THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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APPEAL OF NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC AND FAIRPOINT LOGISTICS, INC. REGARDING UNEMPLOYMENT COMPENSATION

NO. 2017-0362

RULE 10 APPEAL FROM THE DECISION OF THE ADMINISTRATIVE AGENCY
NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY

BRIEF OF APPELLEES

CLAIMANTS REPRESENTED BY COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1400

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Great Depression. Many states, including New Hampshire, modeled their statutes after a federal Draft Bill, which was prepared by the Committee on Economic Security under the auspices of the Social Security Act. See Milton I. Shadur, Unemployment Benefits 12
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I. Summary of the Argument

First, FairPoint's argument that the Commissioner exceeded his authority when he ordered a *de novo* hearing is moot because the Appellate Board would have heard the appeal and reached the same decision even had the Commissioner declined to order a *de novo* hearing. Put differently, the Appellate Board would have heard the same appeal and reached the same decision, regardless of whether the appeal was (1) brought to it by the Claimants had the Commissioner declined to re-open the hearing or whether, (2) as occurred, the appeal was brought by FairPoint following the *de novo* hearing.

Second, the Commissioner had the statutory authority to order a *de novo* hearing because the first Tribunal made a "mistake" of law. FairPoint is wrong to assume that the general concept of "mistake" does not include its more specific subset "mistake of law."

Third, FairPoint's question presented regarding the meaning of "stoppage of work" in N.H. Rev. Stat. Ann. § 282-A:36 does not touch on points of law that would affect the outcome of the case. In any event, the definition applied at the agency level is consistent with the statutory text as considered within its historical context.

Fourth, the findings of the second Tribunal were not clearly erroneous in view of the substantial evidence. FairPoint's argument on this point is hardly developed, and does not provide a sufficient basis upon which to reverse the decision. Moreover, in light of the evidence that FairPoint's management, including its CEO, bragged about the minimal impact the strike had, it can hardly be said that the decision was clearly erroneous.

Fifth, in 1979, the U.S. Supreme Court definitively and unequivocally rejected FairPoint's claim that the state unemployment statute is preempted by the National Labor Relations Act.

Sixth, the strike benefit provided to the CWA Claimants is not deductible income as defined in N.H. Rev. Stat. Ann. § 282-A:14 because (1) it is a statutorily defined supplemental unemployment plan and (2) it is not remuneration for personal services. Rather, the benefit is provided from a fund comprised of members' own dues money, and is more like an insurance program.

II. Arguments

A. FairPoint's Claim that The Commissioner Exceeded His Authority In Ordering a *De Novo* Hearing Is Moot

FairPoint places great emphasis on its argument that the Commissioner lacked the authority to order a *de novo* hearing on the grounds of a "mistake" by the first Tribunal Chairperson. However, FairPoint devotes no attention to the question of how or why its argument matters to the ultimate resolution of the case.

Assuming for the sake of argument that this Court agreed with FairPoint, the relief would be to grant FairPoint's request to reinstate the first Tribunal decision. Such relief is not an end unto itself. Had the first Tribunal decision been upheld by the Commissioner, the CWA Claimants would have sought review before the Appellate Board pursuant to N.H. Rev. St. Ann. § 282-A:65, on the grounds that (1) the Tribunal applied the wrong legal definition of "stoppage of work" as found in N.H. Rev. St. Ann. § 282-A:36, and (2) that the strike benefits provided to CWA members were not deductible income under N.H. Rev. St. Ann. 282-A:14. Had the Claimants been required

to seek such review, given the particular travel of this case, we know exactly what would have occurred.

On the question of "stoppage of work," we already know that the Appellate Board would have found fault with the first Tribunal because the Chairman, "despite his more extensive discussion, applied the wrong legal standard." AB Dec., pg. 6. We also know that the Appellate Board agreed with the definition of "stoppage of work" for which the Claimants had advocated. AB Dec., pgs. 5-6. Finally, we know that the Appellate Board did not consider the CWA's strike benefit to be deductible income. AB Dec., pg. 7. Such conclusions would be valid determinations that the Tribunal had acted "in violation of … statutory provisions." N.H. Rev. Stat. Ann. § 282-A:65(I).

Based on these findings, this Court can assume that the Appellate Board would have at least remanded the case for a new hearing. See N.H. Rev. Stat. Ann. § 282-A:65 (Appellate Board has the authority to either "reverse or modify the decision or remand the case for further proceedings.") Therefore, whether a *de novo* hearing was held by order of the Commissioner or the Appellate Board, the result would be the same, namely a hearing before a second Tribunal.

Moreover, because a *de novo* hearing was already ordered and held, we also know the outcome before the second Tribunal Chairperson, and we also know the Appellate Board's decision concerning FairPoint's appeal of the second decision on the question of "stoppage of work," both in terms of the Board's articulation of the legal standard and the application of facts to law in this case. Similarly, regarding whether the CWA's strike benefit is deductible income under N.H. Rev. Stat. 282-A:14 III(a), both Tribunals reached the same result on fundamentally the same record. The Appellate Board found

that the strike benefits were not deductible income. Regardless of whether ruling on the first or second Tribunal decision, the Appellate Board's decision would have been exactly the same. The bottom line is that whether the Commissioner overstepped did not affect the posture of the case in terms of this Court's review. Ultimately, this Court reviews decisions of the Appellate Board, and the Appellate Board has independently ruled on all the substantive questions at issue.

In sum, whatever procedural errors may have unfolded administratively – and the CWA Claimants perceive none – they did not have any legally cognizable effect on the ultimate decision of the Appellate Board. Therefore, the Court need not pass on the question of the Commissioner's authority to re-open a hearing a for a "mistake" pursuant to N.H. Rev. St. Ann. § 282-A:60. Or, if the Court decides to pass on the question solely for the sake of clarity in future NHES proceedings, the Court should recognize that the ultimate agency decision would be the same, and then proceed to decide the other issues FairPoint raises in this case.

B. The Commissioner Properly Exercised His Authority In Ordering a *De Novo* Hearing Based on a "Mistake" by the First Tribunal

FairPoint's argument that the Commissioner lacked the statutory authority to reopen turns on the meaning of the phrase "fraud, mistake, or newly discovered evidence" in § 282-A:60. It is upon those grounds that the Commissioner may reopen a decision of a Tribunal Chairman. FairPoint argues that the Commissioner incorrectly interpreted the word "mistake" to include mistakes of law.

FairPoint has offered no authority to support the proposition that broad concept of "mistake" does not include the narrower subset of "mistakes of law." This is not surprising. In 1981, shortly after an amendment to the New Hampshire unemployment

statute, the Attorney General was asked to opine on the question of the Commissioner's authority under § 282-A:60. The AG responded in 1982 with two points that directly contradict FairPoint. N.H. Atty. Gen. Opinion No. 82-15-F (June 24, 1982).

First, he wrote that "an individual appealing a decision of the Appeal Tribunal must first seek reopening of the decision before the Commissioner pursuant to the provisions of RSA 282-A:60 (1981 Supp.) and RSA 282-A:61 (1981 Supp.) in order to perfect an appeal to the Appellate Division." N.H. Atty. Gen. Opinion No. 82-15-F, 1982 WL 188103 (June 24, 1982). Thus, FairPoint's claim that mistakes of law can only be addressed by the Appellate Board or this Court is simply incorrect. All avenues of appeal, whether to the Appellate Board or eventually this Court, and upon whatever grounds, must begin with the Commissioner. See Appeal of Mullen, 169 N.H. 392, 399 (2016) (commissioner is "second level of appeal" "in all unemployment compensation appeals")(quoting RSA 282–A:60). If FairPoint's narrow reading were correct, it would mean that most claimants' appeals to the Commissioner would be perfunctory and futile. It is unreasonable to assume that this was the Legislature's intent. The fact that all appeals must first go through the Commissioner indicates that he has the authority to act on those appeals.

