IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0486

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC,

Petitioner,

vs.

EARL B. COOPER, et al., and WORKFORCE WEST VIRGINIA BOARD OF REVIEW,

Respondents.

BRIEF OF THE PETITIONER

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2. The Circuit Court erred by affirming the Board of Review's use of a plant production methodology which (a) ignored evidence that practically all of the substantial non-union work at the plant stopped during the strike so that non-union personnel could maintain some limited production; (b) compared production during the strike not with a comparable period immediately before it but to non-strike production during a worldwide collapse in the aerospace industry during the Great Recession; and (c) ignored the fact that for eleven of the sixty-one days in August and September 2012, the plant ran at full capacity, not strike capacity.

3. The Circuit Court erred by affirming the Board of Review's rejection of federal preemption under the National Labor Relations Act, where it interpreted our unemployment compensation statute to give employers more "incentive to bargain with the strikers" and to "balance the bargaining position" of the parties.

II. STATEMENT OF THE CASE

The Petitioner, Constellium Rolled Products Ravenswood, LLC ("Constellium Ravenswood" or "Constellium"), operates an aluminum products manufacturing facility near

Ravenswood ("the Ravenswood facility").[1] It employed, at the times relevant, around 680 hourly and 180 salaried employees.[2]

The United Steel Workers union, local 5668 ("Union"), represents Constellium Ravenswood's hourly workers for collective bargaining purposes.[3] The 2010 Collective Bargaining Agreement ("CBA") between Constellium Ravenswood and the Union was set to expire by its terms in July 2012.[4] The parties engaged in extensive negotiations and extended the 2010 CBA twice as a result.[5] They were unable to reach an agreement, and the last extension expired at midnight on August 4, 2012.[6]

The Union workers voluntarily went on strike and walked away from their jobs on August 5, 2012.[7] During the strike, Constellium Ravenswood's salaried personnel did what they could to keep it from financial ruin, but they could not maintain more than a fraction of the plant's normal operation.[8] After further negotiations and concessions, Constellium and the Union reached agreement on a new CBA, and the Union members returned to their jobs fifty days later.[9]

Notwithstanding that they had voluntarily left their jobs, the union workers ("Claimants") applied for unemployment compensation benefits for the period that they were voluntarily not

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[1] App. 0005.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] App. 0006-0007, 0033-0046.

[9] *Id.*

working.[10] West Virginia law disqualifies unemployment compensation claimants if a labor dispute causes a stoppage of work to preserve labor-management relations.[11] In turn, that question has been held to hinge on whether there was a substantial curtailment of the employer's normal operations.[12] As a result of the strike, Constellium Ravenswood contested the Claimants' applications for unemployment benefits, and the claims were referred to the Administrative Law Judge Tribunal ("Tribunal"). On November 1 and 2, 2012, the Tribunal held a hearing, took testimony, and admitted exhibits.[13]

On December 14, 2012, the Tribunal issued its decision. It concluded that there was no "substantial curtailment" of the Ravenswood plant's normal operations, no "stoppage of work during the strike," and that Claimants were not disqualified from unemployment compensation benefits.[14] Although unnecessary to its decision, the Tribunal additionally found that if there had been a work stoppage, the two statutory exceptions to disqualification that the Union claimants had argued for—the "less than prevailing wages" exception and the "denial of the right of collective bargaining" exception—did not exist.[15]

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[10] App. 0004.

[11] App. 0008.

[12] App. 0009.

[13] App. 0004.

[14] App. 0004-0012.

[15] *Id.*

Constellium Ravenswood appealed the Tribunal's decision to the Board of Review.[16] The Union claimants also appealed the Tribunal's decision on the limited issue of the existence of the "less than prevailing wages" and "denial of the right of collective bargaining" exceptions.[17]

On February 13, 2013, the Board of Review held a hearing on the cross-appeals. On February 22, 2013, in a very brief opinion containing no discussion or independent analysis, the Board affirmed the Tribunal's decision.[18]

On March 20, 2013, Constellium Ravenswood and the Claimants each timely appealed the Board's February 22, 2013, order to the Circuit Court of Kanawha County.[19] Constellium appealed the order affirming the Tribunal's decision of no "work stoppage" (Case No. 13-AA-44 or "44 case").[20] The Union claimants appealed the Board's Order for not expressly addressing the Tribunal's finding that the "less than prevailing wages" and "denial of the right of collective bargaining" disqualification exceptions did not exist (Case No. 13-AA-45 or "45 Case").[21]

On September 13, 2013, the Circuit Court consolidated the parties' cross-appeals of the Board's February 22, 2013, decision because they involved common questions of law and fact.[22] On November 1, 2013, Constellium Ravenswood and the Union claimants submitted their respective appeal briefs to the Circuit Court.[23] The parties' response briefs and reply briefs were

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[16] App. 0018, 0087.

[17] App. 0015-0017.

[18] App. 0136-0138.

[19] App. 0141-0163.

[20] App. 0141-0143.

[21] App. 0149-0155.

[22] App. 0177-0178.

[23] App. 0180-0355, 0356-398

submitted concurrently on November 18, 2013, and December 9, 2013.[24] Over six years later, on June 15, 2020, the Circuit Court issued its order affirming the Board of Review's decision.[25]

One of the issues in this matter regards the appropriate period to measure the economic impact of the strike on Constellium Ravenswood's production. Instead of using the two months immediately before the strike, the Union advocated, and the Tribunal and Board of Review adopted a two-and-a-half-year period, which was affirmed by the Circuit Court stating, "it is not clearly wrong or unreasonable to conclude that a longer, more comprehensive time frame captures a more reliable picture of what is 'normal business' and more accurately reflects the cyclical nature of Constellium Ravenswood's business."[26] However, this manipulation of data inappropriately included a period within which Constellium Ravenswood's production had been significantly impacted by the Great Recession from which it had recovered at the time of the strike.[27]

Another issue regards the further suppression of the economic impact of the strike on Constellium by averaging the output values of Constellium and the Union, which the Circuit Court affirmed stating, "While there may be merit in choosing a different time frame for other types of comparisons, the time frames chosen by the ALJ Tribunal for comparison to the issues raised in these proceedings were reasonable, and likewise took into account the positions of both parties."[28]

To further minimize the strike's economic impact, the Board of Review included production for eleven days after the strike ended, which was affirmed even though the Circuit

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[24] App. 0399-0435, 0436-0449, 0457-0477, 0478-0489.

[25] App. 999-1012.

[26] App. 1004.

[27] App. 0181, 0206, 0461, 0544, 0629, 0630.

[28] App. 1004.

Court admitted it could "calculate the output metrics for August and September of 2012, divide that figure by the number of days in the same period to get an average daily value and subtract eleven (11) days' worth of that value from the monthly output totals for the labor dispute period."[29]

The Circuit Court essentially conceded this manipulation of the production metrics:

> This Court acknowledges the way production, shipping, and revenue numbers were calculated, the metrics used, the time frames used, the results of those calculations, the market predictions, the value of the items made versus the value of the items not made, the hours worked versus not worked, the positions not filled and so forth are all variables that could be adjusted and manipulated in various ways to produce innumerable results.[30]

In addition to the preceding manipulation of the production metrics, the Tribunal and Board of Review ignored the undisputed evidence regarding the compromises made to achieve a significantly lower production, which the Circuit Court affirmed with the following non sequitur:

> Constellium Ravenswood also takes exception with the production based metrics relied upon by the ALJ Tribunal, asserting that by using production, shipping and revenue metrics to determine how close Constellium Ravenswood's plant was operating to normal levels during the labor dispute, the ALJ Tribunal ignored other factors, such as the strained work schedule of salaried employees, that may have had a bearing on how the labor dispute affected business. While it is true that for some businesses, production output metrics may not necessarily give an accurate picture of company operations; however, Constellium Ravenswood is an aluminum production company that, by its nature, is output driven.[31]

In holding that a strike by nearly 700 employees was not a work stoppage, the Circuit Court relied on *Cumberland & Allegheny Gas Co. v. Hatcher*, 147 W. Va. 630, 130 S.E.2d 115 (1963), but the applicable statute has been amended since that case was decided,[32] and one of its syllabus points

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[29] App. 1005.

[30] App. 1007.

[31] App. 1006.

