THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2017-0362

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

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

REPLY BRIEF OF PETITIONERS/APPELLANTS

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ORAL ARGUMENT
REQUESTED TO BE ARGUED
BY ARTHUR TELEGEN

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[1] For the sake of not overburdening the record, FairPoint has included only pertinent excerpts of the Hughes publication. FairPoint can provide the entire source, should the Court request.

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INTRODUCTION

Fundamentally, this case is about two questions: what is the standard applied to determine whether there has been a "stoppage of work" and what process is followed when determining strikers are disqualified for unemployment benefits pursuant to RSA 282-A:36. Across their briefs, Appellees paint a picture of clarity and efficiency. But as is evident from the nearly three-and-a-half-year sojourn of this case, the standard advanced to determine the existence of a "stoppage of work" and the process used to adjudicate these disputes is anything but. FairPoint[2] submits this reply to address but some of the issues raised in Appellees' briefs.[3]

ARGUMENT

I. No Part Of This Case Is Moot

Based on a revisionist history, CWA Claimants argue that whether or not the commissioner acted *ultra vires* is irrelevant to the outcome of this case, and is moot. Their proposed alternative history simply assumes away unanswered questions necessary to their hypothesized result.

CWA Claimants' argument piles speculation atop speculation. First, it assumes that Claimants would have undertaken a third round of appeal to the Appellate Board ("Board"). Second, despite "knowing" the Board would have ruled the same way based upon its dicta, *see* CB at 3, the case would have advanced to the Board for direct review of the first Tribunal's decision (rather than the second Tribunal's) and with a limited administrative record. The Board would have been without two lengthy decisions from the commissioner -- which is what the Board in fact deferred to, not the second Tribunal's decision -- and all the parties' pleadings

[2] "FairPoint" refers to Northern New England Telephone Operations LLC and FairPoint Logistics, Inc., collectively.
[3] "CB," "IB," and "DB" refer to the briefs of the CWA Claimants, IBEW Claimants, and Department, respectively. Citation to the addendum filed with FairPoint's opening brief takes the form "Add. at __." Citation to the Certified Record takes the form "CRV X at __."

before the second Tribunal to guide its analysis.[4] In fact, CWA Claimants trumpeted the Board's reliance on the commissioner's analyses in their opposition to FairPoint's motion for reconsideration to the Board. *See* CRV I at 20-21. Without the commissioner's analyses, the Board's rulings are far from predictable.

Third, it is impossible to know the composition of either the Board or the Tribunal in the CWA Claimants' revisionist history. Neither entity is static, and members of a given Board session or Tribunal are selected from a pool. *See* RSA 282-A:62(I), 66(I) (Board consists of eight members, three of whom sit in session on any given appeal); RSA 282-A:53 (Tribunal consists of one or three members).[5] Given the lack of New Hampshire precedent on the interpretation of "stoppage of work," it is reasonable to conclude that a Board consisting of different members could conclude differently, particularly without the commissioner's lengthy analyses. Moreover, given that two Tribunal chairs evaluated similar record evidence and came to different findings of fact and conclusions of law, the outcome of a hypothetical third Tribunal on remand is speculative. *Compare* Add. at 2-9 *with* Add. at 23-26. Simply put, what CWA Claimants present as foregone conclusions are anything but.

Moreover, CWA Claimants misstate this Court's review of administrative decisions pursuant to RSA 282-A:67. CB at 4. Contrary to their assertion, this Court reviews a final decision of the Tribunal, not of the Board. *See* RSA 282-A:67(II) (a party appeals "*a final decision of the appeal tribunal* as reversed, modified, or affirmed by the appellate board" (emphasis added)). As the statute states:

> 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

[4] The Board's dicta reveals its reliance upon the commissioner's analysis in favor of that standard. Add. at 47-48.
[5] The Department's website indicates that five or six employees serve as Appeal Tribunal Chairs. *See* https://das.nh.gov/directory/procSearch_internet.asp?Action=Depts&lstDepts=EMPLOYMENT+SECURITY+DEPT (last visited Feb. 28, 2018).

> *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) In violation of constitutional or statutory provisions;
>
> (b) In excess of statutory authority;
>
> (c) Made upon unlawful procedures;
>
> (d) Clearly erroneous in view of the substantial evidence on the whole record; or
>
> (e) Affected by other error of law.
>
> Otherwise, the court shall affirm the *appeal tribunal's decision*.

RSA 282-A:67(V) (emphasis added); *Appeal of Pelleteri*, 152 N.H. 809, 813 (2005) (this Court is without jurisdiction to review Board's observations that "neither clarified nor limited the appeal tribunal's record or determination").

Finally, the record brought to a tribunal matters. Without the commissioner's *ultra vires* action, any appeal to this Court would be based on the first Tribunal's factual findings, which demonstrated the strike's significant impact on FairPoint's business. The weight of those findings would support a "stoppage of work," regardless of the standard applied.

II. Appellees Miss The Mark Regarding The Commissioner's Scope Of Authority

Claimants center their arguments regarding the scope of the commissioner's authority on dicta from a thirty-five-year-old opinion of the Attorney General. IB at 16-17; CB at 4-5. Yet they falter when faced with the questions presented in the opinion and the legislature's response.

First, the question posed in the Attorney General's opinion had nothing to do with the *scope* of the commissioner's review. Instead, the question posed was "whether, pursuant to RSA 282-A:64 (1981 Supp.), the commissioner must deny the reopening 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." N.H. Atty. Gen. Opinion No. 82-15-F, 1982 WL 188103, at *1 (N.H.A.G. June 24, 1982). Second, the legislature responded to this opinion when it codified its primary message by a 1987 amendment

to RSA 282-A:60 that added the first sentence "[t]he second level of appeal shall be to the commissioner." *See* 1987 N.H. Laws 409:5. Had the legislature intended to give the force of law to the Attorney General's dicta regarding correcting "misapplications" of law, it would have done so by codifying that statement. It did not.

Appellees' further arguments are easily disarmed. For instance, CWA Claimants argue that "mistake" must be broadly construed because all appeals from the Tribunal must pass through the commissioner. CB at 5. But this argument ignores this Court's explicit recognition of the limitations of the scope of the commissioner's review pursuant to RSA 282-A:60 in *Appeal of Mullen*, 169 N.H. 392, 400 (2016) (*Mullen II*) ("The commissioner is given the *limited authority* to reopen 'on the basis of fraud, mistake, or newly discovered evidence.'" (emphasis added)); *id.* at 403 (commissioner may "reopen on the *limited basis* of fraud, mistake, or newly discovered evidence") (emphasis added)). IBEW Claimants' position that the commissioner "clearly ha[s] broader review authority than the Appellate Board or this Court," IB at 18, similarly ignores *Mullen II*.

In addition, Appellees misinterpret this Court's statement that the commissioner's "adjudicatory role . . . streamlines review and enables correction of errors earlier in the process" as supporting an expansive definition of "mistake" that includes errors of law. *Mullen II*, *supra* at 404. In *Mullen II*, this Court appears to contemplate that the commissioner's review will expedite the appellate process, furthering the goal of prompt and efficient resolution. *Id.*; *see also Pomponio v. State*, 106 N.H. 273, 275 (1965). This Court also seemingly recognizes that mistakes can be made in the adjudicatory process that the commissioner is uniquely positioned to regulate and correct. *See e.g. Mullen II*, *supra* at 395 (re-opening record because Tribunal mistakenly excluded testimony of a witness).

But that goal is not served by interpreting "mistake" to include "error of law."[6] A party seeking a definitive ruling of law is hindered, not facilitated, if such questions are held to fall within the scope of the commissioner's authority. While a party aggrieved by a statutory interpretation of the Board can appeal to this Court, *see* RSA 282-A:67(II), a party aggrieved by a commissioner's decision has no right to further appellate review unless and until it endures at least one additional Tribunal determination and at least one subsequent request for reopening to the commissioner. As the legislature appointed the Board and this Court as the penultimate and ultimate, respectively, authorities on errors of law, *see* RSA 282-A:65, 67, expanding "mistake" to include errors of law simply adds heightened cost and delayed resolution.

This case exemplifies the point. Here, Claimants filed for benefits in October 2014, the first Tribunal issued his decision in April 2015, and the parties were prohibited from appealing to the Board until December 2016. CRV VI at 9; Add. at 1, 44. Within this timeframe was a thirteen-month delay between the second Tribunal's decision and the commissioner's subsequent denial of FairPoint's request to reopen. Add. at 22, 44.

Finally, the Department's attempted invocation of "administrative gloss" fails for at least two reasons. DB at 12-13. First, as noted, *supra*, the legislature, given the opportunity to endorse the Attorney General's 1987 opinion, declined to adopt its dicta. Second, the Department offers zero evidence that it has applied its preferred interpretation "to similarly situated applicants over a period of years without legislative interference." *See In re Kalar*, 162 N.H. 314, 321 (2011); *see also In re State Emps.' Ass'n of New Hampshire*, 161 N.H. 476, 482 (2011) ("evidence of this singular action cannot be deemed an 'administrative gloss' indicative of legislative intent").

[6] Notably, beyond *Mullen II*, no case cited by the Department analyzes RSA 282 after the 1987 amendment that mandated the commissioner serve as the second level of appeal. *See* DB at 10-11.

III. The First Tribunal's Decision Was Misconstrued To Find A Mistake

Claimants attack the first Tribunal's acknowledgment that New Hampshire law has not specifically defined a "stoppage of work" and there is no clear consensus with respect to what constitutes a "substantial curtailment." Add. at 6; CB at 7; IB at 18-19. Claimants argue that this acknowledgment proves the first Tribunal did not understand the "substantial curtailment" standard. Yet their argument misconstrues his comments and ignores his analysis.

To start, the first Tribunal's acknowledgment that the standard had not been specifically defined suffered only from candor. Both the commissioner and the Board ultimately concluded as much. Add. at 14 ("[] there is no New Hampshire case that explicitly defines 'stoppage of work' . . . "); Add. at 47 ("The cited section of the statute has not been considered in our context yet by the Supreme Court."). But in his alternative ruling, the first Tribunal defined "stoppage of work" as a substantial curtailment of an employer's operations, and consistent with this standard, spent the bulk of his decision marshalling facts relevant to the factors identified by the cases Claimants cited and consistent with those the commissioner later identified as pertinent to the analysis. Add. at 2-8. His analysis of relevant factors disproves he misunderstood the standard.

The "mistake" appears to lie, then, in his failure to define a measurement of what amount of disruption constitutes a "substantial curtailment." But even the cases relied upon by Claimants and the commissioner recognize that no set rule exists. *See Hertz Corp. v. Acting Dir. of the Div. of Emp't & Training*, 437 Mass. 295, 297 (2002) ("How much disruption is required to constitute a substantial curtailment is a fact-specific inquiry; there is no percentage threshold or numerical formula."); *Boguszewski v. Comm'r of Dep't of Emp't and Training, et al.*, 410 Mass. 337, 344 (1991); IB at 24 (*citing Hertz*); CB at 14-15 (*citing Hertz* and *Boguszewski*); *see also* Add. at 18. And the Department's Directive 340-17 is silent as to how the factors identified therein (which were consistent with those analyzed by the first Tribunal) should be weighed or

what level of disruption suffices. CRV III at 426-30. Viewed in context, the first Tribunal did not play mere "lip service" to the standard; he articulated the standard, analyzed factors accepted as relevant to it, and declined to provide a measurement that case law says does not exist. Any question as to which Tribunal correctly understood the standard can be resolved by placing the two decisions side-by-side.

IV. IBEW Claimants Rely Upon Case Law That Favors FairPoint's Interpretation

IBEW Claimants rely upon *Legacy v. Clarostat Mfg. Co.*, 99 N.H. 483 (1955) as the foundation for their argument that a "stoppage of work" means a review of multiple factors unrelated to the accomplishment of work. IB at 20-21, 23. Yet *Legacy* undermines that position. In *Legacy*, this Court held that "a stoppage of work does not cease until *normal operations* may reasonably be resumed by the employer." *Id.* at 486 (emphasis added). In so holding, this Court cited to *Lawrence Baking Co. v. Michigan Unemployment Comp. Comm'n*, 308 Mich. 198 (1944), where the Michigan Supreme Court adopted a "substantial curtailment" standard. *Legacy*, *supra* at 487. But this Court did not adopt that standard, instead focusing on when "normal operations" reasonably resumed. *Id*. at 486-87.

Logic suggests the same standard be employed to determine the end of a stoppage of work as to determine its beginning. "A work stoppage either exists or it does not, so there must be a single line of demarcation between existence and non-existence." *Claimants Represented by CWA Local 1400 and IBEW Local 2327 v. Maine Unemployment Ins. Comm'n*, Nos. BCD-AP-15-06, -16-01, at *12-13 (Me. Super. Aug. 26, 2016). Otherwise, there would be "an undefined gap" that the statute could not have meant to create. *Id*. at *12.

Thus, *Legacy* is not the springboard to "substantial curtailment" that IBEW Claimants hope, but instead suggests a standard tethered to the statutory language and thus the actual work not performed due to the labor dispute. *See e.g. Adomaitis v. Dir. of the Div. of Emp't Sec.*, 334

Mass. 520, 524 (1956) ("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'"); *Board of Review Decision*, M-0336, M-0338, M-0346, M-0352, M-0373, M-0395, M-0396 and M-0397, at *22 (Aug. 18, 2017).

Most particularly, it undermines Claimants', the second Tribunal's, and the Board's undue reliance upon such false proxies as the Company's "bottom line" to evaluate a strike's impact on the Company, and emphasizes the "work" in "stoppage of work."

V. Claimants Distort The Record Evidence

In their defense of the second Tribunal's decision, Claimants take liberties with the record evidence. For instance, when quoting excerpts from a quarterly earnings call of FairPoint's CEO, Mr. Sunu, CWA Claimants strip his statements of prefatory qualifiers. *Compare* CB at 17 *with* CRV III at 126-27, 134. IBEW Claimants stray further. In one sentence they claim that Mr. Sunu "attributed any increase in the trouble load to the historic winter weather," but in the next quote a letter from Mr. Sunu stating that "[t]he *majority of the backlog of orders* is directly associated with the extreme weather." IB at 10 (emphasis in original); CRV III at 120. Moreover, they ignore the undisputed evidence that the backlog more than doubled after the strike began and before any winter storm hit, CRV III at 91-92, 23(81-82), and that the strike prevented FairPoint from employing its normal techniques to cope with the severe weather, *id.* at 21(75), 24-25(87-89).

Not all their liberties are so obvious. IBEW Claimants represent that Mr. Sunu "represented that if it were not for the 'unprecedented and unexpected series of severe winter storms,' service would have *returned to normal (if not improved) levels* much faster." IB at 10 (emphasis added). But that is not what Mr. Sunu said. Mr. Sunu discussed the winter storms' impact on FairPoint's operations in reference to FairPoint's goal of mitigating harm and

providing reasonable service to existing customers, *see* CRV III at 120, not their impact relative to FairPoint's normal operations.[7] Thus, contrary to the IBEW Claimants' representation, Mr. Sunu's statement offers no basis of comparison between FairPoint's operations during the strike to its normal, non-strike operations. His analysis assumed substantial disruption by the strike.

VI. CWA Strike Pay Is Not A Supplemental Unemployment Plan

The strike pay that CWA Claimants received[8] does not fall within the "supplemental unemployment plan" exclusion from wages under RSA 282-A:14(III)(a) and RSA 282-A:3-a.[9] First, as the commissioner found, a supplemental unemployment plan requires that the plan *supplement* the receipt of unemployment compensation, and thus to qualify as such a plan it must be contingent upon the receipt of unemployment compensation. *See* Add. at 41; *see also* RSA 282-A:3-a ("'supplemental unemployment plan' shall mean a plan, system, trust or contract by the terms of which an individual will receive from the . . . union . . . , *payments supplemental to unemployment compensation or based on or to be paid in conjunction with unemployment compensation*, which are available to the employees generally . . . .") (emphasis added). And the record is devoid of evidence that the CWA strike pay was contingent upon receipt of unemployment compensation. *See* Add. at 41. Second, the strike pay that CWA Claimants

[7] "Reasonable service" is the service FairPoint hoped to provide customers *without* its entire skilled workforce; "normal operations" is what FairPoint provides customers *with* its entire skilled workforce.

[8] CWA Claimants' arguments that the strike pay was not "wages" within the meaning of RSA 282-A:14(III) falter primarily (but not exclusively) due to one central fact -- they had to work to get paid. This Court, in *McIntire v. State*, identified the requirement to work as a critical feature for determining whether strike pay is "wages" within the statute. 116 N.H. 361, 366-67 (1976). Nowhere in *Worcester Telegram Pub. Co. v. Dir. of Div. of Emp. Sec.*, upon which CWA Claimants principally rely, does it state strikers were *required to work* in order to receive compensation. 347 Mass. 505, 513 (1964) (strikers must be "willing to do their share" and "cooperate with the union," but no mention of being *required to work*). Their analogy to insurance payments is similarly flawed, because unlike the CWA's strike pay, policy beneficiaries are not *required to work* at the direction of the insurance company in order to receive their payout. CWA Claimants cannot escape the terms of their strike pay.

[9] CWA Claimants' claim that RSA 282-A:3-a somehow superseded *McIntire, supra*, is flat wrong. *McIntire* addressed whether strike pay constitutes "wages" as defined in present-day RSA 282-A:15(I). RSA 282-A:3-a defines the term "supplemental unemployment plan," which is referenced in RSA 282-A:15(II), but has no bearing on the interpretation of RSA 282-A:15(I). And as demonstrated here, the CWA's strike pay is not a supplemental unemployment plan. *McIntire* remains good law.

received was not "available to the employees generally" because it was provided only to CWA members who struck in exchange for their completion of union-directed tasks. CRV III at 6-7 (15-17). The strike pay was not "generally available" to those members who did not strike or perform their fair share of union-directed tasks. *Accord* 26 U.S.C. § 501(c)(17)(D) (Internal Revenue Code defining "supplemental unemployment compensation benefits" to mean only benefits paid for "involuntary separation from the employment . . . resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions").

CONCLUSION

For these reasons and those articulated in its opening brief, FairPoint respectfully requests that this Court grant it the relief requested in its opening brief.

DATED: 3/1, 2018

Respectfully submitted,
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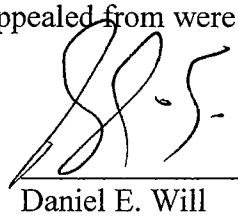
CERTIFICATE OF COMPLIANCE WITH RULE 16(3)(i)

I certify that the written decisions appealed from were included in the addendum attached to Appellants' opening brief.



