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Bombardier Transp. USA, INC. v. Nev. Labor Comm'r; The Int'l Union of Elevator Constructors; and Clark County, 135 Nev., Adv. Op. 3 (Jan. 17, 2019)

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Bombardier Transp. USA, INC. v. Nev. Labor Comm'r; The Int'l Union of Elevator Constructors; and Clark County, 135 Nev., Adv. Op. 3 (Jan. 17, 2019)[1]

EMPLOYMENT LAW: WAGE LAW REQUIREMENTS

Summary

The Court found Nevada's wage law requirement for a "public work" applies to construction of the airport shuttle system. The Labor Commissioner did qualify the work as a "public work" because it is repair work and found that twenty percent of the work involved repair rather than maintenance so NRS § 338.010(15) does apply.

Background

McCarren International Airport had an Automated Transportation System installed by Bombardier in 1985. The transportation system takes passengers between gates C and D. Bombardier and Clark County entered a five-year maintenance contract in June of 2008. The International Union of Elevator Constructors represented the technicians working on the transportation system and in October of 2009 they filed a complaint alleging that Bombardier was not paying the technicians the correct wage rates. The Labor Commissioner held a six-day administrative hearing at which he determined this was a "public work" and that no exemption applied.

The Labor Commissioner determined that twenty percent of the work was major repairs and required the prevailing wages under NRS § 338.010(15). Bombardier filed for judicial review. The district court summarily affirmed and remanded so that the Labor Commissioner would have supervision and jurisdiction over payment. This appeal followed.

Discussion

I.

Bombardier argues that the Labor Commissioner was wrong in finding that the contract is a public work and that it should be exempt. Further, they argue that the determination that twenty percent was repair work is not supported by substantial evidence and that the technicians were wrongly classified as Elevator Constructors.

The Court reviews this decision "based on the administrative record, whether substantial evidence supports the administrative decision."[2] The court reviews legal conclusions and statutory interpretations de novo.

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[1] By Amanda Stafford

[2] Kay v. Nunez, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006).

II.

Public work is "any project for the new construction, repair or reconstruction of . . . [a] project financed in whole or part from public money for [a variety of public purposes]."[3] Bombardier contends that the contract was not public work because it was not a project nor was it for the new construction, repair or reconstruction of.

A.

First, there is no statutory definition of "project" in chapter 338 so the Labor Commissioner used two dictionary definitions to determine the definition. Bombardier argues that to meet the definition of project there must be a singular definite end point. Because the contract involved ongoing work, Bombardier argues there is no endpoint and thus it is not a project.

The question of whether this was a project is a factual determination, so the Labor Commissioner's decision will be upheld as long as there is substantial evidence to support the finding. The Labor Commissioner relied on a defined and comprehensive schedule that was outlined in the contract as the basis of the determination that this was a project. Although the contract was mainly maintenance work the finding was that twenty percent still met the definition of project. The Labor Commissioner's determination that the entire contract was a project was overbroad because only certain tasks met the project definition. Only the provisions providing for repairs outside of normal maintenance were projects.

B.

Bombardier further contends that even if it was a project it was not "for . . . new construction, repair, or reconstruction."[4] Bombardier argues that the prevailing wage requirements only apply if the purpose is repairs and that her the contract was for maintenance. The use of "for" can show purpose, but it does not completely exempt contract with dual purposes. NRS § 338.010(15) allows for individual provisions to be severed and looked at individually and not just the contract as a whole. If NRS § 338.010(15) did not allow for this severance than people could insulate themselves from the statute by including repair provisions in maintenance contracts.

The Legislature intended that public work projects for repair were subject to prevailing wage requirements. For simple or day-to-day tasks the Legislature did not want to burden public bodies with prevailing wage requirements.[5] The Legislature did not intent to exempt repair work where projects involve both repair and maintenance work.

Next, the question is if the contract included repairs as in NRS § 338.010(15). The Labor Commissioner found that some tasks that Bombardier called maintenance were actually repairs because they needed technical training or skills to complete. Some of these tasks included: repairs of station doors, graphics, and occupancy detectors and repair and replacement of contactors and isolation switches. The statutory language does not define "repair" so we look to the dictionary definition, which characterizes a repair as an activity beyond normal maintenance. The Labor Commissioner found that some of the contract provisions are major tasks that fall under this

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[3] NEV. REV. STAT. §338.010(15) (2017).
[4] *Id.*
[5] *See* Hearing on A.B. 94 Before the Assembly Government Affairs Comm., 61st Leg. (Nev., Feb. 12, 1981).

definition of repair. Further the Legislature intended to include major tasks such as those contained in the contract within the statute.

III.