[32] At the time *Hatcher* was decided, W. Va. Code § 21A-6-3 provided that a claimant would be disqualified for unemployment benefits for a "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, establishment, or other premises at

overruled by *Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982). The *Hatcher* case involved a lockout by an employer,[33] not a strike by employees, and its application to the circumstances of a strike is dubious at best. Instead, this Court's decision in *Verizon Servs. Corp. v. Bd. of Review of Workforce W. Virginia*, 240 W. Va. 355, 811 S.E.2d 885 (2018), where this Court held that a work stoppage occurring at an employer's facility during a labor dispute disqualified striking employees for unemployment benefits during the time of stoppage, is more instructive.

Relative to the federal preemption argument, the Circuit Court mischaracterized it as advocating "preempt[ion of[the granting of state unemployment compensation benefits to workers during a labor dispute."[34] To the contrary, Constellium Ravenswood argued as follows:

> By singling out only those employers who resort to lawful self-help techniques during a strike, with the admitted, stated goal to "balance the bargaining positions," the Board of Review has invaded the congressionally-mandated "free zone [for collective bargaining] from which all regulation, 'whether state or federal', is excluded." Unsurprisingly, and despite *New York Telephone*, other courts have rejected unemployment compensation laws and decisions that evaluated bargaining behavior or other protected conduct in the decision-making process.[35]

Accordingly, the Circuit Court erred by affirming a decision that engaged in balancing the collective bargaining process that Congress has mandated must remain free from state inference.

III. SUMMARY OF ARGUMENT

First, the Circuit Court erred by affirming the Board of Review's decision that there was no disqualifying "stoppage of work which exists because of a labor dispute" where nearly 700

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which he was last employed." *Hatcher*, supra at 636, 130 S.E.2d at 119. Presently, W. Va. Code § 21A-6-3(4)(b) provides, "A lockout is not a strike or a bona fide labor dispute and no individual may be denied benefits by reason of a lockout."

[33] *Hatcher*, supra at 634-635, 130 S.E.2d at 118.

[34] App. 1011.

[35] App. 0230-0231 (footnotes omitted).

workers walked off the job for fifty days requiring the Petitioner's salaried and non-union employees to abandon their jobs and work long hours performing the duties of the striking workers.

Second, the Circuit Court erred by affirming the Board of Review's use of a plant production methodology which (a) ignored evidence that practically all of the substantial non-union work at the plant stopped during the strike so that non-union personnel could maintain some limited production; (b) compared production during the strike not with a comparable period immediately before it but to non-strike production during a worldwide collapse in the aerospace industry during the Great Recession; and (c) ignored the fact that for eleven of the sixty-one days in August and September 2012, the plant ran at full capacity, not strike capacity.

Finally, the Circuit Court erred by affirming the Board of Review's rejection of federal preemption under the National Labor Relations Act where it interpreted West Virgina's unemployment compensation statute to give employers more "incentive to bargain with the strikers" and to "balance the bargaining position" of the parties.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner respectfully submits that because this appeal involves issues of fundamental public importance as a Circuit Court has held that a strike by almost 700 employees at an aluminum plant for fifty days during which an employer struggled to maintain a significantly reduced level of production with supervisors and administrative staff was not a disqualifying "work stoppage" under the unemployment compensation statute, and an issue of first impression regarding federal law preempting state interference in collective bargaining through the interpretation and application of an unemployment compensation statute, oral argument under R. App. P. 20 is warranted.

V. ARGUMENT

A. STANDARD OF REVIEW

"The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given, and the standard of judicial review by the court is *de novo*."[36]

Specifically, "Where there is no material conflict in the pertinent evidence, a determination whether there exists 'a stoppage of work' as a consequence of a labor dispute, within the meaning of the unemployment compensation statutes of this state, becomes a question of law as distinguished from a finding of fact."[37]

Applying this standard of review, this Court has not infrequently reversed or affirmed the reversal of the Board of Review decisions.[38] Likewise, in this case, this Court should reverse the decision of the Board of Review and remand for entry of judgment for Constellium Ravenswood.

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[36] Syl. pt. 3, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994).

[37] Syl. pt. 4, *Hatcher*, supra.

[38] See, e.g., *Myers v. Outdoor Express, Inc.*, 235 W. Va. 457, 774 S.E.2d 538 (2015); *Smith v. Bd. of Educ. of Berkeley Cty.*, No. 14-0851, 2015 WL 2364292 (W. Va. May 15, 2015) (memorandum); *Women's Health Ctr. of W. Virginia v. Parsons*, No. 13-0519, 2014 WL 2524930 (W. Va. June 3, 2014) (memorandum); *Bevins v. W. Virginia Office of Ins. Com'r*, 227 W. Va. 315, 708 S.E.2d 509 (2010); *May v. Chair & Members, Bd. of Review*, 222 W. Va. 373, 664 S.E.2d 714 (2008); *Adkins v. Gatson*, 218 W. Va. 332, 624 S.E.2d 769 (2005); *James F. Humphreys & Assocs., L.C. v. Bd. of Review*, 216 W. Va. 520, 607 S.E.2d 849 (2004); *Vieweg v. Gatson*, 209 W. Va. 268, 546 S.E.2d 267 (2000); *Ohio Valley Med. Ctr., Inc. v. Gatson*, 202 W. Va. 507, 505 S.E.2d 426 (1998); *Glass v. Gatson*, 200 W. Va. 181, 488 S.E.2d 456 (1997); *Private Indus. Council of Kanawha Cty. v. Gatson*, 199 W. Va. 204, 483 S.E.2d 550 (1997); *Raleigh Cty. Bd. of Educ. v. Gatson*, 196 W. Va. 137, 468 S.E.2d 923 (1996); *Smittle v. Gatson*, 195 W. Va. 416, 465 S.E.2d 873 (1995); *Adkins v. Gatson*, supra; *Mercer Cty. Bd. of Educ. v. Gatson*, 186 W. Va. 251, 412 S.E.2d 249 (1991); *Wolford v. Gatson*, 182 W. Va. 674, 391 S.E.2d 364 (1990); *Perfin v. Cole*, 174 W. Va. 417, 327 S.E.2d 396 (1985).

B. THE CIRCUIT COURT ERRED BY AFFIRMING THE BOARD OF REVIEW'S DECISION THAT THERE WAS NO DISQUALIFYING "STOPPAGE OF WORK WHICH EXISTS BECAUSE OF A LABOR DISPUTE" WHERE NEARLY 700 WORKERS WALKED OFF THE JOB FOR FIFTY DAYS REQUIRING THE PETITIONER'S SALARIED AND NON-UNION EMPLOYEES TO ABANDON THEIR JOBS AND WORK LONG HOURS PERFORMING THE DUTIES OF THE STRIKING WORKERS.

It is important for courts "to protect the unemployment compensation fund against claims by those not entitled to the benefits of the Act."[39] Thus, while unemployment statutes are typically liberally construed to achieve their purpose, "[t]his 'liberality' rule is not to be utilized when its application would require [courts] to ignore the plain language of the statute."[40] West Virginia's unemployment statute "is not intended . . . to apply to those who 'willfully contributed to the cause of their own unemployment.' Rather, the intent of the act is to relieve those individuals who are able and willing to work but who, through no fault of their own, are unable to find suitable employment, of some of the anxieties and risks attendant to unemployment."[41] "The unemployment compensation program is an insurance program, and not an entitlement program, and is designed to provide 'a measure of security to the families of unemployed persons' who become involuntarily unemployed through no fault of their own."[42] "[T]he obligation of employees under the Act is to do whatever is reasonable and necessary to remain employed."[43]

W. Va. Code § 21A-6-3(4) provides, "Upon the determination of the facts by the commissioner, an individual is disqualified for benefits . . . [f]or a week in which his or her total or

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[39] *Childress v. Muzzle*, 222 W. Va. 129, 133, 663 S.E.2d 583, 587 (2008).

[40] *Adkins v. Gatson*, supra at 565, 453 S.E.2d 395 at 399 (citations omitted).

[41] *Hill v. Bd. of Review*, 166 W. Va. 648, 651, 276 S.E.2d 805, 807-08 (1981).

[42] *Childress*, supra at 133, 663 S.E.2d at 587 (footnote, citations, and internal quotations omitted) (alterations in original).