Second, the Attorney General notes that while the "Commissioner cannot on his own modify, amend, or reverse any Appeal Tribunal decision," he "may find ... that a mistake has been made, either through misapprehension of fact or misapplication of law, and order reopening." N.H. Atty. Gen. Opinion No. 82-15-F (June 24, 1982) (emphasis added). That is precisely what happened here. After the CWA and IBEW requested reopening, the Commissioner determined on July 1, 2015, that there had been a

misapplication of N.H. Rev. St. 282-A:36 and ordered a *de novo* hearing. This was merely another example of the Commissioner's usual and ordinary exercise of his statutory authority. See, e.g., In re Pelleteri, 152 N.H. 809, 810 (2005) (Commissioner reopened hearing based on Tribunal's mistake of law concerning "wages" and "bonuses"); Appeal of Mullen, 169 N.H. 392, 395 (2016) (proper for Commissioner to order a *de novo* hearing where Tribunal had "mistakenly excluded the testimony of a particular witness"). Here, the Commissioner identified a mistake of law concerning substantial curtailment, corrected it, and ordered a new hearing so that a Tribunal Chairman could apply the facts to the proper legal standard.[1]

FairPoint makes much of the fact that the Commissioner is empowered to correct a "mistake," whereas the Appellate Board is empowered to correct an "error of law." FP Br., pg. 18. FairPoint claims that the inclusion of the phrase "of law" in N.H. Rev. St. Ann. § 282-A:65 means that its absence in N.H. Rev. St. Ann. § 282-A:60 was a deliberate exclusion by the Legislature intended to prevent the Commissioner from acting on mistakes of law. To the extent these phraseological variants were deliberate, FairPoint has the effect backward. The phrase "of law" is a phrase designed to limit the general. For example, one can commit a "crime," or a "crime of passion." The notion of "crime" is the general that becomes limited when "of passion" is appended. Or, one can make a "mistake," or a "mistake of omission," in which case the former category is broader than the latter. To the extent one can draw a conclusion from the inclusion of the phrase "of law" in 282-A:65, the conclusion is that the Legislature intended to preclude the

[1] Moreover, "it is well established in our case law that an interpretation of a statute by the agency charged with its administration is entitled to deference." In re Town of Seabrook, 163 N.H. 635, 644 (2012). As such, the Commissioner's opinion that mistakes in § 282-AA:60 includes mistakes of law, as expressed in his letter of July 20, 2015, is entitled to deference.

Appellate Board from questioning the factual determinations of the Tribunals, i.e., narrowing the sorts of errors the Appellate Board can correct to errors of law. This is not to say that the word "mistake" authorizes the Commissioner to reverse decisions with which he disagrees for any reason, but it does empower him to fix mistakes of law, or the mistake of entering an alternative finding based on a deliberately undefined legal concept (as occurred in the first Tribunal decision). See Appeal of Mullen, 169 N.H. at 395.

FairPoint collaterally argues that reopening was inappropriate because the first Tribunal had expressly applied the standard of substantial curtailment. FP Brief, pg. 20. The claim is contradicted by the Tribunal's own words:

> Nothing in the law or rule guides the Chairman to define work stoppage based on the actions of the claimant or the employer. The unions argue that the Chairman should adopt the "majority view" of other states that reference "stoppage of work" within their statutes; however, although these states further define stoppage of work as a "substantial curtailment" of the employer's business, there is no clear consensus with respect to what constitutes a "substantial curtailment." The Chairman declines to create such a definition in the absence of guidance from the law, rule, or case law.

FairPoint Ex. 1, pg. 7 (emphasis added). Given Chairman Croce's acknowledgment that he had declined to define "substantial curtailment", it was proper for the Commissioner to reject his analysis. As the Appellate Board interpreted it, the first Tribunal had a "failure to understand/apply the case law on proof of work stoppage," and did nothing but give "lip service to the proper standard elsewhere in his opinion." AB Dec., pgs 5 and 6. The fact that the first Tribunal touched on relevant concepts and facts is an insufficient basis to conclude that he was applying the actual statutory standard.

C. FairPoint's Argument About the Precise Meaning of "Stoppage of Work" Is Not Material to the Outcome of this Appeal, Because There Appears to Be General Consensus That It Refers to a "Substantial Curtailment"

Regarding the second question FairPoint presents, the CWA Claimants are confused by what exactly is at issue.

FairPoint begins its question presented by stating, "If a 'substantial curtailment' standard is adopted as the proper interpretation of RSA 282-A:36…." FP Br., pg. 1 (emphasis added). However, FairPoint does not appear to contest adoption of this standard. Instead, the thrust of FairPoint's argument is to assert that the Court should be mindful of three elements to a substantial curtailment analysis: (1) evaluating the work normally performed by the strikers that was not performed because of the strike; (2) consideration of the employer's status as (an alleged) public utility; and (3) "consideration of the realities as to how the work normally performed by the workers is performed." Id.

Although the CWA Claimants will discuss the legal standard below, the Court should understand that the three issues identified above are not the reason FairPoint lost at the administrative level. The reason FairPoint lost is because it failed to prove its case on the facts. For example, the Appellate Board noted that cross-examination of "FairPoint's chief witness Peter Nixon amply demonstrated the weakness of FairPoint's evidence. Mr. Nixon repeatedly admitted that 'It was hard to quantify the impact and/or to separate out [what] was due to the weather vs the strike.'" AB Dec., pg. 6. Similarly, the Appellate Board noted that the "record included a FairPoint press release, published a month into the strike, and which claimed that 'productivity is well above pre-strike levels despite being hampered by aggressive and disruptive picketing, sabotage and extraordinarily bad weather…The majority of Backlog orders is directly associated with the extreme weather…four major storms in 50 days." AB Dec., pg. 7. In other words,

FairPoint did not prevail because it could not prove the impact of the strike on its operations, nor could it prove whether certain metric results were caused by the strike or by other factors. Nothing that FairPoint argues in this section of its brief could affect this Court's determination of the appeal.

The CWA Claimants do not contest, and never have, that the substantial curtailment analysis requires consideration of the work normally performed by the strikers that was not performed because of the strike. The record is not only replete with facts and arguments about this subject, but this issue was central to the decision. Indeed, if FairPoint is arguing that the agency did not consider this information, the CWA Claimants are truly perplexed. Of course, it is also the case that this factor is not the only one to consider. Other relevant factors include financial results. See, e.g., Boguszewski v. Comm'r of Dep't of Employment & Training, 410 Mass. 337, 344 (1991); see also Whitcomb v. Dep't of Employment & Training, 147 Vt. 525, 526 (1986) ("Generally, the determination of substantial curtailment must depend upon the facts and circumstances of each case, but among the factors commonly considered are business revenues, production, services and worker hours before and during the strike."). However, FairPoint does not appear to argue to the contrary, and the Appellate Board (and Tribunal) looked to all these factors.

On the second point – whether special consideration is appropriate because FairPoint is allegedly a public utility – the CWA Claimants need only offer a few observations. First, FairPoint did not prove it was still a public utility following the deregulation of the telephone industry, and given that it offers more than telephone service as a product (namely internet and television service, which are not even arguably

products of a regulated utility). Second, the relevance of the question of "public utility" in Boguszewski and Whitcomb is simply the point that an agency is not precluded from reaching a finding of substantial curtailment because the primary product of phone service continues. See Boguszewski, 410 Mass. at 341-42; Whitcomb, 147 Vt. at 526. However, the agency decision in this case did not turn solely on the fact that FairPoint's service continued, and so the so-called public utility consideration does not bear on this Court's analysis. Again, the evidence and analysis ranged far more broadly into areas such as productivity.

Finally, FairPoint's third point asks the Court to be cognizant of the reality of the workplace. Fair enough, but again, this is a point not contested, and it has no effect on the case. This argument is evidently driven by the FairPoint's disappointment that it failed to prove that certain performance metrics were caused by the weather or the strike. That is not a problem of law or the construction of the "stoppage of work" statute, but simply FairPoint's failure to convince the finder of fact of certain facts.

