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.

REPLY BRIEF OF THE PETITIONER

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I. INTRODUCTION

The Claimants' brief contains no meaningful response to *any* of the legal errors committed by the Administrative Law Judge Tribunal, the Board of Review, and the Circuit Court, warranting a reversal and remand with directions for entry of judgment for the Petitioner, Constellium Rolled Products Ravenswood, LLC ("Constellium Ravenswood").

II. ARGUMENT REGARDING DIRECT APPEAL

The version of the West Virginia unemployment compensation statute at issue in this case[1] disqualified a claimant from receiving benefits for any period during which a "labor dispute" caused a "stoppage of work."[2] The statute did not define "stoppage of work," but jurisprudence interpreting the phrase asks the question of whether a strike like the one at issue in this case caused a "substantial curtailment" of the employer's overall work during the strike period. In other words, did the strike cause the employer to accomplish overall substantially less work during the strike than it would have accomplished overall but for the strike? If that comparison shows a substantial curtailment of work, then the striking claimants are disqualified. Here, the record evidence is clear that the Claimants' prolonged work stoppage substantially curtailed Constellium Ravenwood's operations disqualifying them from receiving unemployment benefits.

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[1] The version of the W. Va. Code § 21A-6-3(4) (2012) in effect at the time of the strike at issue in this case provided, "Upon the determination of facts by the commissioner, an individual is disqualified for benefits: . . . (4) For a week in which his or her total or partial unemployment is due to a stoppage which exists because of a labor dispute at the factory, establishment or other premises at which he or she was last employed[.] The 2012 version of the statute is applicable in this case. *Verizon Services Corp. v. Board of Review of Workforce West Virginia*, 240 W. Va. 355, 357 n.2, 811 S.E.2d 885, 887 n.2 (2018). In 2017, the Legislature amended W. Va. Code § 21A-6-3(4) (2017) to disqualify an individual from receiving unemployment compensation benefits in any work "in which he or she did not work as a result of . . . [a] strike or other bona fide labor dispute which caused him or her to leave or lose his or her employment."

[2] W. Va. Code § 21A-6-3(4).

The Claimants' brief misstates the statute, arguing they "are entitled to benefits if they prevail on any one of the exceptions to disqualification under 21A-6-3(4): (1) Was there a stoppage of work? (2) Were the employees required to accept wages, hours or conditions of employment less favorable than those prevailing for similar work in the locality? (3) Were the employees denied the right of collective bargaining under generally prevailing conditions?"[3] Claimants' item "(1)," however, is the disqualification condition itself (the only thing relevant in this case), not "one of the exceptions to disqualification." Their "(2)" and "(3)" are the disqualification exceptions to condition (1) (issues that are not relevant in this case).

A. 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 CONSTELLIUM RAVENSWOOD'S SALARIED AND NON-UNION EMPLOYEES TO ABANDON THEIR JOBS AND WORK LONG HOURS PERFORMING THE DUTIES OF THE STRIKING WORKERS.

The Claimants employ distinctions without differences between their case and the cases that Constellium Ravenswood discussed in its opening brief in an effort to avoid the clear and simple principle for which those cases stand: Myopic focus on production figures is an invalid way to determine whether there has been a stoppage of *work* during a strike.[4]

Claimants assert that *Travis v. Grabiec*, 287 N.E.2d 468 (Ill. 1972), is "fully distinguished from the situation" here[5] because *Travis* "involved a group of thirteen different unions in multiple departments where construction work was halted and transportation of product by truck and barge

[3] Resp. Br. at 2.

[4] Resp. Br. at 15-17.

[5] Resp. Br. at 15.

practically terminated."[6] Constellium Ravenswood is unsure how such immaterial facts "fully distinguish" *Travis* from this case. As the passage from which the Claimants quoted made clear, courts must look *not* just at decreased production, but at the totality of decreased production, business revenue, service, number of employees, payroll, and man hours, all of which were substantially curtailed during the strike here. As noted, the number of working employees plummeted during the Claimants' strike, and service work within the plant was more or less *completely* halted. By focusing too narrowly on a tree or two, the Claimants have missed the forest: "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.*"[7] Indeed, immaterial differences in how many unions worked in what departments aside, *Travis* could hardly more clearly describe the situation in the instant case and the rule that should govern it, as thoroughly covered in Constellium Ravenswood's opening brief.

Contrary to the Claimants' ubiquitous rhetoric, there is no "interesting paradox of consistency or inconsistency in [the Company's] position ..."[8] Instead, *Laclede Gas Co. v. Labor & Indus. Relations Comm'n of Mo.*, 657 S.W.2d 644 (Mo. Ct. App. 1983), stands for the simple rule that when an employer assigns its non-union employees to cover for its striking union employees and those non-union employees are unable to do any of their normal work and were only able to maintain some semblance of production by putting in unsustainable, Herculean hours, there has

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[6] *Id.*

[7] 287 N.E.2d at 470 (emphasis added).