[43] *Id.*

partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he or she was last employed." Under the Act, "in order that employees may be disqualified from receiving unemployment compensation benefits because of 'a stoppage of work' resulting from a labor dispute, it must appear that there has resulted a substantial curtailment of the employer's normal operations."[44]

In concluding that "[t]here was not a work stoppage at the employer facility as a result of the labor dispute,"[45] the Tribunal looked not at the Ravenswood facility's "normal operations" but only at its output (production, shipping, and revenue). A manufacturing employer's "normal operations" encompass far more than just the very last steps in the finishing of its wares.[46]

A manufacturer's employees usually engage in *a lot* of operations not directly related to generating those wares. Much of a manufacturer's operations require redirecting time, money, and labor *away from* making products to many other essential endeavors, like administration, management, training, and and compliance with environmental, labor, financial, and many other regulatory requirements. And it is undisputed that nearly *all* that work—usually performed by the reassigned salaried employees—went undone during the strike. A near-total curtailment of those operations undeniably constitutes a "stoppage of that work." The Tribunal, however, failed to take any of that into account in its decision, looking only to current output data.

Furthermore, much of the normal operations of making goods has only an indirect or delayed correlation to finished goods output. Normal processes in marketing, research and

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[44] Syl. pt. 2, *Hatcher,* supra.

[45] App. 0007.

[46] "In the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning." Syl. pt. 3, in part, *Ohio Cellular RSA Ltd. P'ship v. Bd. of Pub. Works of W. Va.*, 198 W. Va. 416, 481 S.E.2d 722 (1996) (quotations and citations omitted).

development, sales, customer service, preventive and responsive maintenance, and a host of other operational areas contribute to output, but only indirectly and typically not until later—and certainly not earlier—periods. But again, the Tribunal failed to take any of these curtailed operations into account.

The clear majority of cases addressing materially identical factual scenarios have rejected the Tribunal's output-only methodology.[47] Many quote an important article by Professor Willard A. Lewis, *The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence,*[48] in which he noted, "Since the mid-fifties, there has been a new emphasis placed upon the term 'operations.' As production increasingly represents less than the totality of the employing unit's performance, decreases in business revenue, services rendered, marketing, research, and maintenance, transportation, and construction activities have come to the fore as indicia of

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[47] It is especially appropriate in this case to look to other states' "stoppage of work" jurisprudence, because West Virginia's Unemployment Act is materially the same as analogous acts in most other states. The West Virginia legislature enacted our Act in 1936, while most of the other states also adopted the same or a similar act patterned after a federal draft bill:

> During the decade of the 1930's all of the various states enacted some form of unemployment compensation legislation, and many of these statutes were modeled after the language of the Federal Draft Bill, which in turn was based largely upon British unemployment compensation legislation. All of these statutes provide in some way for the disqualification of workers whose unemployment was the result of a labor dispute at the place where they were last employed, with the majority of jurisdictions adopting the "stoppage of work" approach of the Draft Bill, which provided, in part, that "[a]n individual shall be disqualified for benefits . . . [f]or any week with respect to which it is found that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed."

Thomas J. Goger, *Construction of Phrase "Stoppage of Work" in Statutory Provision Denying Unemployment Compensation Benefits During Stoppage Resulting from Labor Dispute*, 61 A.L.R.3d 693 (1975) (footnotes omitted) (first alteration in original). *See also Childress*, 222 W. Va. at 136-37, 663 S.E.2d at 590-91 (giving weight to the fact that the Court's interpretation of the Act was consistent with other states' courts' interpretations).

[48] See Willard A. Lewis, *The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence*, 45 J. URB. L. 319, 332 (1967).

substantialness."[49] Similarly, another leading commentator observed, "Several administrators have been faced with the difficult situation in which a temporary work rearrangement has averted the normal production-crippling effect of a strike by the employer,"[50] and, therefore, "[t]he principle of 'probable strike success' indicates that *decisions should turn on whether the work can continue permanently on the new basis or whether the employer will be compelled to rehire to replace the strikers.*"[51]

Here, it is beyond question that the Ravenswood facility could *not* have continued permanently with operations during the strike; Constellium Ravenswood would instead have been forced to release the salaried employees back to their regular operations and hire replacements.

Courts with unemployment compensation acts materially identical to West Virginia's agree, holding that measuring an employer's "normal operations" means more than counting goods made or sold. There are too many such cases to do more than discuss a few.[52]

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[49] Accord Pedro L. Cisneros, Note, *Unemployment Compensation and the "Stoppage of Work" Concept—Abandoning State Neutrality by Requiring the Employer to Replace Strikers or Resume Operations During a Labor Dispute*: IBP v. Aanenson, 24 CREIGHTON L. REV. 685, 697 (Feb. 1991) ("A review of the cases reveals that the test that is usually followed is the resumption of 'substantially normal production.'").

[50] Milton I. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification (1949-1950)*, 17 U. CHI. L. REV. 294, 310-12 (1949).

[51] *Id.* (emphasis added). As demonstrated below, federal law (specifically, the National Labor Relations Act) preempts a state's efforts to subsidize the strikers' bargaining power—with unemployment compensation benefits or otherwise. The analysis in this section is confined to showing that even if the NLRA did not preempt such efforts, the Tribunal nonetheless wrongly applied state law.

[52] See also *Pfenning v. Dept. of Emp. & Training*, 557 A.2d 897, 899 (Vt. 1989) ("In [*Whitcomb v. Dep't of Emp. & Training*, 520 A.2d 602 (Vt. 1986)], we upheld the Board's determination that there was a stoppage of work in a telephone company despite the absence of evidence of a decline in business revenue or primary service. Our affirmance was based on extensive findings of curtailment in other parts of the employer's operation—such as equipment installation and operator-assisted calls—combined with a decrease in worker hours."); *Twenty-Eight (28) Members of Oil, Chem. & Atomic Workers Union v. Employment Sec. Div. of Alaska Dep't of Labor*, 659 P.2d 583, 591-92 (Alaska 1983) ("Most decisions follow the general practice of examining decreased production, business revenue, service, number of employees, payroll, or man-hours.") (citing Shadur, *supra* n.50 at 35); *Aaron v. Review Bd. of Ind. Emp. Sec. Div.*, 440 N.E.2d 1, 3 (Ind. Ct. App. 1982) ("Even though [the employer] was able to resume production, normal

In *Travis v. Grabiec*, 287 N.E.2d 468 (Ill. 1972), the Illinois Supreme Court interpreted the phrase "'stoppage of work' as it relates to the eligibility of striking employees for benefits under the [Illinois] Unemployment Compensation Act" to properly require examination of *all* aspects of the employer's "normal operations."[53] The agency initially held the plant's striking hourly workers disqualified under the same "work stoppage" exception at issue in the instant case.[54] The trial court initially affirmed that decision,[55] but on a motion by the claimants, remanded for the taking of evidence on production.[56] On remand, the agency reaffirmed its position, stating that even though the refinery had produced "substantially the same daily thru-put" of oil as before the strike, the totality of the facility's normal operations had not resumed.[57] The trial judge reversed, finding that the work stoppage ended "[w]hen [the employer], by whatever methods used inside its own plant, reached *substantially normal production,*"[58] and the intermediate appellate court affirmed.[59] On appeal to the Illinois Supreme Court, the court held that neither of the two argued

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operations contemplate something more than production. The business operations must substantially conform to the standard or regular operations of the plant. If the labor dispute interferes with the normal plan of operations, this disqualification is applicable.") (quotations and citations omitted); *Mountain States Tel. & Tel. Co. v. Sakrison*, 225 P.2d 707, 712 (Ariz. 1950) (looking to production, hours worked, and internal and external services provided); *cf. Shell Oil Co. v. Brooks*, 567 P.2d 1132, 1153 (Wash. 1977) (holding that a finding of no "stoppage of work" was not clearly erroneous because the agency had taken a "total operations" view—"The specific criteria accented by the commissioner in this case were whether there was a diminution in production *and whether there was a substantial curtailment of other normal nonproduction 'operations.'* "—and found that where only a handful of workers are reassigned to perform the striking workers' operations, the resulting 16%-19% curtailment does not warrant reversing the agency's order).

[53] *Id.* at 468-69.