1. New Hampshire's statute is almost identical to the model federal legislation that was drafted to employ the American Rule.

As background, perhaps it is useful for the Court to consider the origins of the "substantial curtailment" standard, even though the issue does not appear to be disputed by FairPoint, as noted above.

The labor dispute disqualification provision found in RSA § 282-A:36 is extremely similar to statutes in other states, which "almost uniformly take the approach that a substantial curtailment of the operations of a plant or factory due to a labor dispute qualifies as a 'stoppage of work.'" Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of

Review, 197 N.J. 339, 355 (2009) (quotations omitted).[2] Adopting the majority "American Rule" that a "stoppage of work" refers to whether an employer's operations have been substantially curtailed will allow New Hampshire to comport with "the overwhelming weight of authority" in other states.[3]

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[2] Approximately 20 states currently have unemployment compensations statutes requiring that, for a claimant to be disqualified for benefits, a claimant's unemployment be due to a "stoppage of work" or "work stoppage" caused by a labor dispute. Of those states, 14—Alaska, Georgia, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Jersey, Utah, Vermont, and West Virginia—continue to interpret "stoppage of work" as the substantial curtailment of the employer's business activity; 1, Maine, interprets the phrase to mean the "cessation of plant operations" (similar to substantial curtailment); 2—Oklahoma and Wyoming—interpret the phrase to mean the cessation of the claimant's employment. Like New Hampshire, it does not appear that the Delaware or Mississippi courts have yet to expressly weigh in. Pennsylvania's highest court has not considered the question, and there is a split of authority among Pennsylvania's lower courts. Compare Conroy Unempl. Compensation Case, 257 A.2d 65, 67 (Pa. Super. 1969) with Unemployment Comp. Bd. of Review v. Tickle, 339 A.2d 864, 869 (Pa. C. 1975).

[3] New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 534, n. 24 (1979) ("many States, pursuant to the so-called 'American rule,' allow strikers to collect benefits so long as their activities have not substantially curtailed the productive operations of their employer"); Trapeni v. Dep't of Employment Sec., 455 A.2d 329, 331 (Vt. 1982) ("since the operations of the [employer] continued despite the strike, 21 V.S.A. § 1344(a)(4) did not disqualify the claimants from receiving benefits."). See also Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Review, 963 A.2d 289, 297 (N.J. 2009) ("It has long been accepted that the term 'stoppage of work' refers to whether the nurses caused work to stop at the hospital...and not whether the striking nurses stopped working themselves."); Twenty-Eight (28) Members of Oil, Chem. & Atomic Workers Union, Local No. 1-1978 v. Emp't Sec. Div. of Alaska Dep't of Labor, 659 P.2d 583, 591 (Alaska 1983); M. A. Ferst, Ltd. v. Huiet, 52 S.E.2d 336, 339 (Ga. Ct. App. 1949); Haw. Tel. Co. v. State of Haw. Dep't of Labor & Indus. Relations, 405 F. Supp. 275, 288 (D. Haw. 1976); Robert S. Abbott Pub. Co. v. Annunzio, 112 N.E.2d 101, 106 (Ill. 1953); Bridgestone/Firestone, Inc. v. Emp't Appeal Bd., 570 N.W. 2d 85, 90 (Iowa 1997); Pickman v. Weltmer, 382 P.2d 298, 303 (Kan. 1963); Employment Sec. Admin. v. Browning-Ferris, Inc., 438 A.2d 1356, 1362 (Md. 1982); Reed Nat. Corp. v. Dir. of Div. of Employment Sec., 446 N.E.2d 398, 399 (Mass. 1983); Tri-State Motor Transit Co. v. Indus. Comm'n Div. of Employment Sec., 509 S.W.2d 217, 221 (Mo. Ct. App. 1974); Bell Fed. Credit Union v. Christianson, 466 N.W.2d 546, 549 (Neb. 1991); Anderson v. Bd. of Review of Indus. Comm'n of Utah, 737 P.2d 211, 214-15 (Utah 1987); Trapeni v. Dep't of Emp't Sec., 455 A.2d 329, 331 (Vt. 1982); Cumberland & Allegheny Gas Co. v. Hatcher, 130 S.E.2d 115 (W. Va. 1963), overruled on other grounds by Lee–Norse Co. v. Rutledge, 291 S.E.2d 477 (W. Va. 1982).

The similarity of New Hampshire's statute with other states' is not a coincidence. By 1937, every state in the country had passed unemployment compensation laws as part of the national effort to ameliorate the devastation of the Great Depression. Many states, including New Hampshire, modeled their statutes after a federal Draft Bill, which was prepared by the Committee on Economic Security under the auspices of the Social Security Act. See Milton I. Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, 17 U. Chic. L. Rev. 294, 294 (1950). The Draft Bill, in turn, was modeled in large part after the British Unemployment Insurance Acts, inclusive of the Acts' requirement that the "trade dispute" disqualification be on account of a "stoppage of work." Willard A. Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J. Urb. L. 319, 322 (1968). Under long-settled British law interpreting that requirement, the phrase "stoppage of work" referred "not to the cessation of the workman's labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed." Shadur, supra at 308 (citations omitted). The U.S. Dept. of Labor advocated for states' adherence to this interpretation in its recommendations to states on unemployment legislation, published in 1962: "The Bureau recommends that the labor dispute disqualification continue, in general, as long as the labor dispute causes a substantial stoppage of the employer's work." U.S. Dep't of Labor, BES No. U-212, Unemployment Insurance Legislative Policy: Recommendations for State Legislation, pg. 70 (1962), available at http://workforcesecurity.doleta.gov/dmstree/pl/brown_book.pdf (last visited February 8, 2018).

The New Hampshire legislature not only fashioned its current unemployment statute after the Draft Bill, it wholesale replaced its prior unemployment law with its 1937 adoption of the federal model. See N.H., 178 (unemployment statute amended "by striking out all of said chapter and inserting in place thereof the following..."). Chapter 179-A:4.D of New Hampshire's 1937 session law, which disqualified claimants whose unemployment was "due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he or she is or was last employed," replicates the Draft Bill *word for word*, save only for the replacement of "commission" with "commissioner." Compare N.H., 179-A:4.D with Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types (1936). That provision remains unchanged 77 years later. This legislative history reveals that the "labor dispute" disqualification provision of New Hampshire's unemployment compensation statute is firmly rooted in the federal Draft Bill, which was replicated in numerous other states.

According to this Court, where other states have statutes that are "almost a literal copy of" New Hampshire's, "[t]his coincidence is persuasive evidence of a practical re-enactment here of the foreign statute, and an adoption of the construction which the highest court of that state had given to it." Mann v. State Treasurer, 74 N.H. 345, 68 A. 130, 131 (1907). Accordingly, it is proper to look to the historical meaning of "stoppage of work" under the British Unemployment Insurance Acts and as explained by the U.S. Dept. of Labor because, as noted above, the trade dispute disqualification in the Acts was built into the federal Draft Bill, which New Hampshire adopted in relevant part. Given that jurisdictions with similar unemployment statutes have resoundingly accepted the

interpretation adopted at the agency level, it would have been anomalous for New Hampshire to have done otherwise. Although there is a lack of legislative history so as to discern the Legislature's intent in 1937, it would be quite odd if the Legislature had meant something different than the federal model, but nonetheless used language identical to that model.