[8] Resp. Br. at 16.

been, by any rational definition of the term, a substantial curtailment of work. Thus, "[t]he curtailment of most management activities must be given equal weight with production under the statute,"[9] and "the better reasoning is that delivery of final product is not the sole determinate of a stoppage of work."[10] "The better view," repeated the Court, "is that whether the *entire operation of the employer* has returned to normal is the deciding issue."[11]

The Claimants offer no reason to believe that this logical, rational interpretation of Missouri's stoppage-of-work disqualification does not apply to West Virginia's.

The Claimants characterize the result in *Boguszewski v. Comm'r of Dept. of Emp. & Training*, 572 N.E.2d 554 (Mass. 1991), as being that where production "remained at normal levels during the dispute" but the employer's other functions, like "maintenance, inspection, testing, installation or replacement, clerical and administrative functions were either not performed or were performed at levels between 3% and 50% of normal," there is "a substantial curtailment" of work.[12] These facts should sound familiar: They are even more generous to the *Boguszewski* claimants than the facts presented here are to the Claimants, where production did *not* remain at normal levels, and all other work dropped to practically nothing. The Claimants' effort to distinguish *Boguszewski* is therefore difficult to understand.

Perhaps recognizing this, they point to *Hertz Corp. v. Acting Dir. of Div. of Emp. & Training*, 771 N.E.2d 153 (Mass. 2002), where, the Claimants say, the Massachusetts Supreme Judicial

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[9] 657 S.W.2d at. 650.

[10] *Id.*

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

[12] Resp. Br. at 16.

Court "reached the opposite result" and "found no work stoppage."[13] Of course it did. What the Claimants have "failed to cite"[14] is: (1) that in *Hertz,* but unlike here, while non-union workers performed the union workers' work, they *were also able* to perform "some of the normal functions of management,"[15] (2) that in *Hertz,* but ***very*** unlike here, there was "no reliable evidence of an increase in customer complaints due to the strike,"[16] and (3) that in *Hertz,* but unlike here, the reduction in such non-union workers' work was "minor" and thus did not constitute a substantial work stoppage."[17] Here, the non-union workers were *unable* to perform their own jobs during the strike, and the consequent reduction in that work was hardly "minor," but nearly complete. And here, there were not just customer complaints, but cancelled orders and the loss of customers and sales. The instant case could hardly be any more different from *Hertz.*

B. THE CIRCUIT COURT ERRED BY AFFIRMING THE BOARD OF REVIEW'S USE OF A PLANT PRODUCTION METHODOLOGY WHICH (1) 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; (2) 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 (3) 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 the Claimants themselves acknowledge, there is "an almost unanimous agreement among the other [*sic*] 50 states" that analysis of curtailment of work "refers to the stoppage of the

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[13] *Id.* at 17.

[14] *Id.*

[15] 771 N.E.2d at 156.

[16] *Id.*

[17] *Id.*

employer's operations rather than to a mere cessation of *employment by claimants* ..."[18] That is, courts must not over-simplistically compare only the work that the Claimants would have done but for their strike to the same work that others did in their absence during the strike. Instead, they must compare *all* of the work that would have been done at the employer's facility during the strike to *all* of the work that was actually done during the strike. The statute does, after all, base disqualification on the stoppage of "*work*," not the stoppage of production.

First, then, the Tribunal was required to compare *all* "work" that would have taken place at the Ravenswood facility during the strike but for the strike, to *all* "work" that was actually done there during the strike. It is beyond dispute, however – indeed, the Claimants do not dispute – that that is *not* what the Tribunal did. Contrary to the Claimants' mischaracterization of the undisputed evidence, simply forming aluminum is not "*the*" normal work activity at the plant.[19] It is merely *a* normal work activity at the plant. As explained in Constellium Ravenswood's opening brief, governing law required the Tribunal to compare strike-level versus but-for-strike-level product design, process design, marketing, sales, production, shipping, logistics, maintenance, safety, personnel, management, finance, and a host of other "work" normally done at the Ravenswood facility by both the union and salaried employees when everyone is doing his or her normal work.[20]

Instead, however, contrary to the governing law, the Tribunal looked only at the work that the Claimants would have done had they not gone out on strike – *i.e.*, making shippable product – versus what shippable product was made during the strike. The Tribunal *completely ignored* the

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[18] Resp. Br. at 10-11 (emphasis added).

[19] Resp. Br. at 6 (emphasis in original).

[20] Pet. Br. at 11.

nearly *total* curtailment of all of the other work that the salaried employees would have done at *their* jobs during the strike but that they could not do because they were struggling as best they could to make at least some product and to keep the plant from burning down, while Mr. Cooper and his fellow Claimants were on strike.