[54] *Id.* at 469.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

standards—*full* normal operations or substantially normal *production*—was correct: "In our opinion, both the position asserted by the Director and that expressed by the trial and appellate courts are too doctrinaire to conform to the intention of the legislature."[60] Relevant to the instant case, the Supreme Court held that:

> the position . . . [that] looks only at gross production without regard to the means by which that production is achieved or the continuing disruption of the normal operating methods of the employer, does not reflect the intention of the legislature. Since there is no single pattern or mold which can confine all aspects of all of the varied types of industrial and commercial enterprises and all of the labor disputes in which they and their employees may become involved, it is not surprising that it is difficult to capture all of the variables in a single word or phrase. It may be that there are some situations in which normal operations can be measured accurately enough in terms of gross production. *But there are other situations in which a myopic concern with production to the exclusion of the consideration of all other aspects of the enterprise can result in gross distortion.*[61]

Following Professor Lewis, the court found that when an employer's salaried employees "left their jobs and took over certain production facilities, but not all of such facilities," normally operated by three times as many striking hourly employees, much of that employer's normal operations will inevitably go undone.[62] Quoting that part of the trial judge's opinion looking beyond just production output, the court affirmed that standard:

> [W]hen the employer regained production to a point where business operations are substantially normal, then stoppage of work ends. Normal operations would mean that conforming to the standard, or regular operation of the employer's plant. *Even though for a period of time full production was carried on by a skeleton force working abnormal hours and performing abnormal functions, this certainly could not mean normal operation.* To hold otherwise, would require this Court to say that the employer did not need [its full complement of hourly] employees, or need the existing facilities that were not being used, nor to maintain or replace its equipment. *The Court is of*

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[60] *Id.* at 469-70.

[61] *Id.* at 470 (emphasis added).

[62] *Id.* at 470-71.

the opinion that "stoppage of work" ends when the employer's business operations returns to substantially normal operations.[63]

In *Laclede Gas Co. v. Labor & Indus. Relations Comm'n of Mo.*, 657 S.W.2d 644 (Mo. Ct. App. 1983), "[t]he decision depend[ed] on[, *inter alia*, whether] the strikers [were] unemployed 'due to a stoppage of work' which existed because of the labor dispute at Laclede? If a work stoppage existed, the claimants would be ineligible for benefits."[64] During the strike, Laclede kept its output up in part because the company assigned non-striking employees to do the work of more than three times as many strikers.[65] Of course, those non-striking employees' own operations and much of the striking hourly employees' work (like planning, budgeting, routine maintenance, customer calls, and so forth) went undone.[66]

The agency denied the striker workers' applications for unemployment compensation under Missouri's materially identical "stoppage of work" provision.[67] The claimants appealed to an appeal tribunal, arguing that the company's continued production during the strike meant that there had been no work stoppage.[68] The appeals tribunal affirmed the denial, but the Commission granted the claimants' appeal, accepted their argument, and reversed a decision that the circuit court affirmed on further appeal.[69]

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[63] *Id.* at 471-72 (emphasis added) (internal quotations and citation omitted) (alteration in original)

[64] *Id.* at 646.

[65] *Id.*

[66] *Id.* at 646-47.

[67] *Id.* at 647.

[68] *Id.* at 647-48.

[69] *Id.* at 648.

The Missouri Court of Appeals framed the "issue [a]s whether an employer which is able to maintain prestrike levels of production but which must reduce, postpone or eliminate the activities of nearly all other departments has suffered 'a substantial diminution of its activities, production or services.' "[70] Applying a statutory "stoppage of work" provision like West Virginia's (and other states') jurisprudential one, the court wrote:[71]

> For two reasons this court holds that the Commission erroneously applied the law when it placed sole emphasis on the fact that an employer has been able to maintain delivery of final product in the face of a strike in determining whether there was a stoppage of work. First, Missouri's statutory definition of "stoppage of work" specifically declares a substantial diminution of activities, production or services, in the disjunctive, to be a stoppage of work. The curtailment of most management activities must be given equal weight with production under the statute.[72]

The court was clear, however, that the same result would have obtained notwithstanding the statutory definition:

> Second, even without Missouri's statutory definition, under the substantial curtailment of operations test applied by other jurisdictions, *the better reasoning is that delivery of final product is not the sole determinate of a stoppage of work.* The Commission evaluated the facts by the wrong standard.[73]

"The better view," held the Court, "is that whether the *entire operation of the employer* has returned to normal is the deciding issue."[74]

In *Boguszewski v. Comm'r of Dept. of Emp. & Training*, 572 N.E.2d 554 (Mass. 1991), most of the hourly employees went on strike, so management and the non-union workers attempted as

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[70] *Id.* at 650.

[71] *Id.*

[72] *Id.* at 650.

[73] *Id.* (emphasis added).

[74] *Id.* at 653 (emphasis added).

best they could to keep production going.[75] "During the strike, many of the company's operations were halted, or performed at a level substantially below normal," including safety, sales, maintenance, clerical, and administrative functions.[76] The company was only able to maintain its pre-strike level production and revenues.[77]

After an administrative appeal of an initial award, the agency ultimately denied benefits based on the "stoppage of work" rule.[78] A trial judge reversed and awarded benefits "because 'the employer's primary business function, the for profit generation and distribution of electricity, proceeded without interruption.'"[79] On appeal, the Massachusetts court reinstated the agency's denial, "conclud[ing] that the board's decision that there was a 'stoppage of work' under the statute, even though the employer continued full production and lost no revenues as a result of the strike, was consistent with the law and was supported by substantial evidence."[80]

The court found that "[t]he central question presented by this appeal is whether the term 'stoppage of work' refers exclusively to an employer's output and revenues, or may also refer to operations which are not immediately tied to output and revenues, such as maintenance, inspection, testing, installation, and administrative operations."[81] The court refused to allow production to trump other possible factors, saying that "[b]ecause of the variety of factual situations in which the labor dispute disqualification may be invoked, we decline to define the term

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[75] *Id.* at 556.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 555.

[79] *Id.* at 557.

[80] *Id.* at 555-56.

[81] *Id.* at 557.

'stoppage of work' any more precisely than it has already been defined in prior cases."[82] "There are no necessary, specific elements of the definition,"[83] continued the court, and "[w]hile output and revenues remain important factors for the board to consider, they will not necessarily be dispositive."[84]

In *Hatcher*, this Court held that whether there has been a "substantial curtailment of normal operations" depends on many factors and not on any one to the exclusion of others:

> A determination of the existence or nonexistence of a stoppage of work in a case of this nature must necessarily depend upon the facts of each case. ... It is conceivable that in some situations a strike or lockout affecting relatively few employees would produce a stoppage of work if such men were employed in the performance of duties of such vital nature that their unemployment would result in a substantial curtailment of the *normal overall activities or operations* of the employer. On the other hand, in other situations the unemployment of a proportionately greater number of employees might have no substantial effect on the normal activities of the employer. In some situations, a substantial curtailment of work in a single category or department of the employer's operations might be of such a vital nature as to result in a substantial curtailment of the employer's *overall activities* if all categories or departments were of an interdependent nature; while, conceivably, in another and different situation, a complete cessation of work in a single category or department of some incidental or minor nature might produce no appreciable curtailment of the *overall operations* of the employer.[85]

This Court refused to overturn the award, in part based on the deference owed to the agency's determination, and in part because—unlike this case—present *and future* production and the salaried workers' own work were *not* substantially curtailed:

> Notwithstanding such testimony, we believe it is fair to say that there was *no substantial showing of unfulfilled demands or unfulfilled requirements* in such categories [of non-production work] during the lockout period; and, as has been stated previously, there was *no showing of an accumulated backlog of work or services*

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[82] *Id.* at 559.

[83] *Id.*

[84] *Id.* (quoting *Lewis*, supra n.48 at 34, and Shadur, *supra* n.50 at 35.)

[85] 147 W. Va. at 639-40, 130 S.E.2d at 121 (emphasis added).

> in such categories sufficient in volume or nature to require employment of additional personnel or to require overtime employment on the part of the regular employees after normal operations were resumed.[86]

As discussed, only one of those findings was made in this case (no substantial curtailment of output), and, as demonstrated elsewhere herein, that finding was clearly wrong as a matter of law.

Hatcher was a comparatively early case, and although it *focused* on production given the facts of that case (including what the Court found was only insubstantial curtailment of the non-production work),[87] courts in other states have correctly cited it for the proposition that "normal operations" requires examination of the totality of the employer's operations, not just production. In *Laclede*, *supra*, the court stated that Missouri's "substantial curtailment of operations test, which is applied by other jurisdictions, *see* note 9, *supra*, lumps all three factors [activities, production, and services] together and requires a look at the employer's business as a whole."[88] Note 9, in turn, cited *Cumberland* (and *Travis*) as cases requiring just such a "business as a whole" examination.[89] Maryland's Supreme Court also cited *Cumberland* to support its observation that "the original intent of the 'substantial curtailment' test may have been . . . to expand the criteria from industrial production to other business-related factors in determining whether a work stoppage had occurred at the individual work site."[90]

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[86] 147 W. Va. at 639-40, 130 S.E.2d at 121 (emphasis added).

