or maintenance.

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.

Respondents' interpretation of NRS 338.011(1), in contrast, would essentially amend 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). NRS 338.011(1) contains no caps or limitations. The legislature purposefully refused to include the limitations proposed and referenced in the Respondents' Briefs. 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.

In addition to claims regarding the legislative history, the Union also argues that application of NRS 338.011(1) should not apply because it would prevent payment of prevailing wages in situations which involve maintenance. Once again, this argument assumes that application of the exemption deprives employees of wage rates to which they are entitled.[5]

Respondents' "bundling" argument is absurd. They contend that application of the exemptions in NRS 338.011(1) would undermine the prevailing wage law and allow employers to hide repair work which might otherwise be covered by including it in a maintenance contract. Given that NRS 338.011 contains a number of textual safeguards which preclude such gamesmanship, this unsubstantiated speculation is over the top. But the argument is also illogical because to accept it, the Court would have to conclude that the text of the statute, which refers to contracts not work or tasks, is void. Indeed, Respondents have argued that an element of repair is inherent in *every* maintenance contract. As such, accepting Respondents' position would render NRS 338.011(1) meaningless. No contract

---

[5] The Union's assertion that the Labor Commissioner should have concluded that less than 80% of the work under CBE-552 was maintenance is nonsensical. The Labor Commissioner already determined that no less than 80% of the work performed under the Contract is maintenance. The Union did not appeal that decision.

could qualify for the exemption, even a contract like CBE-552, which the Labor Commissioner concluded consists of no less than 80% maintenance.

Respondents' concern is also overblown and not supported by record evidence. The Commissioner determined that 80% of the work performed under the Contract is uncovered maintenance. NRS 338.011(1) was enacted in reaction to the Labor Commissioner's overly expansive interpretation of the term repair, and was intended to allow a local government to avoid prevailing wage requirements for contracts which are directly related to its ongoing operations. Indeed, although Respondents contend that the exemption is limited to small contracts for unsophisticated work, they fail to acknowledge that such contracts *were already exempt* at the time that NRS 338.011(1) was enacted because the value of such contracts was less than $100,000. Respondents' position would nullify the exemption.

G. Bombardier Has Demonstrated That CBE-552 Is Exempt Pursuant To the Railroad Company Exemption In NRS 338.080.

Like NRS 338.011(1), the exemption for railroad companies found in NRS 338.080(1) is broad. *See* Opening Brief at 49-53. In response, the Labor Commissioner refused to apply the exemption because Bombardier does not operate a traditional railroad in Nevada. TR3943-44. There is no support for this decision other than guesswork and speculation. NRS 338.080(1) expressly provides that companies which are not railroad companies, but which are merely

performing work "for" such a company, are exempt from the payment of prevailing wage.

The Labor Commissioner and the Union advance a handful of other arguments regarding the Railway Labor Act and their own speculation about legislative history (there is no legislative history available for this provision). These arguments are new and not set forth in the Decision. More importantly, they also miss the point. The facts demonstrate the Bombardier is a railroad company in every sense of the word. Approximately 50% of its revenues are derived from the sale, installation and/or operation of traditional railroads and components, including locomotives, switches, and the operation of light rail systems in the United States. It is excluded from the prevailing wage law by NRS 338.080, and it was error for the Labor Commissioner to reject the exemption.

III. REMEDY

Bombardier has also petitioned for judicial review of the Labor Commissioner's Decision because his chosen remedy is contrary to law. Opening Brief at 53-66. Virtually all of the Union and Labor Commissioner's arguments were addressed in the Opening Brief. Those that were not are addressed here.

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

The Labor Commissioner committed a serious legal error when he excused the Union from establishing the amount of time for which it was allegedly owed

and instead, shifted the burden of proof to Bombardier because, a handful of claimants claimed to have recorded their work tasks inaccurately. TR3948-49. The Commissioner's only new response is that Bombardier should be estopped from asserting this claim because it appealed before the Labor Commissioner conducted follow-up hearings intended to ascertain the precise amount of repair work which had been performed.

This estoppel argument is new. It was not made below and is without merit. The conditions for judicial estoppel do not exist here. *See Southern California Edison v. First Judicial Dist. Court*, 127 Nev. Adv. Op. 22, 255 P.3d 231, 237 (2011). Bombardier has not taken an inconsistent position. It has merely observed and criticized the Labor Commissioner for concluding that at least 20% of the work performed under CBE-552 is repair even though there is no evidence in the record to substantiate such a claim beyond Union Exhibit 1.