This was not factual error. It was clear legal error, a misapplication of the governing case law, and the Board of Review and the Circuit Court were wrong to affirm the Tribunal's misinterpretation. The Claimants do not even address this error in their response.

Even ignoring the Tribunal's failure to go beyond simply measuring pounds of aluminum, it did not even do that correctly. The Tribunal's calculations were neither "careful" nor "thorough," as the Claimants suggest.[21] Instead, the Tribunal based its extrapolation of what would have been made but for the strike on historical data from periods that were wholly different from the strike period (including periods when the union was out on strike during 2010), and it used substantial full-capacity, non-strike production figures in its calculation of the supposed curtailed, strike-level production. Finally, the Tribunal ignored the undisputed evidence that during the strike, the Company incurred revenue losses that would be felt in the future.

The only legally relevant question does not ask courts to compare apples to oranges by dividing what the employer did three years before the strike into what was actually done during the strike. Instead, it requires courts to ask whether the strike "curtailed" the employer's work: *i.e.*, to find the ratio of apples to apples by dividing what would have been done *during the strike* but for the strike into what was actually done *during the strike.*

[21] Resp. Br. at 7.

In *some* cases, it might be appropriate to extrapolate what work would have been done during the strike from historical data, but *only if it made sense to do so in that particular case*: *i.e.*, where the proponent of that historical data lays a foundation showing that such data is indeed a valid predictor of what would have happened during the strike but for the strike.

But in other cases—like this one—where the only available historical data is from periods during which the employer accomplished significantly less work than the sole evidence showed it would have during the strike, then it is clear legal error to use such irrelevant historical data as evidence of the work that would have been done but for the strike.

Thus, for example, in a case where the sole, undisputed evidence is that the historical data reflects output during a period when demand for the employer's products was at all-time lows,[22] but that during the strike, demand for the employer's product was at all-time highs, then it would be error to consider such historical data in ascertaining the work that would have been done but for the strike.

Likewise, in a case where the sole, undisputed evidence is that the historical data reflects output during a period when the employer had its single most important piece of equipment offline for repair or replacement *for months*, but where that same undisputed evidence showed that no such down-time would have been experienced during the strike, it would likewise be error to consider such historical data.

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[22] From January 2010 until at least mid-2011, for example, the worldwide economic downturn had so greatly depressed demand for the Ravenswood facility's products that Constellium Ravenswood was in "survival mode" just "scraping to get by," "losing money[,] and not surviving at th[o]se incomes" (App. 1156-1157).

But that is exactly what the Tribunal did here. In determining the "but for the strike" production that would have taken place during the strike, the Tribunal used historical data from periods of depressed demand for Constellium Ravenswood's products, even though demand during the strike would have been at record high levels.[23] The Claimants do not even address this problem with their historical data, much less dispute it. They simply ask the Court to do what the Tribunal, the Board of Review, and the Circuit Court did: Ignore it. The Tribunal also used data from months where a critical piece of machinery (the stretcher) was offline, but it is undisputed that it could have been running at full capacity during the strike but for the Claimants' refusing to use it. Again, the Claimants do not dispute this; they simply ignore it.

On the other hand, Constellium Ravenswood offered the sole, undisputed, unrebutted data showing the production that would have occurred during the strike had the Claimants not crippled the facility's capabilities by going on strike (including what output had been in the *comparable* months just before the strike). The Tribunal (and, in affirming, the Board of Review and Circuit Court) were clearly wrong to reject that sole relevant evidence and instead adopt the irrelevant years-old historical data.

The Claimants barely address this issue in their response, simply saying, without any explanation, that the Tribunal was right. Perhaps in an effort to defend the Tribunal's use of this incomparable – and thus irrelevant – historical data, the Claimants did assert—with no evidence—

[23] At the hearing before the Tribunal, the Claimants 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* prior to the strike; they 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.

that "[b]usinesses are not run on a monthly basis, but on a yearly basis . . . ."[24] They then attempt to create a conflict in Constellium Ravenswood's observation that its business is not subject to annual or seasonal cycles, but is subject to industry demand. The Tribunal's error was obliviously in assuming that sales in September of one year accurately predict sales in September of some later year.

The Claimants (and the decisions below) have missed the point: The sole evidence was that Constellium Ravenswood's business is subject only to its *customers' demands*. When its customers' industries are doing poorly, as was the case in the periods that the Tribunal based its "but for strike" figures on, demand for, and production of, Constellium Ravenswood's goods were down. But as the undisputed evidence clearly demonstrated, during the time when the Claimants chose to walk off their jobs, Constellium Ravenswood's customers' industries were doing record-breaking business, and demand for Constellium Ravenwood's products would have been equally great.

The Tribunal's comparison of non-comparable "historical" sales during periods of low industry demand and Constellium Ravenswood's inability to make product due to unprecedented equipment outages and an earlier strike – *i.e.*, apples—to the production that would have taken place during the strike – *i.e.*, oranges – as legal error.