[87] *Id.* at 123, 130 S.E.2d at 643.

[88] 657 S.W.2d at 654.

[89] *See also Boguszewski*, 572 N.2.2d at 343-44 & n.11 (declining to focus on production and noting that *Cumberland* did not hold that production is the only relevant factor: "Several courts have declined to treat a curtailment of production as a necessary element of a 'stoppage of work.' *Cases cited by the claimants* [including *Cumberland*], *which place primary weight on curtailment of production or revenues, also consider other factors and do not persuade us to adopt the claimants' position.*").

[90] *Giant Food, Inc. v. Dept. of Labor, Licensing & Regulation*, 738 A.2d 856, 865–66 (Md. 1999).

"Many functions are necessary to sustain production on a long term basis for a large scale employer; therefore, focusing solely on an employer's final output grossly distorts the view of the operations of a business."[91] Simplistically measuring the very last step or two in a manufacturing employer's normal operations—*i.e.*, counting the production and shipping of finished items—is an erroneous method of measuring that employer's overall normal operations during a strike. The Tribunal and Board of Review erred by failing to consider the undisputedly near-*total* curtailment of the salaried workers' everyday operations. The undisputedly substantial curtailment of the hourly employees' normal operations that did not immediately and directly contribute to current-period finished product output; and the undisputed future loss of orders, customers, and sales, the effect of which should properly be accelerated to the period when those losses were suffered—*i.e.*, the strike—even though the measurable impact on cash flow might not be felt until later.

Accordingly, this Court should set aside the judgment of the Circuit Court and remand for entry of judgment in favor of Constellium Ravenswood.

C. THE CIRCUIT COURT ERRED BY AFFIRMING THE BOARD OF REVIEW'S USE OF A PLANT PRODUCTION METHODOLOGY WHICH (A) IGNORED EVIDENCE THAT PRACTICALLY ALL OF THE SUBSTANTIAL NON-UNION WORK AT THE PLANT STOPPED DURING THE STRIKE SO THAT NON-UNION PERSONNEL COULD MAINTAIN SOME LIMITED PRODUCTION; (B) COMPARED PRODUCTION DURING THE STRIKE NOT WITH A COMPARABLE PERIOD IMMEDIATELY BEFORE IT BUT TO NON-STRIKE PRODUCTION DURING A WORLDWIDE COLLAPSE IN THE AEROSPACE INDUSTRY DURING THE GREAT RECESSION; AND (C) IGNORED THE FACT THAT FOR ELEVEN OF THE SIXTY-ONE DAYS IN AUGUST AND SEPTEMBER 2012, THE PLANT RAN AT FULL CAPACITY, NOT STRIKE CAPACITY.

As noted, "in order that employees may be disqualified from receiving unemployment compensation benefits because of 'a stoppage of work' resulting from a labor dispute, it must

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[91] *Laclede Gas Co., supra*, 657 S.W.2d at 654.

appear that there has resulted a substantial curtailment of the employer's normal operations."[92] Here, the Tribunal's and Board of Review's analyses of "substantial," "curtailment," and "normal operations" were all wrong. As the governing statute makes clear, the sole relevant question is whether there has been a "stoppage of work." And, as the governing jurisprudence makes clear, that question, in turn, depends on whether there has been a "substantial curtailment of the employer's normal operations." "Curtailment" means a lessening or reduction. So, to determine whether some figure has been curtailed, one needs to compare what that figure would have been but for the condition at issue to what it was given the existence of the condition. The sole relevant question in this case, then, is *whether the Ravenswood facility's normal operations during the strike were substantially curtailed from what the normal operations would have been during the same time but for the strike.*

At the hearing, Constellium Ravenswood put on evidence of what the Ravenswood facility's output *would have been* but for the strike: (1) the company's (98% accurate) output forecasts for August and September 2012, generated not for use in this litigation but for the company's normal, day-to-day managerial decision-making, and (2) what output had been in the five *comparable* months immediately before the strike. Claimants, on the other hand, put on no evidence of what the Ravenswood facility's operations would have been in August and September 2012 but for the strike. Instead, they offered only evidence of what the Ravenswood facility's output had been in the nearly *three years* before the strike, and never showed how those figures had anything to do with what the facility would have *actually produced* in August and September 2012 but for the strike. Furthermore, there was *much* undisputed evidence to the contrary.

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[92] Syl. pt. 2, *Hatcher,* supra.

First, from January 2010 until mid-2011, the worldwide economic downturn had so greatly depressed demand for the Ravenswood facility's products that the company was in "survival mode" just "scraping to get by,"[93] "losing money[,] and not surviving at th[o]se incomes."[94] *Second*, the Ravenswood facility experienced at least two major outages of its stretcher—the most critical piece of equipment involved in their lucrative plate business—each of which caused production downtime, and one of those was after January 2010.[95] Far worse, though, plate production was almost completely shut down for *three months* at the end of 2011 and beginning of 2012 while Constellium invested $46 million upgrading the stretcher, and it was not fully operational until February 15, 2012.[96] *Third*, the labor dispute over a predecessor CBA shut down production at the Ravenswood facility for about two weeks in 2010.[97] *Finally*, it was wrong for the Tribunal to assign any weight to August and September 2011 production data on the mistaken belief that when Constellium's witness testified that the Ravenswood facility's business, and especially the aerospace business, was on a "cycle," he meant that it was on an *annual* cycle.[98]

The Tribunal asserted that it did not directly calculate any figures using the August and September 2011 output data, but stated that it used the fact that output during those two months was *very* low to support using "the average of the claimants' recommended time period and the employer's recommended time period" because "[t]he August 2011/September 2011 time period

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[93] App. 0030, 0052, 0184, 0206, 0318, 0461, 0523, 0544, 0608, 0629.

[94] App. 0030, 0052, 0055, 00184, 0206, 0209, 0314, 0461, 0523, 0544, 0547, 0608, 0629, 0632.

[95] App. 0009, 0026, 0030-0031, 0043-0045, 0052, 0185-0186, 0198, 0206, 0209, 0242, 0283-0285, 0301, 0315-0315, 0318, 0326-0329, 0523-0524, 0535, 0544, 0547, 0620, 0629, 0632.

[96] App. 0031, 0052, 0186, 0206, 0283, 0524, 0544, 0609, 0629.

[97] App. 0052, 0206, 0544, 0629.

[98] App. 0054, 0055, 0206-0208, 0545, 0630.

was a similar two month cycle, one year previous to the strike."[99] But there was no evidence that the "cycles" that Ravenswood facility's products are subject to are annual ones. On the contrary, there was *copious evidence* that August and September 2011 output data was generated when operations at the Ravenswood facility were in the worst kind of "down" point in the actual business cycle. It was error for the Labor Dispute Tribunal to assign *any* weight to August or September 2011 production data in computing what non-strike production would have been at the Ravenswood facility during August or September 2012—an undisputed "up" point in the cycle.

These factors all caused greatly reduced output at the Ravenswood facility from January 2010 through January 2012, making those months *completely unrelated* to the record-setting, capacity-straining demand that *actually would have happened* at the Ravenswood facility in August and September 2012—if, of course, Claimants had not abandoned their jobs.

The Tribunal acknowledged that the governing legal standard asks about apples, but then they counted oranges. The question is not, "What was Constellium's average production since day one at the Ravenswood facility?" The question was, "What would the Ravenswood facility have actually produced during August and September 2012 but for Claimants' strike?" This point cannot be over-stressed: *Constellium put on the sole record evidence at the hearing of what production would have been during August and September 2012 but for Claimants' strike* (the company's output forecast report, and the March through July 2012 output).

Production data from up to three years earlier, when the Ravenswood facility was operating under *very different, very bad* conditions, was utterly irrelevant to answering the governing question. Even if it was correct to use historical statistical data to predict the Ravenswood facility's future

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[99] App. 0010.

probable output (instead of the proven accurate forecasts), then the only such *relevant* historical statistical data must come from months that are substantially the same as the months to be predicted—*i.e.*, March through July 2012:[100]

Q Okay. It's true, is it not, Mr. Weber, that the business is cyclical?

A Absolutely. Correct.

