THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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 ADMINISTRATIVE AGENCY
NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY

BRIEF OF PETITIONERS/APPELLANTS

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A. Whether the Commissioner acted in excess of the authority accorded him by RSA 282-A:60 when ordering the *de novo* hearing on the grounds that the first Tribunal made a "mistake"? [CR Vol. I at 29-32, 109-17].

B. If a "substantial curtailment" standard is adopted as the proper interpretation of RSA 282-A:36, as a matter of law, whether such a standard necessitates: an evaluation of the work normally performed by the strikers that was not performed because of the strike; consideration of an employer's status as a public utility; and consideration of the realities as to how the work normally performed by the workers is performed? [CR Vol. I at 32; CR Vol. II at 261-70].

C. Whether RSA 282-A:36, should be interpreted to avoid a constitutional question and preemption by the National Labor Relations Act, in violation of the Supremacy Clause of the United States Constitution? [CR Vol. I at 33-34].

D. Whether the second Tribunal's findings, inferences, and conclusions were clearly erroneous in view of the substantial evidence on the whole record that a stoppage of work occurred as a result of the labor dispute? [CR Vol. I at 32, 124-25].

E. Whether the Appellate Board erred as a matter of law when it concluded, contrary to the Commissioner and both Appeal Tribunals, that strike pay is not deductible income for purposes of RSA 282-A:14? [CR Vol. I at 34-35].

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

These materials are set forth in the Appendix that accompanies this brief.

STATEMENT OF THE CASE

This case arises out of a strike of FairPoint's[1] unionized workforce in New Hampshire, Maine, and Vermont. On October 17, 2014, approximately 650 of FairPoint's New Hampshire employees represented by the International Brotherhood of Electrical Workers, Local 2320 ("IBEW") and the Communications Workers of America, Local 1400 ("CWA") (collectively, the "Unions") went on strike. The strike lasted over four months and included all of FairPoint's skilled technicians. Despite the employees' voluntary decision to stop working, the striking workers applied for unemployment benefits. Whether these workers are entitled to benefits depends upon whether there was a "stoppage of work." *See* RSA 282-A:36.

[1] "FairPoint" refers to Northern New England Telephone Operations LLC and FairPoint Logistics, Inc., collectively.

Between November 5 and November 13, 2014, Certifying Officers of the Department of Employment Security (the "Department") determined that the Claimants were ineligible for benefits because their unemployment was due to a labor dispute that resulted in a "stoppage of work." *See* RSA 282-A:36; CR Vol. VI at 66, 147, 234, 324.[2] The Claimants appealed that determination to the Appeal Tribunal. CR Vol. VI at 69, 150, 238, 326.

After a first hearing on this matter, the first Appeal Tribunal ("the first Tribunal") determined that the striking workers were disqualified from receiving benefits because there was a "stoppage of work." *See* Add. at 6.[3] After observing that what is a "stoppage of work" is unsettled in New Hampshire, the first Tribunal made alternative findings: (1) that the Claimants were disqualified because they stopped working because of a labor dispute; and (2) that the Claimants were disqualified because the strike substantially curtailed FairPoint's operations. *See* Add. at 6-9. In support of his rulings of law, the first Tribunal made factual findings regarding the strike's effect on marketing, servicing new customers, revenue, infrastructure development planning, strategic and tactical planning, elevated trouble loads and weather-related repairs, and customer complaints -- all factors relevant to an analysis of whether there was a substantial curtailment of FairPoint's operations. *Id.* The first Tribunal "separately conclude[d] that the union members' strike pay is deductible wages under RSA 282-A:14." Add. at 9.

The Claimants moved to re-open the case, contending that the first Tribunal should have been swayed by their arguments that New Hampshire must adopt the reasoning of extra-jurisdictional case law. The Commissioner granted those requests.[4] *See* Add. at 11-19. The Commissioner analyzed the limited case law in New Hampshire and cases from other jurisdictions interpreting "stoppage of work," and decided that the first Tribunal was in error

[2] Citation to the Certified Record takes the form "CR Vol. X at __."
[3] Citation to the Addendum takes the form "Add. at __." Decisions included in the Addendum are cited to therein.
[4] Without questioning the first Tribunal's separate analysis regarding strike pay, the Commissioner nonetheless re-opened that issue as well because the issue was "intertwined with other issues presented." Add. at 19.

when he concluded that a "stoppage of work" refers to the cessation of work by the employee because of a strike. Add. at 16-17. The Commissioner then decided that the correct standard to be applied is whether there is a "stoppage or curtailment of the employer's operations." Add. at 16. Although the first Tribunal had applied this alternative standard in his decision and spent the bulk of his decision analyzing whether there was a substantial curtailment of FairPoint's operations, the Commissioner found that the "alternative finding on substantial curtailment is affected by mistake of law based on the fact that no standard was articulated." Add. at 17. FairPoint maintained then, and has maintained since, that the Commissioner exceeded his limited authority by rejecting the first Tribunal's decision and ordering the case re-opened.

Nevertheless, a *de novo* hearing was held on September 29, 2015, with the second Tribunal replacing the first Tribunal. *See* Add. at 26. Once again, FairPoint presented evidence demonstrating that the strike had its intended effect of significantly curtailing FairPoint's business. During the strike, FairPoint expended enormous effort to reallocate its management workforce and, at great expense, to hire contractors to perform the strikers' work. Even with this expenditure of money and resources, FairPoint could only meet its responsibility and regulatory obligations to maintain service for its customers at a significantly impaired level. In addition, to prioritize its existing customer service, FairPoint had to largely stop critical revenue-producing activities.

The second Tribunal disregarded much of the evidence FairPoint presented and, by decision dated November 19, 2015, reversed the Certifying Officer's initial determination and granted the strikers benefits. *See* Add. at 21-26. Despite the Commissioner's assertion that the first Tribunal failed to articulate a standard, the second Tribunal's full articulation of the standard consisted of first referencing it as "substantial curtailment of business" and then "substantial

curtailment of work," yet no more. Add. at 25.[5]

FairPoint brought a motion pursuant to RSA 282-A:60, asserting that the Commissioner exceeded his statutory authority in ordering the *de novo* hearing, that the second Tribunal rejected FairPoint's evidence for no legally plausible reason, and that there was in fact a stoppage of work. *See* CR Vol. I at 241-46. Accordingly, FairPoint moved to vacate the second Tribunal's decision and to reinstate the first Tribunal's decision. *Id.*

Over a year later, on December 15, 2016, the Commissioner responded to FairPoint's request. Therein, the Commissioner: (1) decided that he acted within the scope of his statutory authority when he chose to vacate the first Tribunal's decision and order a *de novo* hearing; (2) repeated extra-jurisdictional case law cited in the Claimants' briefs regarding the stoppage of work standard; and (3) upheld the second Tribunal's decision. *See* Add. at 28-42. Despite the fact that the first Tribunal stated he was analyzing whether there was a substantial curtailment of FairPoint's operations, and that he in fact analyzed factors later articulated by the Commissioner as appropriate for such an analysis, the Commissioner characterized his determination as a "negative impact" analysis. Add. at 30 n.6. The Commissioner also critiqued the first Tribunal's decision by stating he did not rely upon internal NHES Directive No. 340-17, which lists factors that the first Tribunal more or less addressed in his rulings of law. Add. at 30 n.5. No party had suggested to the first Tribunal that the Directive was relevant.

Pursuant to RSA 282-A:65, FairPoint appealed to the Appellate Board (the "Board"). FairPoint again averred that the Commissioner exceeded his statutory authority when he re-opened the case on the basis of a purported "mistake of law," that the standard for "stoppage of work" advanced by the Commissioner was unfounded in New Hampshire precedent, that its

[5] As had the first Tribunal, the second Tribunal found that the "employees had to perform strike duty to be eligible for strike pay," and thus the strike pay was deductible wages within the meaning of RSA 282-A:14. Add. at 26.

evidence demonstrated a stoppage of work no matter the standard employed, and that such an interpretation would be preempted by the Supremacy Clause of the United States Constitution because it improperly encroached upon federal labor law. *See* CR Vol. I at 105-26. Moreover, FairPoint opposed the CWA Claimants' appeal to the Board, in which they argued that both Tribunals and the Commissioner erred when concluding the strike pay that CWA Claimants received in exchange for performing services for the CWA during the strike should not count as compensation for purposes of RSA 282-A:14. *See id.* at 128-33.

The Board held a hearing on March 31, 2017, at which the parties[6] presented extensive oral arguments. CR Vol. I at 135. On April 17, 2017, the Board affirmed the second Tribunal's award of benefits, but reversed the decision to reduce benefits because of the strikers' receipt of strike pay. Add. at 43-50.

In so doing, the Board stated that the scope of review afforded the Commissioner under RSA 282-A:60 should be "construed to allow for full consideration of all [Appeal Tribunal] rulings, including those dealing with case law and burden of proof." Add. at 46. Yet the Board failed to explain how that construction was supported by the statutory language, the statutory scheme, canons of statutory construction, and was consistent with this Court's recognition of the limits of the Commissioner's scope of review in *Appeal of Mullen*, 169 N.H. 392, 400 (2016) ("*Mullen II*"). The Board further noted that *Mullen II* was distinguishable because there the Commissioner sua sponte re-opened the decision, whereas here it was re-opened at the request of the Claimants. Add. at 46.

Moreover, the Board ruled that it was correct to require FairPoint to prove a substantial curtailment of operations in order to demonstrate that there was a stoppage of work under RSA 282-A:36. Add. at 47-48. While the Board nonetheless deemed that requirement appropriate, it

[6] Counsel for the Department was present at the proceedings before the Board.

evaluated that requirement erroneously by unduly focusing on economic factors, going so far as stating that the test requires "harm to the bottom line." Add. at 48. In so doing, the Board did not square its opinion with the unrebutted evidence of the substantial impact across FairPoint's operations, particularly the evidence demonstrating: (1) FairPoint's limited ability to replace the striking workers and the work they performed; (2) the construction, installation, and marketing work that was significantly curtailed; (3) the significant impairment of FairPoint's repair activity; (4) wholesale customers lost to competitors, limiting current and future revenue streams; and (5) the significant increase in customer complaints. Add. at 47-49.

Moreover, while the Board, relying upon *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979), summarily dismissed FairPoint's argument as to federal preemption, it did not explain how a state unemployment statute that rewards strikers with benefits based upon the effectiveness of their strike does not improperly interfere with federal labor law. *See Machinists v. Wisconsin Emp't Relations Comm'n*, 427 U.S. 132, 144 (1976) ("For a state to impinge on the area of labor combat designed to be free is . . . an obstruction of federal policy.") (citation omitted); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 619 (1986) ("*Golden State I*"); Add. at 47.

Finally, the Board adopted one of two competing views regarding strike pay, and deemed the strike pay at issue here as non-deductible. Add. at 49. However, it declined to square its decision with the factors identified by this Court in *McIntire v. State*, 116 N.H. 361, 366-67 (1978), with the fact that here, the Union bylaws provided strike pay not be paid to anyone who refuses the duty assigned to him and where the Union president testified that strikers who did not perform their fair share of duties would not receive strike pay. *See* Add. at 49.

FairPoint filed a motion for reconsideration of the Board's decision. *See* CR Vol. I at 27-37. The Board denied that motion. Add. at 52. This appeal followed.

STATEMENT OF THE FACTS

I. FAIRPOINT'S BUSINESS

FairPoint is a regulated telecommunications company that provides voice and broadband (internet) services to residential customers, business customers, and wholesale customers. CR Vol. III at 12(39).[7] Most of FairPoint's business is providing phone and internet services to residential and business customers, and thirty percent is its wholesale business, where FairPoint allows other carriers to utilize its network to provide service to the end user. *Id.* at 13(41).

Since entering the New England market in 2008, FairPoint has faced increasing competition due to deregulation and rapidly advancing technologies, decreasing its traditional revenues. *Id.* at 10(30-32), 13-14(44-46). FairPoint entered this market because it believed that it could enhance the existing business by investing in broadband infrastructure, thereby creating a future revenue stream. *Id.* at 10(32). FairPoint also believed that it could capitalize on the area's low business penetration by increasing the marketing and sale of new products to be deployed over the broadband network. *Id.*

In order to recoup its investment, it is critical that FairPoint increase its customer base, particularly its large business customers and wholesale customers. FairPoint's residential landline business is in decline, reduced by 7-9% each year. *Id.* at 15(50-51). At a time when many residential customers are "cutting the cord," abandoning their landline telephone service, FairPoint's survival depends on its ability to replenish its revenue with new business. *Id.* In particular, in order to remain a viable enterprise, FairPoint needs to grow its wholesale business. *Id.* To that end, FairPoint typically puts 30-40% of its capital budget towards growing its network. *Id.* at 19(67). Without investment into its infrastructure, FairPoint cannot create new

[7] The Certified Record contains the condensed transcript of the *de novo* hearing before the second Tribunal, which includes four transcript pages per Certified Record page. The page numbers in parentheses specify the condensed transcript page(s) cited to.

revenue to replace the revenue it is losing. *Id.*

Because of the strike, FairPoint drastically cut back on its infrastructure investment. *Id.* Comparing the months of the strike in 2015 to the amount of investment made during those same months in 2014, FairPoint reduced investment by $5.7 million. *Id.*

FairPoint also faces stiff competition from other telecommunications providers and cable companies. *Id.* at 14(45-48). FairPoint's ability to be competitive in the current market "depends upon service, depends upon price, it depends upon value." *Id.* at 14(45). FairPoint has to offer competitive rates for its services or customers can, and often will, take their business elsewhere. In addition, FairPoint must provide its existing customers with a positive experience to avoid losing the market to its competitors. A poor customer experience results not only in the loss of that particular customer but often can also dissuade that customer's friends, family, neighbors, and nearby businesses from subscribing to FairPoint services.

All the while, FairPoint's responsibility to provide service to its current customers limited its ability to maximize its profits. *Id.* at 14-15(48-49). As a federally-designated "provider of critical infrastructure" FairPoint is obligated to deliver service to anyone in its service area and to keep its network operating even in times of emergency, whether that emergency is a storm, a strike, or otherwise.[8] *Id.* at 13(43). FairPoint does not "have the luxury of turning off the switch, walk[ing] out the door, and shuttering the facility." *Id.* While new installations generate additional revenue for FairPoint, repairs to existing services do not provide revenue. CR Vol. V at 251-52. To the contrary, any repair is an expense for the Company. *Id.*

II. FAIRPOINT'S WORKFORCE

The IBEW is the dominant telecommunications union in New Hampshire and represents

[8] As a "carrier of last resort," the state of New Hampshire obligates FairPoint to provide telephone service to any customer in its service area. CR Vol. III at 17(59-60). As a provider of "critical infrastructure," FairPoint is obligated by the Federal Communications Commission to keep its network running and operating in times of emergency. *Id.* at 13(43).

employees whose job responsibilities include building, installing, maintaining, and repairing FairPoint's network and equipment. *Id.* at 223-29. IBEW-represented employees are primarily technicians, including splice service technicians, outside plant technicians, equipment installation technicians, and central office technicians. *Id.*; CR Vol. III at 87. Most other IBEW-represented employees support the employees who build, install, maintain, and repair the network. *Id.*

There are thirty-five CWA-represented employees working for FairPoint in New Hampshire. *Id.* All but one of the thirty-five are call center service representatives who work in a non-customer facing offline call center. CR Vol. III at 37-38(140-41).

III. THE STRIKE

The terms and conditions of employment for FairPoint's unionized workforce are governed by collective bargaining agreements between FairPoint and the IBEW and CWA. *Id.* at 85. At 11:59 p.m. on August 2, 2014, the collective bargaining agreements expired. CR Vol. V at 74. Nonetheless, between August 3 and October 16, the Claimants continued to work without a contract. But on October 17, 2014 both Unions struck without notice. *Id.* at 69-70. Virtually all of the unionized employees walked off the job and did not return to work until February 25, 2015. *Id.* at 339-40.

While on strike, the CWA compensated its striking members by paying "strike pay" to those who did their "fair share of strike duty" by picketing or performing some other service on behalf of the union. CR Vol. III at 287-93, 6(16). Eligible CWA strikers received $200 a week after the first 15 days of the strike, $300 a week after the first 29 days, and $400 a week after the first 57 days. *Id.* at 289, 5(10). CWA members who were not actively striking, whether they crossed the picket line or were elsewhere, did not receive strike pay. *Id.* at 5(10-11), 7(17). IBEW strikers did not receive strike pay. *Id.* at 4(8).

IV. THE STRIKE'S EFFECT ON FAIRPOINT'S BUSINESS

The strike's effect on FairPoint's business was significant in terms of the reduction of its capacity to do its work and the adjustments FairPoint had to make to its business strategy and its daily operations. Understanding a strike was possible, FairPoint developed a contingency plan, which required it to bring on contractors and assign some of its own managers to perform the strikers' work. *Id.* at 18(62-64). The hope was to provide "reasonable service" for its existing customers and, accordingly, repair services were prioritized and revenue-generating installations were not. *Id.* To that end, aggressive marketing activities were halted when the Unions authorized a strike in the summer of 2014. CR Vol. V at 342.

Because of the strike, investment into discretionary capital projects was drastically reduced, all but critical construction ceased, and preventative maintenance that would have improved its network was halted because there was insufficient manpower to perform these functions. CR Vol. III at 19(67). In addition to the disruption to FairPoint's operations, the response to the strike cost FairPoint approximately $63 million and resulted in an estimated 50% reduction to FairPoint's free cash flow. *Id.* at 36-37(136-40).

The Unions struck for a reason. As demonstrated below, installation of new services almost ceased, the time it took to complete repairs increased dramatically, and revenue decreased. Moreover, because of FairPoint's reduced workforce, it ceased activities to increase its revenue.

A. The Number of Skilled Employees Available to Perform Work During the Strike Was Significantly Reduced.

The strikers included all of FairPoint's skilled technicians. To maintain reasonable service for its existing customer base, FairPoint utilized management employees and hired contractors to perform some of the strikers' work. CR Vol. V at 242-43. As the majority of those contractors were not local, the contractor workforce was ramped up during the first few

weeks of the strike. CR Vol. III at 18(63), 19-20(68-69). At no point did FairPoint's contingent workforce equal the number of striking workers. *Id.* at 20(70).

Unrebutted evidence showed the gross hours spent on the strikers' work before and after the strike. *Id.* at 27-28(100-01), 87. Both the manager force and the contractors were working twelve-hour days, six days a week. CR Vol. V at 243. Even at this pace, their total hours did not reach the number of total hours the unionized employees worked before the strike (including regular overtime) because the contingent workforce was smaller than the union workforce. CR Vol. III at 89. The contingent (managers and contractors) workforce averaged between 80-110 individual workers in New Hampshire during the strike compared to FairPoint's normal complement of 161 union workers that performed field work. *Id.* at 20(70). Not only were there fewer hours worked, but the strike hours were worked by a recently-trained contractor force and reassigned management personnel who did not have experience equal to that of the striking workers. *Id.* at 20(69). The strike workforce lacked the numbers, experience, and expertise of the striking workforce.

B. Normal Revenue-Generating Activity Was Abandoned, and Repair Work Struggled.

The strike had its intended effect on FairPoint's operations. The strike caused a steep decline in sales of new products and services and a sharp increase in the backlog of installation and service orders. *Id.* at 102-07, 94-95.

FairPoint was forced to all but abandon its efforts to attract new customers or upgrade the services it provided to existing customers -- factors critical to FairPoint's business model. CR Vol. V at 342, 351-52. The unrebutted evidence demonstrated a dramatic drop in new units and services sold to New Hampshire customers, with a nearly 75% decrease in call center orders and 35% decrease in field sales during the strike. Each missed sale represents an ongoing loss to

FairPoint's subscription business. CR Vol. III at 102-07, 19(65-67), 31-32(114-19).[9]

In addition, installations for the services that FairPoint did sell during the strike slowed. The strike created a backlog of installation and service orders that "very dramatically" increased the time it took FairPoint to provide its new and existing customers the services that they ordered. *Id.* at 50(191); CR Vol. V at 250-51, 340-41. The unrebutted evidence shows a steady increase from under 500 backlogged orders to over 1,000 backlogged orders. CR Vol. III at 94-95. At best, new installations were delayed; some were undoubtedly lost forever. CR Vol. V at 349-50. Effectively, the strike doubly punished FairPoint for giving priority to the repair services for existing customers.

C. The Strike Significantly Impaired FairPoint's Ability to Make Timely Repairs.

Repair activity was markedly slowed by the strike. CR Vol. III at 91-92. FairPoint's contingent workforce was never able to clear the backlog of maintenance tickets at the same rate that its unionized workforce could. *Id.* at 20(72). The unrebutted evidence demonstrates that FairPoint's trouble load (i.e. the number of maintenance tickets outstanding) doubled immediately after its workforce walked off the job, and soared after storms hit.