In this historical framework, focusing on law in neighboring Massachusetts, a "stoppage of work" means that "operations must be 'substantially curtailed.'" Hertz Corp. v. Acting Dir. of Div. of Employment & Training, 437 Mass. 295, 297 (2002) There is no "precise definition of the words 'stoppage of work'..." Westinghouse Broad. Co. v. Dir. of Div. of Employment Sec., 378 Mass. 51, 55–56 (1979). A "'stoppage of work' refers to the effect upon the employer's operations produced by the labor dispute. It does not refer to the cessation of work by the individual employee or employees. Id. "To determine the claim of substantial curtailment, the board should view the drop in production and the decreased number of employed production workers, as compared with those figures from the previous year, in the context of all the circumstances, including the over-all status of the corporation's operations." Reed Nat. Corp. v. Dir. of Div. of Employment Sec., 388 Mass. 336, 340 (1983). The quantum of "disruption [] required to constitute a substantial curtailment is a fact-specific inquiry; there is no percentage threshold or numerical formula." Hertz, 437 Mass at 297; see also id. at 299 ("It is within the state agency's "discretion to conclude that the combined impacts of the strike detailed in its findings of fact did not cause a substantial stoppage of Hertz's operations as a whole.")

Because there is no precise definition of "stoppage of work," "[t]here are no necessary, specific elements of the definition. The board should continue to follow an empirical approach, evaluating each situation on its facts... While output and revenues remain important factors for the board to consider, they will not necessarily be dispositive. As production increasingly represents less than totality of the employing unit's performance, decreases in business revenue, services rendered, marketing, research, and maintenance, transportation, and construction activities have come to the fore as indicia of substantialness." Boguszewski v. Comm'r of Dep't of Employment & Training, 410 Mass. 337, 344 (1991) (quotations and citations omitted). The NHES is not "required by law to find a substantial curtailment of the employer's production of [its product] in order to make a determination that a labor dispute caused a 'stoppage of work.'" Id. at 341–42. Nonetheless, the continued delivery of the employer's primary product remains relevant to the Board's analysis. Id. at 344. This is the law as found and applied by the Commissioner, second Tribunal and Appellate Board. Indeed, except perhaps at the most extreme of edges, FairPoint appears to agree.

D. The Second Tribunal's Decision Was Supported By Substantial Evidence, and Must Be Affirmed

The heart of this case might have been the ultimate question of whether there was a substantial curtailment of employer's operations. Probably because the standard of review is so heavily stacked against it, FairPoint devotes less than two pages to the question of whether the second Tribunal's decision was proper.

To prevail on this point, FairPoint must demonstrate that the decision below was "[c]learly erroneous in view of the substantial evidence on the whole record." N.H. Rev.

Stat. Ann. § 282-A:67(d). "In reviewing decisions under RSA 282–A:67, we will not 'substitute [our] judgment for that of the appeal tribunal as to the weight of the evidence on questions of fact.'" In re First Student, Inc., 153 N.H. 682, 684 (2006) (citing N.H. Rev. Stat. Ann. § 282-A:67, V).

First, FairPoint's argument is hardly of sufficient detail in this type of case to justify the Court's taking the extreme step of overturning an unemployment decision on the facts.

Second, as noted above, FairPoint largely misses the point, namely that it failed to prevail because it failed to prove causation, and that that failure was caused in large part by its own CEO and press release crowing about how its operations were not only not impacted by the strike, but its performance improved.

For example, in a December 23, 2014, letter to U.S. Sen. Jeanne Shaheen and U.S. Rep. Ann Kuster, FairPoint President and CEO Paul Sunu boasted that FairPoint was "doing exceptional work and showing productivity well above pre-strike levels...." CR.III.120-21. A week after the strike had ended on February 25, 2015, Sunu reported to investors and the public:

> We learned a lot during the strike, and as time passed, the organization gained confidence, long-held truths were challenged and new and more efficient processes were put into place. And as a result, we saw how productive we can be. With our managers working front-line positions, we documented improved processes that saved hundreds of working hours per day. And we saw that, on average, our contingent force could complete more jobs per day than pre-strike levels.... And thanks to the productivity gain from our continuity plan, they returned to a trouble load[4] that was below pre-strike levels.

CR.III. 127.

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[4] Trouble load is the number of pending repair jobs on FairPoint's approximately 260,000 access lines and services carried over the internet.

During the strike, the contingent workforce cleared more customer service work orders and completed more jobs per day than the pre-strike unionized workforce. CR.III. 127. A senior management witness agreed with Sunu that "productivity far exceeded what the prestrike levels were from our workforce" and that witness attributed the increased productivity to the flexibility of the contingent workforce. CR.V. 383. The majority of the order backlog that developed during the strike was "directly associated with the extreme weather," which included "four major storms in fifty days, with regional impact approaching levels not seen since [Hurricane] Irene in 2011." CR.V. 392. According to Sunu, "if not for the unprecedented and unexpected series of severe winter storms, we would have been able to achieve our objective much earlier." CR.III. 126-27. Sunu added that "when you start to see our numbers in the first quarter and what it is that we've been able to achieve, you got to find that even during the strike we were able to get our trouble load down to a level it's never been before." CR.III. 134.

Given that the second Tribunal's decision is consistent with the Company's very own statements and the minimal impact of the strike on its operations, it cannot be said that the decision is not supported by substantial evidence.

E. FairPoint's Claims of Federal Preemption Were Squarely Rejected by the U.S. Supreme Court in 1979

This Court must reject FairPoint's argument that the state unemployment statute, or any particular interpretation thereof, is preempted by the National Labor Relations Act for the simple reason that the U.S. Supreme Court rejected this argument 39 years ago in in New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) ("N.Y. Tel.").

In short, FairPoint seeks to apply a federal preemption doctrine called Machinists preemption, which in general precludes state and local governments from affecting the relative economic and collective bargaining strength of parties to a labor dispute. See Machinists v. Wisc. Emp't Relations Comm'n, 427 U.S. 132 (1976). However, in N.Y. Tel., the Supreme Court unequivocally rejected application of Machinists preemption to unemployment statutes:

> Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments. ... [T]he fact that the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reason for concluding that Congress intended to pre-empt that exercise of state power.

Id. at 544-45; see also Baker v. Gen. Motors Corp., 478 U.S. 621, 634 (1986) (explicitly reaffirming N.Y. Tel., and rejecting the same argument the Employer is making here); Verizon New England, Inc. v. Rhode Island Dept. of Labor and Training, 723 F.3d 113, 118 (1st Cir. 2013) (in rejecting the same argument FairPoint makes here, court states that "Supreme Court precedent in New York Telephone could not be clearer...if anything, it is facially conclusive that New York Telephone precludes Verizon's preemption claim here") (emphasis added); Verizon New England Inc. v. Massachusetts Executive Office of Labor & Workforce Dev., 87 Mass.App.Ct. 1126 (2015) ("Whatever strength Verizon's argument possessed in 1976 is fatally diminished by a 1979 Supreme Court case holding States can maintain unemployment compensation systems.") (unpublished).

There is only one way in which the Supremacy Clause bears on this case. State v. Exxon Mobil Corp., 168 N.H. 211, 229 (2015) ("The federal preemption doctrine is

based upon the Supremacy Clause of the United States Constitution.") "When the United States Supreme Court has decided an issue of federal law, we must follow the case that directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions." State v. Addison, 165 N.H. 381, 419, 87 A.3d 1, 41 (2013) (internal quotations and citations omitted); see also State v. Melvin, 150 N.H. 134, 140, 834 A.2d 247 (2003) ("When interpreting federal law, ... we are bound by the United States Supreme Court's current explication of it."). Therefore, this Court must follow N.Y. Tel., and must reject FairPoint's claim of preemption.

F. The Strike Benefits Paid to the CWA Claimants Are Not Deductible Income

The New Hampshire unemployment statute allows one's maximum weekly unemployment benefit amount to be reduced by "wages and earnings" in excess of thirty percent of his or her weekly benefit amount. N.H. Rev. Stat. § 282-A:14 III(a). However, statutory and decisional authority are clear that a strike benefit issued by a union to its members is neither wages nor other deductible income under § 282-A:14. First, strike benefits are a supplemental insurance program as defined in § 282-A:3-a. Second, even if § 282-A:3-a does not apply, the strike benefit is neither a wage nor other deductible income, because as numerous other jurisdictions have recognized, it is more like the payment of an insurance benefit.