Q So it can have its ups and downs, and so you have to look at the totality of the length of time that Constellium has been in business to establish what the production and revenues have been over that period of time.

A Is that a question?

Q Yes, sir, I'm asking you is that an accurate statement.

A To me, they are very different cycles, so, no. The opportunity lost in August is relevant to the cycle you're in, not relevant to the cycle you're not in.

Q I see. But it's true, is it not, that in looking at the history of any company, that you have to look at the totality of the production and income over its history, particularly when you're in a cyclical type business that you have just said that you're in?

A Look at it regarding?

Q Income and production.

A So if I was going to buy a company, I would look at it. If I'm going to project future, no, I wouldn't.

Q But the question that I asked you is a "yes" or "no." Yes, you have to look at the totality to get a good picture as to what the losses and production figures are or their income?

JUDGE SAYRE: You can explain your answer. You don't have to just say "yes" or "no." Go ahead.

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[100] In any event, that data is generally *higher* than Constellium Ravenswood's forecasts, making the actual strike production an *even greater* curtailment over the non-strike figures.

> THE WITNESS: Yeah, I really struggle at answering either way on that. Back in 2010, the company was losing money and not surviving at these incomes. We are now in the strength of the cycle. The time to make money to stay in business compared to the 2012 numbers is what you see. It's dramatically different than the revenues back in this period.
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> The same thing on the production. We had a period of three months with the stretcher outage. We did not sell aerospace plate. How can we compare the revenue of that period to the strength of a cycle where we lost business? I don't see the relevance.[101]

A business certainly does "have its ups and downs," as Claimants' counsel asked. But that is not the point. The point is that the *sole evidence* proved that August and September 2012 would have been "ups," not "downs." The *only evidence* is that those two months were "in the strength of the cycle ... It's dramatically different than the revenues back in this period [before March 2012]." As Paul Weber articulately said, "*The opportunity lost in August is relevant to the cycle you're in, not ... to the cycle you're not in.*"[102]

The governing question does not ask about "the totality of the length of time that Constellium Ravenswood has been in business to establish what the production and revenues have been over that period of time."[103] It asks, "What would production have *actually been* in *those two months* but for the strike." And answering that question does *not* require "looking at the history of [the] company"[104] or at "an entire picture of what the employer has done during its ownership of

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[101] App. 0313-0315.

[102] App. 0314.

[103] *Id.*

[104] *Id.*

the Ravenswood facility"[105] when there is *no evidence* to tie that "history" to the future—especially when there *is* a mountain of evidence showing that there is *no* such connection.

Where work is seasonal, for example, the Alaska Unemployment Insurance Benefit Policy Manual on labor disputes gives the following example warning not to compare apples to oranges under that state's "stoppage of work" rule: "The labor dispute occurs at a time when the production would have experienced a marked seasonal upswing. The stoppage must be measured against what is usual for the season, *not to the low levels prior to the dispute.*"[106]

Why Claimants, the Tribunal, and Board of Review insisted on factoring in "down" periods to determine what production would have actually been in the "up" periods of August and September 2012 defies explanation, and as a result the decision must be reversed.

The strike lasted only from August 5 through September 23, 2012, so only fifty of the sixty-one total days in August and September 2012 were at strike-level capacity. During the other eleven days in those two months, the Ravenswood facility was running at normal, *full* capacity. Only whole-month output metrics were available at the hearing, however. As demonstrated above, it is easy enough to back out those eleven days of normal, full-capacity operations to *properly* compute and compare strike- versus full-capacity data. The Tribunal, however, was either unable to or simply refused to do this, calling such simple math "estimat[ing] and guess[ing]":

> The tribunal is mindful that 18% of the August/September 2012 period did not include the strike. The strike was from August 5, 2012 to September 24, 2012, encompassing 82% of the August/September 2012 period. Instead of trying to extrapolate, assume, estimate and guess the amount, difference and significance of the strike and non-strike business activity in the August/September period, the tribunal uses the August 2012 and September 2012 monthly revenue, production

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[105] App. 0322.

[106] *Alaska Unemployment Ins. Benefit Policy Manual: Labor Dispute*, at LD3.2-1 (Sept. 19, 2002) (emphasis added), available at http://www.labor.state.ak.us/esd_unemployment_insurance/ui-bpm.htm.

> and shipping data to measure the revenue, production and shipping occurring during the August 5, 2012 to September 24, 2012 strike. Essentially, the tribunal is treating the situation as if the strike period was August 1, 2012 to September 30, 2012, for the purposes of measuring monthly revenue, production and shipping activity.[107]

Contrary to the Tribunal's portrayal, however, math is not "guessing." One need only resort to math to easily back out the 18% of the days in August and September 2012, during which time the Ravenswood facility was running at normal, *full capacity* to find what went on during the fifty days when it was running at much lower strike capacity. Furthermore, the difference is—obviously—hardly trivial.

For the convenience of this illustration only, Constellium Ravenswood used the March through July 2012 actual data for what the Ravenswood facility would have produced in August and September 2012 but for the strike (instead of Constellium's forecast).[108] Improperly ignoring the fact that 18% of August and September 2012 was run at full capacity artificially elevates the apparent August coil production, for example, from 23.0% of what it would have been but for the strike[109] to 33.4% of what it would have been but for the strike.[110] It can thus be seen that the

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[107] App. 0004-0005.

[108] App. 0009.

[109] The 23.0% figure results from applying simple math to back out the full-capacity days from the total days to yield the during-strike figures (again based on the Tribunal's raw data, but without rounding raw data and intermediate results to a single decimal place). First, the average daily full-capacity figure is equal to the full-month, full-capacity production (*i.e.*, the March through July 2012 monthly average of 15.129) divided by the number of days in that period, to get 0.494 million pounds. Then one multiplies by the number of full-capacity days in August (4), to get the full-capacity coil production in August (1.978 million pounds). Subtracting that from the actual production for *all* of August (5.051) gets the strike-capacity production for the *last 27 days* of August (3.073). And finally, dividing that by 27 days, gest the average strike-only coil production during August of 0.114 million pounds. Then dividing the *actual* strike-capacity coil production in August by what it *would have been* gives 0.114 / 0.494 million pounds, or 23.0%.

[110] The 33.4% that the Tribunal assumed was far simpler to compute: just divide the actual strike-level coil production for August (5.051) by what it would have been but for the strike (*i.e.*, the average production in the immediately previous five months, or 15.129), to get 33.4%.

Tribunal's simplistic refusal to back out the 18% of normal, full-capacity plate production overestimates the corrected coil production figure by *almost half again.*

In addition to overestimation of the facility's productivity, the Tribunal found that "strike revenues approximated 72% of normal business revenues," "production during the strike approximated 49% of coil and 62% plate normal business production," and "shipping during the strike approximated 77% coil and 69% plate normal business shipping."[111] In other words, even ignoring all non-output measures, even using years-old irrelevant down-period data, and even counting eleven days of full production as strike production, output curtailment was still down 51%, 38%, 23%, 31%, and 28% compared to the Ravenswood facility's normal operations.

Inexplicably, however, the Tribunal went on to hold—with absolutely no analysis or even mention of what standard for "substantial" it was applying: "Therefore, it is found there was not a substantial curtailment of normal business activity at the employer facility during the strike."[112] This holding[113] is clearly in error.

To constitute a stoppage of work, the strike must constitute "substantial curtailment of the employer's normal operations." "Substantial" means "of substance" or "material." "The stoppage need not be complete..."[114] It must have some effect on the employer. Writing in the 1950s, when focusing on output metrics was common, the Fifth Circuit wrote that in decisions

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[111] App. 00010.

[112] *Id.*

[113] The Tribunal characterized its conclusion as to whether the figures that it found represented a "substantial curtailment" as a "finding" and then in the next sentence its conclusion that there was not a stoppage of work as a "holding." App. 0010. As noted above, these are both holdings, not findings of fact.

[114] *Hatcher, supra* at 638, 130 S.E.2d at 120 (quotations and citation omitted).

concentrating on such measures, "[t]he critical breaking point would seem to be about a 20 to 30 per cent cut in production as being sufficient to establish a stoppage."[115]

Furthermore, one of the essential rules in a state's labor regulation is the requirement that "[t]he State should be neutral in labor disputes..."[116] The patent *non*-neutrality of the Tribunal's conclusion, however, can easily be seen by comparing its decision to find a curtailment of production between 28% to 51% as "not substantial" given the clear jurisprudence finding such figures "substantial" when the shoes were on the employees' feet. In case after case, courts—including this Court—have found that "substantial" in that context can mean as little as 15%.