Just as bad, in computing the curtailed-capacity work actually done during the strike, the Tribunal admitted that it instead failed to back out a significant amount of *full*-capacity, *non-strike* work—eleven of sixty-one days, in fact—a mistake that badly overinflated the amount of

[24] Resp. Br. at 14.

production that supposedly occurred "during" the strike.[25] Furthermore, the Labor Dispute Tribunal failed to take into account the considerable effect of the future losses of work that the plant undisputedly suffered because of the strike. Again, however, the Claimants do not attempt to defend the Tribunal's mistakes. Ironically, Claimants' historical data (discussed *supra*) even covered a period in 2010 during which the facility was shut down for weeks due to a labor dispute. So in addition to using *full*-capacity, *non-strike* production figures to determine what was done *during the strike*, the Tribunal also used *curtailed*-capacity, (2010) *strike* production figures to determine what would have been done *but for the strike*. Having stood this percentage on its head, it is hardly any wonder that the Tribunal's percentages were so wrong.

It is unclear from the Tribunal's decision what percentage it used as the cut-off for how much "curtailment" is "substantial." As Constellium Ravenswood demonstrated in its brief, the work that employees other than the Claimants would normally have done but for the strike was practically 100% curtailed during the strike, and even the work that the Claimants would normally have done but for the strike was also substantially curtailed during the strike.

Citing *Cumberland & Alleghany Gas Co. v. Hatcher*, 147 W. Va. 630, 130 S.E.2d 115 (1963), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982), and *Homer Laughlin China Co. v. Hix*, 128 W. Va. 613, 37 S.E.2d 649 (1946), *superseded on other grounds as stated in Pickens v. Kinder*, 155 W. Va. 121, 181 S.E.2d 469 (1971), the Claimants assert that West

[25] In computing the supposed curtailed-capacity, strike-level production, the Labor Dispute Tribunal used full-month production figures for August and September 2012, even though for eleven of those sixty-one days, the plant was *not on strike*: "The tribunal is mindful that 18% of the August/September 2012 period did not include the 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." (App. 0008).

Virginia case law requires that work be curtailed between 75% and 80%, *i.e.*, that no more than 15% or 20% of the work that would have taken place but for the strike actually did take place.[26] That is *not* what those cases said.

Homer Laughlin held that:

> [a] strike, by employees of the operator of a factory, which results in curtailment to the extent of approximately seventy-five per cent of the production of one of its departments, and arises from breach of a wage contract by the striking employees, creates a stoppage of work which exists because of a labor dispute, within the meaning of the statute . . . .

Id., Syl. pt. 1. The Claimants have silently inserted "only" into this Syllabus Point to make it read "*only* a strike . . . ." But that is not what the Court held. That figure was used in the Syllabus Point, without any further discussion, simply because that figure was what the case presented.[27]

Relatedly, the Claimants also make much of the fact that Constellium Ravenswood did not put on additional workers after the Claimants returned from the strike to make up for "accumulated backlog" and say that this somehow takes this case out of the "rule" that such a finding is "required under *Cumberland*" in order for there to have been a work stoppage.[28]

First, that, too, is not the rule; *Cumberland* does not "require" evidence that post-strike, the employer hired additional workers or worked overtime to catch up a strike-induced backlog. It said only that no such evidence was present in that case.[29] Once again, the Claimants have inserted an "only" into a case where the Court chose not to put one.

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[26] Resp. Br. at 11, 14-15.

[27] *See* 128 W. Va. at 617–18, 37 S.E.2d at 652–53.

[28] Resp. Br. at 14.

[29] *See* 147 W. Va. at 636, 130 S.E.2d at 119 ("Withrow testified that, when normal operations were resumed after the settlement of the labor dispute, it was not necessary to employ additional personnel or to

Second, the undisputed evidence clearly explained one reason why this was so: because in Constellium Ravenswood's highly competitive market, customers are not happy to wait around indefinitely while the Claimants decide to come back to work. Instead, they simply cancel their orders and take their business elsewhere,[30] a fate that Constellium Ravenswood suffered because of the Claimants' strike,[31] but a factor that the Tribunal failed to take into account.

Third, the Claimants' assertion is misleading. They carefully crafted their statement that "there was no testimony ... showing any accumulated backlog of work or service *in the product or shipping or maintenance service categories*,"[32] leaving the Court with the impression that there was no backlog of work. As their careful editing makes clear, however, the Claimants plainly knew that such an impression would be false:

> Q Okay. With respect to the employees in your department, now that the labor dispute is over, is there a backlog of projects and work that employees normally would have performed had there been no labor dispute, that must now be worked through?
>
> A Yes. Throughout the year, every year, we have goals and objectives, and we have—through the year, of course, we establish timelier [*sic* timeline] for completion of projects or tasks, closure of gaps so to speak, and those were all put on hold. So, you know, we are delinquent in several areas as far as closing of gaps or completing

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place any regular employees on an overtime basis in order to take care of any backlog of work arising from the suspension of normal work.").