Because of the strike, FairPoint's pre-strike objective of repairing an out of service line within a twenty-four hour window was extended for some customers to "several weeks." *Id.* at 35(132). The strike magnified the effect of the storms because FairPoint could not employ normal techniques to cope with the severe weather. The unrebutted evidence showed that the striking skilled workforce would have reduced the trouble load spikes "much more quickly" than the contractors did. *Id.* at 21(75), 35(132). Normally, FairPoint would respond to significant storms in "winter normal" mode by maximizing overtime, bringing technicians in from

[9] Employer Exhibits 9A and 9C depict the drops in field sales and call center orders, respectively. *See* CR Vol. V at 102, 104.

neighboring states, and pulling staff from other non-repair focused crews. *Id.* at 24-25(87-89). Because managers and contractors were already working at capacity on the trouble load and because the ongoing strike in neighboring states prevented New Hampshire from borrowing any out-of-state FairPoint contingent workers, the Company could not clear the resulting troubles, and the backlog grew. *Id.* at 24-25(87-89), 91-92.

D. FairPoint's Wholesale Business Was Dramatically Affected By the Strike.

The strike's effect on FairPoint's wholesale business was significant. Wholesale sales account for approximately 30% of FairPoint's business. *Id.* at 33(121). Prior to the strike, FairPoint had Network Interface Agreements with its major wholesale customers that were virtually exclusive. *Id.* at 32(119-20). As a result of the uncertainty caused by the strike, a number of these wholesale customers established relationships with other providers and may never again use FairPoint at the pre-strike level. *Id.* at 32(120). This is particularly damaging to FairPoint's bottom-line. As stated above, FairPoint has invested heavily to build out its network. It recoups this cost, in large part, by charging wholesale carriers to utilize its network. When carriers choose to take their business to another provider, FairPoint has limited means to offset the fixed cost it already invested in building its network. *Id.* at 33(121-22).

E. Nearly All Construction and Preventative Maintenance Stopped During the Strike.

FairPoint's investment in its infrastructure was scaled back to critical, obligatory projects only, and discretionary construction was halted. *Id.* at 19(67), 36(134). As explained above, this "discretionary construction" represents the construction FairPoint does to build out its current network and which is critical to its long-term success. *Id.* at 19(67). FairPoint spent $5.7 million less during the months of the strike than it did during those same months in 2014. *Id.*

F. Customer Satisfaction Plummeted During the Strike.

The unrebutted evidence showed that the strike caused a backlog of repair orders and that

the backlog damaged FairPoint's reputation and good will. Customer dissatisfaction soared during the strike. FairPoint customers expressed their displeasure with FairPoint's service during the strike by filing four times as many complaints with the Consumer Affairs Division of the Public Utilities Commission ("PUC") in October 2014 than in September 2014. *Id.* at 97-98. FairPoint customers filed 351 complaints with the PUC in December 2014 alone -- well over 100 more complaints than the nine months in 2014 that preceded the strike combined, and over 300 more complaints than those seen in December 2011, 2012, and 2013. *Id.* Although, historically, customer complaints increase following bad storms, the number of complaints filed in December 2014 so far exceeded any other month in the preceding four years that it cannot be explained solely by the storms that hit New Hampshire in December 2014. *Id.*; CR Vol. V at 273.

G. Revenue.

FairPoint's revenue from October 2014 to February 2015 was nearly 11% less than the same period a year earlier.[10] CR Vol. III at 110. The Company lost revenue as a result of the strike. *Id.* at 35(130-31). This loss resulted from fewer installations completed, the loss of residential and business customers to other providers during the strike, and lost business from wholesale carriers.

Because FairPoint is a subscription business, missed sales represent a loss to the Company for the life of that customer. FairPoint's residential and small/medium business high speed internet (DSL) customers, on average, stay with the Company for 3.7 years, and its voice customers stay with the Company for 14 years. *Id.* at 32(119). The loss of New Hampshire sales attributable to residential and small/medium business customers was an estimated $3 million.[11,12]

[10] And this drop is significant compared to the drop in any prior year. CR Vol. III at 110.
[11] This estimate does not include the lost revenue attributable to the lost sales of FairPoint's direct sales force and wholesale sales force which were also considerable. *See* CR Vol. III at 102-03, 108.
[12] This figure is based on the assumption that lost customers would have been FairPoint customers for only twelve months, which is far less than the average length a customer typically stays with FairPoint. CR Vol. III at 19(66).

Id. at 102-03, 108. To the extent that it lost potential customers to its competitors, many of those prospective customers -- and the revenue they represent -- are lost by FairPoint for years.

H. Cost of the Strike.

These losses were compounded by the high cost of the strike to FairPoint. Even taking into account the "avoidable costs" of not having to pay the striking employees, the strike cost FairPoint approximately $63 million. *Id.* at 34-35(128-29), 36(136).

SUMMARY OF THE ARGUMENT

The Commissioner exceeded the scope of the limited appellate authority afforded him by RSA 282-A:60 when he ordered the first Tribunal's decision re-opened on the purported basis of a "mistake of law." The language of RSA 282-A:60 and the appellate review scheme of RSA 282-A:60-67 demonstrate that he exceeded his authority. Moreover, the first Tribunal made no such mistake of law, as when faced with unsettled law, the first Tribunal made alternative rulings of law supported by factual findings, with the alternative ruling predicting the analysis the Commissioner ultimately advanced as the new law of New Hampshire. The Commissioner's rejection of the first Tribunal's decision was *ultra vires*, and thus should be vacated.

Moreover, the Commissioner erred when he decided that the phrase "stoppage of work" as used in RSA 282-A:36 must be defined as a substantial curtailment of all aspects of its operations. This Court has never ruled in such a manner, and to do so would run afoul New Hampshire precedent and abandon the plain language of the statute and the British precedent from which it was derived, which indicate that it is the work normally performed by the strikers that was not performed because of the strike that is to be evaluated. Moreover, the Court should avoid adopting an interpretation that clashes with federal labor law and thus violates the Supremacy Clause of the United States Constitution.

Even assuming, *arguendo*, that an expansive "substantial curtailment" analysis is

appropriate, the second Tribunal's decision was clearly erroneous in the face of the unrebutted evidence of the Company's business and its inability to perform the work that the strikers normally performed. The record demonstrates that FairPoint's unionized workforce performs three primary categories of work, that workforce struck FairPoint for over *four months*, and the work normally performed by the strikers was severely compromised for that period.

Finally, the Board erred as a matter of law when it concluded, contrary to the Commissioner and both appeal tribunals, that strike pay is not deductible income for purposes of RSA 282-A:14.

ARGUMENT

I. STANDARD OF REVIEW.

Appeals to the New Hampshire Supreme Court from the Department are governed by RSA 282-A:67, which provides:

> The court shall not substitute its judgment for that of the appeal tribunal as to the weight of the evidence on questions of fact. The court shall reverse or modify the decision of the appeal tribunal, or remand the case for further proceedings, as determined by the court, only if the substantial rights of the appellant had been prejudiced because the administrative findings, inferences, or conclusions are: (a) [i]n violation of constitutional or statutory provisions; (b) [i]n excess of statutory authority; (c) [m]ade upon unlawful procedures; (d) [c]learly erroneous in view of the substantial evidence on the whole record; or (e) [a]ffected by other error of law. Otherwise, the court shall affirm the appeal tribunal's decision.

RSA 282-A:67. This Court reviews the interpretation of statutes and the constitution *de novo*. *Linehan v. Rockingham Cnty. Comm'rs*, 151 N.H. 276, 278 (2004). Statutory interpretation starts with the language of the statute, and this Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Land America Commonwealth Ins. Co. v. Kolozetski*, 159 N.H. 689, 691 (2010). Individual sections are interpreted "not in isolation, but together with all associated sections." *Id.*

II. THE COMMISSIONER EXCEEDED THE SCOPE OF HIS STATUTORY AUTHORITY AND ACTED *ULTRA VIRES* BY RE-OPENING THE FIRST TRIBUNAL'S DECISION ON THE PURPORTED BASIS OF "MISTAKE OF LAW."

RSA 282-A:60 sets out the standard for the Commissioner to re-open an Appeal Tribunal decision. In relevant part, the statute states that "the commissioner may, upon written request of an interested party or upon his own initiative, in any case in which a decision has been rendered, re-open the case on the basis of *fraud*, *mistake*, or *newly discovered evidence*." *Id.* (emphasis added). This Court recently explained that the statute does not confer the authority to re-open merely because the Commissioner "disagrees with the tribunal decision." *Mullen II*, 169 N.H. at 403. Instead, this Court recognized that the Commissioner may only re-open a tribunal decision on "the *limited basis* of fraud, mistake, or newly discovered evidence." *Id.* (emphasis added) (citation omitted). Here, the Commissioner exceeded the limited scope of review afforded him by RSA 282-A:60 when he ordered the first Tribunal's decision re-opened for a *de novo* hearing on account of "mistake."

As a starting point, the scope of the Commissioner's review pursuant to RSA 282-A:60 is more limited than the Board's review pursuant to RSA 282-A:65. Had the legislature intended to accord the Commissioner the same scope of review as the Board, it surely would not have used contrasting language when setting the parameters of the Commissioner's review. *See Appeal of Marti*, 169 N.H. 185, 188 (2016) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include."). To conclude otherwise would ignore the limits of the Commissioner's review as stated in the plain language of the statute. *See Appeal of Niadni, Inc.*, 166 N.H. 256, 260-61 (2014) (statutory interpretation starts with the language of the statute itself, and ends there where the language is unambiguous).

The Commissioner's determination that he could correct the first Tribunal's purported

"mistake" was without statutory authority. First, the Commissioner's decision to re-open relied upon his belief that the statutory language "fraud, mistake, or newly discovered evidence" includes "mistake of law." The only authority he cited was dicta[13] in a thirty-five-year-old opinion of the Attorney General. *See* N.H. Atty. Gen. Opinion No. 82-15-F, 1982 WL 188103, at *1 (N.H.A.G. June 24, 1982) ("N.H. A.G.O."). An opinion of the Attorney General is neither binding on this Court, *see e.g. Hess v. Turner*, 129 N.H. 491, 492 (1987), nor entitled to weight where "it is completely devoid of supporting legal analysis, reference to legislative history of the statute, citation of historical precedents, etc.," *Balke v. Manchester*, No. 01-E-092, 2002 WL 31248133, at *4 (N.H. Sup. Ct. June 4, 2002).

Moreover, as noted above, had the legislature intended to grant the Commissioner the authority to correct a mistake or error *of law*, it would have included those words expressly in the statute. *See Correia v. Alton*, 157 N.H. 716, 718-19 (2008) ("We will neither consider what the legislature might have said nor add words that it did not see fit to include."); *see also* RSA 282-A:65 ("the appellate board shall reverse or modify the decision . . . [if it] is [a]ffected by reversible error *of law*") (emphasis added). The legislature's use of the phrase "of law" in establishing the Board and this Court's scope of review, and its omission of the phrase "of law" in establishing the Commissioner's scope of review, require the interpretation that its omission was intentional. *Correia*, *supra* (language used elsewhere in statutory scheme demonstrates that if legislature intends to confer certain powers, "it knows how to do so" (*citing Appeal of*

[13] The Attorney General's opinion offers no support or analysis for its passing statement that "mistake" encompasses "misapplication of law," and this Court should afford little (if any) deference. It sought to address "whether, pursuant to RSA 282-A:64 (1981 Supp.), the Commissioner must deny the re-opening of a decision of the Appeal Tribunal before an appeal may be perfected to the Appellate Division, or whether an appeal may be taken directly from a decision of the Appeal Tribunal to the Appellate Division." *See* N.H. A.G.O., *supra* at *1. When stating the limited bases upon which the Commissioner may re-open or re-hear a decision of the Appeal Tribunal, the Attorney General stated that "the Commissioner may find . . . that a mistake has been made, either through misapprehension of fact or misapplication of law, and order reopening." *Id.* at *2. This statement is akin to commentary on an unasked question as opposed to a statement of the law.

Baldoumas Enters., 149 N.H. 736, 739 (2003))); *see* RSA 282-A:65, 67. When the legislature gave the Commissioner authority to re-open the record to address certain mistakes, *see e.g. Appeal of Pelleteri*, 152 N.H. 809, 810 (2005); *Mullen II*, 169 N.H. at 395 (re-opening record because Tribunal mistakenly excluded testimony of a witness),[14] it consigned mistakes or errors of law[15] to the different jurisdiction of the Board and this Court, *see* RSA 282-A:65, 67.

This interpretation is consistent with this Court's recent statement that RSA 282-A:60 "streamlines review and enables correction of errors earlier in the process." *Mullen II*, 169 N.H. at 404. This objective is met where "fraud" or "newly discovered evidence" is at issue, as the legislature explicitly accorded both the Commissioner and the Board authority to review such cases. It is also met for mistakes other than mistakes or errors of law. *See e.g. Pelleteri, supra.* Yet the goal of administrative efficiency should not subvert appellate authority bestowed upon the Board and this Court, yet not upon the Commissioner.

Assuming, *arguendo*, that the Commissioner's statutory authority encompasses rejecting mistakes of law, the first Tribunal committed no such mistake. First, as the Commissioner agreed, New Hampshire law is unsettled as to how the phrase "stoppage of work" should be defined. *See* Add. at 16-18. New Hampshire law is clear, however, that there cannot be a "mistake of law" where the law at issue is unsettled. *Gannett v. Merchants Mut. Ins. Co.*, 131 N.H. 266, 272-73 (1988). That would equate "a mistake in prophecy or opinion" with a mistake of law. *Poti v. New England Road Mach. Co.*, 83 N.H. 232, 140 A. 587, 589 (1928). In effect, the "mistake" that the Commissioner purported to base his decision to re-open upon was the first

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[14] In neither *Pelleteri* nor *Mullen II* did this Court address whether the purported "mistakes" by the Appeal Tribunal were "mistakes" within the meaning of RSA 282-A:60. In *Pelleteri*, this Court addressed whether the appellants equal protection and due process claims were waived. *Id.* at 811-12. In *Mullen II*, the appellant advocated for an interpretation of RSA 282-A:60 that restrained the Commissioner from re-opening or re-hearing an unemployment *fraud* case because, she argued, the Commissioner was an interested party. *Id.* at 403. Neither appellant asked this Court to consider the *scope* of the term "mistake" as used in RSA 282-A:60.

[15] Moreover, the legislature's decision to define the Commissioner's review with the term "mistake," and its decision to define the Board and this Court's review in terms of "*error* of law" (emphasis added), further strengthens the distinctions between the respective scopes of review.

Tribunal's failure to define and adhere to a standard that did not, and does not, exist under New Hampshire law.

There was no "mistake of law" in the first Tribunal's decision. It can hardly be a mistake of law to identify two possible meanings of "stoppage of work" and to apply them both. The first Tribunal, realizing the law was unsettled, made an alternate ruling. In doing so, he predicted the standard urged by the Commissioner -- that a "stoppage of work" should be defined as a substantial curtailment of the employer's business. *See* Add. at 6. Not only did the first Tribunal lay out his alternate ruling, he devoted most of his decision to marshalling the evidence relevant to this issue and analyzing how the evidence demonstrated that there was a substantial curtailment of FairPoint's business. Add. at 6-9. Of course, a holding in the alternative carries the same weight as a primary holding. *See Hawthorne Tr. v. Maine Sav. Bank*, 136 N.H. 533, 537-38 (1992) (assessing on appeal trial court's primary and alternative grounds for dismissal).

Nevertheless, the Commissioner determined that the alternative finding was also infected by a mistake of law because "no standard was articulated," that each case involves a fact-specific inquiry, and that in reaching a conclusion a variety of factors should be considered. Add. at 17-18. The Commissioner stated that in the *de novo* hearing, the Tribunal should consider at a minimum, "a comparison of business revenues, production, services and worker hours before and after the strike," and "[r]eference should also be made to NHES . . . Directive No. 340-17, Attachment A." Add. at 18 (citations omitted).

In light of this directive, the first Tribunal's "mistake" becomes imperceptible. He stated the standard he considered in his alternative ruling by "defin[ing] stoppage of work as a substantial curtailment of the employer's business." Add. at 6. Consistent with the Unions' requests and the extra-jurisdictional case law, he employed a case-specific analysis tailored to the particular facts of the situation. Add. at 6-8. He examined the specific facts of this case and

considered the factors relevant to this case that the Commissioner urged for consideration in reaching a decision. *Id.*

The Commissioner's other criticisms of the first Tribunal's decision were just unfair. First, the Commissioner's statement that Directive No. 340-17 was not followed is misleading. The Directive establishes the procedure to follow when a local office manager or other Department employee is "made aware of a labor dispute." *See* Directive 340-17, CR Vol. III at 426-30. Even assuming it is applicable to the Appeal Tribunal, the Directive contains no more than a list of short questions that mention some of the factors to consider for a work stoppage, but does not specify *how* to determine whether various functions were substantially curtailed.[16] Where the first Tribunal's decision addresses at length the categories of information referenced by the Directive questions, the Commissioner's position that the Directive was not "referenced" elevates form over substance.[17]

Second, the Commissioner's characterization of the first Tribunal's analysis as a "negative impact" analysis is specious. The extra-jurisdictional case law cited by the Commissioner states that to assess whether there has been a substantial curtailment, one should perform a "fact-specific inquiry; there is no percentage threshold or numerical formula," *Hertz Corp. v. Acting Dir. of the Div. of Emp't & Training*, 437 Mass. 295, 298 (2002), with a focus on "the main business of the employer," *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,

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[16] The exact text of the applicable fact finding guide questions are reproduced as follows:

7. Did a stoppage of work occur? Evidence?
   a) Production stopped or severely curtailed?
   b) Shipments stopped?
   c) Operation shutdown?
   d) Dollar amounts/percentage of curtailment?
   e) Deliveries of materials? By whom?
8. Exact date and time of work stoppage?
9. If there was a work stoppage, which units were/were not involved? Which types of workers?

[17] Furthermore, nowhere in the Directive or Attachment A does it state that the Directive must be referenced in an adjudicator's written determination.

592 (Alaska 1983).

The Commissioner did not explain how to determine "substantial impact" without analyzing "negative impact." In effect, the Commissioner affixed a label to the first Tribunal's analysis, different from the label he later chose. The Commissioner relabeled the analysis to justify ordering a do-over.

Ordering a re-opening and *de novo* hearing of the first Tribunal's decision was in excess of the Commissioner's statutory authority, and thus the Court should reverse that decision. The Commissioner's disagreement with the first Tribunal's decision was not a "mistake" within the meaning of the statute. Otherwise the Commissioner could re-open a tribunal decision when he merely "disagrees with the tribunal decision." *See Mullen II*, *supra* at 403.

III. EVEN IF THIS COURT ADOPTS A "SUBSTANTIAL CURTAILMENT" ANALYSIS, IT SHOULD NONETHELESS REJECT A "HOLISTIC" ANALYSIS OF AN EMPLOYER'S BUSINESS. INSTEAD, IT SHOULD LIMIT "STOPPAGE OF WORK" TO "STOPPAGES OF *WORK*," WHILE RECOGNIZING THE REALITIES OF HOW THE WORK NORMALLY PERFORMED BY THE WORKERS IS PERFORMED.

This Court has never defined the phrase "stoppage of work" as used in RSA 282-A:36. The Unions and the Commissioner will ask this Court to adopt the phrase "substantial curtailment of an employer's operations," the definition advanced by a majority of other states. If the Court does so, it still should tether the term to the statutory language.

The purpose of New Hampshire's unemployment statute is "to prevent the spread of unemployment and to lighten the burden on those workers who are involuntarily unemployed through no fault of their own." *Appeal of Boudreault*, 123 N.H. 332, 333 (1983). Unemployment caused by a labor dispute "is generally considered voluntary and not within the purpose of an unemployment compensation act. . . . If the dispute caused the unemployment, the employee is disqualified from receiving benefits." *Gorecki v. State*, 115 N.H. 120, 122 (1975). Accordingly, New Hampshire law disqualifies claimants:

> 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....

RSA 282-A:36.

Nothing in New Hampshire law warrants adopting the position that the phrase "stoppage of work" implicates the overall effect on the employer's business. Presumably the "work" in "stoppage of work" has to mean something, and New Hampshire law at minimum allows it to mean the strikers' work.[18]

As this Court writes a blank slate, it should avoid "holistic" efforts to test what effect the strike had on the Company's "bottom line." *See* Add. at 48. A company's bottom line is but one factor that some courts have considered as a proxy to evaluate whether a strike caused a "stoppage of work" under the "substantial curtailment" standard. *See e.g. Boguszewski v. Comm'r of Dep't of Emp't and Training, et al.*, 410 Mass. 337, 344 (1991) (identifying revenue as one indicator of "substantialness") (citation omitted). Yet a "substantial curtailment" standard can be an amorphous one where, as recently recognized by the Massachusetts Board of Review, "[o]ver time, the terminology referring to the work stoppage issue has become confusing." *Board of Review Decision*, M-0336, M-0338, M-0346, M-0352, M-0373, M-0395, M-0396 and M-0397, at *21 (Aug. 18, 2017).