During the FairPoint strike, all members of CWA Local 1400 were eligible to receive strike benefits. CR.III. 7. The strike benefits came from the CWA Robert Lilja Members' Relief Fund ("the Fund"), which was set up by the national union for the relief of strikers and victims of collective bargaining, and for the defense of the union and the

workers who are its members. The Fund is financed by members with the legal right to strike, who pay approximately 50 cents per month into the Fund. CR.III. 5.

The Fund rules state that, subject to the availability of funds, members may receive $200 per week starting on the 15th day of the strike; $300 starting on the 29th day of a strike; and $400 on the 57th day of a strike. CR.III. 5. In addition to relief payments, the Fund also pays for medical and hospital costs for eligible striking members, and may provide payments to victims of collective bargaining strategies as determined on a case-by-case basis. CR.III. 289. Don Trementozzi, the president of CWA Local 1400 and the individual responsible for distributing the relief payments to eligible members, explained that the fund is "like an insurance policy." CR.III. 5.

According to the Fund's rules, strikers for the local union "shall be expected to do their fair share of strike duty, unless excused for just cause by the Local." CR.III. 290. Local 1400 members were generally expected to picket five days per week, but the picketing requirement was lowered over the course of the strike and some members were exempted altogether for reasons such as health. CR.V. 482-83. Members were not required to picket in order to receive the benefit. CR.III. 5. Sometimes members who could not picket would help the Union in other ways, such as at the office. CR.III. 5. Regardless of the amount or nature of union activity a member engaged in, all members received the same benefit amount stated in the rules of the Lilja Relief Fund. CR.III. 5-6.

According to the rules of the Fund, "no payments are authorized as compensation for picket duty or any other strike duty." CR.III. 288. The strike benefits were reported to the IRS on Form 1099, which covers non-wage income. CR.III. 5.

1. The Legislature has specifically excluded strike benefit payments by unions from the definition of "wages"

New Hampshire's unemployment statute specifically excludes from its definition of "wages" payments from a supplemental unemployment plan. N.H. Rev. Stat. § 282-A:14.III(a) ("'Wages' shall not mean and shall not include payments from a supplemental unemployment plan as defined in RSA 282-A:3-a"); N.H. Rev. Stat. § 282-A:15.II(b) ("The term 'wages' shall not mean and shall not include...[t]he amount of any payment made to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provisions for individuals in its employ generally or for classes of individuals in its employ...on account of...[a] supplemental unemployment plan"). The statute defines a "supplemental unemployment plan" as "a plan, system, trust or contract by the terms of which an individual will receive from the...union... payments supplemental to unemployment compensation or based on or to be paid in conjunction with unemployment compensation, which are available to the employees generally but not available in advance, in a lump sum or for loan, to be paid only during periods of unemployment..." N.H. Rev. Stat. § 282-A:3-a That is exactly what the Lilja Strike Fund is. The Fund provided lump sum payments during the period of unemployment, and were to have been paid in conjunction with unemployment compensation (had the benefit not been denied). The statute recognizes that there are certain forms of income that people may receive without having an effect on their unemployment benefits, and a union-paid benefit like this is one of them. Therefore, the N.H. Legislature has statutorily excluded payments by unions to their members during periods of unemployment, and the strike benefits that Local 1400 members received are therefore not deductible income.

2. The strike benefits were not remuneration for personal services.

Even if the Legislature had not excluded strike benefits from the definition of wages, it would still be improper to consider the strike benefits to be deductible income.

In McIntire v. State, the New Hampshire Supreme Court held that lockout[5] payments were not deductible from unemployment benefits otherwise due the plaintiffs." McIntire v. State, 116 N.H. 361 (1976) (citing Worcester Telegram Pub. Co. Inc. v. Dir. of the Div. of Emp't Sec., 347 Mass. 505, 513-14, 198 N.E.2d 892, 898 (1964); Kentucky Unemployment. Ins. Comm'n v. Louisville Bldrs. Sup. Co., 351 S.W.2d 157, 161-62 (Ky.Ct.App.1961); cf. Armstrong v. Adams, 113 N.H. 370, 308 A.2d 844 (1973)). The New Hampshire unemployment statute defines "wages" as "every form of remuneration for personal services paid or payable to a person directly or indirectly by his employing unit, including salaries, commissions, bonuses...and similar advantages estimated and determined in accordance with the rules of the commissioner of the department of employment security." N.H. Rev. Stat. § 282-A:15. In McIntire, the Court specifically stated that a fund created by contributions from union members' monthly dues and to which the employer did not contribute are not payments attributable to the employer as an "employing unit" and therefore do not constitute wages. McIntire, 116 N.H. at 366. New Hampshire is not alone in this opinion, as courts in other states have consistently found that payments from funds which employees themselves contribute cannot be deemed "wages" in accordance with unemployment statutes.[6]

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[5] A lockout is similar to a strike, in that it is the "withholding or cessation of furnishing work by an employer to his employees in order to gain a concession from them." Gorecki v. State, 115 N.H. 120, 123, 335 A.2d 647, 649 (1975). For these purposes, there is no material difference between payments during a strike or lockout, as illustrated by McIntire's citation to cases concerning strikes.

[6] Worcester Telegram Pub. Co. v. Dir. of Div. of Emp't Sec., 347 Mass. 505, 513-4 (1964) ("We adopt the view, taken by those courts which have considered the question,

The New Hampshire unemployment statute is clear that the remuneration must be for "personal services" performed on the employing unit's behalf. N.H. Rev. Stat. Ann. § 282-A:15 ("every form of remuneration for personal services"). The notion that the services must be for the employer's behalf is common to other state statutes. See e.g., M.G.L. ch. 151A § 1(s)(A) ("every form of remuneration of an employee...for employment by an employer"). To the extent that the union expected members to fulfill

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that strike benefits are not remuneration and that the claimants are not barred from receiving unemployment benefits by their receipt of strike benefits."); General Motors Corp. v. Bowling, 85 Ill. 2d 539, 545-46, 426 N.E.2d 1210, 1213; Radice v. N.J. Dept. of Labor & Indus., 4 N.J. Super. at 368, 67 A.2d at 315 (strike payments "came from a fund to which the [claimants] had contributed and might be analogized to savings funds or to private insurance for which they had paid the premiums"); Fox v. Mayfield, 43 Ohio App. 3d 12, 14, 538 N.E.2d 1077, 1079 (1988) ("reasonable minds could only conclude that the strike benefits [claimant] received were not wages from [union], but rather were a return of dues from an insurance fund which was meant to assist union members in a strike situation"); Florence Printing Co. v. NLRB., 376 F.2d 216, 220 (4th Cir. 1967) (no unjust enrichment where strike benefits and unemployment compensation are awarded because strike benefits were financed solely by the employees); Capra v. Carpenter Paper Co., 258 Minn. 456, 465, 104 N.W.2d 532, 539 (1960) (strike benefit payments from fund to which employees had contributed are not "wages"); Alaska Pulp Corp. v. United Paperworkers Intern. Union, 791 P.2d 1008, 1013 (Alaska 1990) ("Strike benefits are not wages paid to a worker for participating in a union demonstration, but part of the benefit package purchased with union dues. Even if payment of strike benefits is conditioned on participation in a union demonstration, the strike benefit is still a benefit, albeit a conditional one, not a wage."); Church Homes, Inc. vs. Conn. Unemployment Comp., Conn. Super. Ct., No. CV020814357S (June 16, 2006) (striking employees were in no way employees of the union and the benefits received came directly or indirectly from those same employees and were therefore not remuneration); Ky. Unemployment Ins. Comm'n of Com. of Ky. v. Louisville Builders Supply Co., 351 S.W.2d 157, 162 (Ky. 1961) ("an employee receiving strike benefits from his union is not in employment and the benefit are not wages for employment"); Tucker v. Assoc. Grocers, Inc., 473 So. 2d 328, 333 (La. Ct. App.) writ denied, 477 So. 2d 716 (La. 1985) ("'strike pay' is a benefit derived from union membership, presumably made available by dues paid into the union, and does not constitute "actual earnings."); United Steelworkers of America, AFL-CIO v. Doyle, 150 N.E.2d 334, 360 (Ohio Com. Pl. 1958) (supplemental unemployment compensation benefits, payable to eligible employees from fund established under a Supplemental Unemployment Benefit Plan and Agreement do not constitute 'remuneration' within the meaning and intent of the Ohio Unemployment Compensation Law ; the Plan "is a collective agreement to make contributions for the purpose of securing benefits in addition to those provided by the [Ohio Unemployment Compensation Law]").