[30] "[A]t a certain point you disappointed them [your customers] too much, and they're going to look to our competitors." (App. 0298-99.) "When they [customers] have not received what they wanted at their time, they are generally not very happy about that. So in my role of supply chain, I am that liaison between sales and operation. They want to know, 'When am I going to get it? When are you going to be healthy? When are you going to be on time to give me confidence to give you another order?' So I have heard a lot of unhappy customers in the last couple of months, yes." (App. 0296.)

[31] *See, e.g.*, App. 0297 (explaining that just one week into the strike, Constellium Ravenswood's largest volume coil customer called and said, "We want to pull all of our orders for the balance of the year. We're going to fill them with your competitor. We don't trust you're going to fill our order on time to meet our production needs," and placed its orders with Alcoa, a competitor).)

[32] Resp. Br. at 14 (emphasis added).

> maybe a policy or procedure review. There's several corporate type things that we are working on, that we have to play catchup now and hopefully will be able to accomplish by year end or by the target date.
>
> Q Okay. So you're saying the backlog included reviews and corporate reports?
>
> A Yes, corporate assigned objectives, tasks, things that we had to—or have to do by year end or by a certain date. So, like I said, those have been put on hold and were put on hold during this period of time, so now we're playing catchup and hoping to be able to close those gaps.[33]

In fact, the backlog of work in the safety and environmental departments had yet to be cleared at the time of the Tribunal's decision.

Finally, the statement is false even as written. The evidence at the hearing was that the plant *did* suffer a backlog of production orders that it was unable to meet.[34] The strike *did* cause a significant backlog of work—in all areas of the plant, including production.

Constellium Ravenswood is unsure what "statistical hyperbole" is.[35] The Claimants appear to believe that it means applying basic math to the sole, undisputed record evidence. Similarly, the Claimants characterize Constellium Ravenswood's comparison of the work that "would have" taken place at the plant but for the strike, to the work that "actually" was done "an attempt to distract or distort" the issues.[36] But this comparison is *exactly what the law requires*. It was the Tribunal (the Board, the Circuit Court, and now the Claimants) who have "distracted and

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[33] App. 0262-63.

[34] *See, e.g.*, App. 0303 ("With the typical aerospace lead time of six months, we are going to be disappointing customers until probably April of 2013 on the last forecast I put together.... It's going to be a long time till we make plate customers happy again.").

[35] Resp. Br. at 13.

[36] *Id.*

distorted" the facts by failing to take into account all of the work done at the facility, rather than over-simplistically looking to just the work that the Claimants did before they went on strike, and by failing even to do that in a manner that is even remotely defensible.

C. 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.

The Claimants point out that the Supreme Court of the United States in *N.Y. Tele. Co. v. N.Y. State Dep't of Labor*,[37] held that New York's unemployment compensation provision "is *not* a 'state la[w] regulating the relations between employees, their union and their employer,' as to which the reasons underlying the pre-emption doctrine have their 'greatest force.' Instead, as discussed below, the statute is *a law of general applicability*."[38] In such a case, "the payments to the strikers implement a broad state policy that does *not primarily concern labor-management relations* . . . ."[39] As the Claimants further note, this Court has recognized that in circumstances when unemployment compensation is deployed as just such a "general purpose" weapon merely to combat unemployment, then *New York Telephone* might apply.[40] Again, however, the Claimants miss the point.

Here, the Tribunal could hardly have been any clearer in saying that its goal in awarding the Claimants unemployment compensation benefits was *not* combatting unemployment generally, but *specifically* to give the Claimants a boost to "even things up," because the Tribunal felt that the

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[37] 440 U.S. 519 (1979).

[38] *Id.* at 533 (emphasis added) (alteration in original) (citation omitted).

[39] *Id.* at 534 (emphasis added).

[40] Resp. at 19 (quoting *Roberts v. Gatson*, 182 W. Va. 764, 769 n.5, 392 S.E.2d 204, 209 n.5 (1990).)

Claimants' own decision to go on strike put them at some kind of a disadvantage in the collective bargaining negotiations: "During a strike, the claimants are not working, the claimants are not receiving pay; so the striking claimants have incentive to bargain since the claimants' family expenses continue to accrue and the claimants are without income."[41] Thus, concluded the Tribunal, the State would have to weigh in in order to be neutral: "The tribunal is careful to not intervene to favor one party over another party. However, *to balance the bargaining positions of the claimants and the employer* regarding cash flow,"[42] the Labor Dispute Tribunal decided to award the Claimants benefits.