Neighboring jurisdictions have staked guideposts that can instruct this Court's analysis. First, the Court need not turn its focus away from the actual work not performed due to the labor dispute. Massachusetts has long recognized that "where a labor dispute blocks a substantial amount of work which would otherwise be done it has stopped that much of the work and is therefore a 'stoppage of work.'" *Adomaitis v. Dir. of the Div. of Emp't Sec.*, 334 Mass. 520, 524

[18] The Massachusetts Supreme Judicial Court has explicitly recognized this interpretation. *See Adomaitis*, *infra* at 524 ("where a labor dispute blocks a substantial amount of work which would otherwise be done it has stopped that much of the work and there is therefore a 'stoppage of work which exists because of a labor dispute'").

(1956). This principle remains central within the context of a "substantial curtailment" analysis, as evidenced in the Massachusetts Supreme Judicial Court's ("SJC") analysis of a strike's effect on a telephone company's operations in *Boguszewski*, *supra* at 342-43. In fact, this summer the Massachusetts Board of Review emphasized the importance of evaluating the work not done as a result of the labor dispute:

> Given the focus on 'stoppage of work' in the language and purpose of [the labor dispute disqualification], we think it makes sense to look first at what happened to the work normally performed by the striking employees (*i.e.*, bargaining unit work), rather than to examine the evidence in the more confusing terms of 'production' and 'support operations.' If the employer cannot show that bargaining unit work was substantially curtailed, then it will have to establish that the strike measurably and substantially disrupted the work of the non-bargaining unit work force.

Board of Review Decision, *supra* at *22. In so stating, the Massachusetts Board of Review reaffirmed that the work normally performed by the strikers is the barometer by which to gauge the strike's effect on an employer's operations. This Court should take heed and similarly recognize.

The British antecedents to the unemployment statute demonstrate that "stoppage of work" meant stoppage of work.[19] British law considered the question of whether the work was stopped and not performed by others when evaluating a worker's eligibility for benefits. *See Hawaiian Tel. Co. v. Hawaii Dep't of Labor and Indus. Relations*, 405 F. Supp. 275, 287 (D. Haw. 1976) (disqualification "for benefits if his unemployment is due to a trade dispute so long as the job which he held continues to be vacant. . . . Vacancies might be terminated by the return of the worker, by the hiring of a replacement, or by a readjustment of work operations." (*quoting* Hughes, *Principles Underlying Labor-Dispute Disqualification*, Illinois Division of Placement

[19] Many states modeled their labor disqualification statutes after the federal Draft Bill, which was prepared in conjunction with the Social Security Act. *See* Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. Chic. L. Rev. 294 (1950). The federal Draft Bill was modeled in substantial part after the British Unemployment Insurance Acts. *Hawaiian Tel. Co.*, *infra* at 287. Decisions of British Umpires interpreting the British trade dispute disqualifications form a body of precedents for interpreting the American labor dispute disqualifications. *Id.*

and Unemployment Compensation (July, 1946))).[20] Thus, British law considered whether striking employees were fully or substantially replaced. *See* Brit. Ump. 495, at 596 (1927) ("When a considerable number of men with one accord cease to carry on with their work it seems to me that there must almost inevitably be a stoppage of work, whether a few minutes only or several months elapse before the men return to work or their places are filled by other men."); Brit. Ump. 496, at 599-600 (1922) (stoppage of work where, despite "management [maintaining] substantially the same output after the dispute as before[,] . . . the applicants' places were not filled . . . . [and] [t]hey continued to be in the position that there was work which they would be doing but for the dispute").

Second, both Vermont and Massachusetts[21] provide special considerations for public utilities. The Vermont Supreme Court has addressed how the substantial curtailment standard and factors outlined by the Commissioner apply in the context of a labor dispute involving a telecommunications provider. In *Whitcomb v. Dep't of Emp't and Training*, 147 Vt. 525 (1986), the Court found that a strike by the IBEW caused a substantial curtailment of New England Telephone & Telegraph's ("NET") operations despite the fact that telephone service to customers was not significantly affected, billing and payment were not curtailed, and service activity was actually slightly higher on the last day of the strike than it was on the first day of the strike. *Id.* at 527. The Court determined that NET's evidence of an increase in the backlog of installations, the decrease in worker hours and delays in calls to operator assistance was "significant" and established that the strike substantially curtailed its operations. *Id.* at 528. In reaching this conclusion, the Court allowed that while "business revenues, production, services

[20] FairPoint has submitted an inter-library loan request for a clean copy of the Hughes publication. The request was not fulfilled by the time of this filing. FairPoint will submit a supplemental appendix with the relevant portions, should the Court so desire.

[21] Two states whose law the Commissioner relied upon in advancing the more expansive "substantial curtailment" standard. *See* CR Vol. III at 438-39.

and worker hours before and during the strike," are relevant considerations, these factors are not dispositive. *Id.* And in *Boguszewski*, the Massachusetts SJC similarly ruled that given the nature of a public utility's business, the fact that the provision of service continues is largely irrelevant. 410 Mass. at 345.

As in *Whitcomb* and *Boguszewski*, in considering a substantial curtailment standard, this Court should do so in the context of FairPoint's business. FairPoint is a public utility and as such has obligations to its customers that guided its priorities. Courts are concerned not to punish public utilities for satisfying their obligations to provide service to their customers. *Whitcomb*, 147 Vt. at 527-28; *Boguszewski*, 410 Mass. at 345; *Weld v. Gas and Elec. Light Comm'rs*, 197 Mass. 556 (1908); *see also* Lewis, *The Stoppage of Work Concept in Labor Dispute Disqualification Jurisprudence*, 45 J. Urb. L. 319, 330-31 (1967-68) ("while the courts refuse to apply a different or exceptional rule to utilities, the weighing of factors in such operations is necessarily of another order from that of manufacturing firms").

Third, this Court should adopt a standard cognizant of the realities within which employers operate and workers perform their work. Much of the work normally performed by FairPoint's unionized workforce -- repairs, installations, and construction -- is tied to the weather; storms not only cause more repairs, but also make repair, installation, and construction work more difficult to perform. The strike prevented FairPoint from deploying its usual response to winter storms, and thus it prevented FairPoint from operating "winter normal." Any standard applied must not be divorced from these realities.

IV. CONSTITUTIONAL CONSIDERATIONS SUPPORT THIS LIMITED APPLICATION OF THE TERM "STOPPAGE OF WORK."

Federal labor law preemption forbids the application of state statutes that enmesh the State with the "free play of economic forces" between labor and management, which Congress intended to be left unregulated. *See Machinists*, *supra* at 139-40. If this Court delves into the

overall impact of the strike on FairPoint's operations -- effectively a who's winning analysis -- then RSA 282-A:36 violates this principle. The standard for "stoppage of work" applied in some states grants a state body latitude to determine the effectiveness of a strike. Then, in granting unemployment benefits to striking employees if their union's strike is determined to cause no "substantial curtailment," those states level the playing field that labor policy says is to be left alone by the states.

The National Labor Relations Act, 29 U.S.C. § 151 et. seq. ("NLRA") deliberately left unregulated certain weapons of economic self-help, such as strikes and lock-outs, because Congress intended collective bargaining to be left to the economic power of the parties to a collective bargaining relationship. *Machinists*, *supra* at 140. "The economic weakness of the affected party cannot justify state aid contrary to federal law ... the use of economic pressure by the parties to a labor dispute ... is part and parcel of the process of collective bargaining." *Id.* at 149 (internal quotations omitted). Whether a union's strike does or does not hamper the overall operations of an employer's business, it is not for the state to fix the problem. *Id.* at 148-49. To the extent that the Department is administering RSA 282-A:36 to subsidize strikes where the impact on an employer's overall business is limited, it enables employees to strike longer and to exert added pressure on the employer until such a curtailment does occur or a concession is made. *Id.*; *Golden State I*, *supra* at 609-20 (state pressuring employer to settle with union is preempted by the NLRA).

Machinists preemption of such a statute would be obvious but for the Supreme Court's decision in *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979). There, the Supreme Court held the states were permitted to enact statutes under which striking workers are either authorized to receive or prohibited from receiving unemployment benefits. The three-Justice plurality examined the legislative history of the NLRA and the Social Security Act

("SSA"), and found evidence that Congress considered the specific type of statute in question and intended to permit states to make the policy determination whether striking workers should or should not be entitled to receive unemployment benefits. *Id.* at 540-41, 544.[22]

But the separate opinions in *New York Tel.* produce a narrow holding. The opinions rely on legislative history indicating that Congress specifically contemplated the type of statute before the Court and that Congress intended to allow states to enact laws either authorizing or prohibiting payments of unemployment compensation to striking workers. *Id.* at 546-51. Allowing states to compensate or not compensate employees who strike is not the same as finding that states can delve into the effectiveness of a strike, and utilize unemployment compensation to rebalance the parties' strength.

The Supreme Court later emphasized that *New York Tel.* was not carte blanche for states to use unemployment compensation to regulate labor-management relations. While *Baker v. General Motors Corp.*, 478 U.S. 621 (1986), ultimately follows *New York Tel.* in holding that a state may disqualify from unemployment compensation those who finance a strike that puts them out of work, *id.* at 634-35, it also reaffirmed the holding of *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967). In *Nash*, the Court held that a state's refusal to pay an employee unemployment compensation because she filed a charge with the National Labor Relations Board was preempted as interfering with federal labor law. 389 U.S. at 235. In *Baker*, the Court explained that the labor policy will yield to a state's determination whether or not to pay strikers and their supporters unemployment compensation, but it trumps a state law which "undermin[es] an essential protection in the NLRA." *Baker*, 478 U.S. at 636; *see also United Steelworkers of Am. AFL-CIO-CLC v. Johnson*, 799 F.2d 402 (8th Cir. 1986).

[22] If it were not for the legislative history showing that Congress specifically contemplated this type of statute, a majority of the Justices -- the concurring Justices and the three dissenting Justices -- would have found that even such a degree of involvement in the labor management struggle would be preempted. *See Rhode Island Hosp. Ass'n v. Providence*, 667 F.3d 17, 28 n.6 (1st Cir. 2011).

Interpreting the phrase "stoppage of work" as requiring an analysis of the struck employer's "bottom line," and to decide thereby whether to grant benefits, goes far beyond any interpretation considered in *New York Tel.* Individual employees are no more or less deserving of unemployment compensation because of a strike's effectiveness. The only reason to base compensation on the effectiveness of the strike is to place the state's thumb on one side of the scale or the other in an area where Congress has forbidden interference. *See Golden State I*, 475 U.S. at 619 ("A local government, as well as the National Labor Relations Board, lacks the authority to introduce some standard of properly balanced bargaining power... or to define what economic sanctions might be permitted negotiating parties in an ideal or balanced state of collective bargaining." (internal quotations and citations omitted)). If this Court were to consider the effect on FairPoint's bottom line, or the effectiveness of FairPoint's efforts to mitigate the strike's impact, when deciding whether to award the Claimants benefits, it would distort the federal labor law regime. *See NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (holding that telecommunications firm did not violate the NLRA when it brought employees from its other offices to fill the strikers' places in an effort to carry on its business and refused to discharge the replacements at the strike's end in order to make room for the strikers); *Cf. Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 438 (1989) ("That the prospect of a reduction in available positions may divide employees and create incentives among them to remain at work or abandon a strike before its conclusion is a secondary effect fairly within the arsenal of economic weapons available to employers during a period of self-help.").

This Court interprets statutes to avoid constitutional questions. *See State v. Pratte*, 158 N.H. 45, 49 (2008) ("A statute will not be construed to be unconstitutional, where it is susceptible to a construction rendering it constitutional." (*quoting State v. Pierce*, 152 N.H. 790, 793 (2005))). Here, this can readily be achieved. This Court should construe the statute in

accordance with its plain language and British precedent and emphasize the strike's effect on the work normally performed by the strikers, not its impact on the Company's bottom line or a "holistic" assessment of its business.

V. THE SECOND TRIBUNAL'S FINDINGS, INFERENCES, AND CONCLUSIONS WERE CLEARLY ERRONEOUS ON THE WHOLE RECORD.

The second Tribunal clearly erred when, in the face of the unrebutted evidence of the Company's inability to perform the work that the strikers normally performed, it found that no stoppage of work occurred. The record demonstrates that FairPoint's unionized workforce performs three categories of work, that workforce struck FairPoint for over *four months*, the work normally performed by the strikers was severely compromised for that period, and additional evidence demonstrated the strike's substantial impact. Specifically, the unrebutted evidence demonstrated:

- FairPoint was unable to replace the strikers' hours and could not substantially perform the strikers' work, *see supra*, SOF[23] at IV.A;
- Construction, installations, and marketing were significantly curtailed, *see supra*, SOF at IV.B, E;
- Repair activity was significantly affected by the strike, *see supra*, SOF at IV.C;
- FairPoint's wholesale business lost customers to competitors, limiting current and future revenue streams, *see supra*, SOF at IV.D;
- Customer complaints, a key metric of FairPoint's goodwill, significantly increased, *see supra*, SOF at IV.F;
- Revenues decreased nearly 11%, with the strike accounting for a substantial part of that decrease, *see supra*, SOF at IV.G; and
- FairPoint incurred $63 million in expenses related to the strike, *see supra*, SOF at IV.G.

In the face of this unrebutted evidence, the second Tribunal largely disregarded the realities of FairPoint's business and its obligations as a public utility. The second Tribunal

[23] "SOF" refers to the Statement of the Facts, *supra*.

faulted FairPoint for its inability to precisely isolate the effects of the strike from the effects of the winter storms in its metrics. Add. at 25. In so doing, the second Tribunal defied the realities within which FairPoint's business operates, and effectively penalized the Company for its inability to control the weather.

Moreover, the second Tribunal effectively penalized FairPoint for employing reasonable mitigation strategies such as focusing on repairs over installations by categorizing the cessation of marketing activities as FairPoint's chosen "business model," and thus "beyond the impact of the strike." Add. at 25. Labeling an employer's mitigation tactics as its "business model," so as to diminish the strike's effect, ignored the fact that such tactics were *because of* the strike. Moreover, it seemingly ignored that the skilled workforce that performs the repairs and installations was on strike for over four months.

Beyond being illogical, such analysis is counter to New Hampshire precedent, as "judgment about reasonable action within the context of a [labor] dispute . . . should play no part in administering the provisions of the compensation scheme relating to labor disputes." *Appeal of Simplex Wire & Cable Co. Inc.*, 131 N.H. 40, 48 (1988). In the context of a "stoppage of work" analysis, this Court need look no further than Massachusetts for authority on this point. *See Adomaitis*, *supra* at 524-25 (finding a stoppage of work where employer mitigated harm of labor dispute because mitigation was *in response to* labor dispute).

VI. THE APPELLATE BOARD ERRED AS A MATTER OF LAW WHEN IT CONCLUDED, CONTRARY TO THE COMMISSIONER AND BOTH TRIBUNALS, THAT STRIKE PAY IS NOT DEDUCTIBLE INCOME FOR PURPOSES OF RSA 282-A:14.

In order to receive unemployment benefits, individuals are required to file weekly "continued claims" that disclose any and all wages earned during the period in which they are seeking benefits. CWA Claimants received compensation in the form of "strike pay" from their union while on strike. CR Vol. III at 292; CR Vol. III at 6(16). To be eligible for strike pay, the

CWA required its striking members to do their "fair share" and perform "duties" on behalf of the union. *Id.* Only those members that did were compensated. CR Vol. III at 6(16). Therefore, strike pay is a "form of remuneration for personal services" constituting wages under RSA 282-A:15, I. As such, the Commissioner and both tribunals correctly decided that each CWA Claimant who received strike pay should have his or her weekly benefit reduced by all strike pay (combined with any other earned wages) that exceeds 30% of that Claimant's weekly benefit amount pursuant to RSA 282-A:14, III (a).

Before the Board, the CWA Claimants characterized these payments as "akin to an insurance payment" or in exchange for "exercis[ing] a protected right," disregarding the testimony of their own witness and the plain language of the Fund's ground rules. Mr. Tremontozzi, the president of CWA Local 1400, stated unequivocally that members who did not participate in the strike or did not perform their "fair share" of duties, such as picketing, processing strike pay, or other duties Mr. Tremontozzi assigned, would not be paid. CR Vol. III at 6(15-16). The Fund's ground rules specifically state that "[s]trikers must perform strike duties as defined by the Local to be eligible for payments from the Fund." CR Vol. III at 292. These rules are not "self-imposed" by the recipients, but are at the assignment of the Union president. Both sources state that strike pay can only be received in exchange for duties performed and neither limits those duties to picketing. The evidence does not support their characterization.

New Hampshire precedent reinforces this conclusion. While addressing whether payments to union members during a lockout constituted wages, this Court, in *McIntire v. State*, provided the pathway through which to demonstrate that "strike pay" constitutes wages for purposes of the unemployment statute. 116 N.H. 361, 366-67 (1976). In *McIntire*, the Court addressed whether lockout payments received by the claimants were wages within the unemployment statute. *Id.* In its analysis, the Court identified two factors that indicated that

these lockout payments were not "wages" within the meaning of the unemployment statute. These factors were: (1) that the president of the union local testified that the "union required nothing from its members in exchange for the benefits"; and (2) that the union constitution and bylaws specifically provided that strike pay would not be paid to "any member who refuses to do the duty assigned to him by those in charge of the strike," whereas no such provision was included as to lockout pay. *Id.* at 366-67. Only after highlighting those two factors did the Court rule that the lockout pay did not constitute "wages" within the meaning of RSA 282. *Id.* at 367.

The two factors found lacking in *McIntire* are present here. First, Mr. Tremontozzi testified that members who did not participate in the strike or did not perform their "fair share" of duties that the CWA assigned would not receive strike pay. CR Vol. III at 6(15-16). Second, the ground rules for the Fund state that "[s]trikers must perform strike duties as defined by the Local to be eligible for payments from the Fund." CR Vol. III at 292.

Moreover, additional support lies beyond New Hampshire precedent, as a number of other states have held that strike pay bars or offsets unemployment benefits. *See e.g. Cohen v. Levine*, 383 N.Y.S. 2d 447, 448-49 (1976) (claimants who receive strike pay in exchange for performing strike-related duties on behalf of union are not totally unemployed); *Casilio & Sons, Inc. v. Unemployment Comp. Bd. of Review*, 667 A.2d 507, 511 (Pa. Commw. Ct. 1995) (strike pay was remuneration for services performed by union members on behalf of union, and thus wages that must be deducted from unemployment benefits); *Int'l Ass'n of Machinists v. Tucker*, 652 So. 2d 842, 843 (Fla. Dist. Ct. App. 1995) (same).

CONCLUSION

FairPoint initially prevailed by demonstrating the obvious -- that a strike of nearly all of its skilled technicians, persisting over four months, significantly interfered with the work normally performed by the strikers and FairPoint's operations. The Commissioner determined,

however, that a "mistake" was made, and declared that New Hampshire should adopt an amorphous standard from extra-jurisdictional case law. In so doing, the Commissioner acted *ultra vires*, and urged a statutory interpretation unmoored to the statute's text and New Hampshire precedent. After a second hearing, FairPoint again presented unrebutted evidence of the strike's effect, yet this time was denied by the second Tribunal in the name of the newly-adopted standard. The Board endorsed this standard, yet emphasized the strike's effect on the Company's "bottom line," and subsequently reversed the judgment of both tribunals and the Commissioner by deciding that "strike pay" paid to CWA Claimants was not deductible income.

FairPoint respectfully requests that this Court:

(1) vacate the Commissioner's *ultra vires* action in re-opening and ordering a *de novo* hearing, and reinstate the determination of the first Tribunal; or alternatively

(2) reverse the decision of the second Tribunal as an error of law, and reinstate the determination of the first Tribunal; and

(3) reverse the decision of the Board and find that the "strike pay" paid to the CWA Claimants constituted deductible income for purposes of RSA 282-A:14.

ORAL ARGUMENT

FairPoint requests oral argument before the full court by Attorney Arthur Telegen.

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

I certify that the written decisions appealed from are included in the attached addendum.

Daniel E. Will

DATED: 12/19, 2017

Respectfully submitted,
NORTHERN NEW ENGLAND
TELEPHONE OPERATIONS LLC AND
FAIRPOINT LOGISTICS, INC.

By their attorneys,

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CERTIFICATE OF SERVICE

I, Daniel E. Will, hereby certify that on 12/19, 2017, I provided two true copies of the forgoing document via certified mail, return receipt requested, upon the following:

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Daniel E. Will

CERTIFICATE OF COMPLIANCE

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

Daniel E. Will

ADDENDUM

Table of Contents

NEW HAMPSHIRE EMPLOYMENT SECURITY

APPEAL TRIBUNAL DECISION

JFS-86969

Claimant's Name: April Broderick	Social Security Number: XXX-XX-7173
	Date Issued: April 14, 2015
April Broderick 250 Ohio Ave Manchester, NH 03104	Appeal Tribunal: APPEAL TRIBUNAL UNIT 45 South Fruit Street Concord, NH 03301 Telephone: (603) 223-6140 Fax: (603) 223-6141

APPELLANT:

April Broderick

DOCKET NUMBER(S):

14-03458, 14-03451, 14-03472, & 14-03493

INTERESTED PARTIES:

Northern New England Telephone Operations, LLC and/or Fairpoint Logistics, Inc. and/or Fairpoint Communication, Inc.