In *Wolford*, the Board, the Circuit Court, and this Court all accepted "that generally a 25% reduction in hours worked would constitute good cause" under the "substantial change" rule.[117] Similarly, in *Glass*, the employer added five or six hours of work to the employee's week. The Board of Review disqualified the employee because she quit her job voluntarily without good cause.[118] On appeal, this Court reversed the Board, holding that the extra five or six hours—*i.e.*, just a *15%* increase—constituted a "substantial unilateral change" in the conditions of her employment, an excuse for quitting under the Act.[119]

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[115] Jerre S. Williams, *The Labor Dispute Disqualification—A Primer and Some Problems*, 8 VAND. L. REV. 338, 340 (1955).

[116] *Lee-Norse Co.*, 170 W. Va. at 167, 291 S.E.2d at 483.

[117] 182 W. Va. at 676, 391 S.E.2d at 366 (citing syl. pt. 2, *Murray v. Rutledge*, 174 W. Va. 423, 327 S.E.2d 403 (1985) (citing Pennsylvania case calling a 30% reduction in pay a "substantial change")).

[118] 200 W. Va. at 183, 488 S.E.2d at 458 (citing W. Va. Code § 21A-6-3(1)).

[119] 200 W. Va. at 183-84, 488 S.E.2d at 458-59. *See also Brewster v. Rutledge*, 176 W. Va. 265, 342 S.E.2d 232 (1986) (holding that night watchmen whose pay was increased but then restored *to the original level* and who was reassigned to perform some janitorial work instead of all night watchman work had suffered a "substantial unilateral change in the conditions of employment"); *Steinberg Vision Assoc. v. Unemployment Comp'n Bd. of Rev.*, 624 A.2d 237, 240 (Pa. Commw. Ct. 1993) (noting that "a 14.2% wage reduction is at the cusp of what is considered to be a substantial impact"); *IBP, Inc. v. Aanenson*, 452 N.W.2d 59, 67 (Neb. 1990) (observing that a curtailment of about 30% is generally enough to be substantial);

No "remedial purpose" doctrine justifies allowing employees to benefit from a rule defining "substantial" as low as 15% but refusing to accept a 28% to 51% diminution in an employer's output a "substantial curtailment" of its normal operations. When the employees' oxen are the ones getting gored, "substantiality is measured by the impact on the employee, and whether the change involves any real 'difference' in employment conditions."[120] The same test should apply to employers. And as repeatedly demonstrated here, the impact on Constellium Ravenswood from salaried employees' dire work conditions and the curtailment of work undone, product not made and not shipped, orders, customers, goodwill lost, and revenues not generated as a result of the strike can hardly be overstated. Even accepting the Tribunal's erroneously low output figures, there was a "substantial curtailment of the employer's normal operations" at the Ravenswood facility during the strike; there was, therefore a "stoppage of work"; and the Claimants should have been disqualified.

Accordingly, this Court should set aside the judgment of the Circuit Court of Kanawha County, and remand with directions to remand to the Board of Review for entry of a ruling disqualifying the Claimants from the receipt of unemployment compensation benefits.

Lou Stecher, Inc. v. Labor & Indus. Relations Comm'n, Div. of Emp. Sec., 691 S.W.2d 936, 940 (Mo. Ct. App. 1985) (approving of "20 to 30 percent cut in production" standard).

[120] *McCarthy v. Unemployment Comp. Bd. of Review*, 829 A.2d 1266, 1272 (Pa. Commw. Ct. 2003) (applying same "substantial unilateral change in the terms of employment" that West Virginia law recognizes).

D. THE CIRCUIT COURT ERRED BY AFFIRMING THE BOARD OF REVIEW'S REJECTION OF FEDERAL PREEMPTION UNDER THE NATIONAL LABOR RELATIONS ACT, WHERE IT INTERPRETED OUR UNEMPLOYMENT COMPENSATION STATUTE TO GIVE EMPLOYERS MORE "INCENTIVE TO BARGAIN WITH THE STRIKERS" AND TO "BALANCE THE BARGAINING POSITION" OF THE PARTIES.

Even if it were correct as a matter of state law, the Board of Review's interpretation of the work stoppage requirement serves to *regulate* and dramatically shift the balance of the collective bargaining process for employers and unions subject to the NLRA.[121]

Under West Virginia's unemployment compensation statute, the Board of Review evaluated the assessment of whether Constellium Ravenswood's operation had suffered a "substantial curtailment" in production as a result of a labor dispute, even though employees had voluntarily decided to strike and cease working.

Notably, the Board of Review upheld the Tribunal's finding that conditioning the granting of unemployment compensation to strikers on the employer's continued operation aims "*to balance the bargaining positions* of the claimants and the employer regarding cash flow; if the employer plant continues to produce during the strike, then the West Virginia Statute permits the claimants to receive unemployment compensation benefits during the strike."[122] The Board of Review's ruling improperly affirms the decision that the state should step into the collective bargaining process to give employers more "incentive to bargain with the strikers," and "to balance the bargaining position" of the parties.[123] Affirming the decision to re-balance the

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[121] 29 U.S.C. § 151, *et seq.*

[122] App. 0009 (emphasis added).

[123] App. 0006-0007.

collective bargaining process—as linked to the "work stoppage requirements"—is in direct conflict with federal labor law.

The Supreme Court has long explained that states are prohibited from inserting themselves into the collective bargaining process by regulating the use of economic weapons and other forms of economic self-help by employers and unions. In enacting the NLRA, Congress intended that the use of economic self-help was "to be controlled by the free play of economic forces."[124] An employer's decision to keep its operation running to some degree during a strike, whether by using salaried replacements or outside temporary or permanent replacements, is a quintessential "self-help" strategy for employers when the bargaining unit chooses to go out on strike.[125] Because Congress intended such "self-help" methods to be "unrestricted by any governmental power to regulate,"[126] the National Labor Relations Board ("NLRB") *and the states* are precluded from restricting or regulating such techniques. Because states must remain neutral when it comes to the balance of bargaining power between labor and management, they are specifically barred from passing legislation or taking administrative action that, even arguably, could tip the scales.[127]

Recently, a federal court struck down a Hawaii statute governing employees' use of sick leave that applied only to unionized employers with one hundred or more employees.[128] By

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[124] *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Relations Comm'n*, 427 U.S. 132, 144 (1976) ("*Machinists*").

[125] *Belknap, Inc. v. Hale*, 463 U.S. 491, 493 (1983); *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938).

[126] *Machinists*, 427 U.S. at 145.

[127] *See Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148, 1154-55 (4th Cir. 1992) (striking down interpretation of West Virginia's Neutrality Statute that restricted police officers from stopping violence and blocking of property access during labor disputes, as under that interpretation "the free zone of economic forces [in labor disputes] required by law is an impossibility.").

[128] *See Haw. Pac. Pacific Health v. Takamine*, No. 11-706, 2012 WL 6738548 (D. Haw. Dec. 31, 2012).

restricting only unionized employers, the statute "impermissibly favor[ed] unions and employees over employers" and thereby shifted the balance of power in negotiations over sick leave to unions and employees.[129] Accordingly, the statute was not a neutral, minimum labor standard but rather an attempt to tip the scales of bargaining power in favor of organized labor.[130]

Similarly, burdening an employer with unemployment compensation liability, tied to its protected right to continue some or all its operations during a strike, is not a neutral minimum standard. Instead, it effectively penalizes an employer's use of an undisputedly lawful bargaining tactic and thus is designed to tip the scales of bargaining power in favor of unions.[131] In affirming the Tribunal, the Board of Review has impermissibly placed its thumb on the scales to "balance the bargaining positions" of the parties. This approach violates Congress's clear mandate that states may not become involved in the collective bargaining process under the NLRA.

Although states have some discretion to grant or deny unemployment compensation to strikers, here, the Board of Review has overstepped permissible state action.

In *New York Telephone Co. v. New York State Dep't of Labor*, the Supreme Court held that New York could *categorically* provide unemployment compensation to strikers after seven weeks of striking or being locked out, as the decision did not involve an assessment of an employer's lawful bargaining tactics.[132] The New York statute and the Board of Review's ruling in the instant

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[129] *Id.* at *4–5.

[130] *Id.* at *5.