The error in this logic barely needs explaining. Weighing in to restore a misperceived imbalance that was the natural result of free and fair negotiations is not "remaining neutral." It is "favoring one party over another." It is "regulating the relations between employees, their union and their employer."[43] Furthermore, the promise of unemployment compensation undoubtedly *prolonged the strike*, hardly serving the State's policy goals.

The State clearly stepped into the collective bargaining negotiations between Constellium Ravenswood and the Union and, misperceiving the Claimants to be at a disadvantage because, having gone on strike, they were not being paid, decided to "balance the bargaining positions of the claimants and the employer." Putting aside the fact that the Tribunal's assessment was clearly wrong, the undisputed evidence showed that Constellium Ravenswood's small cadre of non-union workers could not possibly have kept the facility afloat much longer – such assistance, intended not

[41] App. 0008.

[42] App. 0008-9.

[43] 440 U.S. at 533.

to serve the State's general policy of employment security, but *expressly intended to help one side in a labor dispute*, is preempted by the NLRA, and it is not excused either by *New York Telephone* or *Roberts*. To paraphrase an old adage, with neutrality like that, who needs enemies?

III. ARGUMENT REGARDING CROSS-APPEAL

The Claimants have filed what they term a "limited counter-appeal"[44] assigning error to the Circuit Court's ruling that three additional issues they had raised before the Board of Review were "technically moot."[45] Two of the three issues in the cross-appeal arise from a since-superseded provision in W. Va. Code § 21A-6-3(4) (2012), which provided that a claimant was not disqualified from receiving unemployment compensation benefits where he or she was "required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality" or was "denied the right of collective bargaining under generally prevailing conditions."[46] The third issue involved the Tribunal's decision to quash part of a subpoena purporting to require production of certain communications between Constellium Ravenswood and its parent entities concerning the labor dispute.[47] As detailed below, the issues raised in the cross-assignments of error have no merit as a matter of law.

Before the Tribunal, the Claimants sought subpoenas *duces tecum* to compel production of, *inter alia*, documents that they "believe[d] [would] specifically show that foreign nationals were controlling all economic issues in the contract negotiations between [the union local] and [the

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[44] Resp. Br. at 21.

[45] App. 1011.

[46] The 2017 revisions to W. Va. Code § 21A-6-3 (2017) deleted and replaced these provisions of the statute. *See* footnote 1, *supra*.

[47] App. 0015-0017.

Company],"[48] which, the Claimants opine, "is a violation of the National Labor Relations Act."[49]

The subpoenas sought:

> 1. All communications, memos, emails, text messages, videos and pictures between Constellium Rolled Products Ravenswood, LLC employees or its agents, including AFIMAC, regarding union members of Constellium Rolled Products Ravenswood, LLC, regarding the labor dispute between United Steelworkers ("USW") Local Union 5668 and Constellium Rolled Products Ravenswood, LLC.
>
> 2. All internal communications, memos, emails, text messages or videos between Constellium Rolled Products Ravenswood, LLC between union and non-union employees regarding contract negotiations, replacement workers, or any other information regarding the formation of contract proposals for a collective bargaining agreement between Constellium Rolled Products Ravenswood, LLC and USW Local 5668.
>
> 3. All communications, memos, emails, text messages or videos between Constellium Rolled Products Ravenswood, LLC employees and its agents and employees or any of its affiliates, and Appollo [*sic*] Global Management, LLC, or any of its affiliates, including Appollo [*sic*] Investment Fund VII, LP, Rio Tinto, Funds [*sic*] Strategique d'Investment FSI [*sic*], Constellium France SAS, Constellium Switzerland AG, and any other companies, affiliates or agents, regarding the proposed collective bargaining agreement between Constellium Rolled Products Ravenswood, LLC and USW Local 5668, including the use of replacement workers.[50]

Finding these confusing requests to be "vague, general and unnecessarily cumbersome,"[51] the Tribunal granted Constellium Ravenswood's motion to quash the subpoenas (and others not

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[48] App 0016.

[49] Resp. Br. at 22.

[50] Resp. Br. at 21.

[51] App. 1664-1665.

at issue in the Cross-Appeal).[52] The Circuit Court and Board of Review determined the issue concerning the subpoenas was moot.[53]

Before this Court, the Claimants contend for the first time that the Tribunal's order quashing their subpoenas constituted a denial of due process.[54] Additionally, the Claimants argued before the Tribunal that the "less than prevailing wages" exception and the "denial of the right of collective bargaining" exception to disqualification for unemployment benefits which, at the time, were contained in W. Va. Code § 21A-6-3(4) (2012), should prevent them from being disqualified from unemployment benefits.

The Tribunal rejected the Claimants' argument and held that neither exception applied because the Claimants were *not* required to accept wages, hours, or conditions of employment substantially less favorable than those prevailing for similar work in the locality and were *not* denied the right of collective bargaining under generally prevailing conditions. The Board of Review expressly did not address those latter two disqualification exception findings.[55] The Circuit Court found the issues to be moot.[56]

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[52] *Id.*

[53] App. 1011.