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CERTIFICATE OF SERVICE

I, Daniel E. Will, hereby certify that on 3/1, 2018, I provided two true copies of the forgoing document via first-class U.S. mail upon the following:

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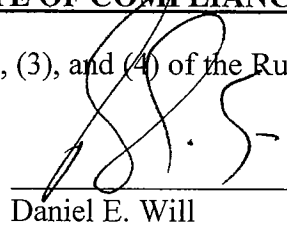
CERTIFICATE OF COMPLIANCE

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



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26 U.S.C. § 501(c)(17)(D) Exemption from tax on corporations, certain trusts, etc.

The term “supplemental unemployment compensation benefits” means only--

(i) benefits which are paid to an employee because of his involuntary separation from the employment of the employer (whether or not such separation is temporary) resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, and

(ii) sick and accident benefits subordinate to the benefits described in clause (i).

RSA 282-A:3-a Supplemental Unemployment Plan

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:53 Appeal Tribunals; Composition and Jurisdiction

Appeal from a certifying officer's determination and a decision made pursuant to RSA 282-A:164 shall be to an impartial tribunal appointed by the commissioner. Each such tribunal shall be known as an appeal tribunal, and shall consist of 3 members or one member. If the tribunal consists of 3 members, one member shall be a representative of employees, one shall be a representative of employers, and one shall be an employee of the department of employment security who shall serve as chairman of the tribunal. If the tribunal consists of one member, that member shall be an employee of the department of employment security and shall be the chairman. No person shall participate as a member of an appeal tribunal in any case in which he is an interested party or is the employee of an interested party. The chairman shall not be disqualified in an appeal concerning an individual claiming benefits by reason of state or federal employment.

408:10 Repeal. RSA 21-J:7, III, relative to hearings and appeals by the director of audits, is repealed.

408:11 Effective Date. This act shall take effect upon its passage.

[Approved May 26, 1987.]
[Effective Date May 26, 1987.]

CHAPTER 409 (HB 165)

AN ACT RELATIVE TO SUNSET REVIEW OF THE DEPARTMENT OF EMPLOYMENT SECURITY AND RELATIVE TO APPELLATE PROCEDURE IN SUCH DEPARTMENT.

Be it Enacted by the Senate and House of Representatives in General Court convened:

409:1 Sunset; The Department of Employment Security Renewed. The department of employment security is hereby renewed to comply with RSA 17-G. The agency or program shall terminate on July 1, 1993, subject to RSA 17-G.

409:2 Effect of Later Enactments. Passage of this act renewing the department of employment security shall not limit any subsequent legislative action affecting this agency or program. The general court shall retain its full power to make amendments to or to terminate the department of employment security, pursuant to RSA 17-G:9.

409:3 Withdrawal of Appeal. Amend RSA 282-A:55 to read as follows:

282-A:55 —Withdrawal of Appeal. A chairman may allow an appeal to be withdrawn by the appellant; but, in such case, the chairman shall send notice by certified mail, return receipt requested, of his allowance of the withdrawal to all interested parties at the last address of each according to the records of the department of employment security. Simultaneously with the mailing of such notice, the determination of the certifying officer from which the appeal had been taken shall become final.

409:4 Decision. Amend RSA 282-A:58 to read as follows:

282-A:58 —Decision. In every appeal, except those withdrawn, the chairman shall prepare a written decision which shall be sent by certified mail, return receipt requested, to each interested party at the last address of each according to the records of the department of employment security. The decision, except one on an appeal dismissed for lack of prosecution or defaulted for failure to attend, among other necessary things as determined by the commissioner, shall: set forth all the material findings and specific provisions of law necessary to support the conclusions; identify the interested parties and the account, whether fund or employer, to which benefits will be charged, if allowed; identify the week or period during which benefits are denied; identify the first week and subsequent period with respect to which benefits will be paid, if allowed; determine all things necessary to finally dispose of the case; and identify the members of the tribunal.

409:5 Reopening of Appeal. Amend RSA 282-A:60 to read as follows:

282-A:60 Reopening of Appeal Tribunal Decision; Procedure. 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 been rendered, reopen the case on the basis of fraud, mistake, or newly discovered evidence. Such request shall set forth the facts or argument considered to be the basis for the reopening. The commissioner shall not consider any request for reopening unless it is received in his office within 14 calendar days immediately following the date of the mailing of the appeal tribunal's decision. The commissioner shall promptly notify in writing all interested parties of the request for reopening.

409:6 Commissioner's Determination. Amend RSA 282-A:61 to read as follows:

282-A:61 —Commissioner's Determination. The commissioner shall render his determination within a reasonable period after all the facts or arguments are made available to him. The determination of the commissioner shall be sent by certified mail, return receipt requested, to each interested party at the last address of each according to the records of the department of employment security. The appeal tribunal shall, upon direction to reopen, proceed in the same manner as though an appeal in said case were being taken from a determination of a certifying officer; provided, however, that the further hearing shall be limited to the introduction of evidence or argument relative to and concerning the factors which constitute the basis or ground for the reopening unless the commissioner orders a de novo hearing.

409:7 Renaming the Appellate Division the Appellate Board; Per Diem Allowance. Amend RSA 282-A:62 to read as follows:

282-A:62 Appellate Board.

I. There shall be an appellate board consisting of 5 members, no 2 of whom shall be from the same executive council district, who are and continue to be residents of New Hampshire, appointed by the governor with the advice and consent of the executive council for 3-year terms and until their successors are appointed and qualified. Two of the members shall be attorneys-at-law admitted to the practice of law in the state of New Hampshire, one of whom shall be the chair, and one of whom shall be the vice chair and shall serve in the absence of the chair. These 2 members shall be the only members of the appellate board who are attorneys-at-law. Another member shall be a representative of business management familiar with unemployment compensation laws. A fourth member shall be a representative from organized labor familiar with unemployment compensation laws. The fifth member, who shall also be familiar with unemployment compensation laws, shall be designated as the member representing and shall represent the public. The appointments shall be for 3 years. Any vacancy shall be filled for the unexpired term. The members shall be paid $100 for each day or any part thereof during which they perform services, except that the chair and vice chair shall be paid $150 for each day or any part thereof during which they perform services. All members shall be reimbursed for all expenses determined by the commissioner to be necessary to the performance of their duties including mileage and board and room necessary for the conduct of hearings, except that no person who is a member of the appellate board and holds a part time, full time or per diem position with the executive, legislative or judicial branch shall receive the per diem allowance.

II. In the event of an increased workload the chair of the appellate board may request the governor with the advice and consent of the executive council to appoint up to 4 additional at-large members to the board, with equal representa-

tion for business management and organized labor. These new members shall serve for 3 years or until notified by the chair that the workload has been reduced to a level so that their services are no longer required.

409:8 Organization and Support; Renaming the Appellate Division the Appellate Board. Amend RSA 282-A:63 to read as follows:

282-A:63 —Organization and Support. The appellate board shall be part of the department of employment security for organizational purposes but shall operate independently of that department. The commissioner, after consultation with the appellate board chair, shall develop a cooperative working agreement outlining the annual funding for the appellate board which shall be provided for and administered by the commissioner. The agreement shall also describe all clerical personnel, facilities, space, supplies, services, and other support necessary to the functioning of the appellate board which shall be determined by, provided for, and administered by, the commissioner.

409:9 Jurisdiction; Renaming the Appellate Division the Appellate Board. Amend RSA 282-A:64 to read as follows:

282-A:64 —Jurisdiction.

I. The appellate board shall hear appeals from decisions of the appeal tribunal. An appeal must be filed with the appellate board within 15 days of the date of mailing of:

(a) The commissioner's decision on a request for reopening; or

(b) The appeal tribunal's decision on an appeal which had been remanded by the appellate board, in which case a request for reopening is not required.

II. The appellate board may allow a late appeal, if, in its opinion, good cause exists.

III. The review by the appellate board shall be confined to the record. No evidence shall be received. The appellate board shall provide all parties and the commissioner with a tape recording of the appeal tribunal; however, the appellate board chair may require a transcription of the first level hearing. In such case a copy shall be provided to all parties. The commissioner shall provide the appellate board with a copy of all other department records relating to the claim.

IV. The appellate board may decline to review any appeal which presents no substantial question within the appellate board's jurisdiction as set forth in RSA 282-A:65.

409:10 Reversal, Modification, or Affirmation; Renaming Appellate Division the Appellate Board. Amend RSA 282-A:65 to read as follows:

282-A:65 —Reversal, Modification or Affirmation. The appellate board shall not substitute its judgment for that of the commissioner or appeal tribunal as to the weight of the evidence on questions of fact, or as to the prudence or desirability of the determination. The appellate board shall reverse or modify the decision or remand the case for further proceedings only if the substantial rights of the appellant had been prejudiced because the findings, inferences, conclusions, or the decision is:

I. In violation of constitutional or statutory provisions; or

II. In excess of the statutory authority of the department of employment security; or

III. Affected by reversible error of law; or

IV. Affected by fraud; or

V. Affected by the absence of newly discovered evidence, which was not available to the affected party upon reasonable search at the time of the first level hearing, in which case the appeal shall be remanded to the appeal tribunal.

Otherwise, the appellate board shall affirm the order.

409:11 Quorum, Sessions, Exclusivity; Replacing the Appeal Division with Appeal Board; Renaming Appellate Division the Appellate Board. Amend RSA 282-A:66 to read as follows:

282-A:66 —Quorum, Sessions, Exclusivity.

I. The appellate board, while in session, shall consist of 3 members designated by the chair. Any party aggrieved by a decision of the appeal tribunal may appeal. The parties to such appeal shall be the claimant, all interested parties as defined in this chapter, and the commissioner. The appellate board shall adopt rules of procedure pursuant to RSA 541-A. It shall not require written briefs. The appellate board shall:

(a) Render a written decision within 15 business days of the hearing; and

(b) Adopt the decision of the appeal tribunal.

II. The appellate board shall sit in Concord, or any other area designated by the chair, and shall hold sessions at least monthly for the purpose of hearing arguments, making orders, rendering decisions and filing opinions.

III. The appellate procedures provided by this chapter shall be exclusive.

409:12 Judicial Review; Renaming Appellate Division the Appellate Board. Amend RSA 282-A:67 to read as follows:

282-A:67 Administrative Reconsideration and Judicial Review.

I. An interested party who is aggrieved by the decision of the appellate board or the commissioner, may within 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 specifying in the request the grounds therefor. The appellate board shall within 30 days deny or grant the motion for reconsideration or order a new hearing.

II. An interested party who has exhausted all administrative remedies within the department and who is aggrieved by a final decision of the appeal tribunal as reversed, modified, or affirmed by the appellate board after a motion for reconsideration is granted or denied or after the decision on rehearing, may appeal that decision to the supreme court, but only if the notice of that appeal is filed with the court within 30 days after the date of mailing of the decision from which the appeal is taken and the notice of appeal is served upon the commissioner and the attorney general contemporaneously with the filing of that notice of appeal with the 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.

III. Within 60 days after the service of the notice of appeal upon the commissioner, or within such further time allowed by the court, the commissioner shall transmit to the court a certified copy of the entire record of the proceeding. By stipulation of all parties to the review proceeding, the record may be shortened. If the record is shortened by stipulation, the court may subsequently require additional portions of the record certified.

IV. The review of the court shall be confined to the record. No evidence shall be received in the court. The court may require oral argument or written briefs, or both.

V. 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) In violation of constitutional or statutory provisions;
(b) In excess of statutory authority;
(c) Made upon unlawful procedures;
(d) Clearly erroneous in view of the substantial evidence on the whole record; or
(e) Affected by other error of law.

Otherwise, the court shall affirm the appeal tribunal's decision.

409:13 **Membership of Appellate Board.** Notwithstanding RSA 282-A:62, the members of the appellate division shall become members of the appellate board upon passage of this act. The terms of the initial members of the appellate board shall expire at the time such individual's terms in the appellate division were due to expire.

409:14 **Rules; Appellate Division.** Any rule adopted by the appellate division under RSA 282-A:66 shall remain in effect until its expiration date under RSA 541-A:2, IV, unless the appellate board amends or repeals the rule, pursuant to RSA 282-A:66, prior to that date.

409:15 **Effective Date.** This act shall take effect July 1, 1987.

[Approved May 26, 1987.]
[Effective Date July 1, 1987.]

CHAPTER 410 (HB 228)

AN ACT LEGALIZING CERTAIN TOWN AND DISTRICT MEETINGS AND RELATIVE TO AN INCREASE IN THE SALARIES OF THE CONWAY POLICE COMMISSIONERS.

Be it Enacted by the Senate and House of Representatives in General Court convened:

410:1 **Town of Plymouth.** All votes, proceedings, and actions of the annual town meeting in the town of Plymouth held March 13, 1985, are hereby legalized, ratified, and confirmed, including but not limited to voting to authorize borrowing and expending money for the acquisition of a dump truck.

410:2 **Town of Plainfield.** All votes, proceedings, and actions of the annual town meeting in the town of Plainfield held March 12, 1985, are hereby legalized, ratified, and confirmed, including but not limited to voting to authorize borrowing and expending money for a backhoe.

410:3 **Plymouth Village Water and Sewer District.** All votes, proceedings, and actions of the annual village district meeting in the town of Plymouth held on March 19, 1986, are hereby legalized, ratified, and confirmed, including but not limited to voting to authorize borrowing and expending money for a groundwater exploration and an analysis of the existing water distribution system.

410:4 **Town of Haverhill.** All votes, proceedings, and actions of the annual town meeting in the town of Haverhill held March 10, 1987, are hereby legalized, ratified, and confirmed.

STATE OF MAINE BUSINESS AND CONSUMER COURT

Cumberland, ss.

CLAIMANTS REPRESENTED BY
COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1400,
and INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 2327,

Petitioners,

v. Docket Nos. BCD-AP-15-06 and BCD-AP-16-01 (consolidated)

MAINE UNEMPLOYMENT INSURANCE COMMISSION,

Respondent,

FAIRPOINT LOGISTICS, INC. and NORTHERN NEW ENGLAND
TELEPHONE OPERATIONS LLC
(d/b/a FAIRPOINT COMMUNICATIONS-NSE),

Parties-in-Interest.

DECISION ON APPEAL

These appeals are from decisions of the Maine Unemployment Insurance Commission ["the Commission"] denying unemployment compensation benefits to the Petitioners, former or current employees of the Parties-in-Interest who were involved in a labor dispute during late 2014 and early 2015. The Petitioners contend that the Commission erred by: 1) placing the burden of proof as to whether there was a stoppage of work on the employees; 2) failing to apply the "substantial curtailment" standard in determining whether a stoppage of work had occurred; and 3) making factual findings that were unsupported by substantial evidence in the record. Petitioners contend that the Commission decisions should be vacated and that the court should order that they be granted unemployment benefits. The Commission and the Parties-in-Interest contend that the Commission decisions were correct and should be affirmed.

For the reasons discussed below, the court vacates the decisions and remands the Petitioners' claims at issue in these cases to the Commission for further proceedings.

Background

Petitioners are employees of Parties-in-Interest Fairpoint Logistics, Inc. and Northern New England Telephone Operations LLC (collectively "the Employers"). For purposes of collective bargaining, Petitioners are represented by the International Brotherhood of Electrical Workers, Local 2327 or the Communication Workers of America, Local 1400 (collectively, the "Unions"). *See R.* 23-41, 1699-1700.

On October 17, 2014, Petitioners and other employees of the Employers represented by the Unions went on strike. R. 335. Thereafter, Petitioners applied for unemployment compensation. Petitioners were initially denied benefits by the Maine Department of Labor, Bureau of Unemployment Compensation ("Bureau"), which found that Petitioners' unemployment was due to a stoppage of work that existed because of a labor dispute within the meaning of 26 M.R.S.A. § 1193(4). R. 226-231, 338-339. Petitioners appealed to the Division of Administrative Hearings ("Division"), which consolidated the appeals. R. 233. The Division conducted a two-day adjudicatory hearing on March 30 and 31, 2015 pursuant to 26 M.R.S.A. § 1194(3) and 1082(4-A). *See R.* 1243-1671.

On June 5, 2015, the Hearing Officer issued a decision reversing the Bureau's decisions and allowing the Petitioners benefits from October 19, 2014, if otherwise eligible and qualified. *See* R. 201. The Hearing Officer determined that the Employers did not experience a stoppage of work due to the Petitioners' involvement in a labor dispute and that the Employers avoided the stoppage, at least in part, through the use of personnel hired to perform the work of the striking employees within the meaning of 26 M.R.S.A. § 1193(4). R. 197-200. The Employers timely appealed the Hearing Officer's decision to the Commission. R. 134-190. The

Commission determined that no further hearing was warranted and decided the Employers' appeal on the existing evidentiary record. R. 5.

In a Decision dated October 1, 2015, the Commission, acting through the Chairman of the Commission without the participation of the employee or employer representative members,[1] set aside the Hearing Officer's Decision and determined that Petitioners were disqualified from receiving unemployment benefits because there was a stoppage of work pursuant to 26 M.R.S.A. § 1193(4). *See* Me. Unemp't. Ins. Comm'n. Dec. No. 15-C-03849 at 18-19 (claimant Michael Beecy),[2] R. 19-20. Section 1193(4) provides, in pertinent part, that "[a]n individual shall be disqualified for benefits:

> **4. Stoppage of Work.** For any week with respect to which the deputy ... finds that the claimant's total or partial unemployment is due to a stoppage of work that exists because of a labor dispute at the ... premises at which the claimant is or was employed, or there would have been a stoppage of work had substantially normal operations not been maintained with other personnel previously and currently employed by the same employer and any other additional personnel that the employer may hire to perform tasks not previously done by the striking employees.

26 M.R.S.A. § 1193(4) (2015).

A. The Commission's Decision

The Commission in its October 1, 2015 Decision determined that Petitioners "bear the burden of proof on the issue of whether there was a stoppage of work or would have been a stoppage of work had substantially normal operations not been maintained within the meaning of 26 M.R.S.A. § 1193(4)." R. 11. The Commission reasoned that Petitioners, as the parties who initiated the departure from employment, should bear the burden of proving their

[1] The Commission chair, whose title by statute is "chairman," *see* 26 M.R.S.A. § 1081(1) (2015), presided over the Employers' appeal without the participation of the employer or labor representative members of the Commission because the employer representative position was vacant at the time. R. 4-5 (*citing* 26 M.R.S.A. § 1081(3) (2015).