[131] *Id. See also San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 247 (1959) ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

[132] 440 U.S. 519, 537 (1979); *see also Baker v. General Motors Corp.*, 478 U.S. 621, 635 (1986) ("Thus, *New York Telephone Co.* makes clear that a State may, but need not, compensate actual strikers even though they are plainly responsible for their own unemployment.").

matter are neither comparable nor harmonious. While a state may enact applicable minimum labor standards, including categorically granting or denying unemployment compensation during labor disputes, it may not use its unemployment compensation statutes to *regulate bargaining behavior by the employer or the union.*[133]

By singling out only those employers who resort to lawful self-help techniques during a strike, with the admitted, stated goal to "balance the bargaining positions," the Board of Review has invaded the congressionally-mandated "free zone [for collective bargaining] from which all regulation, 'whether state or federal', is excluded."[134] Unsurprisingly, and despite *New York Telephone*, other courts have rejected unemployment compensation laws and decisions that evaluated bargaining behavior or other protected conduct in the decision-making process.[135]

Overall, the interpretation of the work stoppage requirement, contingent on the employer's curtailment of operations, is preempted by federal labor law because it targets an employer's self-help in response to a strike and undermines the free collective bargaining process mandated by the NLRA.[136] And, the Board of Review made plain its intent to intrude on the bargaining process: "So, if the employer plant continues to produce products and generate revenue during a strike,

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[133] *Machinists*, 427 U.S. at 147–48; *New York Tel.*, 440 U.S. at 564 ("[t]he differences between state laws regulating private conduct and the unemployment benefits program [in New York] are important from a preemption perspective.").

[134] *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 111 (1989).

[135] *See, e.g.*, *United Steelworkers of Am. v. Johnson*, 830 F.2d 924, 929 (8th Cir. 1987) (finding preempted South Dakota's denial of unemployment compensation based on union membership status, as the state made a "skewed application of its facially neutral test" that "interferes with the congressional objective of protecting equally those who choose to participate and those who choose not to participate in organized labor"); *Decker Coal Co. v. Hartman*, 706 F. Supp. 745, 747–48 (D. Mont. 1988) (holding that receipt of unemployment compensation tied to the commission of unfair labor practices by the employer meant that "the *effect* of the statute is to regulate or prohibit [the employer's] conduct" in bargaining).

[136] *Haw. Pac. Health*, 2012 WL 6738548, at *4–5.

then the employer may be in a better financial cash flow position to negotiate a more favorable employment contract."[137] The evaluation of Constellium Ravenswood's bargaining strength and awarding benefits to diminish that strength is an obvious example of the state involving itself in an exclusively federal area.

Federal law unquestionably granted Constellium Ravenswood an *unrestricted right* to use its own salaried employees during a labor dispute to keep as much production going as possible to satisfy its customers, and thus protect the striking employees' jobs once the labor dispute ends. This approach allows for free economic forces to control the bargaining outcome, as intended by Congress. The upsetting of that natural balance is not permitted and runs afoul of the preemption doctrine.

The Board of Review adopted the Tribunal's factual assessment of Constellium Ravenswood's bargaining strategy and tactics.[138] States and their agencies may not base unemployment compensation decisions by evaluating an employer's strike contingency planning. Thus, multiple courts have struck down state or local attempts to reduce employer bargaining leverage by restricting the use of temporary or permanent replacements during work stoppages.[139]

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[137] App. 0008.

[138] Specifically, the Tribunal found: "The employer had a plan to continue operating the facility, which plan was implemented during the strike. The salaried employees were able to continue to operate the casting department to produce ingots and then process ingots into coils and plates for shipping to customers. The production and shipping continued, at a reduced rate, at the employer facility during the strike." App. 0007.

[139] *See, e.g., 520 S. Mich. Ave. Assoc., Ltd. v. Devine*, 433 F.3d 961, 965 (7th Cir. 2006) (holding that Illinois law that criminalized contracts for replacement workers was preempted by NLRA); *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1337–38 (D.C. Cir. 1996) (striking down presidential executive order that restricted federal contractors from hiring permanent replacements during strikes because it was "regulatory in nature and [] preempted by the NLRA which guarantees the right to hire permanent replacements"); *Greater Boston Chamber of Commerce v. City of Boston*, 778 F. Supp. 95, 97–98

The Board of Review has penalized Constellium Ravenswood for invoking its protected right to use replacement workers during a strike, and thus reduces Constellium Ravenswood's bargaining leverage. This interference with Constellium Ravenswood's right to use replacement personnel provides an additional ground to find that federal labor law preempts the Board of Review's decision.

Finally, although not addressed by the Board of Review, the three statutory exceptions in § 21A-6-3(4) *required* the Tribunal to parse the employer's proposals and negotiation strategies, with the corresponding ability to grant or deny unemployment benefits to the claimants based on this assessment. The three exceptions in W. Va. Code § 21A-6-3(4) required (1) determining if the value of bargaining proposals is "substantially less favorable than those prevailing for similar work in the locality;" (2) deciding whether there has been a denial of the right to engage in "collective bargaining;" or (3) determining if the employer has shut down a plant to "force a wage reduction, changes in hours or working conditions."

Although the Board of Review did not rely on the exceptions in its decision, it adopted the Tribunal's findings, including its review of the exceptions and its assessment of Constellium Ravenswood's bargaining positions and tactics, in its entirety. Because these exceptions overlap with the NLRB's jurisdiction—and in some cases even *exceed* the NLRB's authority to become involved in a labor dispute—the three statutory exemptions undermine the NLRA's statutory scheme. Simply stated, well-established Supreme Court precedent shows that federal law preempts W. Va. Code § 21A-6-3(4).

(D. Mass. 1991) (finding that city ordinance limiting ability to hire replacement workers during strikes and lockouts was preempted and would "directly interfere with the bargaining process intended by Congress").

The first exception directly conflicts with the fundamental principle of labor law that an employer need not offer terms or conditions "substantially" more or less favorable than those prevailing in the region. The NLRA and Supreme Court precedent are clear that neither employers nor unions are compelled to agree to a proposal, make concessions, or come to an agreement.[140] By giving the Tribunal and the Board of Review the authority to grant or deny benefits based on the substance of the employer's proposal or goals, the statute effectively regulates bargaining behavior that Congress intentionally left unregulated.

Moreover, the second exception involves evaluating whether employees have been denied the right to engage in "collective bargaining," which directly overlaps with the NLRB's authority to mandate good faith bargaining under Sections 8(a)(5), 8(b)(3), and 8(d) of the NLRA. West Virginia cannot establish "state-imposed" standards for what constitutes "good faith" collective bargaining, under pain of granting unemployment benefits to employees as a sanction on top of NLRB remedies, where in the state's view the employer has denied employees the right to good faith bargaining.[141] Only the NLRB may make bargaining determinations and issue remedies under its exclusive authority under Section 8 of the NLRA.

Finally, with the third exception, the West Virginia statute looks to whether an employer has exercised its lawful right not to operate to obtain concessions on wages or other terms of employment, with a resulting penalty from the state for taking such action. Granting unemployment compensation benefits contingent on an employer's shutting down operations

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[140] *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937); *H.K. Porter, Inc. v. NLRB*, 397 U.S. 99, 107–08 (1970).

[141] *Garmon*, 359 U.S. at 244 ("To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.").

penalizes the employer's unencumbered right to "shut down" their operations to convince their employees to accept their proposals.[142] Thus, the West Virginia statute seeks to impact and balance a process—collective bargaining—that Congress has mandated must remain free from state interference.

In sum, the three statutory exceptions form a framework that itself is preempted by federal labor law to the extent that it allows the state and its administrative agencies to influence the content of collective bargaining agreements, regulate bargaining conduct, or limit the ability of an employer to choose to cease operating during a strike. The granting or denial of unemployment benefits may not turn on such factors.

VI. CONCLUSION

WHEREFORE, the Petitioner, Constellium Rolled Products Ravenswood, LLC, respectfully requests that this Court set aside the judgment of the Circuit Court of Kanawha County and direct that this case be remanded to the Board of Review for entry of an order ruling that the Respondents, Earl B. Cooper, et al., were disqualified from receiving unemployment compensation benefits and that the challenged provisions of the West Virginia unemployment compensation statute or their application, in this case, are preempted by federal law.

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC

By Counsel

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[142] *See Am. Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965).

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I served the foregoing "Brief of the Petitioners" by effectuating the deposit of a true copy in the United States mail, postage prepaid, addressed as follows:

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