[54] Resp. Br. at 24-30.

[55] App. 0125-0126.

[56] App. 1011.

A. THE CIRCUIT COURT CORRECTLY REFUSED TO DISTURB THE QUASHING OF THE CLAIMANTS' SUBPOENAS *DUCES TECUM* AS VAGUE, GENERAL, AND UNNECESSARY CUMBERSOME, WHERE NO DUE PROCESS ISSUE WAS RAISED BELOW, AND THERE EXISTED NO EVIDENCE OF ANY DUE PROCESS VIOLATION OR LEGAL ERROR IN THE TRIBUNAL'S RULING.

The Claimants' line of reasoning on the issue involving the Tribunal's denial of their subpoena is impossible to follow. Rather than addressing the Tribunal's finding that the requests in their subpoena were "vague, general, or unnecessarily cumbersome," the Claimants head down several irrelevant paths that lead nowhere, the first of which was never raised below.

The Claimants initially style their argument as presenting a claim of denial of procedural due process. They exhaust several pages apparently making the point that administrative hearings such as those conducted during the unemployment compensation process must afford participants a modicum of due process which the Tribunal violated in some unspecified way.[57]

This vague claim appears for the first occasion in their cross-appeal to this Court. But this Court has been clear that it will not review questions which have not been decided by the lower court.[58] The Court has explained:

> Our general rule . . . is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered ... When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise issues [before this Court]. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefits of its wisdom."[59]

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[57] Resp. Br. at 24-29.

[58] *In re E.B.*, 229 W. Va. 435, 468, 729 S.E. 270, 303 (2012); Syl. pt. 2, *Duquesne Light Co. v. State Tax Dep't*, 174 W. Va. 506, 327 S.E.2d 683 (1984); Syl. pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958).

[59] *Whitlow v. Bd. of Educ. of Kanawha Co.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993).

Given that the Claimants raised no due process issue before the Circuit Court, they are precluded from raising any such claim before this Court. Thus, their primary argument on their cross-appeal fails as a matter of law.

Never once do the Claimants ever even attempt to show fault in the Tribunal's conclusion that their subpoenas were "vague, general and unnecessarily cumbersome."[60] Certainly, the mere fact that the Tribunal considered the Claimants' requested subpoenas and found them lacking does not itself indicate a denial of due process. To the contrary, it shows that the Tribunal analyzed the subpoenas and articulated the reasons for denying them. The Claimants have made no effort whatsoever to challenge the fundamental fairness of the Tribunal's ruling on the subpoenas.[61] They have made no showing indicating any legal flaw in the decision. Yet, they nonetheless urge this Court to find error in the Tribunal's ruling. This brand of skeletal "argument", which as this Court has pointed out, is no more than a collection of unsupported assertions, does not preserve a claim.[62] "Judges are not pigs, hunting for truffles buried in briefs."[63]

Like the Court, Constellium Ravenswood is left to address possible arguments that the Claimants *could have made* in support of their subpoenas, even though each argument would have been wrong as a matter of law. To the extent that the Claimants based their subpoenas on the argument that during negotiations, an employer is required to be represented by an individual possessing final authority to enter into agreement with the union, that argument is wrong, and the

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[60] App. 1664-1665.

[61] *Nichols v. State*, 213 W. Va. 586, 591, 584 S.E.2d 220, 225 (2003) ("Aside from all else, due process means fundamental fairness.").

[62] *Dep't of Health & Human Resources v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995).

[63] *Id.* (quoting *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

information that sought by the subpoenas is thus also irrelevant.[64] To the more likely extent that the Claimants instead sought their subpoenas in an effort to prejudice the decision-makers by painting this as a case between West Virginia residents and "foreign nationals,"[65] Constellium Ravenswood points out that such an effort is improper, unduly prejudicial, and, also, entirely irrelevant.

The Claimants say that the information they sought was not protected by attorney-client privilege, and also that they should have been given the information because their "attorney . . . has signed a confidentiality agreement in this case as to any information received regarding trade or business information."[66] But the Tribunal did not quash the Claimants' subpoenas on those bases. They are, therefore, irrelevant here.

Mid-stream through their "argument" concerning procedural due process, the Claimants switch without explanation to a discussion of *admissibility*.[67] They start by saying that the Rules of Evidence stand for certain admissibility propositions. But then they say that those rules did not govern the Tribunal's hearing.[68] But the question is not admissibility *vel non*, but the fact – unaddressed by the Claimants in their brief – that their subpoenas were "vague, general and unnecessarily cumbersome." Even so, the record demonstrates that the information sought by the

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[64] *See, e.g., Parkview Nursing Ctr. II Corp.*, 260 N.L.R.B. 243, 250 (1982) (with one inapplicable exception, "an employer is not required to be represented by an individual possessing final authority to enter into agreement") (emphasis added) (citations omitted).