[2] The Commission Decision contained in the record on appeal happens to have been rendered in connection with the claim of Petitioner Michael Beecy, *see* R. 2, but the same analysis resulted in the same Commission decisions in the claims of all of the Petitioners.

eligibility for benefits under section 1193(4) consistent with "general principles governing the adjudication of unemployment disputes[.]" R. 11-12. While the Commission's Decision placed the burden of proof on Petitioners, the Decision "recognize[d] that the burden of production falls upon the Employers, as the Employers are the keepers of the records necessary to determine whether there was a stoppage of work or a potential stoppage of work." R. 12. The Commission determined that the Employers had met its burden of production. *Id.*

The Commission Decision then addressed the meaning of the term "stoppage of work" within section 1193(4) in light of the legislative history of the statute and a 1985 amendment as well as Maine court decisions interpreting section 1193(4). The Commission determined that "the proper standard for determining the existence of a work stoppage ... is the failure to maintain substantially normal operations standard." R. 14. In adopting this interpretation, the Commission expressly rejected the "substantial curtailment" standard that the Unions on behalf of the claimants contended should govern the determination whether a stoppage of work occurred, noting that defining a work stoppage in terms of "substantial curtailment of operations" could result in an internal consistency with the "substantially normal operations" standard in the second prong of the statute. (*Id.* Accordingly, the Commission applied a multi-factor analysis, evaluating the following enumerated factors to determine whether there was a stoppage of work, i.e., a failure to maintain substantially normal operations:

1. The strike's impact on business operations and production, to include evaluation of the following:
    a. Marketing and installation
    b. Repairs
    c. Construction
    d. Maintenance of Equipment
    e. Number of employees as compared with normal levels
2. The strike's impact on customer satisfaction
3. The strike's impact on revenue[.]

R. 14-15. The Commission determined, in pertinent part, that there was: a 30 to 35% reduction of operations at the Employers' facilities; a cessation of aggressive marketing by the Employers and commensurate reduction in new customers; approximately double the usual number of unresolved repair orders during the strike; a curtailment of new construction, with very little discretionary construction work; a sharp curtailment of preventative maintenance; a decrease in the number of employees working during the strike, including highly skilled employees with advanced training and years of experience; a rise in customer complaints during the strike; and a failure to realize substantially normal revenue during the strike period. R. 15-17.

In laying out this analysis, the Commission noted that bad winter weather "exacerbated the effect of a work stoppage," but concluded that "the root cause of the delay [in carrying out repairs or installing services] was the strike, which began prior to the onset of the storms." R. 17. Accordingly, the Commission "conclude[d] that the employers were not able to maintain substantially normal operations during the strike" and that Petitioners "have not met their burden to prove that there was no work stoppage in the case at bar." R. 19. Finally, the Commission wrote that even had it decided "that the burden of proof rests with the employers, the employers presented substantial credible evidence that a work stoppage occurred when the claimants struck on October 17, 2014." *Id.*

Based on its view of the evidence, the Commission decided "that the employers were not able to maintain substantially normal operations during the strike. Based on a totality of evidence, the Chairman concludes that the claimants have not met their burden to prove that there was no work stoppage in the case at bar." R. 19. This conclusion made it unnecessary to address the question under the alternative prong section 1193(4) of whether there would have been a stoppage of work had the Employers not maintained "substantially normal operations."

The Commission ruled that the Petitioner claimants were disqualified from benefits for the duration of the strike. R. 19-20.

B. The Rule 80C Appeals

Pursuant to Rule 80C of the Maine Rules of Civil Procedure, Petitioners filed a timely appeal of the Commission's October 1, 2015 Decision in the Maine Superior Court. The appeal was then transferred to the Business and Consumer Court and assigned Docket No. BCD-AP-15-06. Thereafter, the Commission and counsel became aware of seven additional claimants who had not been issued individual decisions due to an administrative error. *See R.* 1694. The Bureau issued a decision on or about October 29, 2015 denying benefits to those claimants based upon the Commission's Decision. R. 1791-1792. The additional Petitioners appealed to the Division, which denied benefits based on the Commission's October 15, 2015 Decision No. 15-C-03849, and subsequently to the Commission, which affirmed the denial of benefits on the same analysis as in the earlier round of denials.[3] *See* R. 1694-1696 (Me. Unemp't. Ins. Comm'n. Dec. No. 15-C-07223 (Nov. 16, 2015) (claimant Mark R. Rowe)).[4] Those seven claimants filed a timely appeal that was also transferred to this court and assigned Docket No. BCD-AP-16-01. The parties have agreed that the issues and the material facts are the same in both cases, and that the cases should be consolidated for all purposes in this appeal.

All parties have submitted briefs and an extensive record. Oral argument on the appeals was held August 1, 2016, at which point this court took the appeals under advisement.

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[3] The additional Petitioners' appeal to the Commission was also decided solely by the Commission Chairman. *See* R. 1696.

[4] As is the case with the initial round of Commission decisions on hundreds of claimants, the subsequent Commission decisions on all seven claimants are not all in the record, *see n. 2*, supra. The exemplar decision in the record involves Petitioner Mark R. Rowe. *See* R. 1694-96.

Standard of Review

In reviewing decisions of the Commission, "it is critical that [the court] keep in mind the purposes of the Employment Security Act." *Brousseau v. Me. Emp't Sec. Comm'n*, 470 A.2d 327, 329 (Me. 1984). Because the Act is remedial in nature, it "dictates a liberal construction in favor of the employee." *Id.*

The court reviews the administrative record "to determine whether the Commission correctly applied the law and whether its fact findings are supported by any competent evidence." *McPherson v. Me. Unemployment Ins. Comm'n*, 1998 ME 177, ¶ 6, 714 A.2d 818. The court "will not overrule findings of fact supported by substantial evidence, defined as 'such relevant evidence as a reasonable mind might accept as adequate to support the resultant conclusion.'" *Sinclair Builders, Inc. v. Me. Unemployment Ins. Comm'n*, 2013 ME 76, ¶ 9, 73 A.3d 1061 (quotation omitted). The fact that the record contains inconsistent evidence or that inconsistent conclusions could be drawn from the record does not prevent the agency's findings from being supported by substantial evidence. *In re Me. Clean Fuels, Inc.*, 310 A.2d 736, 741 (Me. 1973). The court will not disturb a decision of the Commission "unless the record before the commission compels a contrary result." *McPherson*, 1998 ME 177, ¶ 6, 714 A.2d 818.

The court reviews "de novo issues of statutory interpretation." *Sinclair*, 2013 ME 76, ¶ 10, 73 A.3d 1061. When interpreting a statute, the court's single goal is to give effect to the Legislature's intent in enacting the statute. *Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶ 19, 107 A.3d 621. In determining the Legislature's intent, the court's first step is to "look to the plain meaning of the statute, interpreting its language to avoid absurd, illogical or inconsistent results." *Sinclair*, 2013 ME 76, ¶ 10, 73 A.3d 1061. In carrying out this analysis, the court considers the statutory scheme as a whole to achieve a harmonious result. *See Town of Ogunquit v. Dep't of Pub. Safety*, 2001 ME 47, ¶ 7, 767 A.2d 291.

If a statute is ambiguous, the court may look to legislative history and other extraneous aids in interpretation of the statute. *Carrier v. Sec'y of State*, 2012 ME 142, ¶ 12, 60 A.3d 1241 (quotation omitted). "A statute is ambiguous if it is reasonably susceptible to different interpretations." *Id.* When an agency interprets an ambiguous statute that is within its area of expertise, the court will defer to that interpretation unless it is unreasonable. *Cobb*, 2006 ME 48, ¶ 13, 896 A.2d 271.

However, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (quotation omitted); *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012) (observing deference would be inappropriate where the agency's interpretation (1) was erroneous or inconsistent with the regulation, or (2) "does not reflect the agency's fair and considered judgment on the matter in question" because it (a) conflicts with a prior interpretation, or (b) is "nothing more than a convenient litigating position").

Discussion

Petitioners' appeal raises three primary challenges to the Commission's decisions denying their claims. Petitioners allege: 1) the Commission committed an error of law by failing to apply the "substantial curtailment" standard for determining whether a work stoppage occurred; 2) the Commission improperly allocated the burden of proof as to whether a stoppage of work occurred under section 1193(4); and 3) the Commission made factual findings unsupported by substantial evidence. The court addresses the first two arguments in turn. The third argument, regarding the Commission's evaluation and weighing of the evidence, need not be addressed in light of the remand.

A. The Commission's Interpretation of the Stoppage of Work Standard Under 26 M.R.S.A. § 1193(4).

The operative statutory provision, title 26, section 1193(4), Maine Revised Statutes, disqualifies striking workers from receiving benefits under two alternative circumstances: 1) where the claimant's "total or partial unemployment is due to a stoppage of work that exists because of a labor dispute at the ... premises at which the claimant" was employed; or 2) "there would have been a stoppage of work had substantially normal operations not been maintained with other personnel previously and currently employed by the same employer and any other additional personnel that the employer may hire to perform tasks not previously done by the striking employees." 26 M.R.S.A. § 1193(4) (2015).

The second clause, relating to maintenance of "substantially normal operations," came into the statute by means of a 1985 amendment. *See* L.D. 209 (112th Legis. 1985) ("An Act to Restrict the Payment of Unemployment Compensation Benefits to Workers Who are on Strike"). Prior to this Amendment, the statute provided, in pertinent part, that an employee was disqualified from receiving unemployment benefits "[f]or any week with respect to which the deputy ... finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the ... premises at which he is or was employed. 26 M.R.S.A. § 1193(4) (1983). The 1985 amendment eliminates the requirement that an actual work stoppage exist and disqualifies a claimant if "there would have been a stoppage of work had substantially normal operations not been maintained," without the use of additional personnel hired to perform the work of the striking employees.

In enacting the 1985 Amendment, the Legislature explained that it intended to "continue[] the present practice under the work stoppage test of allowing striking workers to receive benefits if the employer maintains a substantially normal level of operations by hiring

additional employees to perform the striking workers' tasks." L.D. 209, Statement of Fact at Page 4-L.D. (112th Legis. 1985).

The term "stoppage of work" is not defined in the statute, but the Maine Law Court in *Bilodeau v. Maine Employment Security Commission* indicated that "the term 'stoppage of work' refers generally to a cessation of plant operations." 153 Me. 254, 260, 136 A.2d 522, 526 (1957). The Law Court has not addressed the meaning of "stoppage of work" since *Bilodeau.*

Subsequent Maine Superior Court decisions have interpreted the term "stoppage of work" to mean a "substantial curtailment" of operations, and a "substantial reduction in service." *See Laney v. Maine Dep't of Labor,* 1994 Me. Super. LEXIS 122 at *4 (Cum. Cty., Brodrick, J.) ("a substantial curtailment of operations; *Aden v. Maine Emp't. Sec. Comm'n,* 1983 Me. Super. LEXIS 140 at *4 (Ken. Cty., Clifford, J.) (" substantial reduction in service"); *Boutin v. Maine Dep't of Manpower Affairs,* 1980 Me. Super LEXIS 100 at *9 (Ken. Cty., Wathen, J.) ("substantial curtailment"). In *Boutin,* the Superior Court specifically noted that the "cessation of plant operations" reference in *Bilodeau* did not mean that the plant had to be completely shut down in order for a work stoppage to exist. 1980 Me. Super. LEXIS 100 at *9.

Petitioners assert the Commission erred by failing to apply at least the "substantial curtailment test," if not the "cessation of operations" test for determining whether a work stoppage exists. The Petitioners note that the weight of authority around the country holds that the existence of a work stoppage is determined by whether there is a "substantial curtailment" of operations. *See, e.g.,* Annot., *Construction of Phrase "Stoppage of Work" in Statutory Provision Denying Unemployment Compensation Benefits During Stoppage Resulting from Labor Dispute,* 61 A.L.R. 693, at §§ [2a], [5a] (2016) ("There is also general agreement among the courts that a 'stoppage of work' occurs when there has been a 'substantial curtailment' of the employer's operations, although the measurement of what constitutes a sufficient 'substantial

curtailment' has been regarded as an issue to be determined on the basis of the facts involved in each particular case"); *see also Haw. Teamsters & Allied Workers, Local 996 v. Dep't of Labor & Indus. Relations*, 132 P.3d 368, 375 (Haw. 2006) (interpreting "stoppage of work" to mean a "substantial curtailment"); *Boguszewski v. Comm'r of Dep't of Emp't & Training*, 572 N.E.2d 554, 557 (Mass. 1991) (Massachusetts has "adopted a general definition" of "stoppage of work," that "requires a 'substantial curtailment' of the employer's 'operations'"); *Lourdes Med. Ctr. of Burlington Cty. v. Bd. of Review*, 963 A.2d 289, 298-99 (N.J. 2009).

Petitioners contend that the Commission's application of the "failure to maintain substantially normal operations" standard was an error of law, because the "substantially normal operations" standard is applied only to determine whether a work stoppage has come to an end, not to determine whether a work stoppage exists. *See* Annot., *Construction of Phrase "Stoppage of Work" in Statutory Provision Denying Unemployment Compensation Benefits During Stoppage Resulting from Labor Dispute, supra*, 61 A.L.R. 693 at § [6a]. *See also G.H. Bass & Co. v. Maine Emp't. Sec. Comm'n*, Docket No. KENSC-CV-75-89 (Me. Super. Ct., Ken. Cty. ____).[5]

Finally, Petitioners contend that the legislative history of section 1193(4) and its 1985 amendment does not support the Commission's Decisions, as the amendment did not purport to redefine the term "stoppage of work" as it had previously been construed in *Bilodeau* and *Boutin*.

The Employers and the Commission respond that the Commission's interpretation of a stoppage of work was not unreasonable because the interpretation mirrors the language from the 1193(4) and reads the statute as a harmonious whole. They also contend that use of the "substantial curtailment" standard for the first prong could lead to inconsistent results, with a different standard being utilized depending on whether or not the employer attempted to

[5] Petitioners attached the first three pages of this unreported Kennebec County Superior Court decision as Attachment B to their opening brief. The attached portion does indicate that the court deemed the test of when a work stoppage ends to be when the employer's facility resumes "substantially normal operations." An online LEXIS search indicates that the phrase "substantially normal operations" appears in the LEXIS library of Maine court opinions only in the above-cited *Laney* case.

maintain operations with non-striking and temporary personnel. Furthermore, they argue that Maine courts have only used the "substantial curtailment" standard in dicta, or where the proper standard was not a contested issue. To the extent other jurisdictions use the "substantial curtailment" standard, they contend that this is not binding on Maine courts and, in any event, is based on different statutory language.

The primary justification for the Commission's standard is that the statutory language in Maine—along with the Kansas statute—is unique in that it includes explicit language providing that a "stoppage of work" does not occur when "substantially normal operations" are maintained. *Compare* 26-M.R.S.A. § 1193(4), *and* Kan. Stat. Ann. § 44-706(d) (2016) (referencing maintenance of "normal operations"), *with e.g.*, Haw. Rev. Stat. § 383-30(4) (2016) (only listing disqualification due to stoppage of work because of a labor dispute); Mass. Ann. Laws ch. 151A, § 25(b) (2016) (same); N.J. Rev. Stat. § 43:21-5(d) (2016) (same); N.J. Admin. Code § 12:17-12.2(a)(2) (2016) (defining stoppage of work to mean a "substantial curtailment of work").

In this court's view, the Petitioners' point about "substantially normal operations" being the traditional test of whether a work stoppage has come to an end helps prove the Commission's argument that the existence of a work stoppage can be measured by an employer's failure to maintain substantially normal operations. If, as Petitioners correctly point out, case law in Maine and elsewhere indicates that a "substantial curtailment" is deemed to end when the employer resumes "substantially normal operations," it would follow logically that a "substantial curtailment" means a level of operations that falls below "substantially normal operations."

Otherwise, there would be an undefined gap between "substantially normal operations" and "substantial curtailment" that the case law cannot have meant to create. A work stoppage

either exists or it does not, so there must be a single line of demarcation between existence and non-existence. This in in turn must mean that "substantial curtailment" and "substantially normal operations" are in fact antonyms—the two sides of the same level of operations coin.

And that may explain how the phrase "substantially normal operations" entered the Maine statutes by means of the 1985 amendment. As Petitioners contend, the Legislature, in enacting the 1985 amendment, did not purport to change the definition of "stoppage of work," as interpreted in *Bilodeau, Boutin* and *Aden.* However, the Legislature did not pick the new phrase, "substantially normal operations," out of the air. The 1985 amendment plainly indicates that an employer that maintains "substantially normal operations" is not experiencing a stoppage of work, just as an employer that has resumed "substantially normal operations" is no longer experiencing a stoppage of work, which is the law. Therefore, if a stoppage of work does not exist when "substantially normal operations" are maintained, it is logical to infer that a stoppage of work does exist when an employer fails to maintain substantially normal operations because of a strike.

As mentioned above, any other interpretation of the statute creates an undefined gap between "substantial curtailment" of operations and "substantially normal operations" that the Legislature cannot have intended to create. This court deems the two terms to be mutually exclusive and contiguous antonyms, meaning that any level of operations falling short of "substantially normal operations" is a "substantial curtailment," and, in turn, that any "substantial curtailment" in operations is by definition a "failure to maintain substantially normal operations."

Accordingly, the court concludes that the Commission's application of the "failure to maintain substantially normal operations" standard in determining whether a stoppage of work exists was a permissible application of the statute, albeit one that is semantically, but not

substantively, different from the standard previously applied by the Commission in the same context. This different interpretation does not render the Commission's decision erroneous as a matter of law, especially given the lack of any substantive difference between the former test and the newly announced test.

Accordingly, the court concludes that the Commission did not err in applying a "failure to maintain substantially normal operations" standard in deciding whether a work stoppage existed at various times, but did err in assuming that its new phrasing of the standard reflects a substantive departure from the "substantial curtailment" standard. The next issue is whether the Commission properly allocated to Petitioners the burden of proving that a work stoppage did not exist because of the strike.

B. The Commission's Allocation of the Burden to Prove the Existence of a Work Stoppage

Petitioners argue that the Commission's allocation to them of the burden to prove they should not be disqualified under section 1193(4) was an error of law because the employer—or in some instances the Commission—bears the burden to prove a claimant is disqualified from receiving benefits. Petitioners analogize placing the burden of proof on the employer under section 1193(4) to the placement of the burden on the party asserting an affirmative defense.

The Commission responds that the burden of proof was properly allocated to Petitioners, because a claimant has the burden to prove his or her eligibility for benefits. In support, it argues that since the Petitioners made the affirmative choice to strike, it was reasonable to place the burden of proof on them. Furthermore, the Commission points out that it did decide that the Employers bore the burden of production on the work stoppage issue. The Commission contends that, even if it erred in allocating the burden of proof, the Commission's Decision should be affirmed as it was supported by substantial evidence.

The Employers' arguments echo those of the Commission and emphasize the contention that the burden of proof is immaterial, given that the Commission stated that "even if the Chairman were to ... find that the burden of proof rests with the employers, the employers presented substantial evidence that a work stoppage occurred when the claimants struck on October 17, 2014." R. 18. The Employers also contends that the burden of proof is immaterial because Petitioners challenge the conclusions drawn from the facts, not the facts themselves.