CASE HISTORY:

Following a pre-hearing conference and Appeal Tribunal orders, both The Communications Workers of America and the International Brotherhood of Electrical Workers withdraw their argument of a constructive lockout.

Prior to this withdrawal, the Appeal Tribunal Chairman had put them on notice that he would be comparing the conditions of employment under Fairpoint's new proposal with the Labor Market to determine the reasonableness of the proposed conditions.

The Appeal Tribunal Chairman also put the parties on notice that he would consider the issue of strike pay as deductible income.

APPEARANCES:

Communications Workers of America (CWA,) represented by James Shaw and Sash Gillan.

International Brotherhood of Electrical Workers (IBEW,) represented by Peter Perroni and Meghan Cooper

Claimants: Stephanie Hanscom, April Broderick, Tina Sargent, and David Duhamel

Witness: Stephen Soule and Donald Trementozzi

Northern New England Telephone Operations, LLC, represented by Arthur Telegen, Kelsey Montgomery, and Jon Cho

Witnesses: Michael Reed, State President of Fairpoint Communications - Maine and Daniel White, Director of Staffing and Employee Services

EXHIBIT(S):

Employer Exhibit One: April 1, 2008 Agreement CWA
Employer Exhibit Two: April1, 2008 Agreement IBEW
Employer Exhibit Three: Employee Count
Employer Exhibit Four: Pre-Strike / Post Strike Hours
Employer Exhibit Five: NH Trouble Load Trend
Employer Exhibit Six: NH Order Load Trend
Employer Exhibit Seven: Complaints

Claimant Exhibit One: Trouble Load - Historic
Claimant Exhibit Two: Press Release
Claimant Exhibit Three: Earnings Call Transcript
Claimant Exhibit Four: Emails
Claimant Exhibit Five: Invoices
Claimant Exhibit Six: Contractor / Management Hours
Claimant Exhibit Seven: Spreadsheets
Claimant Exhibit Eight: Strike Pay Information

ISSUE(S) OF LAW:

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

FINDINGS OF FACT:

Northern New England Telephone Operations LLC (henceforth, Fairpoint) is a landline company; it provides services that range from a dial tone for telephone service to high speed Broadband via cables that originate from their buildings to the end user. Fairpoint provides services across nearly the entire State of New Hampshire. Fairpoint also has competition in nearly every part of the State it offers services.

An access line refers to any one of the broad range of services Fairpoint provides to its customers. In recent years, Fairpoint has experienced a decrease between 5-8% of access lines per year.

Fairpoint provides services to both residential and commercial customers as well to their competitors. For instance, Fairpoint competes with cell phone companies for telephone customers; however, cell phone companies rely on landlines from Fairpoint to connect their towers. As cell phone companies expand their service options to their customers, they require more extensive land line connections from Fairpoint.

Fairpoint's business customers have increased their demands for more sophisticated services and higher broadband speeds. In response to these increasing demands and to stay competitive, Fairpoint has been heavily investing in upgrading its network to be in a competitive position to provide faster speeds and more services to its customers.

Fairpoint has central switching offices in Conway and Concord; however, service is limited within a certain radius from these offices. To extend the range, Fairpoint relies on carrier sites. These offices are all interconnected with redundancy to eliminate single point failures. To provide increased broadband speed to more customers, Fairpoint must build carrier sites that extend the range of the switching offices.

There are two unions that represent workers at Fairpoint: Communications Workers of America (CWA) and International Brotherhood of Electrical Workers (IBEW). Fairpoint refers to the work performed by these employees as "bargained for

work".

Bargained for workers include customer service representatives who, in part, field phone calls from existing customers experiencing troubles with their service and phone calls from prospective new customers who want to schedule installation of new service. They also include very technical jobs that cover all aspects of new equipment installation and maintenance as well as the repair work of damaged equipment and cables.

The "Order Load" is the number of pending jobs for installation of service for new customers. The "Trouble Load" is the number of pending repair jobs scheduled. Beginning in October 2014, Fairpoint tracked this information separately. Repair work represents an expense for Fairpoint.

If customers do not get the service they expect from Fairpoint, they can make a complaint to the New Hampshire Public Utilities Commission. Fairpoint tracks the number of monthly complaints made to the New Hampshire Public Utilities Commission. Fairpoint only tracks the number of complaints, not the specific complaints themselves.

To ensure a timely response to major repair issues, such as a weather storm, Fairpoint reallocates its resources across the State and will import and export its resources to and from the border states with the goal of maximizing its workforce at the particular problem location or locations.

The Trouble Load is normally higher during the second and third quarters of the calendar year and lower during the first and fourth quarters. This is because of the influx of tourists to the State during the summer months and because of summer electrical storms. As is illustrated in Claimant Exhibit One, for all of the years 2011 - 2014, the Trouble Load steadily increased from the first quarter of the calendar year into the second quarter of the calendar year. Although Fairpoint experienced some declines in the Trouble Load during the third quarter of each of these years, the Trouble Load peaked during the third quarter of each year at a level that was higher than at any time during the second quarter.

Contrary to the norm, in 2011, during the third quarter, the Trouble Load decreased sharply before spiking because of Hurricane Irene, which occurred in August 2011. The Trouble Load decreased during September and October. Additional storms kept it elevated above pre-Irene levels until November.

During the hearing, the parties accepted data from the National Weather Advisory to show snow fall in New Hampshire from October 2014 through January 2015. According to that same service, at the end of October 2011 New Hampshire experienced a severe Nor' Easter storm. Because of this storm, between October 2011 and November 2011, the Trouble Load spiked to just above the August 2011 level.

In October 2011, there were 37 complaints to the Utilities Commission. In November 2011, there were 41 complaints. The number of complaints in November 2011 was lower than the 71 complaints made during January 2011. By December 2011, the number of complaints decreased to 19.

As an indicator of Fairpoint's ability to respond to and recover from major storms in a timely manner with its trained workforce in place, between November and December 2011, the Trouble Load decreased sharply to a level that was lower than it had been during the second, third, and fourth quarters of 2011. The Trouble Load continued to decline and by February 2012, it was at the same level as it had been in January 2011.

Fairpoint did not experience the same peak levels in the Trouble Load during 2012 and 2013 as they did in 2011. For both years, by December, the Trouble Load was at approximately the same level as it had been during January of the same year.

As illustrated in Employer Exhibit Seven, the number of complaints to the NH Public Utilities Commission mostly followed the same pattern as in 2011 with minor increases and decreases. There were more complaints in January 2011 (71) than during any other month in 2011, 2012, and 2013.

Employees belonging to the two aforementioned unions have worked for Fairpoint under contracts that most recently expired on August 2, 2014. Prior to August 2, 2014, both unions' members voted in favor of a strike in anticipation that the unions and Fairpoint would not reach an agreement for a new contract. Also, in August 2014, in anticipation of an impending strike, Fairpoint curtailed its marketing efforts; Fairpoint reasoned that, should a strike occur, they would be unable to address orders for new service in a timely fashion.

The provisions of the expired contracts remained in place during negotiations. At the end of August 2014, Fairpoint declared an impasse to negotiations. From August 2, 2014 until October 16, 2014, the bargained for workers continued to work under the same conditions of employment of the expired contracts. On October 17, 2014, Fairpoint implemented new conditions of employment, based on their final proposals to the unions.

On October 17, 2014, the workers for both unions implemented the strike and ceased working. Continuing work was available to all of these employees under the working conditions of Fairpoint's final proposal. Per Claimant Exhibit Two, Fairpoint's CEO, Paul Sunu, outlined those conditions as follows:

- No reduction in base wages for current employees
- An average annual base pay of about $58,000.00 for new employees, not including overtime and bonus opportunities
- A comprehensive medical plan, in which, Fairpoint pays 80% of premiums
- A 401K with a dollar-for-dollar company match up to 5%
- Five paid sick days, four personal days, ten paid holidays, and up to five weeks of vacation pay

During the strike, any employee could have returned to work by contacting his or her supervisor. Fairpoint notified its employees of this via a letter the company mailed to the employees' homes. Some workers chose to return to work during the strike.

Fairpoint implemented a contingency plan following the commencement of the strike. Fairpoint utilized members of management (with the necessary expertise) and contractors to perform the bargained for work. Fairpoint had more flexibility with this workforce because there were no limitations on hours or geography. This workforce worked more hours per day and were more flexible with respect to when and where they would work. However, they also lacked familiarity with Fairpoint's specific systems and with New Hampshire's geography. Therefore, they were not as productive on an individual hourly basis as the striking workers prior to the commencement of the strike.

As part of the contingency plan, during the strike, management shifted their focus from the strategic and tactical planning of attracting new customers, expanding and maintaining its infrastructure, and expanding its service offerings.

Michael Reed is the President of Fairpoint operations in the State of Maine. He monitored Fairpoint's productivity from a command and control center. He tracked productivity in different ways and personally witnessed Fairpoint's operations on a daily basis. To achieve the same productivity as their bargained for counterparts, management and contractors were working more hours per day. However, because of their reduced numbers, as a combined effort, they worked fewer overall hours than their counterparts. Mr. Reed reported productivity numbers to Fairpoint's CEO, Paul Sunu.

In October 2014, the Trouble Load was lower than it was at the beginning of January 2014 It was also lower than it had ever been during the second, third, and fourth quarter since the beginning of 2011.. By the end of October 2014 and through November 2011, it increased. It spiked in December 2014. It peaked at about the same level as it did in November 2011.

The increase in October 2014 was atypical. Since 2011, Fairpoint experienced a decrease in the Trouble Load Rate during October, with the exception of 2011 (which can be explained by the aforementioned Nor'Easter).

As illustrated in Employer Exhibit Six, by the end of October 2014, the Order Load increased to a level that was approximately double from what it was in the middle of September 2014. This despite Fairpoint having reduced its advertising efforts and its utilization of alternative call centers to respond to customers, which were located outside of Fairpoint. Fairpoint attributes some of the cause to these workers lacking the experience of Fairpoint's normal workforce, and having only received minimal training, which resulted in reduced productivity. The Trouble Load also negatively impacted the Order Load because Fairpoint prioritized its repair work over new service installations. Fairpoint rescheduled installations for service for new customers to prioritize repair work.

In October 2014, there were 63 complaints to the NH Public Utilities Commission. This number increased to 82 in November 2014 and in December 2014, the number spiked to 351. In January 2015, the number of complaints decreased to 215. In February 2015, although the number of complaints decreased to 80, the number was still higher than during any other month since the beginning of 2011.

At the end of November, 2014, the State experienced a snowstorm. The strike negatively impacted Fairpoint's ability to recover from the storm in a timely fashion, which Fairpoint had proven it could do following the storms of 2011. Historically, Fairpoint maximized all of its workforce resources to address the increased Trouble Load because of the storm. However, with the loss of their workforce because of the strike, Fairpoint could only rely on management and contracted workers to address the Trouble Load.

Beginning in December 2014, Fairpoint maxed out its workforce resources in response to the snowstorms that hit the region; however, the strike removed their option of mobilizing trained workers from neighboring states. Fairpoint had to steadily increase the number of contracted workers; however, there was always a delay caused by the mobilization itself as well as training the contracted workers.

From December 2014 to January 2015, the Trouble Load Rate decreased; however, at a much slower rate than it had from November 2011 to December 2011. The Trouble Load rate continued to decrease; however, on February 25, 2015, it was still higher than it had been on October 15, 2014.

The Order Load continued to increase and by the beginning of January 2015, it was at a level approximately two and half times from where it was at in September 2014. Although the Order Load decreased in February 2015, on February 25, 2015 it remained at a level that was more than double what it was on October 15, 2014. By shifting its focus away from attracting and serving new customers, Fairpoint's revenue was negatively impacted.

Between December 2014 and January 2015, the average number of complaints to the NH Public Utilities Commission decreased to approximately 75, which was still higher than the historic average.

On December 23, 2014 and on March 4, 2015, Mr. Sunu made public comments, in which, he assured the public that, despite the strike, Fairpoint was showing productivity "well above pre strike levels" despite "aggressive picketing and sabotage". He also assured the public that they were addressing more customer service work orders per day compared to the efforts of the

striking employees. Lastly, he blamed the weather for the majority of the impact to Fairpoint's backlog of work.

However, because Mr. Sunu did not personally witness the day-to-day operations, he based his comments simply on the production numbers he received from Mr. Reed. Therefore, he may not have considered that contingency workers were working more hours per day to achieve the same individual productivity as their seasoned and well-trained counterparts. Essentially, it was a by-product of their working more individual hours. The contractors simply lacked the expertise in Fairpoint's specific systems. Mr. Reed can support Mr. Sunu's commentary; however, only with significant qualifiers, which Mr. Sunu did not allude to.

The CWA Union maintains a strike fund that is funded by a portion of member dues. Union members are only eligible to receive strike pay if they perform "strike duties," which are determined by the president of the local union. In New Hampshire, the local set this standard at five days of picketing, which he subsequently reduced. If a member could not picket, the member could perform other duties (working for the union) to establish eligibility.

To be eligible for the receipt of strike pay, the striking workers must have performed some type of service, directed by the local union.

Fairpoint continued to negotiate with the unions and ultimately both sides reached an agreement. The bargained for employees returned to work on February 25, 2015.

CONCLUSION(S) OF LAW:

After a review of all the records and testimony, the Appeal Tribunal Chairman concludes that the claimants were unemployed because of a stoppage of work due to a labor dispute, per RSA 282-A:36.

As was stipulated by the parties, there was a labor dispute. Fairpoint was the claimants last employer prior to the labor dispute.

None of the laws exceptions apply to the claimants in this case. The claimants have stipulated that there was no lockout nor was there a constructive lockout. All of the claimants in this case had a direct interest in the labor dispute, the employer-employee relationship between the claimant and Fairpoint had not been severed, there was no contract in place at the time of the labor dispute, and the stoppage of work has ended within two weeks of the end of the labor dispute (see RSA 282-A:36 sections I, II, and III).

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.

Therefore, the Chairman defines stoppage of work as the claimant's election to stop working because of a labor dispute.

If, however, the Chairman were to define stoppage of work as a substantial curtailment of the employer's business, he would have concluded that Fairpoint suffered a substantial curtailment of its business because of the strike.

Fairpoint is a service industry. Therefore, the best criteria to use to determine whether or not the strike negatively impacted Fairpoint's business and the extent of that strike is criteria that measures Fairpoint's ability to provide its service and Fairpoint's ability to acquire new customers.

Without a corresponding measure of expenses for the same time period, it is difficult, if not impossible, to determine the complete financial impact of the strike to Fairpoint. Regardless, Fairpoint ceased marketing to and servicing for new customers for a majority of a year. Additionally, Fairpoint essentially focused all of its efforts on expense related work (repairs) during the strike. It is more likely than not that, combined, this had a negative impact on Fairpoint's revenue.

Frontline workers (the striking workers) only represent a part of Fairpoint's business; management is the other part. The loss of bargained for workers was a direct result of the strike (the workers walked off the job;) the loss of management workers was an indirect loss. Without management planning in its infrastructure during the strike, Fairpoint significantly impacted its ability to stay competitive by meeting its customers' ever increasing demands for faster service and its ability to attract and serve customers in outlying regions.

Therefore, with respect to management hours diverted to bargained for work hours, the specific number is irrelevant. That management diverted any of its focus from strategic and tactical planning to operations is enough to illustrate a negative impact to Fairpoint's business.

The claimant's argument that the weather was to blame for Fairpoint's troubles and not the fact that they walked off the job is not cogent. The weather and the strike are not mutually exclusive events. Fairpoint's business includes weather related repair work. Therefore, when the claimant's walked off the job, they directly and negatively impacted Fairpoint's ability to perform an essential function of its business.

Fairpoint has shown that with their regular dedicated work force, they can respond to and repair damage from severe weather in a timely fashion. Their response to hurricane Irene in August 2011 and the Nor'Easter in October 2011 with the resulting rapid decrease of the Trouble Load support this conclusion. In October 2014, Fairpoint experienced an atypical increase in the Trouble Load that can only be explained by the striking workers. There was no significant weather event during this time. Therefore, it is more likely than not that the increase was caused solely by the striking workers walking off the job and Fairpoint lacking the workforce resources necessary to address any of its repair work.

From that elevated Trouble Load position, they experienced a spike because of a major weather event. The storms of November / December 2014 do not illustrate unprecedented events; rather, they illustrate why Fairpoint needs and relies on a regular dedicated workforce. It also illustrates how the lack of one substantially curtails its business during such storms. Although Fairpoint ultimately reduced the Trouble Load, it took considerably longer than it otherwise would have had the striking workers been in place. Additionally, as illustrated in Employer Exhibit Five, the Trouble Load remained elevated on February 25, 2014 compared to where it was before the claimants went on strike.

Therefore, although Fairpoint improved its situation by February 2015, it took more man hours per person per day, a shift in the focus of management, hiring contractors, and an essential abandoning of the installation of new service for new customers. Despite all of these efforts, it still took Fairpoint considerably longer to achieve less success than they would have with their regular workforce in place, as illustrated in 2011-2012.

The number of complaints to the Public Utilities Commission illustrates Fairpoint's ability to serve its customers. The historic data shows that during times of significant weather events, the number remained mostly unchanged. It is more likely than not that that is a direct reflection of Fairpoint's historic ability to respond to and repair weather damage in a timely manner. It is also more likely than not that the significant increase in the number of complaints during the fourth quarter of 2014 is directly related to Fairpoint's inability to do the same because of the striking workers.

It is irrelevant that Fairpoint reduced its marketing efforts prior to the strike. This does not change the fact that Fairpoint did so in anticipation of the strike. Because the union workers voted for a strike prior to the expiration of the contracts, this was not an unreasonable preparation. Although there is no separate historic data on the Order Load, Mr. Reed testified that the

Trouble Load trend extends into the Order Load as well. Fairpoint's marketing reduction and redirection of all its resources to repair work clearly had a negative impact on Fairpoint's ability to attract and serve new customers.

Although Fairpoint presented Employer Exhibit Four (based on Claimant's Exhibits Five, Six, and Seven) in good faith to show total work hours before and after the commencement of the strike, the criteria used raises too many questions. Essentially, the data used to calculate the numbers derived from multiple sources, used different methodologies, and relied on different assumptions. However, Michael Reed was a credible witness. His testimony was detailed, straightforward, and logical. Additionally, he was not evasive and was forthcoming when he lacked the answer to a question. Because Mr. Reed was credible, the Chairman accepts, as fact, that during the strike, management and contractors worked, on average, more hours per person per day than the striking workers did prior to the strike. However, they still worked fewer total hours during the entirety of the strike than the striking workers would have during the same timeframe.

Mr. Reed satisfactorily explained the apparent contradictions between Mr. Sunu's statements and reality. Although Mr. Sunu did not use the same qualifiers in his statements, it is more likely than not that the reason was because it was simply meant to spin Fairpoint's situation in a favorable light for public dissemination. Therefore, Mr. Sunu's comments regarding Fairpoint's success are unreliable. First, he was not present at the hearing to clarify his statements. Second, they are unsupported by the evidence. It is more likely than not that Mr. Sunu simply wanted to use what was available to instill public confidence in Fairpoint to protect the business and to ensure that there was still a viable business for the striking workers to return to.

The fact that the striking workers returned work on February 25, 2015 indicates that Fairpoint and the unions must have reached an agreement. Therefore, Fairpoint must have continued negotiating with the unions to reach such an agreement. The unions argued that not only did the strike have little effect on Fairpoint's business operations, but that Fairpoint actually exceeded its operational goals during the strike. The unions failed to explain; however, Faipoint's continued motivation to negotiate with the unions in light of such success. Simply put, if Fairpoint experienced elevated success without the striking workers, it is more likely than not that Fairpoint would have instead prolonged the strike.

Because the claimants removed lockout and constructive lockout from their argument, the Chairman concludes that the conditions of employment, as described by Fairpoint's CEO, are reasonable when compared to the labor market. Therefore, although the claimants had the right to negotiate for better terms, it does not change the fact that suitable work remained available to them during the labor dispute. Because they freely chose not to accept this work, they do not satisfy the overarching eligibility requirement for the receipt of unemployment benefits: they were not unemployed through no fault of their own.

Had the Chairman elected to define work stoppage as a substantial curtailment of Fairpoint's business, Fairpoint has met the burden of proof, by a preponderance of the evidence, to show that they suffered a substantial curtailment of their business because of the striking workers.

The Chairman separately concludes that the union members' strike pay is deductible wages under RSA 282-A:14.

Although the strike pay is comprised of union members' dues, it was not merely a refund of dues back to the members. Rather, the union members were not eligible to receive the monies until they performed a pre defined service for the union.

Therefore, the strike pay was clearly remuneration for service. The Chairman notes that the law does not provide any exception to the definition for strike pay services. Because the monies are wages, it is the claimant's responsibility to report such wages for week during which they were earned.

DECISION:

The Appeal Tribunal Chairman modifies the Certifying Officer's determination and denies benefits effective October 17, 2014 through February 25, 2015.

The Chairman puts the claimants on notice that it is their responsibility to ensure they have reported strike pay as wages for the week during which they were earned. Any claimant who has filed a weekly claim without reporting the receipt of strike pay must contact the Department and provide the necessary information so that a correction to the weekly claim can be performed.