their membership obligations by walking the picket line does not mean that picketing was a "personal service" performed for remuneration. The U.S. Supreme Court has long recognized that picketing is a right that is protected by Section 7 of the National Labor Relations Act. See, e.g., Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180, 225 (1978). Moreover, workers' exercise of these rights is for their own personal benefit because when union members picket, they are acting on their own behalf, and it is the employees who directly benefit from a union contract (which sets their wages, benefits and other terms and conditions of employment). The union was not paying its members to perform the "service" of picketing; instead, employees democratically decided (through their union constitution and bylaws) to pool their already-paid wages in order to provide insurance against unfair bargaining tactics like FairPoint's. The fact that there was a membership requirement to picket as a condition of receiving the benefit does not convert this benefit into a wage. Payment of the strike benefit was effectively a recoupment of wages previously set aside for a strike like this one.

In holding that payments from a strike fund were not "remuneration" paid for services rendered, the Massachusetts Supreme Judicial Court reasoned that a "strike benefit fund is in a sense an insurance arrangement," where the union members contributed their own funds in order to receive some amount of protection in the event of a strike. Worcester Telegram, 347 Mass. at 513-14 ("strike benefits are not remuneration and [] the claimants are not barred from receiving unemployment benefits by their receipt of strike benefits."); see also General Motors Corp., 85 Ill. 2d at 545-46; Radice v. N.J. Dept. of Labor & Indus., 4 N.J. Super. at 368 (strike payments "came from a fund to

which the [claimants] had contributed and might be analogized to savings funds or to private insurance for which they had paid the premiums"); Fox, 43 Ohio App. 3d at 14 ("reasonable minds could only conclude that the strike benefits [claimant] received were not wages from [union], but rather were a return of dues from an insurance fund which was meant to assist union members in a strike situation"). This is consistent with the understanding of Don Trementozzi, the union president. Like the CWA Relief Fund in the current case, the strike benefit policy in Worcester Telegram required the claimant union members to be "willing to do their share of strike duty" in return for strike payments.[7] The Mass. Supreme Judicial Court recognized that "[a]s in the case of some other types of insurance, the union member is required to cooperate with the union in carrying out its strike objectives, in aid of which strike benefits are paid. This seems more a condition of receiving the benefits than an employment. The strike benefits are not remuneration paid for services rendered in the sense in which the word 'remuneration' is ordinarily used." Worcester Telegram., 347 Mass. at 513-14 (internal citations omitted); see also Radice, 4 N.J. Super. at 368, 67 A.2d at 315 (assigned strike duties were "simply an exercise of Union discipline rather than an indication that the benefits were being paid as wages or remuneration for services rendered"); Fox, 43 Ohio App. 3d at 14, 538 N.E.2d at 1079 (control exercised by local union over its members during strike did not amount to controlling the manner and means by which strikers picketed and thus did not create an employer-employee relationship between members and the union).

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[7] The Strike Duty Policy of the CWA Robert Lilja Members' Relief Fund states, "All strikers for the Local shall be expected to do their fair share of strike duty, unless excused for just cause by the Local." Robert Lilja Members' Relief Fund Ground Rules, Section I.A.1, p. 9.

FairPoint takes the position that McIntire requires the Tribunal to consider the strike pay as deductible income because FairPoint union members were required to engage in or support union protest activities to be eligible for the benefit. The Court in McIntire observed that the employees in that case were not required to perform picket duty in order to receive the benefit. 116 N.H. at 366. FairPoint claims that this requires strike pay to be considered deductible income. The argument is flawed. First, McIntire was decided in 1976 and Section 282-A:3-a (which excludes union benefits from deductible income) was enacted in 1983. Thus, even if McIntire stood for the proposition that strike pay that is tied to union protest activity is deductible income, that rule clearly is no longer good law. Second, the Court never goes so far as to reach such a holding, and such a holding should not be inferred, particularly where it would go against the overwhelming weight of authority in other jurisdictions. As noted earlier, the labor dispute provisions of the unemployment compensation system are modeled after the national model. To consider strike benefits to be deductible income would be to arbitrarily veer from that overwhelming weight of authority.

The position that strike payments in this case are not remuneration for the performance of personal services is further supported by the fact that the payments are not related to the extent or value of the strike duties. The CWA members were expected to perform a certain amount of strike duty to get any benefit, all eligible members received the same flat benefit amount regardless of time spent picketing, and the benefits were not prorated depending on what the member did. Radice, 67 A.2d at 315; Wilkes-Barre Council of Newspaper Unions, Inc. v. Com., Office of Emp't Sec.. Dept. of Labor and Indus., 58 Pa. Commw. Ct. 1, 8, 426 A.2d 1294, 1298 (1981) ("an across the board

payment to all members regardless of the service performed, the education and experience of the member, or the amount of hours served does not comport with the normal understanding of 'wages'"); Church Homes, Inc. vs. Conn. Unemployment Comp., Conn. Super. Ct., No. CV020814357S (June 16, 2006), 2006 WL 1828393 (although strike payments required particular tasks to be performed in support of the strike, payments had few characteristics of wages where payments were not based on an hourly rate or a minimum period of service, or the skill or seniority of a member).

This is also the position taken by the Internal Revenue Service and the Social Security Administration, which have specifically concluded that strike benefits paid in a fixed amount—regardless of the value of any actual services performed—are benefits paid as a result of the union member's affiliation with the union and not remuneration for services performed by an employee for an employer. Rev. Rul. 68-424 (IRS RRU) 1968-2 C.B. 419 (strike benefits received by union members in a specified amount pursuant to provisions of union's constitution are not remuneration for services performed by an employee for an employer and are not wages for purposes of taxes); *compare with* Rev. Rul. 75-475 (IRS RRU), 1975-2 C.B. (where union pays striking members on an hourly basis based on 40-hour week and reduces payment for each hour eligible member does not complete strike assignments, strike payments may be "wages"); SSA HDBK § 1325 ("If you are on strike, strike benefits paid by your union generally do not count as wages. It does not matter whether or not you are on picket duty during the strike or are subject to call."); 2A Soc. Sec. Law & Prac. § 28:16 (strike benefits do not count as earnings unless the recipient is a union *employee* actually performing picket or other strike duty).

In sum, the strike benefit is not a wage for a service performed on the union's

behalf. Rather, union members had collectively pooled their wages so that there would be a benefit in the event of a strike. This insurance-like benefit is not a wage or other deductible income.

III. Conclusion

For the reasons stated above, the CWA Claimants request that this Court affirm the decision of the Appellate Board in its entirety.

ORAL ARGUMENT

The CWA Claimants request oral argument by Attorney James A.W. Shaw.

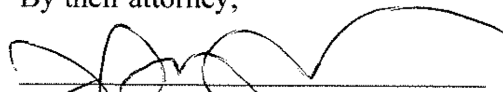
CERTIFICATE OF COMPLIANCE WITH RULE 16(3)(i)

I certify that the written decision appealed from is included in the attached addendum.

Respectfully submitted,

CLAIMANTS REPRESENTED BY
COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1400

By their attorney,



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Dated: February 9, 2018

CERTIFICATE OF SERVICE

I, James A.W. Shaw, hereby certify that on February 9, 2018, I provided two true copies of the forgoing document via certified mail, return receipt requested, upon the following:

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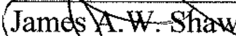
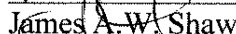


James A.W. Shaw

CERTIFICATE OF COMPLIANCE

I certify compliance with Rule 26(2), (3), and (4) of the Rules of this Court.