Determination of the burden of proof is a question of law. *See, e.g., Bisco v. S.D. Warren Co.*, 2006 ME 117, ¶¶ 10-11, 908 A.2d 625; *Guardianship of Lander*, 1997 ME 168, ¶¶ 5-7, 697 A.2d 1298; *Martel v. U.S. Gypsum Co.*, 329 A.2d 392, 394-95 (Me. 1974).

For several reasons, the court concludes that the Commission erred in placing the burden on the Petitioners to prove that there was not a work stoppage because of the labor dispute.

The Commission's decision to place the burden to prove the existence of a stoppage of work on the Petitioners appears to be based on the view that, "[a]s the parties who initiated the departure from employment, general principles governing the adjudication of unemployment disputes dictate that the claimants have the burden to prove their eligibility . . ." R. 11). Although a claimant does have the burden to prove eligibility for benefits, the Commission erred in assuming that the Petitioners must therefore have the burden to prove that they should not be disqualified from benefits under section 1193(4), which is essentially what the Commission required in requiring Petitioners to prove the non-existence of a stoppage of work. The statutory unemployment compensation framework does not put the burden on a claimant regarding every issue; instead, which party bears the burden—and whether the burden is one of production or persuasion--depends on the issue at hand.

The Commission purported to assign "the burden of production" to the Employers, but it is not clear that it actually did so in the evidentiary sense. The Commission Decision describes the burden of production as follows:

> The Chairman recognizes that the burden of production falls upon the Employers, as the Employers are the keepers of the records necessary to determine whether there was a stoppage of work or a potential stoppage of work. The Employers have satisfied their burden of production in this case. The claimants obtained the evidence which they required to present their case. R. 12.

What the Commission appears to characterize as the "burden of production" seems to refer to a duty to produce documents in discovery rather than an evidentiary burden of production. In the evidentiary context, the burden of production refers to the burden to present some evidence on an issue, in contrast to the burden of persuasion on an issue, and does not refer to producing documents to the opposing party in discovery. *See Brady v. Cumberland County*, 2015 ME 143, ¶36-39, 126 A.3d 1145 (employee and employer's respective burdens of production in employment discrimination cases); *Bisco v. S.D. Warren Co.*, 2006 ME 117, ¶¶12-14, 908 A.2d 625 (workers' compensation claimant's burden of production on impairment).

Even assuming the Commission did assign the evidentiary burden of production to the Employers on the work stoppage issue by requiring the Employers to make some initial showing that a work stoppage occurred, it plainly assigned the burden of persuasion on that issue to the Petitioners. *See* R. 11 (Petitioners "bear the burden of proof on the issue of whether there was a stoppage of work or would have been a stoppage of work had substantially normal operations not been maintained . . .)." In the court's view, the Commission allocated the burden to the wrong party: the Employers should have been assigned the burden of persuasion on the issue of whether the Petitioners should be disqualified by virtue of the section 1193(4) stoppage of work provision.

The claimant to unemployment compensation does bear the burden on certain issues, such as eligibility for benefits under section 1192. *See McKenzie v. Maine Emp't. Sec. Comm'n.*, 453 A.2d 505, 509 (Me. 1982) ("A claimant must establish eligibility for each week for which benefits are claimed.")

However, on issues such as disqualification, the burden generally shifts to the employer to prove grounds for disqualification, and in certain instances, if the employer meets that burden, the burden shifts back to the claimant to prove an exception to the disqualification. For example, even if a claimant meets the conditions for eligibility under section 1192, if the employer proves that a claimant left work voluntarily and therefore should be disqualified, the claimant is disqualified unless the claimant can prove good cause for leaving employment. *See Kilmartin v. Maine Emp't. Sec. Comm'n*, 456 A.2d 412, 414 (Me. 1982). Which party bears the burden on an issue in an unemployment compensation case depends on the issue.

As noted above, once a claimant shows that the claimant is eligible for benefits, the burden of persuasion is on the employer to prove grounds for disqualifying the claimant. For example, the Law Court has held that the employer bears the burden to show that the claimant is disqualified because he or she was discharged for misconduct within the meaning of 26 M.R.S.A. § 1193(2). *See, e.g., Sprague Elec. Co. v. Me. Unemployment Ins. Comm'n*, 536 A.2d 618 (Me. 1988) (employer had failed to satisfy its burden of proof that the employee it had terminated engaged in misconduct). *See also Fountain v. Me. Unemployment Ins. Comm'n*, 2013 Me. Super. LEXIS 167, at *10-11 (employer bears burden of proving employee's conduct meets statutory definition of misconduct). Similarly, the Commission has the burden to prove that a claimant is disqualified under 26 M.R.S.A. § 1193(3) because he or she "refused to accept a referral to a suitable job opportunity when directed to do so by a local employment office." *Tobin v. Me. Employment Sec. Comm'n*, 420 A.2d 222, 225-26 (Me. 1980).

Although the Law Court has not decided which party bears the burden of persuasion in connection with work stoppage issues arising under section1193(4), the very language of the statute answers the question. Section 1193(4) states that a claimant may be disqualified only if the deputy "*finds* that the claimant's total or partial unemployment is due to a stoppage of work that exists because of a labor dispute . . ." 26 M.R.S. § 1193(4)(emphasis added). It logically cannot be a claimant's burden to negate a necessary affirmative finding.[6]

Just as the burden is on the employer or the Commission to prove grounds for disqualification for misconduct or refusal to accept work under subsections (2) and (3) of section 1193, the burden under subsection (4) logically must be on the employer, as the proponent of disqualification, to prove grounds for disqualification under one or the other of the section 1193(4) alternatives.

This allocation of the burden finds further logical support in the general principle of law that "[t]he party who asserts the affirmative of the controlling issues in the case, whether or not he is the nominal plaintiff in the action, bears the risk of non-persuasion." *Markley v. Semle*, 1998 ME 145, ¶5, 713 A.2d 945 (declaratory judgment action). Most, if not all, of the statutory grounds for disqualification enumerated in section 1193—such as misconduct resulting in discharge, refusal to accept work, criminal conviction resulting in discharge, receipt of a pension, making a false statement, receipt of other remuneration—require affirmative proof of grounds for disqualification. As a matter of both logic and due process, once a claimant has made a showing of eligibility, the burden should rest upon the employer (or

[6] The illogic in assigning the burden on section 1193(4) issues to the Petitioners is most evident in light of the language of the second prong of section 1193(4): "there would have been a stoppage of work had substantially normal operations not been maintained with other personnel previously and currently employed by the same employer and any other additional personnel that the employer may hire to perform tasks not previously done by the striking employees." Just to define specifically the points that a claimant's proof would have to cover to meet the burden on that issue seems impossible.

the Commission, as the case may be), as the proponent of disqualification, to prove that the claimant should be disqualified, rather than upon the claimant to prove a negative.

Yet another justification for putting the burden to show grounds for disqualification on the employer (or the Commission) lies in the remedial nature of the statute. *Tobin v. Me. Employment Sec. Comm'n, supra,* 420 A.2d at 226. In *Tobin,* in rejecting the Commission's contention that the burden of proving unsuitability of a job referral-direction falls upon the claimant, the Law Court even said, "*Any* disqualification, being penal in nature, must be strictly reviewed." *Id.* (citation omitted) (emphasis added). That statement, in itself, confirms that placing the burden on claimants to prove that a work stoppage did not exist is contrary to the letter and purpose of the statute, and also at odds with the weight of authority around the country.[7]

Accordingly, the court concludes that the Commission erred as a matter of law in assigning the burden to prove the existence of a work stoppage because of a labor dispute to the claimants.

The analysis turns to the question of how this court should respond to the error. Remand for reconsideration may be appropriate where the wrong burden of proof was applied. *See Me. Eye Care Assocs. P.A. v. Gorman,* 2006 ME 15, ¶¶ 17-18, 890 A.2d 707 (trial

[7] *See Quincy Corp. v. Aguilar,* 704 So.2d 1055, 1065 (Fla. Dist. Ct. App. 1997) ("If the employer does not meet its burden of proving to the appeals referee and the Commission and the labor dispute is the current cause of the unemployment, then the disqualification provision does not apply..."); *Dalton Brick & Tile Co. v. Huiet,* 115 S.E.2d 748, 750 (Ct. App. Ga. 1960) (employer in case involving labor dispute disqualification provision has burden of proof "since the general statutory enactment is one granting benefits upon proof of unemployment and other conditions of eligibility, an employer seeking to deny benefits to one otherwise eligible because of an excepting clause within the act has the burden of showing by a preponderance of the evidence that the employee comes within such exception"); *Be-Mac Transport Co. v. Grabiec,* 314 N.E.2d 242, 249 (Ill. App. Ct. 1974) ("[T]he factual issue regarding availability of work at any plant during any given period of time is a matter peculiarly within the knowledge of the employer .... Therefore, in the process of attempting to bring otherwise eligible claimants within the affirmative defense created by this specific exception of the statute, the burden of proof should logically rest upon the employer"); *IBP, Inc. v. Aanenson,* 452 N.W.2d 59, 67 (Neb. 1990) ("If the strike claimants are otherwise qualified to receive benefits, [the employer] must prove disqualification under [the labor dispute disqualification provision]"). *But see Miceli v. Unemployment Comp. Bd. of Review,* 519 Pa. 515, 523-24 (1988) ("[T]he burden of proof rests with the claimants when the work stoppage is in the form of a strike").

court's acknowledgment that case presented contrary evidence on material facts counsels against inferring that court would have made same findings of fact under different burden of proof); *see also In re Application of Hughes*, 594 A.2d 1098, 1101-02 (Me. 1991) (remand for reconsideration due to application of wrong standard of proof).

C. The Justification for Remand

All parties to this appeal appear to oppose a remand for reconsideration of the evidence. The Petitioners assert that the court should vacate the Commission decision and remand with a directive to the Commission to allow benefits. The Employers and the Commission say that, even if the Commission erred in requiring the Petitioners to prove that they should not be disqualified under section 1193(4), no remand is necessary because the Commission has indicated that the outcome would be no different were the burden allocated to the Employers.

The Petitioners would be entitled to the remand with an order to allow benefits only if the evidence compels a decision in their favor. The court is not prepared, at least at this stage, to say that it does, and in any case deems it appropriate to allow the Commission to re-address the issues on the basis of a correct allocation of the burden.

Likewise, the court does not accept the suggestion extended by the Employers and the Commission to let stand the Commission's error in allocating the burden of persuasion, based on the Commission's statement that the result would have been the same had the burden been on the Employers.

One reason why a remand is appropriate is that the Commission evidently believed that there is a difference between the "substantial curtailment" standard and the "failure to maintain substantially normal operations" standard, whereas the court's view, for the reasons given above, is that they are in effect synonyms defining a work stoppage.

Another reason for the remand is that the Commission's dictum about the result being the same if the burden were allocated to the Employers incorrectly characterizes that burden. The Commission said:

> Based on a totality of evidence, the Chairman concludes that the claimants have not met their burden to prove that there was no work stoppage in the case at bar. Furthermore, even if the Chairman were to reverse the Hearing Officer's finding regarding the burden of proof and find that the burden of proof rests with the Employers, the Employers presented substantial credible evidence that a work stoppage occurred when the claimants struck on October 17, 2014. R. 19).

"Substantial credible evidence that a work stoppage occurred when the claimants struck on October 17, 2014" does not define the Employers' burden, for two reasons.

First, the Employers had to prove that a work stoppage existed (or that there would have been a work stoppage under the conditions outlined in the statute), not just when the Petitioners struck, but during each week for which they claim the Petitioners should be disqualified. As noted above, for a claimant to be disqualified under section 1193(4), the statute requires an affirmative finding, based on the evidence, as to each week for which the employer seeks to disqualify the claimant from benefits, that there was a work stoppage because of the labor dispute or would have been a work stoppage because of the labor dispute had the employer not been able to maintain substantially normal operations without hiring people to do the strikers' work.

Second, the Commission's articulation of Employer's burden omits any reference to the causation element of their proof: the Employers had to prove, as to each week at issue, that a work stoppage existed because of the strike (or that there would have been a work stoppage because of the strike). By way of example, one question of causation raised by the evidence is, if a work stoppage continued to exist during the period when the region was experiencing severe weather, whether the Employers have shown that the continuation of the stoppage was because of the strike.

For these reasons, the Commission's decisions regarding the Petitioners' claims will be vacated and the claims involved in these cases will be remanded for further proceedings.

D. Proceedings on Remand

The purpose of the remand is to enable the Commission to render decisions consistent with this Decision on Appeal, based on the same evidentiary record, on all of the Petitioners' claims.

One area to be addressed on remand has to do with the point made above about the need for a week-by-week determination of whether a work stoppage existed because of the strike. At oral argument, the Commission appeared to take the position that a week-by-week determination of disqualification under section 1193(4) was not required, but the statute plainly dictates otherwise: disqualification occurs *"[f]or any week* with respect to which the deputy . . . finds that the claimant's total or partial unemployment is due to a stoppage of work that exists because of a labor dispute . . ." 26 M.R.S. § 1193(4) (emphasis added). The required affirmative finding has to be specific to each week at issue. The fact that a claimant must make a claim for unemployment for each week for which benefits are claimed, *id.* § 1192(1), means that the claimant's eligibility and any ground for disqualification must be decided on a week-by-week basis. *See McKenzie v. Maine Emp't. Sec. Comm'n, supra. Cf. Burger Unemployment Compensation Case,* 168 Pa.Super. 89, 91, 93, 77 A.2d 737 (1951)(" Each week of unemployment is the subject of a separate claim, the validity of which is determined by a consideration of conditions existing within that week . . .").

Thus, it will be necessary, on remand, for the Commission to examine the evidence in the current record and render findings as to whether, for each week during which the Employers contend the claimants should be disqualified, the evidence establishes either the existence of a work stoppage because of the strike or that there would have been a work

stoppage because of the strike, and in the latter case, the effect on the Employers' operations of bringing in contract workers to do the strikers' work.

Another area to be addressed, if the Commission again applies the "failure to maintain substantially normal operations" standard, is whether the evidence enables the Commission to determine what constitutes the Employers' "substantially normal operations."[8] Such a determination is an obvious baseline prerequisite to any determination of whether the Employers failed to maintain "substantially normal operations." In its Decision, the Commission focused largely on comparing data during the strike with data during the six months to a year before the strike. R.7-8). The implicit assumption underlying that comparison is that the data from the prior six months to a year do reflect "substantially normal operations," but there is no discussion or finding to that effect anywhere in the Commission Decision.

Conclusion

For the reasons discussed, the Commission did not commit an error of law by determining that a "stoppage of work" under section 1193(4) occurs when the employer fails to maintain substantially normal operations, although its view that a "failure to maintain substantial operations" differs from "a substantial curtailment" is not correct. The Commission did err, however, by placing the burden on the Petitioners to prove that they should not be disqualified for benefits.

The court remands the Petitioners' claims to the Commission to determine whether, for each week at issue, the Employers have met their burden to prove that Petitioners should be

[8] "Substantially normal operations" do not necessarily equate to "normal operations," just as "substantial curtailment" does not equate to "curtailment." "Substantially normal operations" means more or less normal operations, i.e. operations within a range of conditions over a span of time that encompass foreseeable, reasonable fluctuations and variations. Of necessity, determining what constitutes "substantially normal operations" may require historical data on operations over more than a snapshot in time.

disqualified by virtue of 26 M.R.S.A. § 1193(4) from receiving unemployment compensation benefits.

Given that the Commission will be revisiting the evidence in light of a different allocation of the burden of persuasion, there is no need to address the evidentiary issues raised by the Petitioners.

IT IS ORDERED:

(1) The appeals of the Petitioners in the cases docketed as BCD-AP-15-06 and BCD-AP-16-01 are sustained. The Commission's decisions to disqualify the Petitioners listed in Exhibits 1 and 2 to the Petition for Review of Final Agency Action in Docket No. BCD-AP-15-06 and the Petitioners listed in Attachments B and C to the Petition for Review of Final Agency Action in Docket No. BCD-AP-16-01 from unemployment benefits from October 19, 2014 are hereby vacated and set aside.

(2) All claims for unemployment compensation benefits of the Petitioners listed in Exhibits 1 and 2 to the Petition for Review of Final Agency Action in Docket No. BCD-AP-15-06 and all claims for unemployment compensation benefits of the Petitioners listed in Attachments B and C to the Petition for Review of Final Agency Action in Docket No. BCD-AP-16-01 are hereby remanded to the State of Maine Unemployment Insurance Commission for further proceedings consistent with this Decision on Appeal.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Decision on Appeal by reference in the docket.

Dated: August 26, 2016

A.M. Horton
Justice, Business & Consumer Court

Entered on the Docket: 8-26-16
Copies sent via Mail __ Electronically ✓

Principles Underlying Labor-Dispute Disqualification

by
Marsile J. Hughes
Illinois Division of Placement and Unemployment Compensation

Attachment to
Unemployment Compensation Program Letter No. 000

July 1946

FEDERAL SECURITY AGENCY
SOCIAL SECURITY ADMINISTRATION
WASHINGTON, D. C.

Foreword

This statement on the labor-dispute disqualification was prepared at the request of the Bureau of Employment Security by Marsile J. Hughes of the Illinois Division of Placement and Unemployment Compensation. It contains Mr. Hughes' own opinions and his personal analysis of the various principles and decisions relating to the labor-dispute disqualification. We believe Mr. Hughes has handled a very complicated subject in an objective and constructive way. The views expressed do not necessarily represent the opinions of the Bureau.

This statement is the fourth in a series on the major disqualifications. The others were sent to State agencies with Unemployment Compensation Program Letters Nos. 101, 103, and 107. Because of its size, the present document has been printed rather than duplicated, as were the others.

We believe this statement should prove both timely and helpful to the State agencies. Additional copies are available upon request to the Bureau of Employment Security, Social Security Administration, Washington 25, D. C.

EWAN CLAGUE, *Director,*
Bureau of Employment Security.

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Principles Underlying Labor-Dispute Disqualification

I. Introduction

Every unemployment compensation act in the American system contains some sort of a provision for the disqualification of individuals for benefits whose unemployment is due to a labor dispute or some form thereof. While it has been argued in some quarters that such unemployment is just as much a hazard of our economic system as any other kind, the general existence of these provisions shows such a common policy to the contrary that this argument calls for no reply. It is rather difficult when labor-dispute provisions are compared with other disqualification provisions of the various State acts to determine definitely the specific policies intended to be carried out by the labor-dispute clauses, and it is surprising how little general information or discussion of the subject has been disseminated. In the United States at this time, because of the divergent wording of the provisions adopted by the States, it is well-nigh impossible to outline a set of principles which can be applied under every law. However, it is clear that all States have something in common in that they attempt in one way or another to deal with the question of eligibility for benefits in the case of unemployment resulting from disagreements in the labor field. The purpose of this discussion is primarily to point out the similarities and dissimilarities and, through such discussion, to arrive at such principles of application as have been developed.