DECISION OF APPEAL TRIBUNAL CHAIRMAN: *Kevin Croce*

Hearing Method: In Person | Hearing Location: Concord

Hearing Date: February 3, 2015 & March 12, 2015 | Decision Date: April 14, 2015

IF YOU WISH TO APPEAL THIS DECISION, SEE REVERSE FOR YOUR APPEAL RIGHTS.
THIS DECISION IS FINAL UNLESS AMENDED BY THE CHAIRMAN OR APPEALED IN WRITING.
AN APPEAL IS TIMELY IF IT IS RECEIVED IN THE DEPARTMENT OR POSTMARKED NO LATER THAN: 4/28/2015

THIS DECISION IS FINAL UNLESS APPEALED IN WRITING OR AMENDED BY THE CHAIRMAN.

AN APPEAL IS TIMELY IF IT IS RECEIVED IN THIS DEPARTMENT OR POSTMARKED BY:

4/28/2015

APPEAL RIGHTS: An Interested Party adversely affected by this Decision may request the Commissioner reopen the decision due to fraud, mistake, or newly-discovered evidence. The Unemployment Compensation law, as provided in RSA 282-A:60, requires a written request that includes the facts or arguments that are the basis for the request. The request should be addressed to: **Commissioner, NH Employment Security, c/o Appeal Tribunal Unit, PO Box 9505, Manchester, NH 03108-9505.** Please include your name, the docket number, and the last four digits of the claimant's Social Security number.

A reopening request is timely if it is postmarked or received by the Department within **14 calendar days from the date the decision was issued**. If the 14th day is a Saturday, Sunday or legal holiday, the deadline above was extended to the next work day.

If the reopen request is filed after this deadline, include the reason(s) for the delay, as the Commissioner may extend this limit if sufficient grounds exist to justify or excuse the filing delay.

After all appeal levels have been exhausted, RSA 282-A:29 allows the Commissioner, with the approval of the Attorney General's Office, to forgive an individual of an overpayment of benefits under certain conditions. To request forgiveness of the overpayment debt, send the reason(s) you believe the debt should be forgiven in writing to:
Commissioner, NHES, 45 South Fruit Street, Concord, NH 03301

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GEORGE N. COPADIS, COMMISSIONER
RICHARD J. LAVERS, DEPUTY COMMISSIONER

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July 1, 2015

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Re: Requests to Reopen Filed by International Brotherhood of Electrical Workers (IBEW) Local 2320 Claimants, and Communications Workers of America (CWA) Local 1400 Claimants; Docket Nos.: 14-03451, 14-03458, 14-03472 and 14-03493

Dear Counsel:

In connection with your respective requests to reopen this matter, I have reviewed the record of the combined proceeding, including transcripts of testimony and exhibits received during the hearing held on February 3, 2015 and March 12, 2015. I have also reviewed the parties' pre- and post-hearing submissions, the requests to reopen, and the response of Northern New England Telephone Operations LLC and FairPoint Logistics, Inc. (collectively "FairPoint") to IBEW's Request for Reopening and CWA's Appeal to the Commissioner.

I. Background

This case involves the consolidated claims of identified bargaining unit employees affiliated with the International Brotherhood of Electrical Workers (IBEW), Local 2320 and Communication Workers of America (CWA), Local 1400. The claimants went out on strike for a period of approximately four (4) months following an impasse in contract negotiations and the imposition of new contract terms by FairPoint Communications. The Appeal Tribunal Chair considered two principal issues in connection with the case: 1) Whether the claimants were involved in a labor dispute that resulted in a stoppage of work, thus causing them to be disqualified from receiving unemployment compensation benefits under RSA 282-A:36 (Labor Dispute); and 2) Whether [any of] the claimants received strike pay that should be treated as deductible income pursuant to RSA 282-A:14 (Total and Partial Unemployment). Related issues, including the issue of whether there was a lockout by the employer, were withdrawn during the course of the hearing.

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II. Labor Dispute Disqualification

A. Decision by Appeal Tribunal Chair

The first issue is the labor dispute disqualification pursuant to RSA 282-A:36. With respect to this issue, the Appeal Tribunal Chair (ATC) made alternative findings. First, the ATC found that, in the absence of a lockout by the employer (actual or constructive), and where the claimants were free to return to work at any time during the pendency of the strike, they had voluntarily absented themselves from work and were not unemployed through no fault of their own. Finding further that none of the other statutory exceptions applied in this case, the ATC ruled that the striking employees were disqualified from receiving benefits. In deciding the case on this basis, he noted that he defined 'stoppage of work' as the claimants' election to stop working because of a labor dispute. Decision at p. 6.[1] The ATC's alternative ruling is addressed below.

In briefings of the issues and in their respective requests to reopen the hearing, CWA and IBEW have argued that the term 'stoppage of work' resulting from a labor dispute, as it appears in the New Hampshire Unemployment Insurance statute, should be interpreted to mean more than individuals not reporting to work during a strike. Specifically, the unions have argued that a large majority of States with labor dispute disqualification provisions similar to New Hampshire's have interpreted the term 'stoppage of work' to mean "substantial curtailment" of an employer's operations in connection with a labor dispute. IBEW Pre-Hearing Brief at p. 6; CWA Appeal to Commissioner (Reopening Request) at p. 11, note 49. In jurisdictions that have adopted a substantial curtailment test, strikers may generally receive benefits unless they are disqualified because the labor dispute caused a substantial curtailment of the employer's operations.

The unions have further argued that being out on strike is not a "voluntary" leaving of work as that concept is utilized in connection with unemployment insurance benefit administration.[2] They take the position that the striking union members are entitled to receive unemployment benefits in this case because, while the strikers did not work, their leaving was not voluntary and FairPoint's operations were not substantially curtailed as a result of the strike.

Although he did not define the term or decide the case on this basis, the ATC took evidence on the issue of "substantial curtailment" in order to cover all contingencies presented in the case. FairPoint put on the testimony of two company witnesses who described mitigation measures the company employed and how it conducted its operations during the strike. Testimony was also presented about impacts of the strike on certain aspects of FairPoint's operations. After an initial

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[1] The ATC's decision to treat the strike as a voluntary absence appears to be based on Gorecki v. State, 115 N.H. 120 (1975), in which the New Hampshire Supreme Court noted that unemployment caused by a labor dispute is generally considered voluntary.

[2] In a case of first impression involving the issue of substantial curtailment, the Vermont Supreme Court stated that, "The consensus supports the conclusion that the two disqualification provisions are mutually exclusive and that an individual whose unemployment is due to 'a stoppage of work' which exists because of a 'labor dispute' cannot be said to have 'left his work voluntarily' within the meaning of the voluntary separation provisions." Trapeni v. Department of Emp't Sec., 455 A.2d 329, 333 (Vt. 1982).

day of testimony, an agreement was made regarding the scope of information to be provided to the unions to allow them to effectively cross-examine the witnesses and test FairPoint's assertion that its operations had been substantially curtailed. Ultimately, although the case was decided on a different legal theory, the ATC made an alternative finding that, "[h]ad [he] elected to define work stoppage as a substantial curtailment of FairPoint's business," FairPoint met its burden to show it "suffered a substantial curtailment of [its] business because of the striking workers." Decision at p. 8.

Questions to be decided in connection with the reopening requests include: 1) whether the ATC's primary finding with respect to disqualification of the claimants is affected by a mistake of law and 2) whether the law was properly applied in connection with the alternative finding of substantial curtailment of FairPoint's operations. There is a separate issue presented in connection with the ATC's finding that strike pay received by some CWA union members should be treated as deductible wages under RSA 282-A:14 should benefits later be granted.

B. New Hampshire Statutory Language

The New Hampshire Unemployment Insurance law contains a disqualification provision which is applied in the context of labor disputes:

282-A:36, Labor Dispute. – *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*; provided that this section shall not apply if it is shown to the satisfaction of the commissioner that:

I. (a) The person is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(b) The person does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided that, if in any case separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises; or

II. The person has become unemployed and entitled to unemployment compensation before the commencement of the labor dispute and his connection with the employer has been totally severed, including the absence of recall rights, seniority rights and other fringe benefits and indicia of employment; or

II-a. The stoppage of work was due solely to a lockout or the failure of the employer to live up to the provision of any agreement or contract of employment entered into between the employer and his or her employees . . . .

. . .

New Hampshire Rev. Stat. Ann. 228-A:36 (Emphasis Added).

C. Interpreting Stoppage of Work

New Hampshire was one of the first States in the nation to adopt an unemployment compensation law when it did so in 1935. NHES Second Annual Report (1937) dated April1, 1938. As noted by IBEW and CWA, the original iteration of the New Hampshire bill was replaced with model legislation adopted by many States based on work undertaken by the Committee on Economic Security in connection with the Social Security Act. IBEW Pre-Hearing Brief at pp. 4-5; CWA Post-Hearing Brief at p. 11. The so-called "Draft Bill" was modeled in large part on the British Unemployment Insurance Acts, which required that the 'trade dispute' disqualification must be as a result of a 'stoppage of work.' Id. Under British law interpreting the Acts, 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." Id. *citing* Milton I. Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, 17 U. Chic. L. Rev. 294, 298 (1950)(Cited in turn in Twenty-Eight Members of Oil, Chemical & Atomic Workers Union v. Employment Security Division, 659 P.2d 583, 588 (Alaska 1983)).

Although there is no New Hampshire case that explicitly defines 'stoppage of work,' the New Hampshire Supreme Court did have occasion to consider the issue in Legacy v. Clarostat Mfg. Co., 99 N.H. 483 (1955). Due to a strike, three-quarters of Clarostat's employees, including the employee claiming benefits, left work. The company was forced to operate on a substantially scaled down basis with a skeleton crew of non-union and non-striking employees. Id. at 485. After the parties reached an agreement, Clarostat was endeavoring to resume normal operations and full production by ramping up over time. The claimant argued that he was entitled to benefits for the several-week period during which he was not recalled after the strike had ended.

The Court addressed the issue of work stoppage as follows:

> While the plaintiff concedes the work stoppage may have continued after the termination of the dispute, he contends that as to him it ended when there was enough work for one shipping clerk to do. This assumes that the work stoppage is to be determined from the standpoint of the individual employee rather than the operation of the plant as a whole. This is not so, as has been previously stated . . . The weight of authority and we believe the better view reaches this result in similar cases holding that a stoppage of work does not cease until normal operations may reasonably be resumed by the employer.

99 N.H. at 486, citing In re: Stevenson, 237 S.E.2d 520 (N.C. 1953) and Lawrence Baking Co. v. Michigan Unemployment C.C., 308 Mich. 198 (Mich. 1944). Because "[s]uch operations had not been resumed before the plaintiff's reemployment on January 17, 1953," the Court overturned the Superior Court's ruling awarding benefits for the extended period of unemployment after the strike ended. Id. at 487.

In Lawrence Baking, cited with approval in Legacy, the Michigan Supreme Court held that, "[t]he phrase 'stoppage of work' refers to the work and operations of the employer establishment and not to the work of the individual employee." Id. at 263-264.

Interpreting new statutory language that at the time was almost identical to RSA 282-A:36, the Court further held that the law would cause a disqualification for benefits only when the claimant's "unemployment resulted from a stoppage or substantial curtailment of the work and operations of the employer establishment because of a labor dispute." Id. at 209.

In 1962, the U.S. Department of Labor ("DOL"), which oversees unemployment insurance programs nationally, issued guidance on interpreting the labor dispute disqualification provision that appeared in many State laws, including New Hampshire's. In connection with 'stoppage of work,' the DOL offered the following:

> The labor dispute disqualification differs from disqualification for the three major causes because the former affects groups of workers rather than individuals, and because the employment relationship is not severed as it is with voluntary quitting and discharge . . . 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. Dept. of Labor, Bureau of Employment Security No. U-212, Unemployment Insurance Legislative Policy: Recommendations for State Legislation, p. 70 (1962). The United States Supreme Court has recognized that "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." New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 534, n. 24 (1979).

In 1982, in a case of first impression, the Vermont Supreme Court considered the issue of whether its labor dispute disqualification applied to disqualify striking claimants where there was no substantial curtailment of the employer's operations as a result of the strike. Trapeni v. Department of Employment Security, 455 A.2d 329 (Vt. 1982). Analyzing the meaning and effect of the term 'stoppage of work,' the Court stated:

> [It] is a fundamental principle of statutory construction in Vermont that if possible every word, clause, and sentence within a statute will be given effect. State v. Tierney, 138 Vt. 163, 165, 412 A.2d 298, 299 (1980)(Add'l cite omitted). Were the phrase "stoppage of work" to refer to the cessation of work on the part of the employee, it would be redundant in the sentence "his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute . . . ." 21 V.S.A. §1344(a)(4). Such an interpretation would render the phrase meaningless, since the statutory sentence has already mentioned "unemployment" (which always involves a stoppage of work by the employee) and presupposes the existence of that condition. Employment Security Administration v. Browning-Ferris, Inc., 438 A.2d at 1362 (Add'l cites omitted.) Only by construing "stoppage of work" to refer to the curtailment of the employer's operations do we give full effect to every word and clause of 21 V.S.A. §1344(a)(4).

455 A.2d, 329, 332. As noted by CWA and IBEW, many States follow this approach and define 'stoppage of work' as a substantial curtailment of the employer's operations. See e.g. Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Review, 963 A.2d 289, 297 (N.J. 2009); 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); Reed Nat. Corp. v. Dir. of Div. of Emp't Sec., 446 N.E.2d, 398, 399 (Mass. 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).

In its Pre-Hearing Memorandum, FairPoint addressed the issues of 'work stoppage' and substantial curtailment. FairPoint argued that, in New Hampshire, unemployment caused by a labor dispute "is generally considered voluntary and not within the purpose of an unemployment compensation act . . . [i]f the dispute caused the unemployment, the employee is disqualified from receiving benefits." Pre-Hearing Memorandum at p. 3, citing Gorecki v. State, 115 N.H. 120, 122 (1975). FairPoint further argued that the New Hampshire Supreme Court has employed a straightforward standard for benefit disqualification under RSA 282-A:36. "If a claimant is unemployed because he or she is on strike, then they are not entitled to unemployment benefits." Id. citing Amory Worsted Mills v. Riley, 96 N.H. 162, 164 (1950) and Simplex Wire & Cable Co. Inc., 131 N.H. 40, 44 (1988).[3]

The unions take issue with FairPoint's position, noting that both Gorecki and Simplex arose in the context of lockout allegations by the claimants. The decisions appealed from in each case had awarded benefits based on an employer lockout theory. The question considered by the New Hampshire Supreme Court in both cases was not whether there was a stoppage of work, but whether the claimants had met their burden of showing that the lockout exception under RSA 282-A:36, II-a applied. Thus, the issue of 'work stoppage' was not addressed in any significant way in the cases and they provide limited guidance on how to interpret the statutory language at issue in this case.[4]

III. Decision on Requests to Reopen Pursuant to RSA 282-A:60 – Labor Dispute Disqualification Ruling by Appeal Tribunal Chair

After carefully reviewing the Appeal Tribunal decision and considering the extensive briefing of the issues provided by FairPoint, IBEW and CWA in this matter, I find that the decision is affected by a mistake of law. While construction of the term 'stoppage of work' is not settled law in New Hampshire, Legacy v. Clarostat Mfg. Co. provides strong support for the proposition that a work stoppage is not measured by the cessation of work by the employee, but, rather, by a stoppage or curtailment of the employer's operations. 99 N.H 483 at 486. The U.S. Department

[3] Yet in its Reply Memorandum, FairPoint stated that 'stoppage of work' is not synonymous with strike and does not refer to the status of an individual's employment. Instead, FairPoint argued that "a stoppage of work occurs when the work of a claimant who is on strike is no longer being performed at the claimant's place of employment on behalf of the claimant's employer. Citing Amory v. Worsted Mills v. Riley, 96 N.H. 162, 164 (1950).

[4] Similarly, the Amory Mills case involved a plant shutdown and allegations of contract violations by the employer.

of Labor has provided guidance to the States to this effect. A majority of States with labor dispute disqualification provisions similar to New Hampshire's have reached the conclusion that 'stoppage of work' refers to a substantial curtailment of the employer's operations. As such, it was a mistake of law to conclude that a stoppage of work under RSA 282-A:36 occurred based on the claimants' election to stop working due to the labor dispute and that this alone disqualified the claimants from receiving benefits.[5]

In addition, I would note that NHES has internal guidance which has not been followed in this case. NHES Directive No. 340-17, which relates to unemployment benefits and labor disputes, attaches a fact-finding guide for use in unemployment cases arising from labor disputes. See attached. The issue of work stoppage is addressed at Item Numbers 7 through 9. This internal guidance document, dated February 9, 2006, confirms that the Department has instructed its fact finders to evaluate the issue of work stoppage by using a 'substantial curtailment' type of test. In determining whether a stoppage of work occurred, fact finders are directed to look at the following evidence: "(a) Production stopped or severely curtailed? b) Shipments stopped? c) Operation shutdown? d) Dollar amounts/percentage of curtailment? e) Deliveries of materials? By whom?" Directive No. 340-17 at Item #7.

The Vermont Supreme Court's reasoning with respect to the issue of whether being out on strike should be considered a voluntary leaving of work is also persuasive. As noted by the Court in the Trapeni case:

> Before the voluntary leaving disqualification comes into play, it must first be established that the claimant 'left the employ of his last employing unit.' The term 'left the employ,' as used in 21 V.S.A §1344(a)(2)(A) refers only to a severance of the employment relationship and does not include a temporary interruption in the performance of services . . . A complete and bona fide severance of the employer-employee relationship does not occur in a labor dispute case, for participation in a strike merely suspends that relationship, it does not terminate it.

455 A.2d 329 at 333. Similar reasoning would apply with respect to RSA 282-A:32.

Having drawn this conclusion, I am granting the requests of IBEW and CWA to reopen the hearing on this matter. The further hearing before the Appeal Tribunal will be held de novo, ". . . a new [hearing] on all issues in no way restricted by what occurred before." RSA 282-A:23.

IV. Alternative Finding re: Substantial Curtailment and Standard for Applying a Substantial Curtailment Test on Reopening

After careful review of the decision, I find that the Appeal Tribunal's alternative finding on substantial curtailment is affected by mistake of law based on the fact that no standard was articulated. This is understandable as the New Hampshire Supreme Court has not

[5] The hearing record contains evidence that FairPoint's operations continued during the strike, with bargaining unit work performed by non-union management employees and contractors. Tr. I at p. 243;Tr. II at p. 72-75.

addressed this issue. Nevertheless, the cases interpreting labor dispute disqualification provisions similar to New Hampshire's provide valuable guidance as to the factors that should be taken into account in evaluating the issue of substantial curtailment.

As noted by the Massachusetts Supreme Judicial Court, "a 'stoppage of work' requires more than holes in coverage that inevitably result when staff is temporarily diverted from one place to another." Hertz Corp. v. Acting Director of the Div. of Emp't & Training, 437 Mass. 295, 298 (Mass. 2002). "How much disruption is required to constitute a substantial curtailment is a fact-specific inquiry; there is no percentage threshold or numerical formula." Id. at 297, citing Westinghouse Broadcasting Co. v. Director of the Div. of Employment Sec., 378 Mass. 51, 55-56 (1971); Reed Nat'l Corp. v. Director of Div. of Employment Sec., 393 Mass. 721, 724 (1985).

Although there is no existing New Hampshire standard for substantial curtailment, there is an extensive body of case law addressing the issue. As noted by the Alaska Supreme Court:

> Most decisions follow the general practice of examining decreased production, business revenue, service, number of employees, payroll, or man-hours . . . Some cases focus primarily on interference with production, denying the payment of benefits only if production is reduced by a significant percentage, usually about twenty to thirty percent. (See, e.g., Meadowgold Dairies-Hawaii, Ltd. v. Wiig, 50 Hawaii 225, 437 P.2d 317, 320 (Hawaii 1968)). Other courts eschew reliance on a precise percentage in determining the "stoppage of work." These courts have adopted a more flexible test of "substantial" work stoppage by assessing "the main business of the employer" and determining whether that primary business purpose has been substantially curtailed. (See, e.g., Westinghouse Broadcasting Co., Inc. v. Director of Division of Employment Security, 378 Mass. 51, 389 N.E.2d 410, 413 (Mass.1979); Continental Oil Co. v. Board of Labor Appeals, 178 Mont. 143, 582 P.2d 1236, 1244 (Mont.1978)).

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).

In their brief on this issue, the CWA claimants have advocated for a sensible, case-by-case, fact-based analysis. CWA Pre-Hearing Memorandum at p. 14. In order to ensure that appropriate factors are considered, on reopening, the Appeal Tribunal Chair should consider, at a minimum, a "comparison of business revenues, production, services and worker hours before and after the strike." Whitcomb v. Department of Employment & Training, 520 A.2d 602,603 (Vt. 1986); citing Twenty-Eight (28) Members, Supra, at 592-593. See also Lourdes Medical Ctr. of Burlington Cnty. v. Bd. of Review, 963 A.2d 289, 299 (N.J. 2009). Other factors listed above may be considered if determined to be helpful by the Appeal Tribunal Chair based upon the input of the parties in light of the specifics of the industry and case at issue. Reference should also be made to NHES' internal guidance provided in Directive No. 340-17, Attachment A.