Bombardier also argues that the contract fits under the exemption of NRS § 338.011(1) because the contract was "directly related to the normal operation of the public body or the normal maintenance of its property."[6] Further they argue that under NRS § 338.080(1) they are a railroad company. The Court finds that neither exemption applies. The Labor Commissioner was correct in finding no exemption applies.

A.

Further, the Labor Commissioner found that NRS § 338.011(1) does not apply because it is only applicable to things "related to the normal operation of the public body or the normal maintenance of its property."[7] The Labor Commissioner determined that the transportation system is not part of the airports "normal operation" and that some of the work exceeded "normal maintenance."

i.

There is no statutory definition of "directly related to the normal operation for the public body."[8] The Court finds that the Labor Commissioner used a narrow reading of the phrase. The Labor Commissioner found that the transportation system is important to the airport but that is not the same as directly related to the airport's normal operation. He came to this finding by determining that the normal operation of the airport is to fly and land planes and transport the passengers by plane and that this could be accomplished without the transportation system.

Bombardier argued that the airport needs the transportation system to get passengers to different parts of the airport. The Union argued that this reading is too broad. The Court chose to define "directly related to the normal operation for the public body."[9] "Directly related" is a connection between things. "Normal" is in accordance with a regular pattern. "Operational" means can function. The Court finds "directly" modifies "related."

The Court finds that transporting passengers is important, but that the contract is not related to the normal operation of the airport. The question here is if the repair portion of the contract was directly related to the normal operation of the airport or its property. The Court finds it is not.

ii.

The Labor Commissioner found that the contract was not exempt because it was not "directly related to . . . the normal maintenance" of the airport.[10] "Normal maintenance" is not defined in the statute. The Labor Commissioner used a definition to define it as work not requiring a lot of skill. Under this definition the Labor Commissioner found that some of the tasks in the

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[6] NEV. REV. STAT. § 338.011(1) (2021).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

contract did not require technical skills so those were exempted, but tasks involving repair exceed normal maintenance.

Normal maintenance is upkeep to keep something operational. Repairs cannot fall under this definition. The Legislature did not consider "normal maintenance" and "repairs' synonymous. The major repairs were not directly related to the normal maintenance of the airport. Thus, the Court agrees with the Labor Commissioner's interpretation that repairs are not covered by this section of the statute.

B.

Bombardier argues that it is a railroad company and is therefore exempt under NRS § 338.080(1). The Labor Commissioner found Bombardier is not exempt because the transportation system is not a railroad and Bombardier is not a railroad company. The Labor Commissioner found that it was not a railroad because it is not on steel rails nor drawn by locomotive. This is the common meaning of railroads. The Court agrees that the transportation system is not a railroad under the statute.

Bombardier argues that even though the transportation system is not a railroad that they are a railroad company. The statute nor legislative history have a definition of "railroad company." The dictionary definition is a "corporation organized to construct, maintain, and operate railroads."[11] Because the transportation system is not a railroad Bombardier cannot be a railroad company. If Bombardier was a railroad company than it would be regulated by the Public Utilities Commission as prescribed by NRS § 704.020. There is no evidence Bombardier is a railroad company so it cannot fall in this exemption.

IV.

Twenty percent of the maintenance work was found to be "public work" by the Labor Commissioner. Bombardier argues that the employee work summaries that the Labor Commissioner used to determine what kind of work it was were inadmissible hearsay evidence. Bombardier argues that this was inadmissible and so the Labor Commissioner did not have substantial evidence for his finding. The Court finds the Labor Commissioner was able to consider the work summaries because evidentiary rules are more relaxed in administrative proceedings. The Labor Commissioner also considered the employees' testimony about their experience working he also looked to the contract itself. The Court finds that this constitutes substantial evidence.

V.

Bombardier argued that the burden of proof in requiring Bombardier to prove damages was improperly shifted by the Labor Commissioner because the employees, as the party seeking the damages, should have the burden. Bombardier is incorrect. NRS § 338.090(2)(a) does not specify which party has the burden to prove the amount. The provision gives the Labor Commissioner the authority to figure out the amount of damages based on the evidence. Therefore, the Court agrees that there is a fair inference that prevailing wages were required for twenty percent of the work

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[11] *Railroad Corporation*, Black's Law Dictionary (10th ed. 2014).

completed. And that the Labor Commissioner properly analyzed evidence from both parties and did not improperly shift the burden.

VI.

Bombardier argues the employees were improperly classified as elevator constructors. The Labor Commissioner found that the employees were elevator constructors because the transportation system is also an automated people mover the employees also did a lot of the same tasks and used a lot of the same tools as elevator constructors.

Conclusion

The Court concluded that the "repair" portion of the contract at issue was a public work projects and no exemptions apply. Accordingly, the Court affirmed the district court's denial of the petition for judicial review.