James A.W. Shaw

State of New Hampshire
DEPARTMENT OF EMPLOYMENT SECURITY
APPELLATE BOARD
45 SOUTH FRUIT STREET
CONCORD NEW HAMPSHIRE 03301-4857

James E. Townsend, Chairman
Thomas P. Mullins, Vice Chairman
Fred Keach
Dick Anagnost
William K. Clayton
Angela T. Finney
Susan Ender
Jeffrey Duval

APPELLATE BOARD DECISION
APPEAL OF FAIRPOINT LOGISTICS INC./CROSS-APPEAL OF LABOR UNIONS CWA AND IBEW et al.
DOCKET #0053-16, 0054-16, 0055-16, & 0056-16

(A) PARTIES

1. CLAIMANT: April Broderick, xxx-xx-7173
Claimant-Appellee

Tina Sargent, xxx-xx-7268
Claimant-Appellee

Stephanie Hanscom, xxx-xx-5555
Claimant-Appellee

David Duhamel, xxx-xx-9996
Claimant-Appellee

2. EMPLOYER: Northern New England Telephone Operations LLC and FairPoint Logistics, Inc.
Employer-Appellant

3. DEPARTMENT OF EMPLOYMENT SECURITY:
Karen Levchuk, Esquire

(B) CASE HISTORY

1. TYPE OF CLAIM: RSA 282-A: 36 Labor Dispute
Whether the claimants are involved in a labor dispute that resulted in a stoppage of work

RSA 282-A: 14 Total and Partial Unemployment
Whether the claimants received strike pay that is deductible income

2. LOCAL OFFICE: Manchester

3. WEEKS AT ISSUE: The Appeal Tribunal allowed benefits in regards to whether the claimants' total or partial unemployment is due to a stoppage of work which exists because of a labor dispute. The Appeal Tribunal reduced or denied benefits due to the receipt of strike pay.

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4. APPEALED FROM: Appeal Tribunal Decision 14-03458, 14-03451, 14-03472, 14-03493
Sandra Mooney, Chairman

5. COMMISSIONER'S DENIAL OF REQUEST TO REOPEN-
DATED: December 15, 2016

6. DATE OF APPEAL TO APPELLATE BOARD: December 30, 2016
HEARING: March 31, 2017

7. APPEARANCES: Attorney Arthur Telegen represented Northern New England Telephone Operations LLC and FairPoint Logistics, Inc., Employer-Appellant; Attorney James Shaw and Shawn LeBlanc, Staff Member, represented Communications Workers of America (CWA); Attorney Peter Perroni and Steven Soule, Business Manager, represented International Brotherhood of Electrical Workers (IBEW); Attorney Karen Levchuk and Attorney Lon Siel represented the Department of Employment Security.

(C) DECISION:

PROCEDURAL HISTORY

The Parties appeal a decision of the Appeals Tribunal ("AT") Chairman, Sandra Mooney, issued on November 19, 2015, (R-Volume II, pp 231-235). The case has a protracted history and arises in the context of a strike by two unions representing approximately 1600 FairPoint workers in Maine, New Hampshire, and Vermont during the winter of 2014-15, including 650 from New Hampshire.

The issues discussed below were the subject of two separate AT de novo hearings, pleadings, cross-pleadings, and administrative rulings by the Commissioner as well as pre-trial hearing correspondence from AT Chair Mooney, giving notice of the legal standards which were ordered by the Commissioner to be applied. (Record, Volume I)

FairPoint appeals her ruling that the claimants, who were on strike from October 17, 2014 to February 25, 2015, were entitled to benefits because, pursuant to RSA 282-A: 36 FairPoint had not demonstrated that the strike caused a "stoppage of work" as defined by case law and standards articulated by the Commissioner of the Department of Employment Security. FairPoint also argued that the Commissioner had exceeded his statutory authority to reopen the first AT decision because there was no fraud, mistake, or newly discovered evidence, in setting aside an earlier decision of the AT, by Chairman Kevin Croce, issued on April 13, 2015 (R-Volume V, pp. 1-9), in favor of FairPoint. A third argument was that FairPoint's due process rights under the New Hampshire and U.S. Constitutions had been violated, including the doctrine of Federal Preemption.

The claimant CWA filed a Partial Cross-Appeal based upon the AT ruling that their "strike pay" from their own strike benefit fund reduced the amount of their eligibility for unemployment benefits, pursuant to RSA 282-A: 14 III, and RSA 282-A:15. Both AT decisions had ruled against CWA on this point. The other union did not have or use a strike pay fund.

The Department of Employment Security ("The Department") argues that the AT was correct on the issue of "Work Stoppage", decided in favor of the unions, and on the issue of strike pay, decided in favor of FairPoint.

The record we have reviewed includes over 2200 pages of text, including transcripts of both AT de novo hearings, 4.5 hours of recorded testimony from the Mooney hearing, and pleadings submitted in connection with the Appellate Board oral arguments. We believe from all this that there are essentially three issues which we must decide:

LEGAL ISSUES

A. Did the administrative ruling(s) of Commissioner Copadis constitute legal error. This involves a consideration of the Commissioner's powers under RSA 282-A: 60-61 and the requirements of Due Process under the State and Federal Constitutions.

B. Did the ensuing decision of AT Mooney properly apply the law on the issue of "work stoppage";

C. And/or did the Mooney AT decision properly apply the law on the issue of so-called "strike pay".

DISCUSSION

A. Consideration of the Commissioner's powers and duties under RSA 282-A: 60-61.

After Chairman Croce issued his decision favorable to FairPoint, the unions filed pleadings seeking to reopen, (R-Volume I, pp. 148-207) and FairPoint objected. (R-Volume I, pp.127-9) The Commissioner did reopen, and issued a decision in which he set forth the legal standard which applied, and ordered a new de novo hearing before a new hearing officer. (R-Volume I, pp.138-146) FairPoint had argued inter alia, that in New Hampshire, unemployment caused by a labor dispute was "generally considered voluntary and disqualified the employees from unemployment benefits."(R-Volume V, p.181), or that if the AT were to delve into the substantive issue of whether the strike caused a work stoppage under RSA-282-A:36, this would run afoul of the NLRA, under the constitutional doctrine of federal preemption.(R-Volume V, pp. 182-186)

The issue is whether the Commissioner exceeded his legal authority under RSA 282-A: 60-61. Despite FairPoint's counsel's elegant and well-crafted argument, we believe that Commissioner Copadis had the authority to rule as he did, and, in fact, had this been presented to us directly we would have adopted the same legal analysis, namely, that FairPoint, in seeking to have the strikers found ineligible for benefits, was obligated to prove that the strike had caused a "substantial curtailment" of its business, rather than simply a "negative impact."

FairPoint's reliance on the recent Supreme Court case, Appeal of Annelie Mullen II, 149 A.3d 1270 (NH 2016) provides no support for its claim that the Commissioner exceeded his statutory authority or violated FairPoint's due process rights. By law, any party seeking to appeal an AT ruling may pursue reopening relief from the Commissioner before coming to the Appellate Board, and in this case the unions invoked his review, whereas in Mullen II it was SUA SPONTE. Further, the Supreme Court in Mullen II expressly validated the Commissioner's adjudicatory role in this process, to correct errors and streamline review. FairPoint also argues that RSA 282-A: 60 limits the Commissioner's review to mistakes of fact, not law.