Original British Theory

The British, in the National Insurance Act of 1911, adopted a very broad disqualification. Any insured worker who lost employment as the result of a stoppage of work which existed because of a trade dispute was disqualified for benefits during the period of such stoppage. Discussion of that enactment in Parliament revealed the public or legislative policy back of that provision. This may be approached from two angles with reference to (1) *what was intended* and (2) *why it was so intended.*

What was intended by the British provision.—This is best explained in the language of the insurance business. The National Insurance Act was intended primarily to insure workmen against the loss of employment resulting from "fluctuations in trade," and it was intended by the trade-dispute disqualification to eliminate entirely from coverage that unemployment which resulted from a trade dispute, as distinguished from that unemployment which resulted from fluctuations in trade. In other words, under the British act of 1911, if the unemployment resulted from a trade dispute, it just "was not included in the policy."

By way of showing how such a theory would operate under current American conditions, let us examine how this would apply to our situation. Among other things, workers may become unemployed because of break-downs of machinery, re-tooling, the taking of inventory, or from lack of orders, finances, raw materials or shipping facilities. All of these causes of unemployment are generally considered to be insured under any unemployment compensation law. But suppose that an employer has the machinery, the finances, the orders, the raw materials, and the shipping facilities. His operations may still be stopped because of difficulty in the labor field, by some sort of a disagreement concerning the terms or conditions under which he may employ help to continue his business. If the unemployment resulted from a stoppage of work for this last reason alone, the British act did not cover it.

Why this was intended.—The reasons given in Parliament for this policy were principally two, which, however, are closely related to each other. First, it was not considered wise to permit the fund to be used to finance or subsidize workers engaged in trade disputes, at least if (and this apparently was by way of concession) such dispute resulted in a stoppage of work at the employer's premises. Undoubtedly it was feared at that time that if benefit was provided for all workers unemployed as the result of a trade dispute, such provision, by encouraging workers to suspend work in furtherance of such disputes, would result in an unfair disadvantage to the employer as well as in an injury to the national economy and the public at large. Secondly, the British at that time had no experience with such a law, and it was thought that payment of benefits in trade disputes would constitute such a serious drain on the fund that the primary purpose of the act might be defeated and it would be impossible to pay benefits to those who lost employment because of trade fluctuation.

Theory of State Neutrality

The foregoing policy gave rise to the theory adopted by the Umpire that the merits of a trade dispute were immaterial in determining the right to benefit. So far as a trade dispute was concerned, it was necessary to decide only whether the unemployment was in the policy or not. So if there was a stoppage of work and it existed because of a trade dispute, such unemployment was not covered by the act. Workers engaging in trade disputes were left to finance themselves and to maintain their position in the dispute on their own resources.

Later Amendments of the British Act

Upon the accession of a Labour Ministry, the British act in 1924 was amended to include certain relief from the general labor-dispute disqualification. By this time it was generally admitted that often workers lost employment as the result of a trade dispute in which they were not participating or directly interested and in which no member of the grade or class of workers to which they belonged was participating or directly interested. The

amendment therefore attempted to set down rules for the restriction of the general disqualification. The purpose of the amendment was to retain the general disqualification of workers who were within the scope of the trade dispute and to relieve from disqualification all workers who were not within the scope of the dispute. The rules adopted through the amendments were insofar as practicable of an objective nature, so that the theory of neutrality was maintained. In other words, in order to administer the provision as it was worded, it was not necessary to consider the merits of the controversy in applying either the general disqualification or the provisions for relief therefrom.

The amendment of 1924 also provided for relief from disqualification of a worker who was out on strike because his employer had violated the terms of a trade agreement. This provision which definitely called for a ruling on the merits of the dispute, i.e., whether the agreement had been violated, was, upon the recommendation of the Unemployment Insurance Committee, repealed by the British act of 1927. In support of this recommendation the Committee expressed the opinion that collective bargaining as well as the authority and usefulness of associations of employees and employers would be strengthened by the change. The Committee thus subscribed to the belief that industrial agreements should carry their own sanction instead of depending upon the Government for enforcement through the payment of unemployment insurance benefits. This was plainly a reiteration of the policy of State neutrality that the administration should not be obliged to decide the issues of a trade dispute in order to determine rights to benefits.

Effect of British Experience on the American System

To the extent that the labor-dispute provisions of our American unemployment compensation laws are modeled after the British act, the underlying reasons and theories of the latter as well as the administrative principles developed thereunder are likely to play an important part. About two-thirds of the States have adopted a labor-dispute provision, which with a few modifications, is patterned directly upon the trade-dispute clause of the British Unemployment Insurance Act of 1935.

It must be borne in mind, however, that in a considerable number of States, there has been a complete deviation from the language used by the British act, to such an extent that British theory and principles can hardly be said to have any authoritative application whatever.

The British Unemployment Insurance Committee in its report of 1927 stated that no provision on the subject matter of trade disputes could be wholly satisfactory. It is apparent that we are dealing with a complicated problem and that the statutory provisions have been, in any case, only attempts to deal with a difficult situation.

American Deviations From British Provisions

While all States have reflected in their laws an intent to disqualify claimants under some circumstances when their unemployment is attributable to a labor dispute, the various provisions indicate that there are two other schools of thought on the subject. Judging from the language used, one school must have thought the British act did not go far enough in extending the disqualification, and that it was too complicated for easy administration. As a result the States in which this idea prevailed adopted a briefer provision which tended to extend disqualification to the same extent or even further than the British act of 1911. The other school thought the British act did not fit the American system, which, according to the preambles of all the acts, was to compensate involuntary unemployment. Consequently, they adopted measures which, in effect, provided that the labor-dispute disqualification should not apply if the unemployment resulting therefrom was involuntary or with certain justification.

Involuntary unemployment due to labor disputes.—The sources of the theory that involuntary unemployment, even if it occurs as the result of a labor dispute is not subject to disqualification, are found not only in the preambles of all the American laws but also in the labor-dispute disqualification provision. Frequently a court has cited the preamble of an act in order to determine the construction of a labor-dispute disqualification provision, the meaning and purpose of which were obscure to the court.

While the preamble of a State law itself cannot be entirely overlooked as a guide to construction, another recognized rule of construction is that where a particular provision of an act within the scope of its general subject matter is definitely inconsistent with the general intent (as expressed in the preamble) the specific provision is intended to control as an exception to the general rule. If the words "labor dispute" have been replaced by the word "strike" or modified by the exclusion of "labor dispute" or "lockout," the conclusion is that the legislature has departed completely from the theory of the British. If disqualification depends on the existence of a "strike," it appears definitely to limit disqualification to instances in which the voluntary nature of the unemployment is established. Under such statutes, there is a possibility that the State administration may have to abandon its position of neutrality at least to the extent of deciding whether the unemployment resulted from a "strike" or voluntary withdrawal or suspension of work by the workers. This is often not an easy fact to determine. In the long run, however, it is possible that this type of provision will be construed very much as though the term "labor dispute" had not been replaced by the word "strike." This possibility is illustrated by the decision in *Sandoval v. Industrial Commission, 110 Colo. 108, 130 P. (2d) 930, 7842.*—Colo. Ct. D. Ben. Ser., Vol. 6, No. 3.

Public policy in the United States.—The enactment of such laws as the National Labor Relations Act and State laws patterned after it definitely shows a public policy toward the orderly settlement of labor disputes and against the stoppages of work so frequently attendant upon them. The right of working men to strike has not been abridged, yet there is a prevailing prejudice against either lockouts or strikes. This feeling is probably stronger against lockouts than against strikes on the theory no doubt that a lockout is a more unfair means of persuading workers to accept terms. These policies and sentiments undoubtedly form the basis for the provisions adopted in the various American laws.

Sources of Provisions Found in American Laws

The labor-dispute disqualification provisions adopted by most States were derived from the suggested provisions contained in the various draft bills prepared by the Social Security Administration for the guidance of the States in drawing an enactment which would meet with its approval. The draft bills at different times recommended (1) a provision modeled after the provisions of the British act, referred to herein as the "stoppage of work" provision, and (2) a provision which apparently was drawn after the provision contained in the Wisconsin act.

Wisconsin was the pioneer American State in the matter of unemployment compensation and had a law enacted in 1932, 3 years before the enactment of the Federal Social Security Act which led other States to follow suit. In substance this type of provision specified that an individual was ineligible for benefits if his unemployment was "due to a labor dispute in active progress at the premises at which he was last employed." A considerable number of States enacted this type of disqualification, referred to hereafter as the "active progress" type. A few States enacted provisions which were phrased in entirely different language. From this it will be seen that all of the American labor-dispute disqualification provisions fall roughly into three classes: (1) the "stoppage of work" type, (2) the "active progress" type, and (3) other unclassified provisions.

The "stoppage of work" type of provision.—The provision suggested by the Social Security Administration, as it appears in the 1940 edition of the *Manual of State Employment Security Legislation*, is section 5(d) as follows: (p.504)

"An individual shall be disqualified for benefits—

"(d) For any week with respect to which it is found that his 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 is or was last employed: *Provided*, That this subsection shall not apply if it is shown that—

"(1) He is not participating in or directly interested in the labor dispute which caused the stoppage of work; and

"(2) He 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 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 purpose of this subsection, be deemed to be a separate factory, establishment or other premises."

The annotations of the *Manual* above cited contain the following explanatory notes at pp. 504, 505:

"*Labor-dispute disqualification.*—This provision represents an attempt to place the unemployment compensation system in a position of strict neutrality in labor disputes. The provision is so drafted as to confine the operation of the disqualification to the persons who are actually concerned in the dispute, and to protect outside parties from loss due to a strike that affects their work indirectly. The disqualification does not apply for any week unless all of the following conditions obtain during such week (1) a stoppage of work exists at the premises at which the individual is or was last employed, (2) the stoppage is due to a labor dispute at such premises, and (3) the individual's unemployment is due to the stoppage.

"Still further restrictions on the disqualification are provided to protect persons and groups who are employed in the establishment in which the dispute occurs but who are not taking part in the dispute and are not directly interested in it. Thus, the employees of a company-operated store will not be disqualified when the store is closed because the employer's factory workers are on strike. No employee in the factory, however, could escape being disqualified by claiming that he was not participating in nor interested in the dispute, unless he could meet the requirements of paragraph (2) of this subsection, that is, to show that he does not belong to a grade or class of workers which is participating in or interested in the dispute.

"The provision found in some laws extending the disqualification to individuals who are financing a labor dispute is not recommended since it might operate to disqualify an individual not concerned with a dispute solely on the basis of his payment of dues to the union that is conducting the strike.

"Consideration has in the past been given to disqualification for unemployment due to a 'labor dispute in active progress' rather than to a 'stoppage of work which is due to a labor dispute.' The 'dispute in active progress' concept, however, is so difficult of precise determination that it would seem to necessitate an arbitrary limit on the duration of the disqualification so that the agency would not be faced with the problem of determining whether a dispute is still 'in active progress' several weeks or months after it begins. Such a limit has serious implications in the event of a prolonged strike involving a large number of workers. The 'stoppage' concept, on the other hand, is more susceptible to determination by objective standards."

The "active progress" type of provision.—The term "active progress" appears to have been first used in the Wisconsin Employment Reserves and Compensation Act of 1932 in the following way: "An employee who left (. . . or lost) his employment with an employer because of a strike or other bona fide labor dispute is not eligible for benefits . . . for any week in which strike or other bona fide labor dispute is in active progress . . . "

One of the early draft bills suggested a provision using the phrase "labor dispute in active progress" as follows:

"An individual shall be disqualified for benefits—

"For any week with respect to which the Commission finds that his . . . unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed . . . "

There are several variations in the language used by the States which have adopted this type of provision, the principal differences being:

(1) Omission of requirement that the dispute be in "active progress."

(2) Limitation of disqualification to a specified number of weeks.

(3) Provisions for relief from the disqualification similar to those appearing in the "stoppage of work" type of provisions.

Authorities on the Construction and Application of Labor-Dispute Disqualifications

It is only natural that the persons who are concerned with or affected by the application of the labor-dispute

disqualification provisions should ask: "Where shall we find guidance in determining the meaning and application of these provisions?" The answer to this is that it is to be found in the precedents established in prior administrative decisions and the decisions of the courts of law. In view of the origins of our American provisions, the decisions of the British Umpire form a body of precedents which may furnish useful and authoritative guidance with respect to the "stoppage of work" provisions adapted from the British law. But under our American system of government the decisions of the courts of law, particularly of the courts of last resort must be regarded as carrying more weight than the decisions of the Umpire. The force and effect of American administrative decisions must rest for their authority upon the reasoning which forms their basis.

The Exercise of Sound Administrative Discretion

The language of every labor-dispute disqualification clause is of necessity very general. The concrete factual situations to which such general language must be applied, as we have already seen from a relatively few years of experience with unemployment compensation, are complex and varied. The primary burden of construing the labor-dispute disqualification provision necessarily falls upon the administrative agency, since it is called upon in the first instance to apply that as well as the other provisions of the act. In order to do this, the agency must be able to understand the principles underlying the provision so that in exercising its administrative discretion in this regard it will have an understanding of the purpose which the provision has in relation to the steps necessary to be taken for carrying out that purpose.

Evaluation of British Authorities

The decisions of the British Umpire are published by the British Ministry of Labour. In addition to the publication of the decisions themselves, the Ministry of Labour has from time to time published analytic guides to the decisions of the Umpire, in which an attempt has been made to analyze the decisions and to formulate the principles drawn therefrom into a compact summary. The Social Security Board in 1937 also published a volume of *Selected Decisions of the British Umpire* as part of the *Benefit Series*. This volume, containing also an outline of the principles, was intended to serve the purpose of both the decisions of the Umpire and the analytic guide, for the assistance of American administrators. With respect to the labor-dispute disqualification clause, none of these works unfortunately contains any discussion of the basic theory upon which all of the decisions have been based. This we have attempted to outline above.

Where the "stoppage of work" provision has followed the language of the British act, the decisions of the Umpire undoubtedly form a valuable source of authority for the construction and application of corresponding provisions of American laws. Yet they do not constitute necessarily the last word, for although they furnish a useful set of precedents in many respects, they are nevertheless subject to certain strong objections.

Chief basis for authority of British decisions.—The use of the British principles is founded on the generally accepted American rule of statutory construction that where a statute is adopted by a State from the law of Great Britain or of a sister State, with it is also adopted the construction of such statute which prior to its adoption uniformly obtained in the jurisdiction from which it was adopted. Such rule of construction can apply only to provisions which are sufficiently similar to the language of the British act so that it can be said that the language was an adoption. Only in the "stoppage of work" type of provision can it be fairly said that this condition is fulfilled.

There is also another important difference between the American and British systems of government which tends to restrict the usefulness of British decisions. Because there is no constitutional division of governmental powers in Great Britain, the entire administration of the British Unemployment Insurance Act has been left in the hands of the executive or administrative part of the Government. In other words, under the British act, the Umpire, an executive officer exercising judicial powers, is the last authority on the construction and application of the provisions of the act. His power in this respect is equivalent to that of a court of last resort in the United States. On the other hand, all American laws, in order to conform to constitutional requirements, contain provisions for the judicial review of any determination or decision allowing or denying benefits in any case. American courts are always inclined to recognize the authority of judicial precedents but frequently have rejected administrative decisions as having no binding effect. At the present time American courts have given indications both ways. Several decisions have acknowledged the influence of the British rulings while at least one court has rejected them completely.

The case in which the court rejected the British theory entirely was *Queener v. Magnet Mills* 8096—Tenn. Ct. D., Ben. Ser., Vol. 6, No. 8, Inc. (Tenn.) 167 S. W. 1, dealing with the meaning of the term "grade or class." There the court expressed the opinion that conditions in England and the United States were so different that the legislature could not possibly have meant the same thing that was meant by the same words as used by the British in their act. This serves, however, to bring to our attention another possible limitation upon the value of the British cases as precedents. So many differences between British and American labor, trade and business customs, usages and practices are apparent from a reading of the Umpire's decisions, that it is often difficult to see how the principles of the Umpire can be applied to American conditions. From these considerations the conclusion seems inevitable that the use and value of the British decisions ought to be limited to those principles which have definite unambiguous relation to corresponding American conditions. This requirement is probably fulfilled in the application of the more general principles rather than in the analogies between detailed situations.

Evaluation of American Precedents

American precedents, setting forth the principles which have been developed in applying the labor-dispute disqualification provisions, are to be found in (1) administrative decisions and (2) decisions of the courts of law. The latter class may be subdivided into (a) the decision of courts of last

resort and (b) decisions of inferior tribunals.

An attempt has been made by the Social Security Administration in its *Benefit Series* to publish every available American precedent falling under the above headings. Due to the relatively large number of administrative decisions, the publication of such decisions has been limited to decisions either furnishing a new application of a principle in the United States or representing a departure from previously announced doctrines. In the case of court decisions, the Administration has tried to restrict publication to the final decision in a given case. However, at the present time there are several cases published in which all decisions in a series have been published, showing the transitions in the case from the first decision of a referee to the final decision of the Supreme Court.

Under the American system of government, of course, the decision of a court of last resort is the most authoritative pronouncement as to the meaning, construction, interpretation, and application of any statutory provision. Where such a decision has passed upon a given point of law, the administrative agency is bound to follow it. If the courts' construction is of such a nature as to render the application of the law administratively difficult, the only recourse of the administration is to secure an amendment of the act which sets out more specifically the legislative intent.

Administrative determinations and decisions at first must depend for their validity and authority upon the reasons adopted and applied by such agency. The longer such principles remain unchallenged in the law courts, the more weight they are likely to carry when they are challenged.

Conflict of Principles Involved in Labor-Dispute Disqualifications

Where the "stoppage of work" type of provisions, modeled after the British act, has been adopted, one of the chief problems in administration has arisen from the absolute inconsistency of the principles which must be invoked in order to follow the British theory as compared with the principles applicable to cases of voluntary leaving, misconduct, and refusal of suitable work. This has been explained, in large part, by the history of the development of the British act. In other words, under the British act, the authorities were not determining, in the case of a trade dispute, whether the individual left work voluntarily or whether he had good cause for leaving or losing his employment. They were determining whether the unemployment of the individual fell within the type of unemployment which was insured or whether it fell in the type which was not insured. If the unemployment was due to a stoppage of work which existed because of a trade dispute, it was not insured, hence there was no need for determining whether it was voluntary or whether it was with good cause. But in practically every American act the labor-dispute disqualification provision is set up in a section of the statute which deals with other disqualifications. While the language used in the "stoppage of work" provision is such as to base the disqualification upon the objective facts of the "labor dispute" and the "stoppage of work," the natural tendency of anyone attempting to construe that provision is to look for some additional reason why an individual should be disqualified in such a case. This is especially true if the loss of employment is not clearly due to a voluntary leaving or a "strike." But even if the unemployment is occasioned by a "strike" or in a sense a "voluntary leaving," individuals affected thereby can see no reason, if the refusal of benefits is based upon such grounds, why they are not entitled to show "good cause" as specified in the "voluntary leaving" and "refusal to work" provisions. It is apparent from this that one of the first problems is to try to formulate some rules or principles distinguishing the "labor-dispute disqualification" provision from the others.