V. Finding re: Strike Pay

The second issue involves strike pay earned only by members of CWA through funds made available by the national union pursuant to the Robert Lilja Member's Relief Fund. CWA Appeal at p. 25. Because the issue of strike pay was intertwined with other issues presented in the Appeal Tribunal proceeding below and was not the subject of extensive testimony, this issue will also be heard de novo when the hearing is reopened. Applicable case law would include McIntire v. State, 116 N.H. 361 (1976).

VI. Hearing on Reopening

The reopened hearing on benefits and strike pay before the Appeal Tribunal will be held de novo, a full hearing on the merits in no way restricted by what occurred before." RSA 282-A:23. A new Appeal Tribunal Chair will hear the case. You will be duly notified of the time and date of the hearing by the Appeal Tribunal. The Appeal Tribunal shall assure that all parties receive actual notice of the hearing.

Sincerely,

George N. Copadis, Commissioner
New Hampshire Employment Security

cc: FairPoint Communications
Arthur G. Telegen, Esquire
Richard J. Lavers, Deputy Commissioner
Maria Dalterio, General Counsel

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GEORGE N. COPADIS, COMMISSIONER
RICHARD J. LAVERS, DEPUTY COMMISSIONER

July 20, 2015

Arthur Telegen, Esquire
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Re: Response to Objection of Northern New England Telephone Operations LLC and FairPoint Logistics, Inc. to the Commissioner's Order: Docket Nos. 14-03451; 14-03472; and 14-03458

Dear Counsel:

I have reviewed the Objection to my July 1, 2015 decision to reopen the above-captioned consolidated cases and offer the following response.

The Appeal Tribunal Chair's decision in this case was issued on April 14, 2015. The International Brotherhood of Electrical Workers, Local 2320 ("IBEW") and Communications Workers of America, Local 1400 ("CWA") filed timely Requests to Reopen on April 28, 2015. On or about May 5, 2015, an attorney for FairPoint contacted the Appellate Section and subsequently the NHES Legal Section seeking time to submit a response to the requests to reopen. NHES General Counsel Maria Dalterio extended time for the response to be filed.

As noted in the Objection, on May 7, 2015, FairPoint also submitted a letter entitled "Response To Request to Re-Open or for Re-Hearing." In the letter, FairPoint argued, without citation of authority, that the Commissioner's review provided for in RSA 282-A:60 is very limited. FairPoint added that, if the Commissioner "intends to extend his examination beyond the limited review" provided for in the statute, "FairPoint respectfully asks for notice as to the scope of review so that it can adequately respond to the briefs submitted by the Unions."

In its May 7, 2015 letter, FairPoint essentially asked to be notified of the Commissioner's decision in advance of the decision being made in order to file a more extensive response to the reopening requests submitted by the unions. The parties had sufficient time to brief all of the issues presented in the case. In particular, FairPoint requested and was granted adequate time to brief any applicable issues following the filing of the requests to reopen by IBEW and CWA.

Moreover, FairPoint's position as to the scope of review under RSA 282-A:60 is simply incorrect. The Commissioner of the Department of Employment Security is vested with broad

authority to administer the Unemployment Insurance law in New Hampshire. RSA 282-A:112. That authority, by necessity, includes interpreting the law as needed when new issues arise.

RSA 282-A:60 is entitled "Reopening of Appeal Tribunal Decision: Procedure." It provides, in pertinent part, as follows:

> The second level of appeal shall be to the commissioner. The commissioner may, upon written request of an interested party or upon his own initiative, in any case in which a decision has rendered, reopen the case on the basis of fraud, mistake or newly discovered evidence.

RSA 282-A:60. The reference in the statute to "mistake" fairly encompasses mistake of law. Appeal of Pelleteri, 152 N.H. 809 (2005); see also RSA 282-A:61. FairPoint argues that reopening may only be granted in the case of "fundamental mistake." However, FairPoint does not define the term "fundamental mistake," or point to any applicable New Hampshire case law that might provide guidance.

The fact that the Appellate Board's jurisdiction is stated in more detail in the statute than the Commissioner's does not require an interpretation that the Commissioner's authority to reopen is limited.

Finally, I disagree that the Unions were seeking "appellate review" in filing the requests for reopening. Authority is provided to reopen a case on the basis of fraud, mistake or newly discovered evidence. RSA 282-A:60. The decision of the Appeal Tribunal Chair is affected by mistake of law, both in the primary finding and in the alternative finding in which no recognized standard for "substantial curtailment" was applied to form the basis for the resulting decision. Therefore, I affirm my July 1, 2015 decision to reopen the case.

Sincerely,

George N. Copadis
Commissioner

cc: James A.W. Shaw, Esquire
Peter J. Perroni, Esquire
Maria Dalterio, Esquire

NEW HAMPSHIRE EMPLOYMENT SECURITY

APPEAL TRIBUNAL DECISION

JFS-86969

Claimant's Name: SARGENT TINA	Social Security Number: XXX-XX-7268
	Date Issued: November 19, 2015
SEYFARTH SHAW, LLP ARTHUR TELEGEN TWO SEAPORT LANE SUITE 300 BOSTON MA 02210	Appeal Tribunal: APPEAL TRIBUNAL UNIT 45 South Fruit Street Concord, NH 03301 Telephone: (603) 223-6140 Fax: (603) 223-6141

APPELLANT:

TINA SARGENT

DOCKET NUMBER(S):

14-03458, 14-03451, 14-03472, & 14-03493

INTERESTED PARTIES:

TINA SARGENT

Northern New England Telephone Operations, LLC and/or Fairpoint Logistics, Inc. and/or Fairpoint Communication, Inc.

CASE HISTORY:

The Commissioner granted a De Novo reopening to consider whether there was a substantial curtailment of business during the strike and whether the strike pay is deductible.

APPEARANCES:

Communications Workers of America (CWA,) represented by James Shaw and Sasha Gillan. Witness Donald Trementozzi, president CWA. Claimants: David Duhamel appeared

International Brotherhood of Electrical Workers (IBEW,) represented by Peter Perroni and Meghan Cooper. Witnesses Robert Erickson, International Representative IBEW and Stephen Soule, Business Manager IBEW. Claimants: Stephanie Hanscom, April Broderick, Tina Sargent, although duly notified failed to appear or request a postponement

Northern New England Telephone Operations, LLC and FairPoint Logistics, represented by Arthur Telegen, Kelsey Montgomery. Witness: Peter Nixon, executive Vice President of External Affairs.

EXHIBIT(S):

Employer Exhibit One: April 1, 2008 Agreement CWA
Employer Exhibit Two: April1, 2008 Agreement IBEW
Employer Exhibit Three: Employee Count
Employer Exhibit Four: Pre-Strike / Post Strike Hours
Employer Exhibit Five: NH Trouble Load Trend
Employer Exhibit Six: NH Order Load Trend
Employer Exhibit Seven: Complaints
Employer Exhibit Eight: Revenue by Month
Employer Exhibit Nine a through g: graphs
Employer Exhibit Ten: Revenue by Month through July of 2015
Employer Exhibit Eleven: Past due orders graph (not considered after the deadline of discovery)
Employer Exhibit Twelve: Gemini NH Operations Headcount (not considered after the deadline of discovery)
Employer Exhibit Thirteen: Gemini Load Compare to no Strike Load graph (not considered after the deadline of discovery)

Claimant Exhibit One: Trouble Load - Historic
Claimant Exhibit Two: Press Release
Claimant Exhibit Three: Earnings Call Transcript
Claimant Exhibit Four: Emails
Claimant Exhibit Five: Invoices
Claimant Exhibit Six: Contractor / Management Hours
Claimant Exhibit Seven: Spreadsheets
Claimant Exhibit Eight: Strike Pay Information

Department Exhibit 1: transcript from prior hearings (2)

Post hearing briefs from Northern New England Telephone Operations, LLC and FairPoint Logistics, IBEW and CWA accepted.

ISSUE(S) OF LAW:

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

FINDINGS OF FACT:

All parties agreed to and stipulate to the following;

1. There was a labor dispute.
2. The employees worked under a contract and the contract expired.
3. The union voted to strike prior to the contract expiring. The vote was prior to August 2, 2014.
4. The employees participated in and were directly interested in the labor dispute.
5. The strike began October 17, 2014 and ended February 25, 2015. The employees returned to work within 2 weeks after the termination of the labor dispute.
6. An employee could return to work at any time by contacting his or her supervisor.

Northern New England Telephone Operations, LLC and FairPoint Logistics stipulated that the statements made by Peter Sunu, CEO contained within claimant exhibit 2 were accurate.

All parties agreed to the submission of the transcripts from the prior hearings, which will be known as Department document 1 in its entirety.

The IBEW employees did not receive strike pay.

The CWA employees received strike pay. The strike pay is paid out of a national strike fund known as the Robert Lilja Members' Relief Fund. The funds are gathered from a portion of the union dues, $0.50 a month of the dues are put into the fund. The fund earns interest and the moneys are paid out of this fund.

Employees receive $200.00 a week after 15 days of the strike, $300.00 a week after 29 days and $400.00 a week after 57 days. If members receive over $600.00 a year in strike pay they receive a 1099 for tax purposes.

There is a strike duty policy that requires employees to perform "their fair share of strike duty, unless excused for just cause." They may be expected to do picket duty or office duty. They may be excused if they are disabled or have medical issues.

The strike began October 17, 2014. The agreement was reached and ratified on February 22, 2015. The workers returned to work February 25, 2015.

Peter Nixon the vice president of external affairs and operations testified for FairPoint. He has 37 years of experience with the business. It began as a family business and he is the fourth generation. The company acquired Verizon in 2007. They were required to continue the CBA through August of 2008. They then agreed with the two unions to extend the CBA for a five year period. They did so to avoid a labor dispute which could have prevented the merger and been detrimental to the integration plan.

The company is in business to sell communications services. They have residential voice and DSL internet, small and medium business, large business and government/education customers and wholesale customers.

The company is losing 5 to 7% of their voice customers a year to wireless providers.

The company has about 5000 customers that utilize the service for 911 only. It is considered to be the carrier of last resort. It is governed by the FCC and cannot shut down. It is required to maintain their old lines as well as develop new products. It is a fixed cost company.

In 2013 the company began to develop a plan to withstand a strike. Negotiations for a new CBA were set to begin in April of 2014. It intended to ask for significant concessions and work rule changes. It anticipated that this would cause a strike.

Part of the plan was to stop marketing. This would reduce the new orders the call center received. The Company would still accept new orders that did come in but would not actively advertise. It was willing to sacrifice revenue to meet its obligation to keep up with repairs. The focused on repairs rather than installations. It intended to use management members and contract workers to fulfill these roles.

Prior to the strike the goal was to have a repair completed within 24 hours. During the strike the goal was to provide reasonable service. Their priorities were 911 system, emergency public safety, customers with medical issues and customers with no alternate communication.

There was a noticeable drop in orders in NH. The revenue dropped about $3,000,000.00.

Typically a data customer remains with FairPoint for 3.7 years. A voice customer will remain with them for 14 years. During the time that FairPoint was not marketing some potential customers may have chosen another provider and it would have lost that revenue for an ongoing period of time.

FairPoint continued with the required construction work such as DOT highway moves. It reduced its investment in the network by 30 to 40% by not implementing the discretionary construction projects.

There was a small off-line call center in Manchester New Hampshire that was involved in the strike. Its workers were represented by the Communication Workers of America union (CWA) separate from the International Brotherhood of Electrical Workers (IBEW). Their work was shifted to the other two call centers outside New Hampshire and absorbed by those employees.

The company contracted with Alta to provide service technicians to New Hampshire. There were 161

service technicians prior to the strike. Alto was to provide 156 technicians. They never reached this goal. Some of the technicians were not qualified and had to be sent back.

Prior to the strike the technicians were resolving 2250 tickets a day. At the beginning of the strike they were resolving 800 tickets a day. By the end of the strike they were resolving 2150 tickets a day. There was an initial increase in the trouble load because fewer tickets were being resolved.

There was a major snow storm on November 26, 2014 that caused significant damage creating outages. This was followed by another storm in December of 2014. In past years when storms hit they would utilized overtime and call in crews from the neighboring states. This storm hit all three states so they were unable to call in outside crews. The storms and the winter weather in New Hampshire were more severe in the 2014/2015 winter than it has been in any recent years. The storms had a significant impact in FairPoint's ability to provide services.

The out of pocket expense for the strike was about $60,000,000.00 to include their legal services required About 40% of the cost is attributable to New Hampshire.

The company did have to give credit back to customers for lack of service during the strike. They gave back $329,000.00 to residential and business customers and an additional $329,000.00 above usual to wholesale customers.

The company submitted monthly revenue amount from October of 2011 to July of 2015. The fluctuations from month to month are normal. They are caused by litigation awards, large contracts and large installation projects.

In a public letter to Senator Shaheen and Congresswoman Kuster, Paul Sunu stated that, "the team is doing exceptional work and showing productivity levels well above pre-strike levels despite being hampered by aggressive and disruptive picketing, sabotage and extraordinarily bad weather." "The majority of the backlog of orders is directly associated with the extreme weather we have encountered four major storms in 50 days with regional impact approaching levels not seen since Irene in 2011." (sic)

At the hearing on February 3, 2015 Mr. Daniel White, director of staffing and employee services, testified that he could not vouch for the accuracy of the report containing the number of hours for pre-strike and post-strike as contained in employer exhibit 4.

CONCLUSION(S) OF LAW:

After a review of all the records and testimony, the Appeal Tribunal Chairman finds that there was no stoppage of work as defined by a substantial curtailment of business. In reaching this conclusion, the Chairman considered the fact that FairPoint knew they were going to ask the Unions to make substantial concessions in the negotiations for the new CBA. In anticipation of the strike they made the business decision to curtail marketing to reduce the number of new orders. They were willing to sacrifice revenue to maintain repairs to service. By choosing this business model they reduced their revenue beyond the impact of the strike. Had the Unions accepted the new agreement revenue would still had been reduced. This is further evidenced by the fact that revenue increased after March 1, 2015 when the company began marketing again.

By FairPoint's own testimony the month to month fluctuations in revenue from October of 2011 through July of 2015 are normal fluctuations.

There was an initial increase in the repair orders pending while FairPoint got the replacement workers in place. There was an increase in the trouble load during the storms. This is a normal event during severe storms. FairPoint asserted that the replacement workers were showing a productivity level above that of pre-strike and the majority of the backlog of orders was directly due to the extreme weather which had a regional impact not seen since Irene in 2011.

FairPoint submitted graphs to represent the impact on their business. There is no way to test the veracity of the reports or the graphs. The director of staffing could not verify if the information was accurate. FairPoint did not demonstrate how much of the impact was directly related to the storms versus related to the strike itself.

Given the totality of the evidence FairPoint has not shown that there was a stoppage of work as defined by a substantial curtailment of work.

The Chairman finds that the CWA employees received deductible income in the form of strike pay. In reaching this conclusion the Chairman finds that the employees had to perform strike duty to be eligible for the strike pay. They either had to work picket duty or office duty unless otherwise excused. This is outlined in the CBA. Therefore they performed personal services in exchange for the strike pay. The Chairman then referred to RSA 282-A: 14 III (a) and found that sums of whatever type or nature unless excluded are considered wages.

DECISION:

The determination of the Certifying Officer is reversed in part and affirmed in part.

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 decision is reversed. Benefits are allowed.

In regards to whether the strike pay is deductible income the decision is affirmed. Benefits are reduced or denied due to the receipt of strike pay.

DECISION OF APPEAL TRIBUNAL CHAIRMAN: *Sandra Mooney*

Hearing Method: In Person Hearing Location: Concord

Hearing Date: September 29, 2015 Decision Date: November 19, 2015

IF YOU WISH TO APPEAL THIS DECISION, SEE REVERSE FOR YOUR APPEAL RIGHTS.
THIS DECISION IS FINAL UNLESS AMENDED BY THE CHAIRMAN OR APPEALED IN WRITING.
AN APPEAL IS TIMELY IF IT IS RECEIVED IN THE DEPARTMENT OR POSTMARKED NO LATER THAN:
December 3, 2015

THIS DECISION IS FINAL UNLESS APPEALED IN WRITING OR AMENDED BY THE CHAIRMAN.

AN APPEAL IS TIMELY IF IT IS RECEIVED IN THIS DEPARTMENT OR POSTMARKED BY:

December 3, 2015

APPEAL RIGHTS: An Interested Party adversely affected by this Decision may request the Commissioner reopen the decision due to fraud, mistake, or newly-discovered evidence. The Unemployment Compensation law, as provided in RSA 282-A:60, requires a written request that includes the facts or arguments that are the basis for the request. The request should be addressed to: **Commissioner, NH Employment Security, c/o Appeal Tribunal Unit, PO Box 9505, Manchester, NH 03108-9505.** Please include your name, the docket number, and the last four digits of the claimant's Social Security number.

A reopening request is timely if it is postmarked or received by the Department within **14 calendar days from the date the decision was issued.** If the 14th day is a Saturday, Sunday or legal holiday, the deadline above was extended to the next work day.

If the reopen request is filed after this deadline, include the reason(s) for the delay, as the Commissioner may extend this limit if sufficient grounds exist to justify or excuse the filing delay.

After all appeal levels have been exhausted, RSA 282-A:29 allows the Commissioner, with the approval of the Attorney General's Office, to forgive an individual of an overpayment of benefits under certain conditions. To request forgiveness of the overpayment debt, send the reason(s) you believe the debt should be forgiven in writing to:
Commissioner, NHES, 45 South Fruit Street, Concord, NH 03301

PROTECTION OF RIGHTS AND BENEFITS

Waiver of Rights Void: ANY AGREEMENT BY AN INDIVIDUAL TO WAIVE, RELEASE, OR COMMUTE HIS RIGHTS TO BENEFITS OR ANY OTHER RIGHTS UNDER THIS CHAPTER SHALL BE VOID. *SEE RSA 282-A:157.*

Limitation of Fees: NO INDIVIDUAL CLAIMING BENEFITS SHALL BE CHARGED FEES OF ANY KIND IN ANY PROCEEDING UNDER THIS CHAPTER BY THE COMMISSIONER OF THE DEPARTMENT OF EMPLOYMENT SECURITY, OR BY HIS REPRESENTATIVE OR BY ANY COURT OR BY ANY OFFICER THEREOF. ANY INDIVIDUAL CLAIMING BENEFITS BEFORE THE COMMISSIONER OR HIS REPRESENTATIVE MAY BE REPRESENTED BY COUNSEL OR OTHER DULY AUTHORIZED AGENT; BUT NO SUCH COUNSEL OR AGENT SHALL EITHER CHARGE OR RECEIVE FOR SUCH SERVICES MORE THAN AN AMOUNT APPROVED BY THE COMMISSIONER. ANY PERSON WHO VIOLATES ANY PROVISION OF THIS SECTION SHALL BE GUILTY OF A MISDEMEANOR. *SEE RSA 282-A:158.*

No Assignment or Attachment of Benefits: ANY ASSIGNMENT, PLEDGE, OR ENCUMBRANCE OF ANY RIGHT TO BENEFITS, WHICH ARE OR MAY BECOME DUE OR PAYABLE UNDER THIS CHAPTER SHALL BE VOID. SUCH RIGHTS TO BENEFITS SHALL BE EXEMPT FROM LEVY, EXECUTION, ATTACHMENT, OR ANY OTHER REMEDY WHATSOEVER PROVIDED FOR THE COLLECTION OF DEBT OR TAXES. BENEFITS RECEIVED BY ANY INDIVIDUAL, SO LONG AS THEY ARE NOT MINGLED WITH OTHER FUNDS OF THE RECIPIENT, SHALL BE EXEMPT FROM ANY REMEDY WHATSOEVER FOR THE COLLECTION OF ALL DEBTS EXCEPT DEBTS INCURRED FOR NECESSARIES FURNISHED TO SUCH INDIVIDUAL OR HIS SPOUSE OR DEPENDENTS DURING THE TIME WHEN SUCH INDIVIDUAL WAS UNEMPLOYED. ANY WAIVER OF ANY EXEMPTION PROVIDED FOR IN THIS SECTION SHALL BE VOID EXCEPT FOR CHILD SUPPORT OBLIGATIONS AS PROVIDED IN RSA 282-A:31. *SEE RSA 282-A:159.*

Prohibition Against Discrimination: NO PERSON SHALL DISCRIMINATE IN ANY WAY AGAINST ANOTHER PERSON BECAUSE OF HIS APPEARANCE OR INTENDED APPEARANCE AS A WITNESS OR PARTY, OR FOR GIVING OR FURNISHING INFORMATION IN CONNECTION WITH ANY PROCEEDING UNDER THIS CHAPTER OR AN APPEAL THEREFROM. ANY PERSON WHO VIOLATES ANY PROVISION OF THIS SECTION SHALL BE SUBJECT TO THE PENALTIES PROVIDED IN RSA 282-A:161-168. *SEE RSA 282-A:160.*

New Hampshire Employment Security
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"We're working to keep New Hampshire working"

GEORGE N. COPADIS, COMMISSIONER
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December 15, 2016

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Re: Northern New England Telephone Operations LLC and Fairpoint Logistics, Inc.'s Motion Pursuant to RSA 282-A:60; Communication Workers of America, Local 1400 Partial Appeal to Commissioner

Dear Counsel:

This decision is provided in response to the Motion Pursuant to RSA 282-A:60[1] filed by Northern New England Telephone Operations, LLC and FairPoint Logistics, Inc. (collectively referred to herein as "FairPoint") and the partial Request to Reopen with respect to the issue of strike pay filed by Communication Workers of America, Local 1400 ("CWA"). Hearing transcripts, exhibits and the parties' pre and post-hearing filings have been reviewed in connection with this decision.