The statute, however, simply states: "The second level of appeal shall be to the Commissioner.(He..may..) reopen the case on the basis of fraud, mistake, or newly discovered evidence." (RSA 282-A, excerpts) This stage of the proceedings may legally be required to be exhausted before any party can appeal to us for review. (NH Attorney General Opinion No. 82-15-F, June 24, 1982) The statute doesn't say what kind of mistake. It says mistake. This is as broad a formulation as may be given, and we believe that our court has deemed this language broad enough to include the category of mistake that impelled the Commissioner to issue his determination here. The Webster's Dictionary definition of MISTAKE is entirely appropriate where, as here, AT Chair Croce confessed that he lacked guidance on the pivotal issue:

"MISTAKE; 1.A wrong judgment: misunderstanding;
2. A wrong action or statement proceeding from faulty judgment;
3. Inadequate knowledge or inattention." Webster's Dictionary, Merriam ed.

This broad understanding of mistake is reflected in our case law, as well as the statute. Appeal of Pelleteri, 152 N.H. 809 (2005).

It would be an impaired agency head if this seemingly broad obligation to review/correct rulings of the AT were not construed to allow for full consideration of all AT rulings, including those dealing with case law and burden of proof. Where, as here, the result of the review is to start over de novo with a new Appeals Tribunal Chair, allegations of due process violations prior to the actual hearing are generally of academic interest, only, unless there is a claim that discovery was hampered, witnesses were tampered with, or there was insufficient notice to the parties on relevant issues, etc., prior to trial, none of which is in play here.

FairPoint's assertion that in instructing the AT of the proper legal standard to apply, the Commissioner was guilty of bias and seeking to reverse the outcome from the first AT ruling is without merit and not proven.

Indeed, we commend the process followed by AT Chair Mooney in engaging in useful pretrial discovery and communications to simplify issues, obtain a stipulation of uncontested facts, and satisfy perceived pretrial obligations. (R-Volume I, Pre-Hearing Record, AT Chair, Sandra Mooney, R-Volume I, pp.1-231). We also commend AT Chair Croce for following a similar path in preparation for the first hearing. (R-Volume V,. pp. 134-5), ill-fated though it was by failure to understand/apply the case law on proof of work stoppage. Both hearing chairs have exemplified high standards for the conduct of administrative law hearings.

The issue of preemption by federal labor law is similarly without merit, and has been since the Supreme Court ruling in New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519, 544-45 (1979). We rule that the Commissioner did not exceed his statutory authority to reopen or commit reversible error of law, nor did he violate the employer's rights to due process under the New Hampshire and/or U.S. Constitution.

B. The legal standard for eligibility in a labor strike case. ("Negative Impact" vs "Substantial Curtailment", a/k/a "The American Rule")

The operative statute is RSA 282-A: 36:

"A person shall be disqualified for benefits for any week with respect to which the commissioner finds that his or her total or partial unemployment is due to a STOPPAGE OF WORK which exists because of a LABOR DISPUTE at the factory, establishment, or other premises at which he or she is or was last employed..."

The cited section of the statute has not been considered in our context yet by the Supreme Court. Perhaps this is because private sector unions, and union job actions, are about as common in New Hampshire as alpine ski areas without snowmaking. The closest case law deals with the lockout provision, RSA 282-A: 36 II-a, construed in Appeal of Simplex Wire & Cable, 1131 NH 40 (1988), and McIntyre v State, 116 NH 361 (1976). There is additional helpful legal analysis in the Commissioner's comprehensive and well-presented legal discussion on December 15, 2016, (Record II, pp. 1-15).

As requested by FairPoint's counsel, we have carefully reviewed and compared both AT decisions, and we agree that Chairman Croce, despite his more extensive discussion, applied the wrong legal standard. Chairman Croce begins by stating his conclusion that the claimants were unemployed because of a stoppage of work...and that he was NOT going to adopt the "substantial curtailment" standard, the so-called "American Rule" asserted by the unions. (Croce decision, R-Volume V, p. 6). The American Rule is the law in a majority of states that have considered it (CWA Memorandum of Law R-V pp. 9-12, IBEW Brief, Volume II, pp. 341-384).

The underlying rationale for creating a negative implication from RSA 282-A: 36, namely, that unless it is a true Work Stoppage, the strikers will be eligible for benefits, appears to be that being on strike is not the same as a voluntary quit, ie that the employees walk out due to actions or threatened actions of the employer, here, substantial benefits concessions. As FairPoint Executive V.P. Peter Nixon, testified:

"We knew that we would be asking for significant concessions and work rule flexibility (when the labor contract expired) as part of our negotiations. We therefore felt there was a high probability of a strike. We started planning for that eventuality in 2013." (R-Volume II, p.34 as page 62 of transcript)

Therefore, under the American Rule, unless the employer can prove that the strike resulted in substantial harm to its bottom line, unemployment benefits to its temporarily unemployed work force should be available. This is precisely the legal standard which the Commissioner rightfully ordered to be applied.

The fact that Chairman Croce gave lip service to the proper standard elsewhere in his decision, does not alter our opinion. He stated clearly: "The Chairman declines to create such a definition in the absence of guidance from the law, rule, or case law." (R-Vol. 5, p. 6 excerpts). If a judge or magistrate is ignorant of the legal standard he or she is charged with applying to the facts, the hearing or trial becomes a fool's errand. The record presented by FairPoint failed to satisfy its burden of proof using the Substantial Curtailment standard at either of the two AT proceedings.

The cross-examination by attorney Shaw, in particular, of FairPoint's chief witness Peter Nixon amply demonstrated the weakness of FairPoint's evidence. (R-Volume II, pp. 575-577). Mr. Nixon repeatedly admitted that "It was hard to quantify the impact" and/or to separate out that was due to the weather vs the strike. One could properly infer that FairPoint held back more precise information on economic impact factors because it did not show that the impact had been substantially detrimental to its bottom line.

The record included a FairPoint press release, published a month into the strike, and which claimed that "productivity is well above pre-strike levels despite being hampered by aggressive and disruptive picketing, sabotage and extraordinarily bad weather…The majority of Backlog of orders is directly associated with the extreme weather...four major storms in 50 days." (R-Volume IV, p 39). We find that AT Mooney properly and clearly applied the applicable law to the facts before her and that her decision on the issue of Work Stoppage is amply supported by the record.

C. Strike Pay Exclusion

The AT decision on appeal to us (as well as the Croce decision) ruled that the weekly strike pay benefit enjoyed by CWA members should be used to reduce its members' unemployment benefits under RSA 282-A:14 III (a) as this was deemed to be "double income". (AT decision of 11-19-16, RII, p. 235) The Commissioner shared this view. We respectfully disagree, and REVERSE.

While there are aspects of the Lilja Members' Relief Fund ("the Fund") which make its payout to striking members resemble wages, under RSA 282-A:15, it is beyond dispute that the source of the Fund is its own union members, out of their own pay. The Fund is not their employer. They are not self-employed. In McIntyre v State, 116 NH 361 (1978), our Court held in a lockout situation which made the workers locked out eligible for benefits that monies received from the fund they created from their union dues was not payment attributable to an employer, ergo not wages, and the same sort of construction should apply to the concept of self-employment. The striking workers had self-imposed conditions to their eligibility for the strike pay, ie hours spent on the picket line etc., but this is simply not "self-employment" and it would reward form over substance to rule that payment to strikers from funds which they themselves contributed from previous earnings/savings should be considered "wages". Applicable case law is catalogued in the pleading captioned "Appeal of CWA," (R-Vol. I, pp.25-29), including Worcester Telegram Pub Co v. Director of Division of Employment Security, 387 Mass. 505, 514 (1964):

"We adopt the view, taken by those courts which have considered the question, that *strike benefits are not renumeration* and that *claimants are not barred from receiving unemployment benefits by their receipt of strike benefits*", (Worcester Telegram, supra, at 514, emphasis added)

RULINGS

Accordingly, the decision of the Appeal Tribunal is AFFIRMED as to its decision to award benefits using the "Substantial Curtailment" or "American Rule" interpretation of RSA 282-A:36, and REVERSED as to its decision to reduce said benefits because of receipt of so called "strike pay" benefits from its strike benefit fund.

SO ORDERED

Signed: James E. Townsend, Chairman
Concurring: Bill Clayton
Angela T. Finney

Dated: April 17, 2017