The foregoing comments do not apply to those statutes which have apparently adopted a "voluntary leaving" criterion in case of labor disputes by the substitution of the word "strike" for the term "labor dispute." But even with such a provision in the statute, the question remains unsolved as to why "good cause" should not be considered. If this last contention finally prevails, there will be, in effect, no labor-dispute disqualification at all since all determinations in such situations can be made under other clauses without reference to the labor-dispute provision.

II. Application of Labor-Dispute Disqualification

Search for the Legislative Intent

It is well established as a legal proposition that a statutory enactment has that meaning which the legislature intended it to have. Under the American system it is the function of the courts of law to construe and interpret from the language of the statute the intent of the legislature. Obviously, if the legislature has definitely stated its intent in the statute itself or in the proceedings which lead to the enactment, the problem is somewhat simplified. But in most cases, the legislative intent must be derived solely from the language used in the statute itself. At the same time, any discussions, reports, or debates which may appear in the proceedings of the legislature may be relied upon as a source for arriving at the meaning intended by the legislature.

Commonly the question of the meaning of the statutory provision falls first in the lap of the administrator. He is charged with the duty of putting the law into effect and frequently he is furnished with no specific guides, long before the matter can be brought before a court. Here the value of a sound theory is apparent, for the longer any administrative interpretation or principle has been in effect without objection, the more likely the courts are to give weight to such decisions, on the theory that such an interpretation being so long unquestioned, represents a true reflection of the commonly accepted meaning of the law and, as such, the legislative intent.

The importance of this principle lies in the fact that it shows how the administrative authorities are effectively restrained from placing an arbitrary interpretation upon the very general language of the statute. At the same time, in view of the functions and influence of the courts, it is almost imperative to adopt principles which will

secure judicial approbation of all important interpretations and applications of the labor-dispute disqualification. So far as possible the attempt to satisfy judicial pronouncements should at the same time fit in with a workable theory of administration. Should a court decision lay down principles which tend to disrupt the operating theory of the agency, it is necessary for the agency to follow such principles laid down by the court until such time as the legislature, by amendment, has repudiated the construction or interpretation placed upon its language by the courts.

Test of Applicability of Labor-Dispute Disqualification Provision

The first perplexing problem that faces an administrator is likely to be that of deciding if the labor-dispute provision applies to the exclusion of provisions dealing with availability, voluntary leaving, or refusal of suitable work. There appears to be no rule of thumb for resolving this question. But there are a few sound principles or considerations which should guide the agency in making such decision.

As a general rule, *the existence of a labor dispute is the fundamental test of the applicability of the labor-dispute disqualification*, for, if the facts disclose a labor dispute, one would have to go far afield to say that the labor-dispute provision was not properly applicable, regardless of what other facts might appear or what other contentions might be made. The same principle would have analogous application under all forms of provision by substituting for "labor dispute" the corresponding term used in the particular provision in question. Thus, where the word "strike" is used, instead of determining first whether a labor dispute existed, the agency would simply determine whether a "strike" existed. The same would hold for "trade dispute" or "industrial controversy," etc.

Test of Disqualification Under Labor-Dispute Disqualification Provision

Here it will be well to distinguish between the test of *applicability* and the test of *disqualification*, for under the provision contained in most acts, disqualification does not necessarily follow because the individual's unemployment is due to a labor dispute. The great majority of statutes also include some other condition which must be present in order to disqualify the individual. In the "stoppage of work" type, for example, no disqualification can be applied unless the stoppage of work exists as a result of the labor dispute. In the "active progress" type of provision, there must not only be a labor dispute to effect disqualification, but the dispute must be "in active progress." Thus the existence of the "stoppage of work" or the "active progress" as the case may be, may be termed the test of eligibility. Of course, where the statute does not require either of these conditions but specifies that disqualification follows if the unemployment is simply due to a labor dispute, the tests are identical, and if the labor dispute is the cause of the unemployment, disqualification necessarily follows.

Suggested criteria for determining the applicability of the labor-dispute disqualification.—Assuming that we are confronted with a doubtful question of whether an individual's unemployment was the result of a labor dispute, a voluntary leaving, or a refusal of work, the following factors should be useful in guiding an administrator in selecting the appropriate provision applicable to the case.

(1) How many individuals have become unemployed for the same reason? Ordinarily, before the labor-dispute provision is called into play, at least in the United States, we would be inclined to look for the unemployment of a number of individuals at the same time. Otherwise the dispute is not important enough to be characterized as a dispute in the labor field but it rather involves the personal differences of particular individuals. For administrative convenience, therefore, such cases may be much more effectively disposed of on the basis of voluntary leaving or refusal of work. In theory, the British Umpire has held that an appreciable stoppage of work might arise from a labor dispute between an employer and one employee. Such a decision depends largely upon the meaning ascribed to the term "stoppage of work." This will be covered later.

(2) The existence of a labor dispute is usually indicated by a stoppage, curtailment, or reduction of the operations carried on at the employer's premises. The greater the apparency of such stoppage, interruption, curtailment, or interference, the greater is the likelihood that a situation exists because of a labor dispute. Sometimes, however, claims will be presented indicating that there was a concerted voluntary leaving or refusal of allegedly unsuitable work. Of course there is always the possibility that a stoppage may be the result of the unavoidable and uncontrollable circumstances mentioned above which are indicative of lack of work.

(3) Have the claimants been definitely separated from their employment to the extent that there is no question about it? This is not always clear. If the separation is complete and unchallenged, the conclusion seems natural that there no longer exists any doubt about it. But the parties are often inconsistent in such matters. The existence of negotiations by the individuals or their representatives for their reinstatement or offer to return to work on new conditions may show that no separation was made, or that the separation is in fact being contested. An agency may discover, after making a disposition of such claims on the basis of voluntary leaving, refusal of work, or misconduct, that the situation actually fell in the pattern of a typical labor dispute.

(4) Does the typical labor-dispute situation existing embody two conditions, (a) that the workers are ready and willing to work on conditions which are satisfactory to them but not to the employer, and (b) that the employer is able and willing to furnish work to the workers upon terms which are satisfactory to him but not to the workers? This is probably the most important mark of a labor dispute. In order to base any deduction upon these circumstances, it is necessary to find out what the facts are with respect to the contentions of the parties. In any event, however, it appears necessary to have such facts in order to analyze any situation.

The foregoing considerations are not entirely without significance in connection with statutes which substitute the word "strike" for labor dispute because any strike presupposes a labor dispute. In a sense it is not possible to say that a strike exists unless some basis for it in unsatisfactory labor relations is found to exist.

The Problem of Securing Facts Upon Which To Base a Determination or Decision

Various problems arise at different stages of administration with respect to securing the facts upon which a decision of eligibility or disqualification must be predicated. If any degree of uniformity is to be attained in applying the statutory provisions to workers performing services in different industries under widely divergent conditions, the agency must make intelligent efforts to obtain full facts in every situation. If the matter of presenting the facts is left entirely to the workers and the employer, or either of them alone, differences may arise in the actual application of the disqualification in the case of one industry or occupation as compared with others. For example, the lack of interest of one employer, if his testimony is not secured, may make it easier for his employees to establish eligibility for benefits, where in an analogous situation another employer by his active interest may present facts which establish the disqualification of his employees. Likewise, employers in some instances may be interested in the discriminatory application of the disqualification, to allow benefits to selected claimants and to deny them to others. Labor organizations sometimes fall under the suspicion of coercing employers in an industry to accept their interpretation of the "labor-dispute disqualification" with the possible result that essentially the same circumstances operate to disqualify claimants for benefits in one industry and not in another.

Burden of Proof

Most, if not all, of the disqualification clauses make no specific provision for the burden of proof, providing only that disqualification be imposed "if it be shown" that certain facts exist. Ordinarily, by the term "burden of proof" is meant the obligation or duty which rests upon someone to establish the facts upon which such party bases an assertion or contention. Likewise, in the absence of specific provision, the burden of proof falls in the first instance upon the party making an assertion or contention to prove it. Such a burden may shift from one party to another as the taking of testimony or the securing of information progresses. While some attention should be given to this problem in all stages of administration, it is of most importance in the last administrative proceeding, from which the only appeal is to the courts. This, of course, includes all proceedings which constitute part of the record for review.

The questions involved in burden of proof may become rather complicated for various reasons, especially when the final record is the result of several administrative processes. Is the burden upon the employer to establish the facts which lead to disqualification? Is the burden upon the claimant to show that no disqualification exists? And finally, is there any burden upon the agency to establish the facts upon which it bases its final decision either way? There can be no doubt that a certain burden falls upon the agency, at least to this extent, that there must be evidence in the record to sustain whatever decision the agency makes.

The provisions for court review differ widely with respect to how far the courts may examine the findings of the administrative officer. In many States the courts are limited by statute to the review of questions of law, as distinguished from questions of fact. In such cases, the findings of the administrative officer carry a presumption that such findings are correct. But even in those States the courts will examine the facts to determine that there is at least some evidence in the record to sustain the findings so that they cannot be regarded as arbitrary or capricious. For example, on the question of whether a labor dispute existed or not, the record may show (1) certain evidence tending to show that such a dispute did exist, and (2) certain other evidence to show that a labor dispute did not exist. If the administrative officer believes the evidence tending to show that (1) or (2) existed, the court will not review the findings of fact and will confine itself to whether those facts as a matter of law constitute or establish a labor dispute. But if the record discloses only (1) and not (2), the court could well decide that the findings to the contrary were arbitrary and capricious.

In other jurisdictions, the courts set down more stringent requirements to be met. For example, the rule of court may be that the decision of the administrative officer must be supported in the record by substantial evidence. In such case the court will examine the evidence more closely. In some States the courts are authorized by statute on review to pass on all questions of fact and law raised by the record. In such case, the court will not only pass upon the questions of law but may also weigh the testimony to determine whether the administrative officer correctly interpreted the evidence in making his findings.

Effect of Constant Changes and Developments in the Labor Field

Due largely to the recent applications of statutory law to labor relations, we are likely to find that new factual situations are being evolved from day to day which have no exact counterpart in past experience. Labor relations are rapidly going through a process of change. The condition of the labor market, the number of persons available for jobs at any given time, is never exactly the same. The state of labor relations at any particular employer's establishment often makes a great deal of difference with respect to (1) the nature of the evidentiary facts which may be presented and (2) the nature of the inferences or deductions which may logically be made from such facts. For example, the existence or non-existence of a picket line has been frequently stressed as proof of the existence of a labor dispute. But, where a closed shop has been in force at an establishment for some time, a picket line may seldom be found. In such case obviously the absence of pickets by itself furnishes little proof that no dispute exists. Again, the condition of the labor market may affect the value of such evidence. If there are many persons looking for jobs and there is a chance that they may be hired at the establishment in question, the absence of a picket line might be much stronger proof of the non-existence of a dispute. Another circumstance in this connection which may affect the gathering of facts and the inferences to be drawn from them is the relative strength or weakness of the organization of labor at a particular establishment. A strong organization of labor may give the workers a power-

ful strategic or tactical advantage in dealing with the employer in disputed matters. Conversely, the same idea applies to the employer. The party having the advantage in strategic or tactical position is often able to stand pat and force the first action to be taken by the weaker side. This is especially important under statutes where an issue affecting disqualification can be made of (1) the responsibility of the party bringing about a stoppage of work and (2) the fault of the parties to the dispute, in bringing about the unemployment of any individuals.

III. Definition of Labor Dispute

In this chapter an attempt will be made to discuss the meaning of all of the basic terms used in the various unemployment compensation acts to indicate the *application* of the labor-dispute disqualification. Such terms are:

- Labor dispute: term generally used
- Strike: Colorado and Utah
- Labor dispute, strike, or lockout: Arizona
- Strike, lockout, or other industrial controversy: New York
- Strike, lockout, or jurisdictional labor dispute: District of Columbia
- Strike or other bona fide labor dispute: Wisconsin
- Labor dispute (except unjustifiable lockout): Mississippi
- Strike or other bona fide labor dispute (except a lockout): Kentucky
- Industrial controversy: Rhode Island
- Industrial dispute: Pennsylvania
- Labor dispute (other than a lockout): Ohio

In discussing the definition of "labor dispute" we must assume that the employer or employers are in a position to employ workers provided that mutually agreeable terms and conditions of employment can be arranged. In other words this discussion is based upon the presumption that there is no financial, mechanical, or economic break-down of industry. The employer has the plant, the finances, the equipment, the materials, and shipping facilities. He requires only the manpower in order to operate. Here we are limited to manpower or the labor field.

Only a few unemployment compensation laws contain a definition of the term "labor dispute" as specifically used in their respective labor-dispute disqualification provisions. Where no specific definition is given in the act itself, the problem is presented of finding a proper and suitable definition for the application of the disqualification provision. Labor disputes have many phases and facets and may be approached from many points of view. The statistician, the psychologist, the economist, the conciliator, the employer, and the working man tend to emphasize those elements which are of peculiar interest to them and may therefore define the term to suit their purposes. The primary purpose of the unemployment compensation laws is to pay unemployment benefits to workers who are unemployed through no fault of their own. The agencies administering these acts are public agencies and for this reason must be guided principally by considerations of public policy in the selection and application of a proper definition of the term. While it might appear that the more narrowly the term is defined the less extensive the disqualifications thereunder, this is not necessarily so, since, if a dispute is not found to exist, other disqualification provisions may be called into play. This discussion, therefore, does not purport to deal with any basic philosophical or sociological aspects of labor disputes, but is limited insofar as is possible to a consideration of the attitude of the Government or the general public to the problem.

If a statute uses a term which is not explicitly defined in the statute itself, the general rule of statutory construction is that the legislature used the term in its generally accepted sense or meaning; that is, the meaning which the term had at the time of the enactment of the statute. Before proceeding with any discussion of the crystallization of any definitions of "labor dispute" reflecting the attitude of government toward such disputes, it is necessary to spend a little time on the development of the laws relating to labor.

Historically, up to comparatively recent times, workmen and labor organizations were greatly restricted in their activities by the common law, criminal statutes, and by injunction law. As the right to organize and bargain collectively came to be generally accepted as legal, these restrictions were removed by statute in cases where a labor dispute was involved. The removal of the restrictions was gradual. The battle of labor was for an expansion of the definition of the field in which labor disputes could be legally carried on, to expand the manner in which the interests of labor might be legally promoted. The broadest extension of the term from the public or governmental point of view is undoubtedly reflected in the definitions contained in such laws as the National Labor Relations Act and the Norris-LaGuardia Anti-Injunction Act. It should be borne in mind that any restriction of the definition of "labor dispute" in the unemployment compensation field might possibly have adverse effects in the long run on the objectives for which labor has been contending during the past century.

Sources of Definition of Labor Dispute

The present available sources of suitable and proper definition of the term "labor dispute" are:

1. Dictionary definitions.
2. Statutory definitions, such as are contained in the British Unemployment Insurance Act, the unemployment compensation laws of a few States, in anti-injunction statutes, and in labor relations statutes.
3. Judicial definitions.
4. Administrative definitions.

In the case of judicial and administrative definitions, we are limiting this discussion to judicial and administrative comments in cases arising under the provisions of unemployment compensation laws.

Dictionary Definition

There is a good deal of advantage to be derived from a consideration of the dictionary definitions of the words comprising the phrase "labor dispute." This method of analysis gives a groundwork which may lead to a more satisfactory analysis of concrete sit-

supra, said: " . . . Congress in the Norris LaGuardia Act has expressed the public policy of the United States and defined its conception of a 'labor dispute' in terms that no longer leave reason for doubt . . . " If Congress has done this in the Norris-LaGuardia Act, it has strengthened that idea by the definition later incorporated in the National Labor Relations Act. Likewise, if Congress has really thus expressed the public policy of the United States, it is reasonable to accept that policy for unemployment purposes. The adoption of a narrower definition for our purposes may not, in the long run, do any real service for workmen. It would tend to produce a confusion in the law, whereas workmen would probably profit more by having the law crystallized. It might permit some workmen to avoid the labor disqualification in a few cases but at the same time bring about a more unfavorable disqualification later under some other provision. In other words, the favorable application of the provision does not mean necessarily that subsequent repercussions may not be produced thereby. It would seem that workmen and their organizations are better off from the larger point of view of labor to forego the receipt of benefits in any kind of a labor dispute under the provisions of a neutral labor-dispute disqualification provision, a provision which is not based on approval or disapproval of their operations for its application.

IV. Definitions of the Terms "Stoppage of Work" and "Active Progress"

The discussion in this chapter embraces the meaning of the statutory terms which have been referred to as the *tests of applicability* of the labor-dispute disqualification. In the "stoppage of work" type of statute, disqualification depends upon the existence of a *stoppage of work* because of the labor dispute. In other words, even though the unemployment of the claimant is clearly due to a labor dispute, he is not disqualified for benefits unless there is also a stoppage of work. Under the "active progress" type of statute, the dispute must be in "active progress" before the disqualification attaches. These two expressions are the only terms used in any statute as a condition for the general application of the labor-dispute disqualification. As a corollary the meaning of these terms will determine not only the application of the disqualification but also the *duration* of any disqualification which is imposed.

If the statutes were explicit on the meaning intended by these terms, no discussion of the meanings would be necessary. While some States have enlarged on the meaning intended by expansion of their statutory language the vast majority of the statutes furnish no additional guidance or definition. The New York provision, for example, contains the following language, providing that the disqualification terminates "the day after such strike, lockout or other industrial controversy was terminated if it ends before the expiration of such 7 weeks." Similarly, Georgia in a provision following the "stoppage of work" type has attempted to clarify the meaning of stoppage of work by the addition of the following language to the labor-dispute disqualification provision:

"Provided further, that when a stoppage of work due to a labor dispute ceases and operations are resumed at the factory, establishment or other premises at which he is or was last employed, but he has not been restored to such last employment, his disqualification for benefits under this subsection shall be deemed to have ceased at such time as the Commissioner shall determine such stoppage of work to have ceased and such operations to have been resumed."

In this same connection it might be mentioned also that Oklahoma amended its labor-dispute disqualification clause to show more clearly that the term stoppage of work was intended to refer to the employer's establishment rather than to the stoppage by individual workers by transposing some of the modifying language so that its provision now reads in part as follows:

"An individual shall be disqualified for benefits: . . .

"For any week with respect to which the Commission finds that his unemployment is due to a stoppage of work which exists at the factory, establishment or other premises at which he is or was last employed, because of a labor dispute; . . ."