The New Hampshire Unemployment Insurance law provides several levels of appeal, including a second level of appeal to the New Hampshire Employment Security ("NHES") Commissioner:

> The Commissioner may, upon written request of an interested party or upon his own initiative, in any case in which a decision has been rendered, reopen the case on the basis of fraud, mistake or newly discovered evidence . . . .

See RSA 282-A:60, Reopening of Appeal Tribunal Decision; Procedure. In connection with its Motion Pursuant to RSA 282-A:60, FairPoint has requested the following relief: to vacate the Appeal Tribunal Decision issued by NHES Chairperson Sandra Mooney on November 19, 2015 and to reinstate a prior Appeal Tribunal Decision issued by Chairperson Kevin Croce on April 14, 2015. As provided in further detail below, the relief requested by FairPoint is not available in this proceeding. The decision on both Requests to Reopen follows.

[1] In accordance with the statute, the Motion is being treated as a Request to Reopen.

I. Background

The case arises out of a strike undertaken by FairPoint's unionized New Hampshire workforce after applicable collective bargaining agreements had expired in August of 2014 and following implementation of disputed contract terms by FairPoint in October of 2014. The unionized employees were represented by CWA and the International Brotherhood of Electrical Workers Local 2320 ("IBEW"), who appeared on their behalf at the hearings on this matter. The claimants had filed for unemployment compensation benefits and the consolidated claims were originally denied at the Certifying Officer level. The primary issue on appeal was whether and how a labor dispute disqualification provision should be applied in the case. A second issue was whether strike pay made available to CWA members through a strike relief fund should be treated as deductible income for purposes of calculating any applicable unemployment benefits.

The New Hampshire Labor Dispute provision reads as follows:

> 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 . . .

RSA 282-A:36 (Exceptions omitted). The Certifying Officer(s) found that the claimants were disqualified under the provisions of RSA 282-A:36 by virtue of the fact that they were voluntarily involved in a labor dispute and thus did not meet eligibility requirements. NHES Determinations dated November 2014.

The IBEW and CWA claimants appealed the disqualification decision to the Appeal Tribunal pursuant to RSA 282-A:53. They filed pre and post-hearing memoranda arguing that a "stoppage of work" under RSA 282-A:36 does not occur solely by virtue of employees being out on strike, but occurs only if the employer's operations are "substantially curtailed" by the strike. This interpretation of stoppage of work has been adopted in a majority of states with labor dispute disqualification provisions similar to the New Hampshire provision quoted above.[2]

On February 3, 2015 and March 12, 2015, NHES Appeal Tribunal Chair Kevin Croce held a hearing on the labor dispute disqualification and strike pay issues. By decision dated April 14, 2015, he denied benefits based on the fact that the claimants had elected not to work because of a labor dispute, which he interpreted as a "stoppage of work" under RSA 282-A:36. While expressly declining to adopt a definition of substantial curtailment (despite extensive briefing of the issue by the parties), the Appeal Chair made an alternative determination that FairPoint had met its burden to show substantial curtailment of its business. As indicated in the findings supporting the decision, substantial curtailment was determined based on "whether or not the strike negatively impacted FairPoint's business" in terms of its ability to provide service and

[2] An extended discussion of "stoppage of work" and "substantial curtailment" may be found in pre- and post-hearing memos filed by the parties as well as my previous Reopening Decision in this matter dated July 1, 2015.

acquire new customers.[3] See Motion Pursuant to RSA 282-A:60, Exhibit 1, Decision at p. 6.[4] With respect to the second issue, strike pay was determined to constitute deductible income.

The claimants timely appealed the decision, requesting reopening pursuant to RSA 282-A:60. By Decision dated July 1, 2015, I found that that the Appeal Tribunal decision was affected by mistake of law, granted the Unions' Requests to Reopen, and ordered a *de novo* hearing in the case. The legal standard applied by the Appeal Chair was not supported by the case law presented by the parties or by NHES' own internal policy guidance as set forth in Directive No. 340-17.[5] The mistake of law finding was based both on the Appeal Chair not applying the substantial curtailment standard in the main decision on the case, and also in applying the standard improperly in the alternative ruling.[6] A new Appeal Tribunal Chair was to be appointed for the *de novo* hearing to avoid the appearance of bias or prejudgment in the reopened proceeding. The issue of strike pay was also reopened on a *de novo* basis.

In determining whether a "stoppage of work" had occurred, the new Appeal Tribunal Chair was instructed in the Reopening Decision to consider substantial curtailment factors identified in the applicable case law, including 'a "comparison of business revenues, production, services and worker hours before and after the strike."' *Citing* Whitcomb v. Department of Employment and Training, 520 A.2d 602, 603 (Vt. 1986)(additional cites omitted). The Appeal Chair was also instructed to look to NHES Directive No. 340-17 relating to labor disputes, which instructs factfinders to evaluate stoppage of work by looking at whether production is stopped or severely curtailed, whether there is operational shutdown, and to review dollar amounts or percentage of curtailment *inter alia*. Finally, the Appeal Chair was instructed to consider any industry-specific factors offered by the employer in support of its case of substantial curtailment.

The *de novo* hearing was held on September 29, 2015. Although exhibits from the prior hearing were going to be available at the *de novo* hearing for convenience, the parties were instructed to

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[3] The basis for this decision included findings that FairPoint "ceased marketing" and "essentially focused all of its efforts on expense related work (repairs) during the strike. It is more likely than not that, combined, this had a negative impact on FairPoint's revenue." Similarly, the Appeal Chair found that "FairPoint's business includes weather related repair work. Therefore, when the claimants walked off the job, they directly and negatively impacted FairPoint's ability to perform an essential function of its business." FairPoint's strategic "marketing reduction and redirection of all its resources to repair work clearly had a negative impact on FairPoint's ability to attract and serve new customers." The Chair further noted that, "with respect to management hours diverted to bargained for work hours, the specific number is irrelevant. That management diverted any of its focus from strategic and tactical planning to operations is enough to illustrate a negative impact to FairPoint's business." Decision at pp. 7-8.

[4] Appeal Chair Croce's decision is included as Exhibit 1 to FairPoint's Motion Pursuant to RSA 282-A:60.

[5] Directive No. 340-17 is a 2006 NHES document that details the Department's procedure in processing claims related to labor disputes. It includes a fact finding guide for labor dispute issues, including stoppage of work.

[6] The Appeal Chair specifically stated that he "declined to create a definition" of substantial curtailment (Decision dated April 14, 2015 at p. 6), but then proceeded to apply a standard that did not conform to the definitions provided in the case law and the provisions of NHES' own Directive. His extremely broad "negative impact" analysis, employed in the absence of an accepted definition of "substantial curtailment," was legally insufficient to support the alternative finding that substantial curtailment/work stoppage had occurred. Based on the decision, any negative impact was considered sufficient to support a finding of substantial curtailment.

be prepared to put on their cases and present testimony at the hearing. FairPoint was found to have the burden of proof on the issue of substantial curtailment. The Appeal Chair premised her decision on NHES Administrative Rule Emp 207.26, "[t]he party asserting a proposition shall bear the burden of proof of the proposition by a preponderance of the evidence." *See also* Appeal of Moore, 164 N.H. 102, 104 (2012) (employer found to have the burden of proving a disqualification from benefits). [7] Even if the burden of proof had been placed on the claimants, the evidence supporting substantial curtailment would have had to come from FairPoint. Where this is the case, it makes sense that the burden of proof should "be assigned to the party most likely to have access to the relevant evidence." Cantres v. Director of Division of Employment Security, 396 Mass. 226, 231 (1985).

Following the hearing and briefing by the parties, Appeal Tribunal Chair Sandra Mooney issued a decision in which she recorded findings of fact and conclusions of law. After reviewing the records and testimony presented in the case, she found that there was no stoppage of work as defined by a substantial curtailment of FairPoint's business. Benefits were thus allowed. Motion Pursuant to RSA 282-A:60, Exhibit 3, Decision dated November 19, 2015 ("Decision") at p. 4. Based on the evidence submitted, she ruled that any strike pay received by the CWA claimants should be treated as deductible income. ("Benefits are reduced or denied due to the receipt of strike pay.") Id. at p. 5.

II. FairPoint's Motion Pursuant to RSA 282-A:60

A. Scope of Commissioner's Authority to Reopen

In the Motion Pursuant to RSA 282-A:60 ("Motion"), FairPoint argues that the Commissioner exceeded his authority by ordering a *de novo* hearing in this matter. In doing so, FairPoint claims that [the Commissioner] was acting as an appellate body and that appeal "lies with the Appellate Board of the NHES, not the Commissioner." Motion at p. 3, *citing* RSA 282-A:64, 65 and 67. As noted by CWA in its Opposition to FairPoint's Motion, the New Hampshire Attorney General issued an Opinion regarding the scope of the NHES Commissioner's authority under RSA 282-A:60 in 1982. With respect to the sequence of appeals, the Opinion provides that:

> [I]t is our opinion that RSA 282-A:64 (1981 Supp.) requires 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.

[7] Vermont case law, interpreting an identical statutory disqualification provision, also supports this approach. "Under Vermont's unemployment statute, as interpreted by the Vermont Supreme Court, the burden of proof is on the employer to demonstrate that the claimant's actions resulted in substantial curtailment of the employer's operation." Findings and Decision of Administrative Law Judge date April 22, 2015, Vermont Department of Labor, Office of Administrative Hearings, at p. 7.

N.H. Atty. Gen. Opinion No. 82-15-F (June 24, 1982), 1982 WL 188103 (N.H.A.G.) at 1. Here, the claimants (represented by CWA and IBEW) both filed timely requests to reopen pursuant to RSA 282-A:60 following the initial Appeal Tribunal decision. In my role as Commissioner, I acted on those requests in accordance with the statute and within the limits of my authority.

FairPoint has also argued that the NHES Commissioner lacks the ability to reopen on the basis of a mistake of law. The Attorney General Opinion noted above also provides that while the Commissioner "cannot on his own modify, amend or reverse any Appeal Tribunal decision. . .", "the Commissioner may find . . . that a mistake has been made, either through misapprehension of fact or *misapplication of law*, and order reopening." Id. at 2. (Emphasis added.) This is precisely what occurred in this case.

In a recent New Hampshire Supreme Court case, a petitioner/claimant argued that the then NHES Commissioner's decision to reopen her case had violated her right to due process. Appeal of Annelie Mullen, Decision issued September 30, 2016. She took the position that it was fundamentally unfair to allow the Commissioner, on her own initiative, to reopen cases involving unemployment compensation fraud when the petitioner/claimant had prevailed at the Appeal Tribunal level. The petitioner argued that the Commissioner had exceeded her authority in ordering reopening, and particularly in providing guidance on how to conduct the hearing on reopening. Like FairPoint, in her request for relief, the petitioner asked that the Commissioner reopen the case, reverse the Appeal Tribunal's decision following reopening, and reinstate the previous decision which had been in her favor.

In response to the petitioner's arguments, the Supreme Court stated in part:

> The plain language of the statute permits the commissioner 'upon written request of an interested party or upon his own initiative, in any case in which a decision has been rendered, [to] reopen the case on the basis of fraud, mistake, or newly discovered evidence.' RSA 282-A:60 (emphasis added). If the commissioner decides to reopen on the limited basis of fraud, mistake, or newly discovered evidence, the case returns to the tribunal for either a de novo hearing or 'the introduction of evidence or argument relative to and concerning the factors which constitute the basis or ground for reopening.' RSA 282-A:61. If the commissioner declines a party's request to reopen, the party may appeal the tribunal decision to the board. RSA 282-A:64. We are not persuaded that this process leads to an absurd result. Rather, we agree with the department that the commissioner's 'adjudicatory role, as expressly permitted by [RSA 282-A:60] . . . streamlines review and enables correction of errors earlier in the process.' Accordingly, we conclude that when the commissioner reopened the March 2012 decision, she did not exceed her authority or violate the petitioner's rights under chapter 282-A.

Id. at p. 10. The decision to grant the requests to reopen in this case falls squarely within the scope of authority described above.

FairPoint claims that in this case, the Commissioner "purported to review Chairperson Croce's decision; disagreed with it; and declared that Chairperson Croce made a 'mistake of law.'" Motion at p. 3. FairPoint further argues:

> The only possible explanation for the *de novo* order was not that Chairperson Croce applied the wrong standard, but that he reached the wrong result from the Commissioner's perspective. As is apparent from Chairperson Mooney's decision, the Commissioner made his preferred result clear to her in the July 1, 2015 letter ordering a *de novo* hearing.

Motion at p. 4. The July 1, 2015 Reopening Decision speaks for itself. It reflects no instruction or statement of preference as to case result – it simply provides guidance on the legal standard for substantial curtailment that should be applied in the *de novo* hearing. *See* Decision at pp. 7-8.

As in the Mullen case, FairPoint has presented no evidence of actual bias with respect to the decision to reopen. As the Court found in Mullen, "[h]ere, as in all unemployment compensation appeals, the commissioner served solely as the 'second level of appeal.' RSA 282-A:60." FairPoint has provided no evidence, and no evidence exists, to support a theory that the Commissioner in any way participated in the second Appeal Tribunal hearing following the decision to reopen. The allegations made by FairPoint's counsel are totally unsubstantiated.[8]

B. Substantial Curtailment Standard

The main issue at the heart of these proceedings is the interpretation of the labor dispute disqualification provision in New Hampshire's Unemployment Insurance ("UI") law. *See* RSA 282-A:36. As noted in the case law cited in the parties' filings, according to the interpretation of similar provisions in many State UI laws:

> "Unemployment benefits are not available if the 'unemployment is due to a stoppage of work which exists because of a labor dispute.' G. L.c. 151A, §25(b).(2). For there to be a 'stoppage of work,' operations must be 'substantially curtailed.' *Reed Nat'l Corp. v. Director of the Div. of Employment Sec.*, 388 Mass. 336, 338 (1983), S.C., 393 Mass. 721 (1985). How much disruption is required to constitute a substantial curtailment is a fact-specific inquiry; there is no percentage threshold or numerical formula.

[8] As noted by the New Jersey Supreme Court in a similar case, '[O]ur province is merely to interpret and apply [the statute] to particular situations as they are presented, keeping in mind the general policy of the act.' *Cites omitted.* With 'regard to the rightness or reasonableness of the positions or demands of the employer or employees,' the State maintains a completely neutral position. Lourdes Medical Center v. Board of Review, 197 N.J 339, 363 (N.J. 2009).

> *See Westinghouse Broadcasting Co. v. Director of the Div. of Employment Sec.*, 378 Mass. 51, 55-56 (1979); *Reed Nat'l Corp. v. Director of the Div. of Employment Sec.*, 393 Mass. 721, 724 (1985).

Hertz Corporation v. Acting Director of the Division of Employment and Training, 437 Mass. 295, 297; 771 N.E.2d 153, __ (2002).

In Hertz, the Massachusetts Supreme Judicial Court found that the Board of Review of the Department of Labor and Workforce Development was "within its discretion to conclude 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." *Cites omitted.* It stated further that:

> Although certain functions went unperformed while managers and nonstriking workers filled in for the striking employees, a 'stoppage of work' requires more than the holes in coverage that result when staff is temporarily diverted from one place to another. If these sorts of disruptions sufficed to constitute a 'stoppage of work,' then virtually every strike would result in benefits disqualification, an outcome expressly rejected by the Legislature when it revised the unemployment compensation statute in 1937."

Hertz, 437 Mass. at 299 - 300.

In order to meet its burden to prove substantial curtailment, an employer must show more than a "negative impact." It must show that its operations have been "substantially curtailed" to the point where there has been a stoppage of work. *See e.g.* Meadow Gold Dairies-Hawaii, Ltd. v. Wiig, 437 P.2d 317, 318-320 (Hw. 1968)(no substantial curtailment where production decreased by 18%, the number of employees substantially decreased and the company stopped all home deliveries, office work and maintenance); Mountain States Tel. and Tel. Co. v. Sakrison, 225 P.2d 707, 712-13 (Ariz. 1950)(no substantial curtailment where among other things revenues dropped 66% and the number of employees decreased 89%); Trapeni v. Dep't of Employment Sec., 455 A.2d 329 (Vt. 1982)(no substantial curtailment found where publisher was able to publish its newspaper on a daily basis - 21 V.S.A.§ 1344(a)(4) did not disqualify the claimants from receiving benefits); Lourdes Med. Ctr. v. Bd. of Rev., 963 A.2d 289, 305 (2009) (holding no substantial curtailment and noting that the employer "as a conscious business objective . . . determined to maintain full services in order not to lose its edge in a very competitive market or to encourage the strikers' demands"). *Compare* Boguszewski v. Commissioner of the Department of Employment and Training, 410 Mass. 337 (1991)(finding stoppage of work even though the employer continued full production where many of the employers operations were halted or performed at a level substantially below normal).

C. Outcome of De Novo Hearing – No Substantial Curtailment

FairPoint argues that Chairperson Mooney's decision resulted from the Appeal Tribunal not considering the evidence presented at the *de novo* hearing. According to FairPoint, Chairperson Mooney "focused on avoiding FairPoint's evidence." Offering no support for this contention, FairPoint also argues that "[i]t is quite apparent that her ultimate conclusion was predetermined." In connection with these allegations, FairPoint "moves the Commissioner (1) to vacate Chairperson Mooney's Appeal Tribunal Decision; and 2) to reinstate Chairperson Croce's Appeal Tribunal Decision." In its particular request for relief, FairPoint is asking the Commissioner to act as an appellate body and reverse a decision – an action that is not within the purview of the authority granted by RSA 282-A:60.

At the September 29, 2016 *de novo* hearing on the issue of substantial curtailment, FairPoint's evidence consisted of the testimony of one live witness – Peter Nixon, FairPoint's Executive Vice President of External Affairs and Operational Support, and exhibits containing summaries of impact information. The record also included exhibits that had been submitted at the prior Appeal Tribunal hearing. By agreement of the parties late in the day of the September 29, 2015 hearing, testimony from the two FairPoint witnesses who testified at the first Appeal Tribunal hearing was included in the *de novo* hearing record to provide a foundation for certain previously submitted exhibits. Tr. 9/29/2015 at 106-109 (Daniel White, FairPoint's Senior Director of Labor Relations (formerly Director of Staffing), and Michael Reed, President of FairPoint Maine). [9]

Following the hearing, the parties filed detailed memoranda in which they reviewed the evidence presented at the September 29, 2016 hearing, as well as at the earlier hearing held before Appeal Chair Croce. In its Post-Hearing Memorandum, FairPoint argued that despite enormous efforts it made to reallocate its management workforce, bring in replacement contractors and largely stop marketing to reduce new orders and focus on repair work, the strike substantially curtailed FairPoint's operations. Memorandum at p. 2. FairPoint noted that in order to maintain service as required during the strike, it used a number of salaried employees (some with prior field experience) and also hired contractors, but "at no time did FairPoint's contingent work force equal the number of striking workers." Memorandum at p. 16. FairPoint argued that Employer Exhibit 4, presented at the first Appeal Tribunal hearing, provided "the best available data on gross hours spent on the strikers' work before and after the strike." Id.

As a result of its decision to abandon efforts to attract new customers or upgrade services to existing customers in order to focus on repairs, FairPoint noted that it experienced a dramatic drop in new units and services sold to New Hampshire customers. Memorandum at p. 17. FairPoint argued that the strike also created a backlog of service and installation orders. Id. at p. 18. The strike magnified the effect of severe winter storms – the "incumbent workforce would have reduced the trouble load spikes 'much more quickly' than the contractors did. Id. at p. 20.

[9] The record reflects that FairPoint was offered the opportunity to put on additional live witnesses at the *de novo* hearing. Tr. 9/29/2015 at pp. 107 – 109.

FairPoint argued that, as a result of the strike, its wholesale business suffered and customer satisfaction plummeted. Based on a chart presented by Mr. Nixon, FairPoint argued in the Memorandum that its revenue for the four month period of the strike was off the previous year's numbers for the same period by nearly 11%. Id. at p. 22, Employer Exhibit 10.

CWA noted in its Brief that the data presented by FairPoint concerning hours worked during the strike was based on estimates made more than two months after the strike started. CWA Post-Hearing Brief at pp. 5-6. During his testimony, Daniel White (FairPoint's Director of Staffing and Employee Services) could not verify the accuracy of the information supporting Employer Exhibit 4, which purported to show staffing levels before and after the strike. Id. at p. 6. IBEW noted that Mr. Nixon's testimony on the issue of post-strike hours was contradicted by the background materials assembled by individual FairPoint managers. IBEW Post-hearing Brief at p. 20. To the extent it could be considered reliable, the evidence did not show that FairPoint's worker hours were reduced substantially or at all during the strike. Id. at p. 22.