B. The Labor Commissioner's Admission of Union Exhibit 1 Was Prejudicial And Warrants Reversal.

In response to Bombardier's attack on the Labor Commissioner's reliance on improper evidence, specifically Union Ex 1, the Commissioner contends that NRS 52.275 did not apply to the hearing because the Commissioner has issued a regulation which provides that the rules of evidence do not apply and also argue that Union Exhibit 1 was admissible as a "demonstrative aid." Again, this is

nonsense. Union Exhibit 1 was a summary of two witnesses' opinions. It is not a "demonstrative aid" like a chart or accident mock-up.

The Labor Commissioner's admission of the Exhibits was prejudicial error. NRS 233B.123(1) provides that administrative agencies cannot receive evidence which is prohibited by statute. Here, Union Exhibit 1, was an improper summary and therefore its admission was precluded by statute – specifically NRS 52.275.

The Union and the Labor Commissioner also contend that the admission of Union Exhibit 1 was not prejudicial because it was not relied upon. However, the Labor Commissioner plainly relied upon Union Exhibit 1 and the opinion testimony of the Union's witnesses to come to his conclusion that Bombardier's records were inaccurate. EOR3947-49. And if the Labor Commissioner did not rely on it, it means he dismissed comprehensive mandatory labor reporting in favor of limited, speculative anecdotal testimony from Union witnesses. That is arbitrary and capricious.

C. The Labor Commissioner's Selection Of The Elevator Constructor Rate Is Not Entitled To Deference.

The Labor Commissioner's selection of the Elevator Constructor classification was clearly erroneous. The existing Clark County prevailing wage classification that is most comparable to the Maintenance Technician is Electronic Communication Installer / Technician. The Respondents' claim that the decision is entitled to deference but add nothing new to the argument. The Labor

Commissioner's decision was arbitrary and capricious and should be reversed. *See* Opening Brief, pp. 61-67.

D. Finally, The Labor Commissioner Committed Reversible Error Because His Application Of The Elevator Constructor Rate Improperly Transferred Job Duties And Was Barred By The Administrative Procedure Act.

Finally, it is important to note that in adopting the Elevator Constructor classification, the Labor Commissioner effectively amended an existing classification which already claims to perform a significant amount of the work that the Commissioner found to require the payment of prevailing wage. The Labor Commissioner contends that this analysis does not apply because he was merely clarifying job descriptions in a contested case. He is incorrect.

Under existing Labor Commissioner regulations, Millwrights are responsible for the repair, assembly and installation of "shafting, conveyors, monorails and tram rails." *See* Labor Commissioner Prevailing Wage Classifications, available 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, and he must be ordered to conduct a hearing in accordance with the APA. The Commissioner simply cannot take such action in the context of a contested case. *See So. Nev. Operating Engineers Contract Compliance v. Johnson*, 121 Nev. 523 (2005); *Littlefield*, 123 Nev. at 37; *see also* NAC 338.040.

Respondents contend that selection of the Elevator Constructor classification did not require notice and hearing. But the Commissioner did not merely select the Elevator Constructor rate. He transferred a significant amount of Millwright work to a different prevailing wage classification. In other words, his actions had an impact on individuals who were not involved and participating in the hearing. That is exactly the kind of administrative act that requires compliance with the APA.

IV. CONCLUSION

For the reasons set forth above, Bombardier's Petition for Judicial Review should be granted and the Union's Complaint should be dismissed.

Dated this 2nd day of April, 2018

JACKSON LEWIS P.C.

/s/ Paul T. Trimmer

Gary C. Moss
Paul T. Trimmer
3800 Howard Hughes Parkway,
Ste. 600
Las Vegas, Nevada 89169

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Reply 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 complies with all applicable 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 6,973 words long in Times New Roman, size 14 Font. 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 2nd day of April, 2018

JACKSON LEWIS P.C.

/s/ Paul T. Trimmer

Gary C. Moss
Paul T. Trimmer
3800 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Attorneys for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of Bombardier Transportation (Holdings) USA, Inc.'s **Reply Brief** was served on the 2nd day of April, 2018 via U.S. mail to the following:

Robert E. Werbicky, Esq. Deputy Attorney General mflatley@ag.nv.gov Adam Paul Laxalt, Esq. Bureau of Business and State Services Business and Taxation Division 100 North Carson Street Carson, City, Nevada 89701 (775) 684-1218 (office) (775) 684-1156 (facsimile) *Attorneys for State of Nevada Office of the Labor Commissioner*	Richard G. McCracken, Esq. rmccracken@dcbsf.com McCracken, Stemerman & Holsberry 1630 South Commerce Street Suite A-1 Las Vegas, Nevada 89102 (702) 386-5107 (office) (702) 386-9848 (facsimile) *Attorneys for The International Union of Elevator Constructors*
Mark Ricciardi Fisher & Phillips LLP 300 S. Fourth Street | Suite 1500 Las Vegas, NV 89101 mricciardi@fisherphillips.com *Attorneys for Clark County, NV*	

/s/ Paul T. Trimmer
An Employee of Jackson Lewis P.C.