Here the transposition of the phrase "which exists at the factory, etc." clearly shows that the legislature contemplated that the stoppage must exist at the employer's factory, establishment, or other premises before a disqualification shall be imposed.

Stoppage of Work

Dictionary Definition

Webster's New International Dictionary, Second Edition, 1935, defines the word "stoppage" as follows: "1. Act of stopping or arresting motion, progress or action; also, a state of being stopped; a halt; obstruction, as on a street, in a water pipe, etc.; a block. . . ." This definition of "stoppage," while it is capable of application to any work whatever from the work performed by an individual worker to the entire work carried on at an employing establishment, appears by its connotation to refer to a result produced rather than to a single individual action, or the action of an individual. That is not to say that the word "stoppage" cannot be properly applied to an individual's "act of stopping his own particular work" but the implication of the remaining part of the definition, namely "a state of being stopped; a halt; obstruction, as in a street, in a water pipe, etc.; a block;" would undoubtedly apply more appropriately to an employing establishment than to one of the workers employed there. At any rate it is plain that the act of an individual in stopping his own particular work would not necessarily mean that the work of the establishment as a whole had stopped.

It is about the application of the word "stoppage" that the practical application of the labor-dispute disqualification provision depends.

Meaning of the Word "Stoppage" Under the British Unemployment Insurance Acts

The term "stoppage of work" has been used in the trade-dispute dis-

qualification provisions of the various British unemployment insurance acts since 1911. In view of the fact that the American provisions adopted for the same general purpose have followed the language of the British law so closely, it is only natural that we should look to the British construction of the word in that connection in determining what was meant by our American enactments. The same technical use of the word, borrowed as it was for the same purpose, almost conclusively establishes that it must have been used in the same technical sense and meaning.

The construction and application of the term "stoppage of work" under the British acts has been summarized in the following statement appearing in the Analytic Guide to the Decisions of the Umpire (1939) (page 10):

"It is not a disqualification that employment has been lost through a trade dispute unless the dispute involves a stoppage of work, and a "stoppage of work" refers primarily not to a 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."

Importance of the Meaning Attached to the Term "Stoppage of Work"

At first glance it may not seem to make much difference what meaning is given to this term. But it will be found that a great deal of administrative difficulty will be encountered if an unsuitable meaning is followed. Obviously the correct meaning must be one which is not inconsistent with the other provisions of the unemployment compensation laws and in particular with the other provisions for disqualification.

If the term "stoppage of work" refers to the action of the individual worker and not to the condition existing at the employing establishment, the labor-disqualification provision is capable of imposing an indeterminate ineligibility upon the individual workers. This might conceivably be interminable since in that case it would be imposed as a result of the worker's stopping of work because of a labor dispute. In other words, if the individual stopped work because of a labor dispute, his unemployment thereupon is attributable to his stopping of work and may reasonably be found to be due to that reason during a period of extended unemployment, regardless of what conditions exist at the employing establishment where he was employed at the time he stopped work. This application of the provision would be much more severe than the provision for voluntary leaving without good cause. This would appear to be not only inconsistent with the voluntary leaving provision but manifestly contrary to the intent of the legislature. The right of working men to stop work or strike is universally recognized as a legal right, just as much as the worker's right to quit his job for any reason whatever. In either case, the worker is acting within his legal rights. But it could hardly be presumed that the legislature would distinguish between these two actions on the same basis and provide a definite limited period of disqualification in the one case and an interminable disqualification in the other. The two provisions can be reconciled only on the grounds that a different criterion was intended to apply in determining the application and duration of any disqualification under the labor-dispute provision.

On the other hand, if the term "stoppage of work" is construed, as the British have always construed it, to refer to the employing establishment rather than to the individual, the disqualification under the labor-dispute provision is determined by whether or not such a stoppage of work exists at the premises where the individual is or was last employed. While it is true that the period of disqualification may extend longer than that provided in the voluntary leaving provision, such disqualification is not based on the grounds that the *individual* has stopped work but on the grounds that the *dispute has resulted in a continued stoppage of work at the employing establishment.*

Administrative Definitions

As a general rule, it is safe to say that all of the administrative agencies enforcing the "stoppage of work" type of provision have followed the general principle established by the British, namely, that the term "stoppage of work" refers primarily to the employing establishment as distinguished from the individual worker.

Judicial Definitions

A number of courts of last resort have passed on the question of the construction of the term "stoppage of work" as it is used in the labor-dispute disqualification provisions of various State unemployment compensation laws. The construction placed upon the term by the British and by the administrative agencies has been sustained in the majority of cases. The principle is set forth very clearly in *Deshler Broom Factory v. Kinney*, 7417 Nebr. Ct. D., Ben. Ser., Vol. 5, No. 7, 2 N. W. (2d) 332, where the court in its own syllabus said:

"6. The term 'stoppage of work' as used in our unemployment compensation law, means a substantial curtailment of work in an employing establishment."

In a later case the court enlarged on the foregoing principle when in *Magner v. Kinney*, 7527 Nebr. Ct. D., Ben. Ser., Vol. 5, No. 9, 141 Nebr. 122, 2 N. W. (2d) 689, it said:

"3. The term 'stoppage of work' as employed in our unemployment compensation law, having been substantially adopted from the English National Insurance Act of 1911, and having received a settled construction by the English authorities charged with the administration of the English act long prior to the adoption thereof by this state, the rule of construction applicable at the present time is that a state by adopting a statute of another state adopts the construction which has been given the statute so adopted by such other state; and in the absence of judicial decision determining the construction and effect of such foreign statute, the practical interpretation given to it by those whose duty it was to apply and administer it affords the best means of ascertaining its true construction; and such construction will be followed unless it be clear that such officers have misinterpreted it.

"4. The technical meaning of the term 'stoppage of work,' as used in our statute referred to, is a substantial curtailment of work in an employing establishment, not the cessation of work by the claimant or claimants."

The same issue was decided by the Supreme Court of Michigan in *Lawrence Baking Company v. Michigan Unemployment Compensation Commission*, 9068 Mich. Ct. D., Ben. Ser., Vol. 8, No. 1, 308 Mich. 198, 13 N. W. (2d) 260. In this case an additional factor undoubtedly affected the court's inter-

pretation of the language of the provision. That factor was that the Michigan labor-dispute disqualification provision had been amended. Under the legal rules of construction it was proper for the court to consider the language used before and after the amendment in order to determine what change in the law the legislature contemplated by the change. Prior to 1941 the Michigan act provided in part:

"An individual shall be disqualified for benefits . . .

"For any week with respect to which his total or partial unemployment is due to a labor dispute which is actively in progress in the establishment in which he is or was last employed."

In 1941 the Michigan Legislature amended its act to provide as follows:

"An individual shall be disqualified for benefits . . .

"For any week with respect to which his total or partial unemployment is due to a stoppage of work existing because of a labor dispute in the establishment in which he is or was last employed."

With respect to the effect of the amendment on the construction of the provision the court went on to say:

"To summarize, section 29(c) of the 1936 act disqualified an employee for benefits if his unemployment was 'due to a labor dispute . . . actively in progress in the establishment.' In 1941 amendment of said section disqualifies an employee for benefits if his unemployment is 'due to a stoppage of work existing because of a labor dispute in the establishment.' Plaintiff contends that the phrase of the amendment, 'stoppage of work,' means the work or employment of the individual employee. Under such contention plaintiff argues that by stopping their work and going on strike, the claimants disqualified themselves for benefits. Defendant contends, as held by the circuit court, that such phrase means the stoppage of operations or work of the employer establishment.

. . .

"In construing the 1941 amendment of section 29(c), we should ascertain and give effect to the intention of the legislature. (Cases citations omitted.) It may be presumed that by the 1941 amendment the legislature intended to change the meaning of the existing law. In 59 C. J. p. 1097, Sec. 647, it is stated:

"'It will be presumed that the legislature, in adopting the amendment intended to make some change in the existing law, and therefore the courts will endeavor to give some effect to the amendment. So a change of phraseology from that of the original act will raise the presumption that a change of meaning was also intended.'

"In said 1941 amendment of section 29(c) the legislature adopted the identical provision used in the unemployment statutes of many other states to impose disqualification for unemployment benefits. See Social Security Yearbook 1940, p. 64 et seq. In the English National Insurance Act of 1911 (Statutes 1-2, Geo. V, chap. 55, Sec. 87, as amended) the same provision is used to impose benefit disqualification. The construction placed upon similar statutory provisions by the courts of other states affords us guidance in interpreting such amendment."

The court then cited from *Magner* v. *Kinney*, supra, substantially as set forth above. After a further consideration of the relation of the amendment to the Declaration of Policy contained in the act, the court took the position that even if the amendment was inconsistent with such declaration it must control as an express exception to the general intent. The court then summarized its holding as follows:

"We are convinced that by the 1941 amendment of section 29(c) the legislature intended to disqualify an employee for benefits, only when his unemployment resulted from a stoppage or substantial curtailment of the work operations of the employer establishment because of a labor dispute. The phrase 'stoppage of work' refers to the work and operations of the employer establishment and not to the work of the individual employee."

The Supreme Court of North Carolina in *In re Steelman*, 219 N. C. 306, 13 S. E. (2d) 544, in substance supports the same view. In that case a stoppage of work was found by the court to have existed at the mill of the Nebel Knitting Company from April 10, 1940, to May 13, 1940. The company resumed operations at its mill on May 13, 1940, at which time the stoppage of work was found to have ended. However, not all of the company's employees returned to work. The company objected to the termination of the disqualification of these employees for benefits. The court, after calling attention to the fact that no determination of eligibility for any period after May 13, 1940, was presented in this appeal, stated its position as follows:

"Perhaps it is fair to say, however, that the effect of the present determination is to declare the employer's letter of 29 April and his testimony that the claimants' positions were still open, if they cared to apply for them, would not perforce disqualify the claimants or render them ineligible for benefits from and after 13 May 1940, the date on which the stoppage of work ceased. The position finds support in Sec. 5(c)(2) of the Act which provides: 'Notwithstanding any other provisions of this Act, no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions. (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute.' There was evidence on behalf of the claimants that they did not return to their jobs because of the labor dispute."

Legislative Intent

In *Lawrence Baking Company* v. *Michigan U. C. C.*, supra, the Company raised the objection that the statute, by making the disqualification for benefits depend upon the existence of a stoppage of work at the employer's establishment, created an unconstitutional, arbitrary, and unjust classification of employers.

On the contention the court made the following comments:

"Plaintiff further contends that the circuit court's construction of the 1941 amendment, which construction we have hereinbefore affirmed, renders said amendment unconstitutional as denying plaintiff employer due process and equal protection of law. Under such contention plaintiff argues that the circuit court's construction results in arbitrary discrimination between employers by classifying them on a basis of (1) those who elect to stop work and close down and (2) those who do not elect to stop work or close down during a strike. The amendment, as construed, does not so classify employers. All employers who are similarly affected 'because of a labor dispute' are treated alike. Under the amendment, as construed, employees are disqualified if the labor dispute results in a stoppage of the employer's work, and they are not disqualified if the labor dispute does not result in such stoppage. *This is a reasonable means of determining qualification for benefits and does not result in arbitrary or unjust discrimination between employers.* (Emphasis ours) In the

case of *In re Steelman*, supra, the court said, p. 310:

"'It thus appears that the State seeks to be neutral in labor disputes as far as practicable, and to grant benefits only in conformity to such neutrality. Of course, it is recognized that in a matter of this kind, some allowance must be made in fixing the line or point of difference between granting and withholding benefits during the stoppage of work caused by a labor dispute. *Supply Co.* v. *Maxwell*, 212 N. C. 624 (194 S. E. 117). "But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark"—Mr. Justice Holmes in *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32 (48 Sup. Ct. 423, 326, 72 L. Ed. 770). The wisdom or impolicy of such decisions belongs to the legislative, and not to the judicial, department of the government. (*United States* v. *F. W. Darby Lumber Co.*, 321 U. S. 100 (61 Sup. Ct. 451, 85 L. Ed. 609).)'"

In other words, the court felt that the legislature, in order to retain so far as possible the neutrality of the State in labor disputes, had the right to make the claimants' eligibility for benefits depend upon the existence of a stoppage of work at the employer's premises since there did not appear to be any mathematical or logical basis on which to fix the line of demarcation between eligibility and ineligibility in cases involving labor disputes.

Judicial Constructions of "Stoppage of Work"

Not all the American courts have been convinced that the traditional construction of the term "stoppage of work" is the correct one. The Supreme Court of Oklahoma in *Mid-Continent Petroleum Corporation* v. *Board of Review*, 8213 Okla. Ct. D, Ben. Ser., Vol. 6, No. 11, 141 Pac. (2d) 69, reflects a contrary view. On the point here under discussion the court expressed its opinion as follows:

"Considering first the question whether 'stoppage of work' as used in the act refers to the individual work of the employee or to the operation of the plant, we agree fully with the position of the corporation and the Attorney General that the provision refers to the individual work of the employee.

"Council for Cox state that administrative officers and text writers say that 'stoppage of work,' as used in similar statutes of other states and in Great Britain, means a shutdown at the factory where the workman was employed. Thus they arrive at the conclusion that unless the plant actually stops operation by reason of the labor dispute, the striker who remains out may receive compensation for unemployment. Their conclusion is not supported by the decision of any court of last resort to which our attention has been called.

"The reasoning of the foregoing officers and writers is not very impressive when applied to our Act of 1936. Had the legislature intended to refer to a shutdown of the plant and not to the cessation of work by the employees, the term 'stoppage of operations' would have been far more appropriate. It seems to us that the word 'work' ordinarily refers to or comprehends the activities of the workman, not the operation of the factory. That portion of the act, *supra*, which disqualifies a workman for benefits 'for any week * * * in which his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory' refers, with respect to the workman, to his unemployment and to his stoppage of work. A strike in a labor sense is generally defined as a stoppage of work by common agreement of workingmen. 15 C. J. S. 1008, par. 11. That was the definition evidently in the mind of the Legislature; the term 'stoppage of work' was considered synonymous with 'strike.'"

There are several details which tend to weaken the effect of the decision of the Oklahoma court as an authority on this issue. In the first place, as appears from the foregoing quotation, the Attorney General, representing the Board of Review differed from the Board on the construction of the term "stoppage of work." In the second place, the Oklahoma legislature had amended the labor-dispute disqualification provision twice after its original passage. These changes are briefly summarized as follows:

(1936) (Original)	". . . unemployment is due to a stoppage of work which exists because of a labor dispute at the factory. . ."
(1939)	". . . unemployment is due to a labor dispute at the factory . . ."
(1941)	". . . unemployment is due to a stoppage of work which exists at the factory. . . because of a labor dispute. . . ."

Mr. Justice Arnold of the Oklahoma Supreme Court filed a dissenting opinion which contains a very thorough analysis of the disqualification provisions in a much more logical and convincing manner than the majority of the court evinced in its opinion. The dissenting judge gave full consideration to the effect of the various amendments with regard to the legislative intent, the relation of the various disqualification provisions with relation to one another, and the inapplicability of some of the authorities upon which the majority relied. The majority opinion was criticized by the Supreme Court of Michigan in the *Lawrence Baking Company case*, supra. After quoting part of the language set forth above, the Michigan court said:

"We call attention to the dissenting opinion in the above Oklahoma case which states, in substance, that benefits should be paid to the employees if there was no stoppage of the employer's work or production. Such dissent states in part:

"'In 1941, the legislature again decided to change its policy. It provided disqualification for benefits "for any week with respect to which the commission finds that his unemployment is due to a stoppage of work which exists at the factory, establishment or other premises at which he is or was last employed, because of a labor dispute." The parties hereto virtually admit that a striking employee could recover under that act if the employee were not otherwise disqualified and there was no stoppage of production.'

"The majority opinion of the Oklahoma court is based upon its interpretation of the phrase 'stoppage of work' as being synonymous with the word 'strike.' We cannot agree with such interpretation which is contrary to the clear meaning and import of the words used. . ."

The ruling of the Oklahoma court rather unfortunately has been unnecessarily reflected in *Walgreen Co.* v. *Murphy*, 8677 Ill. Ct. D, Ben. Ser., Vol. 7, No. 8, 386 Ill. 32, 53 N. E. (2d) 390. In that case the real issue was whether the stoppage of work was to be measured properly by the effect produced by a labor dispute at the warehouse or by the effect produced on the aggregate enterprises of the employer.

There was no question that there was a stoppage of work produced at the warehouse as the result of a labor dispute, but the retail enterprises of the company were operating normally without any stoppage. The labor dispute culminated in a strike by the warehouse employees, which did not extend in any way to the workers employed in the company's retail stores. The Circuit Court affirmed the decision of the Director of Labor, allowing benefits on the grounds that there was no stoppage of work, measured by the aggregate employing enterprise. But on the appeal to the Supreme Court neither the attorneys for the claimants nor the Attorney General filed briefs in opposition to the company's contentions. In effect the court's decision was ex parte and largely for that reason resulted in greater confusion in the application of the terms used in the statute. After citing the Declaration of Policy, the court said:

". . . This declaration of policy expresses the legislative intention that only those who are involuntarily unemployed shall receive unemployment compensation. (*Caterpillar Tractor Co.* v. *Durkin*, 380 Ill. 11.) One who strikes becomes voluntarily unemployed. (*Kemp* v. *Division No. 241*, 255 Ill. 213.) A strike in a labor sense is generally defined as a stoppage of work by common agreement of a body of workingmen for the purpose of obtaining or resisting a change in the conditions of employment. (15 C. J. S., Conspiracy, p. 1008, sec. II.) The manifest legislative intent is that 'stoppage of work' was deemed synonymous with 'strike.' A contrary construction would, in effect, attribute to the General Assembly an intent to finance strikes out of unemployment compensation funds. (*Bledsoe Coal Co.* v. *Review Board*, 46 N. E. (2d) (Ind.) 477; *Board of Review* v. *Mid-Continent Petroleum Corp.*, 141 Pac. (2d) (Okla.) 69.) . . . "

Under the circumstances of this case, the court was merely called on to say whether or not ineligibility for benefits should be applied to the warehouse workers when their unemployment was due to a stoppage of work at the warehouse, which existed because of a labor dispute. All that the court had to decide was whether the warehouse constitutes a "factory, establishment or other premises" within the meaning of the general disqualification provision. For this reason, it would appear that the above-quoted language of the court should be considered simply as *obiter dicta*, statements made aside from the true issue in the case.

What Constitutes a "Stoppage of Work"?