Both CWA and IBEW contested FairPoint's evidence regarding revenue loss. They argued that while FairPoint submitted Employer Exhibits 6 and 9A-G purporting to show a decrease in orders, it failed to provide underlying factual data to support its claim of a loss of revenue resulting from the strike. IBEW Brief at p. 8. The evidence presented was speculative, particularly given the historic volatility of FairPoint's revenue over time. CWA Brief at p. 10. They argued it was more likely that any reduction in orders resulted from FairPoint's conscious decision to stop marketing several months before the strike had started. IBEW at p. 9. With respect to FairPoint's trouble load, CWA and IBEW argued that the spike in trouble load was attributable to four (4) successive winter storms and would have occurred with or without the strike. IBEW at pp. 13-14. They pointed to public statements by FairPoint's President, Paul Sunu, to the effect that the storms actually caused the majority of problems, and "[w]ith our managers working front-line positions, we documented improved processes that saved hundreds of working hours per day . . . thanks to the productivity from our continuity plan, [the striking workers] returned to a trouble load that was below pre-strike levels." CWA Brief at pp. 4-5.

Based on a review of all of the records and testimony presented, and after summarizing the salient facts, Appeal Tribunal Chairperson Sandra Mooney concluded as follows:

- FairPoint knew that it was going to ask for substantial concessions in the new Collective Bargaining Agreements [and knew that a strike was likely];
- In anticipation of the strike, FairPoint made a business decision to curtail marketing to reduce the number of new orders;
- FairPoint was willing to sacrifice revenue to maintain repairs [and] service;
- By proceeding the way it did, FairPoint reduced its revenue beyond the impact of the strike;
- Even if the Unions had agreed to the proposed contract terms, revenue would have been reduced;

- Revenue increased after March 2, 2015 when the company started marketing again;
- Based on FairPoint's own testimony, the month to month fluctuations in revenue from October 2011 through July of 2015 were normal fluctuations;
- There was an initial increase in repair orders while replacement workers were being put in place;
- There was an increase in the trouble load during the snow storms that hit New England during the strike, which is normal during severe storms;
- FairPoint itself asserted that replacement workers were showing productivity levels above the pre-strike levels and the majority of the backlog of orders was directly due to the extreme weather which had a regional impact not seen since Hurricane Irene in 2011;
- FairPoint's graphs, which purported to represent impact on business lacked a sufficient foundation. The Director of Staffing who testified to the graphs could not verify whether the underlying information was correct; and
- FairPoint did not demonstrate how much of the impact it attributed to the strike was directly related to the winter storms versus the strike itself.

FairPoint Motion, Exhibit 3 (Appeal Tribunal Decision dated Nov.19, 2015) at p. 4.

Based on the hearing record and review of the parties' submissions, the Appeal Tribunal Chair found that there was no stoppage of work as defined as a substantial curtailment of business. Decision at p. 4. Given the totality of the evidence, she found that FairPoint had not met its burden.

Upon review of the record, I find that Chairperson Mooney properly considered the evidence presented in the case. Prior to the hearing, and in response to proposed stipulations, she received and incorporated input from the parties in formulating a statement of what evidence would be considered on the issue of substantial curtailment. *See* Letter from Appeal Chair dated August 21, 2016. Her decision in the case reflects that she reviewed and considered the evidence presented on FairPoint's revenue, worker hours before and during the strike, production as demonstrated by per day resolution of work tickets, impact of the strike versus impact of winter storms on repair order backlogs, and productivity levels as reported contemporaneously during the strike by FairPoint, among other things.

FairPoint has made assertions about the Appeal Tribunal Chair's responsibilities that are simply without merit. For example, FairPoint claims in its Post-Hearing Memorandum that:

> Employer Exhibit 4 provides the best available data on the gross hours spent on the striker's work before and after the strike. Tr. 9/29/2015 at 100-01. While there are no exact time records on the contractors or the managers performing struck work, the Chairperson must accept the evidence as probative and unrebutted.

FairPoint Motion, Exhibit 4, p. 16. It is inaccurate to suggest that the Chair was required to accept the evidence in question as "probative and unrebutted." Testimony provided by Daniel White on cross-examination identified gaps in the foundation for Employer Exhibit 4 and raised issues regarding the background information collected in anticipation of the hearing. As noted in Chairperson Mooney's decision, "[a]t the hearing on February 3, 2015 Mr. Daniel White, director of staffing and employee services, testified that he could not vouch for the accuracy of the report containing the number of hours for pre-strike and post-strike as contained in employer exhibit 4." Decision at p. 4. *See also* Post-Hearing Brief submitted by CWA at p.6.[10] Moreover, even if the hours as presented were accurate with the exception of recognized errors presented in the information for the first two weeks of the strike, they did not support a finding of substantial curtailment based on standards contained in the applicable case law.

With respect to evidence of impact on revenue, graphs submitted by FairPoint in Employer Exhibit 9 were extremely high level. Little detail was provided at the September 29, 2015 hearing regarding foundational data supporting the exhibits. It wasn't made clear whether revenue figures were adjusted to reflect the savings to FairPoint for reductions in marketing costs for the months prior to and during the strike (Tr. 9/29/2015 at p. 164, line 6) and/or concessions gained in bargaining (Tr. 9/29/2015 at p. 188, lines 21- 25). At least one specific category of revenue – 5 % of wholesale unit adds – was admittedly not included in Employer Exhibit 9G (Unit Adds/Field Sales). Tr. 9/29/2015 at p. 145.

During the second day of the first Appeal Tribunal hearing (03/15/2015), when asked whether he was able to determine how much of the loss in landline business was attributable to the normal decline in landline revenue versus the amount caused by the strike and the company's reaction to the strike, Michael Reed, President of FairPoint Maine testified:

> It's extremely difficult to measure, especially in the competitive world that we're in; customers experience a delay, customers don't get an answer when they call the call center, and some of the customers that may have stayed with us went to a different provider. We can't tell that with certainty.

Hearing 1, Tr. 3/12/2015 at p. 40, lines 2 - 9. During the September 29, 2015 hearing, Mr. Nixon did testify to an estimated revenue loss attributable to the strike in the amount of approximately $3,000,000.00. The total amount was based on an estimated twelve (12) months' worth of lost business for each theoretical customer lost. Hearing 2, Tr. 9/29/2015 at p. 135.

In her findings of fact, Chairperson Mooney noted that revenue fluctuations for the pre-strike period from October of 2011 to July of 2015 were considered normal. She noted that they were

[10] "White prepared Employer Exhibit 4 by asking managers and supervisors in late December or January – over two months after the strike began – to provide estimates. (Transcript cites omitted). While repeatedly acknowledged that he did not know how the managers and supervisors came up with the numbers they provided him, (cites omitted) and he readily admitted the accuracy of the estimates could not be verified."

caused by "litigation awards, large contracts and large installation projects." FairPoint Motion, Exhibit 3, p. 4; See also Nixon testimony - Tr. 9/29/2015 at p. 174. The record provides a basis for the Chair to conclude that the revenue losses described by FairPoint as being attributable to the strike were consistent with previous fluctuations and were largely self-imposed in connection with FairPoint's mitigation strategy. See Lourdes Med. Ctr. v. Bd. of Rev., 963 A.2d 289, 305 (2009) (finding no substantial curtailment and noting that the employer "as a conscious business objective . . . determined to maintain full services in order not to lose its edge in a very competitive market or to encourage the strikers' demands.")

While FairPoint provided testimony on the overall cost of the strike to the company in New England, it did not present a specific breakdown by State until Mr. Nixon was examined by Attorney Michael Randall of NHES. Even upon further examination, the estimate of the strike cost in New Hampshire was based on a high level percentage calculation of overall costs, including costs of litigation. Tr. 9/29/2015 at pp.136-138.

With respect to the backlog of installation and service orders graphically illustrated at Employer Exhibit 6, there was a significant issue presented of whether the backlog was caused primarily by the strike or by the successive weather events. Chairperson Mooney's decision indicates that she considered and gave weight to FairPoint's contemporaneous public statements about causation made in a letter to Senator Shaheen and Congresswoman Kuster. FairPoint President Paul Sunu stated, "[t]he majority of the backlog of orders is directly associated with the extreme weather we have encountered four major storms in 50 days with regional impact approaching levels not since Irene in 2011." *See* Decision at p.4 referencing Claimant Exhibit 2, p. 1.

III. CWA's Partial Appeal to Commissioner Requesting Reopening on the Issue of Whether Strike Pay is Deductible Income Under RSA 282-A:14, III

By Partial Appeal to the Commissioner, the CWA Claimants have asked the Commissioner to reopen the Appeal Tribunal's decision on the issue of "whether a strike benefit received by the CWA-represented Claimants is deductible income under the New Hampshire Unemployment statute." CWA Partial Appeal at p. 1.

Beginning approximately two weeks after the strike started, all striking members of the CWA were eligible to receive strike benefits. CWA Post-Hearing Brief at p. 19. (Record cites omitted). The benefits came from the CWA Robert Lilja Members' Relief Fund ("Fund"), which is financed through contributions from members' union dues. Id. According to the Fund rules, strikers were "expected to do their fair share of strike duty, unless excused for just cause by the Local." Claimants Exhibit 8, Ground Rules, p. 9. Payments were in a fixed weekly amount which increased over the course of the strike. CWA Brief at p. 19. The question was whether the strike pay received by CWA members constituted wages that should be treated as deductible income in calculating unemployment benefits.

According to RSA 282-A:15, I, "[w]ages means 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 the reasonable value of in kind benefits. RSA 282-A:14, III describes additional forms of compensation that shall be deemed to constitute wages, and also provides an exception for certain payments: "'Wages' shall not mean and shall not include payments from a supplemental unemployment plan as defined in 282-A:3-a or any portion of a lump sum payment for workers' compensation made pursuant to RSA 281-A:37."

A "supplemental unemployment plan" is defined in RSA 282-A:3-a as follows:

> For the purposes of this chapter "supplemental unemployment plan" shall mean a plan, system, trust or contract by the terms of which an individual will receive from the employer, trustees of the plan or trust, *union* or other agency, *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 except payments for vacations, bonuses, profit sharing plans and severance pay or separation pay.

RSA 282-A:3-a (Emphasis added).

CWA cites case law and Revenue Rulings to the effect that strike pay should not be treated as wages and does not constitute deductible income under circumstances where the benefits paid are in a fixed amount unrelated to services performed, are not based on an hourly wage rate, and are not remuneration by an employer for services performed by an employee. CWA also argues that the Robert Lilja Members Relief Fund is a Supplemental Unemployment Plan ("SUP") as defined by RSA 282-A:3-a, and that payments from the fund are thus exempted from the definition of wages as provided in RSA 282-A:14, III-a.

In terms of New Hampshire precedent, CWA argues that McIntire v. State, in which the New Hampshire Supreme Court upheld a trial court ruling that lockout payments were not 'wages' and thus not deductible income, supports a similar result as to strike pay in this case. 116 N.H. 361 (1976). In McIntire, however, the union employees who were locked out did not strike. They continued to make themselves available to work on a day to day basis while their jobs were filled by salaried personnel brought in from other parts of the country. 116 N.H. at 365. If the employees had gone on strike, they would have been required to do strike duty as a condition of receiving strike benefits. Testimony established that, "the union required nothing from its members" as a condition of paying the lockout benefit in McIntire. Id. at 366. This fact was integral to the Court's finding that the lockout payments were not wages from an employing unit. Id. at 366-367.[11]

[11] CWA notes that the McIntire Court considered the fact that the lockout/strike fund was funded by union member contributions in finding the payments weren't wages. However, that finding only disposed of the argument that the lockout payments were wages from the employer, National Gypsum. It did not dispose of the Department's argument that lockout payments paid by the union were wages, and that the union was the claimants' 'employing unit' for purposes of the lockout pay benefit. What was most critical to the Court's analysis was the lack of a requirement to perform services as a condition to receiving benefits.

In response to CWA's partial request to reopen, FairPoint has simply argued that, in this case, strike pay constituted wages pursuant to RSA 282-A:15, I. Because CWA strikers had to do their 'fair share' and perform 'duties,' their compensation from the Fund should be viewed as a "'form of remuneration for personal services' constituting wages under N.H. Rev. State. §282-A:15, I." FairPoint Post-Hearing Memorandum at p. 36.

The Appeal Tribunal Chair found that the CWA claimants "had to perform strike duty to be eligible for the strike pay. They either had to work picket duty or office duty unless otherwise excused. ... Therefore they performed personal services in exchange for the strike pay." The Appeal Tribunal's finding is supported by the portions of the CWA Robert Lilja Members' Relief Fund Rules submitted at the hearing. Section II, B. of the Fund Rules, "Payment to Eligible Strikers," provides that "[s]trikers must perform strike duties as defined by the Local to be eligible for payments from the Fund. For eligibility purposes, a striker is defined as a member or an agency fee payer." Claimant Exhibit 8 at p. 13. Based on this finding, the Chair concluded that the payments received constituted wages.

The Chair's decision does not specifically address the applicability of RSA 282-A:3-a's exception for payments provided through a Supplemental Unemployment Plan to the strike pay received by the CWA claimants. The evidence adduced at the hearing regarding the Robert Lilja Relief Fund was limited and a redacted summary of the Fund Rules was submitted as Claimants' Exhibit 8. Based on hearing testimony and the limited material submitted in Exhibit 8, it is unclear that the Robert Lilja Members' Relief Fund is a SUP. The definition of SUP under RSA 282-A:3-a requires that payments will be made pursuant to a plan, system, trust or contract by the terms of which an individual will receive "*payments supplemental to unemployment compensation or based on or to be paid in conjunction with unemployment compensation . . .*."[12] There is no evidence in the record indicating that receipt of the strike funds was contingent upon receipt of unemployment compensation benefits. As such, I find no error in the Chair's failure to conclude that the strike pay constituted supplemental unemployment benefits exempt from the definition of "wages."

In addition, I find adequate support in the record for the Chair's conclusion, referring to RSA 282-A:14, III(a), that, where the claimants were required to perform personal services in exchange for strike pay, "sums of whatever type or nature unless excluded are considered wages." Decision at p. 5; *see also* McIntire v. State, 116 N.H. 361(1976).

IV. Standard of Review on Reopening

The Appeal Chair has the statutory function to examine the claims records, listen to the testimony of witnesses, and to consider any exhibits that may be submitted during the course of the hearing. It is the Chairperson's responsibility to make findings of fact based upon the evidence and arrive at one or more conclusions of law in determining whether or not an individual is eligible for benefits or is disqualified under the statute. Where the

[12] *See also*, 26 U.S. C. §501(c)(17) for general guidance on what constitutes a sufficient nexus between eligibility for benefits under a plan and entitlement to unemployment compensation benefits.

evidence supports the findings and decision of the Appeal Chair, I am not permitted by law to substitute my judgment for hers.

I find no basis in either the record or FairPoint's Motion Pursuant to RSA 282-A:60 that would permit me to reopen the case on any of the three grounds set forth by the statute as fraud, mistake, or newly discovered evidence. The hearing record and evidence supports the findings and conclusions reached by Chairperson Mooney. I do not have authority, in any case, to reverse and reinstate a prior Appeal Tribunal decision as requested by FairPoint.

With respect to the issue of strike pay and deductible income, I find that the record supports the Appeal Tribunal decision. I find no basis in the record or the filings to reopen on the basis of fraud, mistake or newly discovered evidence.

V. Decision and Appeal Rights

By this letter, the Department is denying FairPoint's request to reopen the decision on benefits granted as a result of the finding of no substantial curtailment. FairPoint has the right to appeal this decision to the Appellate Board. To do so, it must submit a written request for appeal to the Appellate Board.

Also by this letter, the Department is denying CWA's request to reopen on the issue of whether strike pay constitutes deductible income. The CWA claimants have the right to appeal this decision to the Appellate Board. To do so, they must submit a written request for appeal to the Appellate Board.

A request for appeal by any interested party may be mailed or delivered to:

New Hampshire Department of Employment Security
ATTENTION: APPELLATE BOARD
45 South Fruit Street
Concord NH 03301

Or, you may submit an appeal online using an Online Appeal Form on the Department's website, http://www.nhes.nh.gov/forms/index.htm. For the appeal to be accepted, you must either hand-deliver, postmark, or submit your request online by **December 31, 2016, which is fourteen (14) calendar days from this letter's issue date.**

Respectfully,

George N. Copadis
Commissioner

cc: Peter J. Perroni, Esquire
Meghan C. Cooper, Esquire
Maria Dalterio, General Counsel

State of New Hampshire
DEPARTMENT OF EMPLOYMENT SECURITY
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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

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APPEAL RIGHTS

THE FOLLOWING DOCUMENT CONTAINS IMPORTANT INFORMATION.
THE FAILURE TO COMPLY COULD RESULT IN THE REJECTION OF AN APPEAL.

Appeals of decisions of the Appellate Board are allowed to the New Hampshire Supreme Court only after an interested party has exhausted all administrative remedies within the Department of Employment Security and is aggrieved by a final decision of the Appeal Tribunal or Appellate Board.

- **Any interested party who is aggrieved by the decision of the Appellate Board** (or the Commissioner) **may within twenty (20) days of the date of mailing of the Board's decision request that the Board reconsider its decision or that the Board order a new hearing. This is a Motion for Reconsideration of the Appellate Board.** The request must specifically state the reasons for your request. Failure to specify the reasons for your request may result in the Appellate Board summarily denying your request.

- **Failure to file a Motion for Reconsideration with the Appellate Board within twenty (20) days will preclude any further appeal to the New Hampshire Supreme Court.** The Appellate Board shall within thirty (30) days deny or grant the Motion for Reconsideration or order a new hearing. RSA 282-A:67, I.

- In the event that the Motion(s) for Reconsideration or Rehearing are **denied**, then an **appeal** by an interested party may be taken to the **New Hampshire Supreme Court**. If Reconsideration or Rehearing is granted, an appeal to the New Hampshire Supreme Court may be taken when the decision on Reconsideration or Rehearing is rendered or, if the time has expired in which the written decision should have been entered. In such instances the original decision is considered as final agency action.

- Notice of the appeal is to be **filed** with the **New Hampshire Supreme Court** within **thirty (30) days after the date of mailing of the final decision** from which the appeal is taken. The notice of appeal is **served upon the Commissioner and the Attorney General** contemporaneously with the filing of that notice of appeal with the **New Hampshire Supreme Court**. In addition, that notice of appeal shall be served upon **all parties of record**. The service required by this section may be in person or by certified mail, return receipt requested. The appeal shall be styled "appeal of name of the party filing the appeal regarding unemployment compensation". Any interested party, and the State, shall have a right to participate as a party in the appellate proceedings before the Court. **The notice of appeal shall specifically identify each error for which review is sought.** The filing of a notice of appeal shall not stay enforcement of the Appeal Tribunal decision. RSA 282-A:67, I. The appeal should be addressed to:

CLERK, NEW HAMPSHIRE SUPREME COURT
ONE CHARLES DOE DRIVE
CONCORD, NEW HAMPSHIRE 03301

IN THE EVENT AN INTERESTED PARTY, AS DEFINED IN RSA 282-A:42, ENTERS AN APPEAL TO THE NEW HAMPSHIRE SUPREME COURT, A COPY OF THE APPEAL SHALL BE SENT TO THE APPELLATE BOARD BY THE APPEALING PARTY.

State of New Hampshire

DEPARTMENT OF EMPLOYMENT SECURITY
APPELLATE BOARD
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CONCORD NEW HAMPSHIRE 03301-4857

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Jeffrey Duval

May 25, 2017

MAY 30 2017

Arthur Telegen, Esquire
Timothy J. Buckley, Esquire
Seyfarth Shaw, LLP
Two Seaport Lane, Suite 300
Boston, MA 02210

RE: Appellate Docket #0053-16, 0054-16, 0055-16, 0056-16
April M. Broderick, xxx-xx-7173, Claimant-Appellee
Tina M. Sargent, xxx-xx-7268, Claimant-Appellee
Stephanie Hanscom, xxx-xx-5555, Claimant-Appellee
David A. Duhamel, xxx-xx-9996, Claimant-Appellee
Northern New England Telephone Operations, LLC and Fairpoint Logistics, Inc., Employer-Appellant

ORDER

On May 05, 2017, a Motion for Reconsideration was received from Attorneys Arthur Telegen and Timothy J. Buckley on behalf of Northern New England Telephone Operations, LLC and FairPoint Logistics, Inc., Employer-Appellant.

The Motion for Reconsideration is hereby **DENIED**. Based on the information presented, there is no substantial justification to allow a reopening. There will be no further action taken by the Appellate Board.

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

Enclosure: Appeal Rights

CERTIFIED MAIL/RETURN RECEIPT REQUESTED

cc: James A. W. Shaw, Esquire
Peter Perroni, Esquire
NHES/Legal

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