Even though the weight of authority definitely indicates that the term refers to a condition existing at an employing establishment, the settlement of this general principle does not dispose of the more difficult problem of deciding what constitutes a "stoppage of work." In this discussion, it must be assumed that the employing establishment has work on hand to be performed and that there is no other factor than the labor dispute causing the failure of the performance of such work. Here we must deal with factual problems in the light of an established theory to be applied to them. It will be found that a certain amount of difficulty will be met in determining how a stoppage of work can be properly measured in a given case. The word "stoppage" as used in the unemployment compensation law contains no further description to serve as an additional guide to its meaning and application. As we have already considered the dictionary definition of the word, the remaining sources of its more precise meaning in connection with the labor-dispute disqualification must be gathered from the administrative and judicial interpretations of the word. Again we find that the definition adopted must be in accord with sound principles of public policy, consistent with an effective administration of the law.

At the present time, administrative precedents furnish almost the only available guide. There are a relatively small number of judicial precedents. In considering the application of the term "stoppage" to the work operations of an employing establishment, we must deal with the concrete facts in each case for the evolution of the general principles to be applied. It is plain that the administrative agencies have dealt with a much larger number of concrete situations of this kind than the courts have considered.

Under the British unemployment insurance act.—An examination of the principles developed under the British acts may serve not only to show the kind of problems which have arisen in England, but also to serve as a basis of similar principles insofar as they may be applicable to conditions existing in the United States.

Obviously, a most general statement of the problem under consideration is whether a stoppage must involve a total or complete cessation, interruption, or curtailment of an employer's production or operations or whether any perceptible curtailment of such operations is sufficient to constitute a stoppage. There is no doubt that a complete interruption of the employer's operations constitutes a stoppage of work, and with no exceptions, a stoppage of work is regarded as total or complete even though a relatively small number of workers continue to work and even though some work operations and even some production is being carried on. In other words, it is generally conceded that a stoppage of work is complete if it is substantially a total stoppage. But in many cases the facts disclose that the interference with the employer's operations exists in varying degrees. Can the extent of the interruption necessary to render it a "stoppage" be definitely stated in terms of percentages? Or can such extent be expressed with the aid of such descriptive words as perceptible, appreciable, or substantial?

It appears from the Analytic Guide to Decisions by the Umpire that the British have never deemed the word "stoppage" to require a complete or total cessation or interruption of work. The Umpire has held that the disqualification for benefits applies if the "stoppage" was *appreciable*. The principle underlying the British interpretation of the word is shown by the following excerpt from the Analytic Guide (p. 10):

"'A stoppage of work due to a trade dispute' does not presume necessarily a *general* cessation of operations at the premises (*) but where a considerable number of men with one accord cease to carry on with their work there is inevitably a stoppage of work provided that an appreciable interval of time elapses before the men return to work or their places are filled by other men, as it has always been held that the words 'stoppage of work' connote an appreciable stoppage of work (*). Loss of employment through a strike or lockout may or may not be confined to that portion of the workpeople

which is directly concerned in the terms in dispute (*), and amicable arrangements may even be made between the parties for certain of those involved to remain at work for various reasons (*). The numbers affected by the stoppage are not therefore the sole criterion of whether it is appreciable. If a stoppage of work creates vacancies there must be at least a 'distinct check' to the work (*).

"Where considerable numbers of workpeople leave employment in concert or are simultaneously discharged, there must generally be an appreciable stoppage of work for the time being at any rate (*). . . ."

(*) Citations of Umpire's Decisions omitted.

Approaching the problem from the other end, the Analytic Guide contains the following comments on the effect of a dispute resulting in a single job vacancy (p. 10):

"* * * In the case of a single individual it has been frequently held that the presumption is that there is no appreciable stoppage; 'as this is a purely individual case I think it should be assumed, unless there is evidence to the contrary, that the vacancy was filled at once.' (*) In certain circumstances, however, it has been held that the discharge of even one man resulted in a stoppage, where, for instance, the operative discharged was the sole employee (*) or one of the only two journeymen employed by the firm (*) or the only craftsman of the kind employed. (*) It is of course more likely that the work will be rearranged so as to avoid dislocation when the number of men is relatively small (*)."

From the above analyses, it is apparent that the British authorities in determining whether a stoppage of work existed looked first to see whether any job vacancies were created by the dispute. The implication of the statements in the Analytic Guide is that if such vacancies were created and continued to exist for any appreciable length of time, there was a stoppage of work. With this principle as a basis, the only further assistance given by the Guide in outlining the meaning of the term "stoppage" is to be found in the two statements (1) that if a large number of workers lose or leave their employment at the same time, an appreciable stoppage of work is presumed to result, while, (2) on the other hand if only one or a few workers lose their positions, it is presumed that the vacancies are filled in some way without any appreciable lapse of time and there is consequently no stoppage of work. But, in the latter case, additional facts may show that a stoppage of work nevertheless exists.

Under the British interpretation of the word "stoppage" the individual is disqualified for benefits if his unemployment is due to a trade dispute so long as the job which he held continues to be vacant. It would be necessary for the claimant to show that the job vacancy had been filled in some way in order to effect a termination of his disqualification. Vacancies might be terminated by the return of the worker, by the hiring of a replacement, or by a readjustment of work operations. Under the British view, if the vacancy was terminated with no appreciable lapse of time, there would be no stoppage and consequently no disqualification under the trade-dispute disqualification provision.

American administrative decisions dealing with stoppage.—American administrative officers undoubtedly have been guided almost exclusively by British principles. Some have recognized the general principle laid down by the Umpire that an appreciable stoppage is sufficient to warrant the application of the disqualification. Other agencies have not been satisfied with the "appreciable" stoppage theory and have ruled that a stoppage must be *substantial* before a disqualification results. In some cases, efforts have been made by administrative officers to base their decisions as to whether a stoppage exists on a more general basis than the mere consideration of job vacancies. In these instances the officers have considered the over-all operations of the employing establishment before and after the dispute with a view to determining whether the extent of the stoppage can be measured on a percentage basis. This practice appears to be based on the theory that a stoppage must be substantial enough to be reflected by the general picture of the employer's operations.

Court decisions dealing with stoppage.—At this juncture it appears advantageous to give some consideration to the factual situations revealed by the cases which have been disposed of by courts of last resort. At the outset, attention should be called to the fact that in a vast majority of cases which have come before the courts, there were unquestionably substantially complete stoppages of work so that no issue was raised by the parties as to whether a stoppage of work existed on the particular facts; consequently, in those cases the courts have not passed on such an issue. The number of cases decided up to this date, dealing with the factual situations of stoppage is therefore relatively small.

In *Lawrence Baking Co.* v. *Michigan U. C. C.*, 9068 Mich. Ct. D, Ben. Ser., Vol. 8, No. 1, 308 Mich. 198, 13 N. W. (2d) 260, the factual situation was stated by the court as follows:

"* * * Plaintiff, a Michigan corporation, is engaged in the wholesale baking business in the city of Lansing. Prior to July 1, 1941, the United Bakery & Confectionery Workers, affiliated with the United Retail & Wholesale Workers of America, C. I. O., attempted to organize the employees of plaintiff's company into a union. The union representatives and plaintiff's officials conferred on several occasions regarding the collective bargaining agreement as to hours of work, wages, seniority and other conditions of employment. Such negotiations failed, and on July 1, 1941, 16 union members of plaintiff's 98 employees stopped work and went on strike. Such strike interrupted plaintiff's baking operations for a period of only about 15 minutes. It immediately hired new employees and after July 1st there was no further interruption or stoppage of its work and operations. On July 2d it notified each of the 16 striking employees, by letter, that 'due to your participation in the strike it has been necessary to replace you with a new employee.' The union established a picket line at plaintiff's plant and continued such picketing until about September 16th."

The holding of the court in the above case that there was no stoppage of work is entirely reconcilable with the British theory, and yet the court appears to have been influenced also by the theory that the general effect upon the employing establishment should be regarded. While conceivably job vacancies may have been created for longer than 15 minutes by the withdrawal of the 16 union employees until they were replaced by new employees, there manifestly was no serious interruption in the operations of the bakery as an establishment. Under the most limited definition of stoppage the stoppage could not have been said to have

lasted beyond the one day in view of the company's letter to the striking workers.

In both *Deshler Broom Factory* v. *Kinney*, 7417 Nebr. Ct. D, Ben. Ser., Vol. 5, No. 7, 2 N. W. (2d) 332, and *In re Steelman*, 219 N. C. 306, 13 S. E. (2d) 544, the stoppages of work at the employing establishments were substantially total. In the *Deshler* case the facts were summarized by the court as follows:

"The undisputed evidence shows that on October 11, 1939, claimants had back wages due and unpaid for September, 1939, and approximately $6,000 due for wages earned prior to September 1, 1939. On the morning of October 11, 1939, a written notice was given to the manager of the factory to the effect that employees would cease work at 3 p.m., unless September wages were paid in bankable checks before that time. This notice was not signed, but the name 'International Broom & Whisk Makers Union, Local #20' was typed at the bottom. The manager called in the officers of the union and informed them that the conditions could not be met. At 3 p.m. of said day practically all of the employees quit work and left the plant. There is evidence that arguments, persuasive in character, were used to induce reluctant employees to join in the walkout. Picket lines were established, but there is no evidence of force or coercion being used by picketing employees. In fact, the conduct of all the employees seems to have been very commendable.

* * *

"The evidence shows that more than 90 *per centum* of the employees quit work at the appointed hour on October 11, 1939. The factory was not able to continue operation. There being a substantial curtailment of work in the factory, it constituted a stoppage of work within the unemployment compensation law."

It can hardly be maintained from any point of view that when the number of employees withdrawing their services is sufficient to bring about a complete cessation of work at the employing establishment, there is no stoppage of work even though the withdrawal of labor is not unanimous on the part of all of the employees. In such case there is *substantially a total stoppage of work*. As a matter of practice, certain types of employees are often permitted by their union organizations to continue work during a suspension of work by the other members. Such workers are usually maintenance workers allowed to work to keep the premises in condition for an immediate resumption of production after the dispute has been compromised or otherwise settled.

In the *Steelman* case, the court in its summary of the facts merely stated that there was a complete stoppage of work at the employer's mills. The company announced that the operation of the plant would be resumed on a certain date and it did resume operation on that date although not all of the employees returned to their jobs. Some continued to picket the plant. As the issues raised by the claimants did not involve the facts involved in whether there was a stoppage or not, the court did not consider those details. As there was a complete shutdown of the mill, it is clear that a stoppage existed in any event. The importance of the decision lies rather in the court's views concerning the end of the stoppage and the eligibility of the claimants who did not return to work at the end of the stoppage. According to the court the stoppage of work ended when the mill resumed operation. The court did not consider any facts with respect to the volume of work which was being performed after the mill resumed operation as compared with the volume performed before the stoppage of work began. This seems to imply that the court took a general rule for determining whether a stoppage existed or not. If the mill is operating there is no stoppage of work, but if there is an interruption in operation, that constitutes a stoppage. As a result of this viewpoint the court expressed the opinion that those workers who continued to be unemployed after the stoppage ended, could no longer be disqualified under the labor-dispute provision after the stoppage of work had ended by the resumption of operations. On this point, however, the court had no claims before it for the period after the termination of the stoppage. Consequently, its statement in this regard must be regarded as *obiter dicta* and not relevant to the decision in the case.

In *Magner* v. *Kinney*, 7527 Nebr. Ct. D, Ben. Ser., Vol. 5, No. 9, 141 Nebr. 122, 2 N. W. (2d) 689, the court was dealing with a situation which did not involve the complete shutdown of the employing establishment, but which involved only the result produced by the withdrawal of certain truck drivers and other union men. The facts are summarized by the court as follows:

"* * * It is conceded that claimants are all members of Local No. 554, which is the Truck Drivers' Union.

"From the evidence it appears that prior to June 1938, this union had an existing labor contract covering terms and conditions of employment with the Nebraska Truckers Association, to which the Fidelity Storage and Van Company belonged, and of which the firms and organizations pursuing a similar vocation in Omaha and vicinity were members. Negotiations had been going on between the representatives of the parties to this contract with reference to an extension and modification of this contract and were in progress in June, 1938, at the time that contract, according to its terms, expired. These negotiations continued until September, 1938, at which time the undisputed evidence is that all parties were in accord, except as to the issue of 'closed shop' demanded by the union. In these negotiations the local drivers and their union were represented by several individuals. In early September, 1938, these representatives went to Indianapolis, and had a conference with Mr. Tobin, head of the International Union, with which Local Union No. 554 was affiliated. From that city a telegram was sent by the representative of the drivers' union to the Nebraska Truckers Association giving the operators a 42-hour strike notice. The service of this strike notice was a requirement under the terms of the contract between the parties which by its terms expired in June, 1938. The evidence in the record is without substantial contradiction that on or about September 13, 1938, or Monday following the delivery of the Indianapolis telegram, all 'union men' then employed by the Fidelity Storage & Van Company, including the three claimants herein, without further individual demand on or protest to their employer, quit their employment and thereafter failed to report for duty as was customary. Upon this occasion claimants were not discharged or directed to remain away from their usual places of employment by their employer. But it also appears that since the date of this cessation of work by its employees the business houses and premises of the Fidelity Storage & Van Company have been continuously picketed by members of Union No. 554,

and, while claimants herein did not 'picket' the business and premises of their former employer, they did participate in the picketing of other organizations against whom this same strike order was directed. Claimants also admit that since the strike order was issued they were paid strike benefits a number of times from their union organization during the continuance of this labor dispute."

The court made the following analysis of the factors entering into a stoppage of work:

"A labor dispute may produce a stoppage or curtailment of work in an employing establishment in three ways: (1) The cessation of work by all or part of the employees; (2) the cessation of work by a part of the employees may disable the employer from utilizing the services of other employees; (3) it may diminish patronage by customers or the public of the employing establishment and thereby produce a compensating unemployment of workers. In either event the resulting unemployment is due to a stoppage of work because of a labor dispute. Obviously, if those leaving work are immediately replaced, or if the dispute does not otherwise interfere with production or operation and these are not diminished, there is no stoppage of work and hence no disqualification.

"While we agree in principle with the definition of 'stoppage of work' adopted by the district court in the present case, we are unable to agree with the application of that definition to the facts presented by the record.

"Where there is a resulting curtailment of work, when is it substantial? Substantial stoppages of work have been held to exist where seven out of fifty-five men were on strike. (N. J. Bd. Rev. BR-15L, 1939); where operations were resumed with three-fourths of the normal crew (Oreg. Referee's Dec. No. 38-RA-149, June, 1938); and where there was a 20 per cent decrease of production (N.J.Bd. Rev. BR-56L, 1939). In the instant case the evidence establishes not only the abandonment by the strikers of their employment with Fidelity Storage & Van Company in September, 1938, but thereafter a definite and continued interference with its business and employees occasioning a decrease of the total business by it in excess of 30 per cent."

Unfortunately the court did not state how the figure of 30 percent was arrived at from the evidence; however, the court's last above statements show that it is not necessary that the stoppage follow any particular pattern or occur in any specified way. It is sufficient that the decrease in or the interference with the business of the employing establishment be traceable to the labor dispute. An inference may also be drawn from the court's language to indicate that the extent of stoppage may be measured by the number of individuals whose jobs are vacant or by the result of such vacancies upon the usual business operations or production of the establishment.

Active Progress

Inasmuch as this term was not used in the British Unemployment Insurance Acts, it is not possible to secure any guidance as to its meaning from that source. We are, therefore, limited to the consideration of dictionary definitions and administrative and judicial applications of the term.

Dictionary Definition

Consideration is given herein to the separate definitions of the two words comprising the term taken from Webster's New International Dictionary (1935). The definitions are given in full.

"active, adj. 1. Communicating action or motion; causing action or change; —opposed to *passive;* as, *active* powers of mind.

2. Quick in physical movement; of an agile or vigorous body; nimble; as, an *active* child or animal; an *active* gait.

3. In action; actually proceeding; working; in force;—opposed to *quiescent, dormant,* or *extinct;* as, *active* laws, assets, or hostilities; an *active* volcano.

4. Given to action; engaged in action; energetic; diligent; busy;—opposed to *dull, sluggish, indolent,* or *inert;* as, an *active mind;* an *active* man of business.

5. Requiring or implying action or exertion; —opposed to *sedentary* or *tranquil;* as, an *active* employment or service.

6. Given to works rather than to contemplation; as, the *active* life; given to action rather than to speculation.

7. Brisk; lively; characterized by frequent activity or movements, as transactions; as, an *active* demand for corn.

8. Implying or producing rapid action; as, an *active* remedy; progressive; as, an *active* disease.

9. a*Accounting.* Productive; as, active assets. b*Bookkeeping.* (1) Bearing interest; as, an *active* debt or bond. (2) *A Gallicism.* Designating, or belonging to, the asset side of the balance sheet; as, the *active* side; —opp. to *passive.*

10. *Chem & Physics.* aCapable of acting, esp. of acting with more than ordinary vigor; as, active charcoal or nitrogen. bCapable of rotating the plave of polarization of plane-polarized light; —Often preceded by *optically.* See POLARIZATION. 2. cRadioactive; as, an *active* deposit.

11. *Elec.* In phase; having no reactance. The ACTIVE COMPONENT of the current in a circuit is the average power divided by the effective voltage. In a circuit having sine waves of current and voltage, the active component is in phase with the voltage.

12. *Gram.* Pert. to or designating: a The form, or voice, of the verb which represents the subject as the agent or doer of the action expressed by the verb (the wind *blows,* in contrast to *'straws are blown').* See VOICE, n. b A verb used transitively. See TRANSITIVE, 3. c. A verb expressing action *(go, strike, run)* as distinct from mere existence or state *(be, exist);* —opposed to *neuter.*

—COMBINATIONS with a past participle to form a compound adjective are: **active - bodied, active - limbed, active - minded** (66) **Syn.**—Quick, vigorous, alert, ready, prompt, smart, spirited, animated, sprightly; assiduous, industrious,—ACTIVE, AGILE, NIMBLE, BRISK agree in the idea of quickness of movement. That which is *active* (opposed to *lazy, inert)* is thought of as busy or energetic as well as quick; as, an *active* child or demand. *Agile* implies dexterity and ease in the management of one's limbs; as, *agile* as a monkey; 'managing their spears with incredible *agility' (Evelyn). Nimble* suggests lightness and swiftness; *brisk* liveliness and animation of movement; as, *nimble* as a squirrel, *nimble* fingers, 'a fine *brisk* stream *(Gray),* a *brisk* fire of questions. Cf. BUSY, LIVELY, PROMPT, FAST, VIGILANT.

Strong, *active,* and muscular, he follows the case of the deer for days and nights together. *Scott*

Whose motion, whether rapid or slow, was always perfect grace—*agile* as a nymph, lofty as a queen. *Thackeray*

Hanging clogs on the *nimbleness* of his own soul, that his scholars may go along with him. *Fuller*

She walked *briskly* in the *brisk* air. *G. Eliot*

Ant.—Passive, idle, indolent, sluggish, dull; latent.

"progress, n. 1. Movement forward as in time or space; onward course; pro-