[65] Resp. Br. 4, 23, 32.

[66] Resp. Br. at 22.

[67] Resp. Br. at 27.

[68] Resp. Br. at 28.

subpoenas could not possibly have led to admissible evidence, because any such information would have been entirely irrelevant to the controlling legal questions as a matter of law.

The first of the Claimants' three categories of information is impossible to understand:

> 1. All communications, memos, emails, text messages, videos and pictures between Constellium Rolled Products Ravenswood, LLC employees or its agents, including AFIMAC, regarding union members of Constellium Rolled Products Ravenswood, LLC, regarding the labor dispute between United Steelworkers ("USW") Local Union 5668 and Constellium Rolled Products Ravenswood, LLC.[69]

One might seek correspondence "between A and B." The Claimants' request, however, is inexorably vague. It seeks certain items "between Constellium Rolled Products Ravenswood, LLC employees or its agents, including AFIMAC." But it does not say "between Constellium . . ." and *whom*. Constellium Ravenswood therefore could not possibly even have known what communications were responsive.

The request in the second subpoena was worse:

> 2. All internal communications, memos, emails, text messages or videos between Constellium Rolled Products Ravenswood, LLC between union and non-union employees regarding contract negotiations, replacement workers, or any other information regarding the formation of contract proposals for a collective bargaining agreement between Constellium Rolled Products Ravenswood, LLC and USW Local 5668.[70]

This request adds a second "between," making it even more hopelessly *unclear between whom*. Clearly, the subpoenas lacked sufficient clarity to allow for compliance.

Furthermore, the subpoenas were also unnecessarily cumbersome. As Constellium Ravenswood noted in its objection to these requests before the Tribunal, compliance with the

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[69] Resp. Br. at 21.

[70] *Id.*

subpoenas would have required it to locate and copy thousands of pages of email and documents – an effort that would have taken weeks to accomplish, at a cost of tens of thousands of dollars, and during a time when Constellium Ravenswood was preparing its own legal case. The Claimants did not address this in their brief.

Even if the subpoenas had not been plagued by obvious facial deficiencies, the Tribunal would surely have quashed them based on their improper attempt to expose Constellium Ravenswood's bargaining strategy. "There is no requirement for the Company to disclose its bargaining strategy or tactics, or the opinions, mental thought processes, or conclusions and observations of its bargaining team members."[71]

The ALJ in *Beacon Sales* discussed Board precedent and reasoning for the protection of such strategic information. In short, the parties (employer and union alike) "must be able to formulate their positions and devise their strategies without fear of exposure."[72] The ALJ noted that in *Boise Cascade,* 279 NLRB 422, 432 (1986), the judge concluded that "despite the likely probative value of an employer's documents discussing the history of collective-bargaining negotiations and strategic plans for future bargaining, such records must be shielded from disclosure in order to enable the bargaining process to function properly."[73]

The Claimants' obvious purpose was to prejudice the Tribunal by painting this dispute as one between West Virginians and "foreign nationals," a fact that the Claimants' counsel made

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[71] *Beacon Sales Acquisition, Inc. d/b/a Quality Roofing Supply Co.*, 2011 WL 3625915 (Div. of Judges, 1993) at 25-26 (quoting *Morton International, Inc.*, 1993 WL 1609483 (Div. of Judges, 1993)).

[72] *Id.*

[73] *Id.*

perfectly obvious when he called the Union local president to the stand and began his question by cynically asking whether was a Parisian?

> MR. SLAUGHTER: Your Honor, I object to the relevancy of these lines of questioning.
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> MR. MARONEY: I'm going to tie it together, Your Honor. I can show you I am.
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> JUDGE SAYRE: You're saying that because of the nature of the ownership the claimants were denied their right of collective bargaining?
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> MR. MARONEY: Yes, Your Honor.
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> JUDGE SAYRE: The objection is overruled. I have reservations that the nature of the ownership is going to, per se, be outcome determinative on this issue. I would be more inclined to look at the results of the negotiations and the give and take, the concessions on terms as the negotiations unfolded.[74]

But the Claimants never did "tie it together," the Tribunal quashed their subpoena, and the Board and Circuit Court correctly refused to disturb its decision. Constellium Ravenswood respectfully requests the Court to follow that lead and reject the cross-appeal.

B. THE CIRCUIT COURT CORRECTLY LEFT UNDISTURBED THE TRIBUNAL'S CONCLUSIONS THAT (1) THE CLAIMANTS HAD NOT BEEN DENIED THE RIGHT TO COLLECTIVE BARGAINING AND (2) THE CLAIMANTS HAD NOT BEEN REQUIRED TO ACCEPT TERMS AND CONDITIONS LESS FAVORABLE THAN THOSE PREVAILING FOR SIMILAR WORK, WHERE THE EVIDENCE SHOWED THAT THE COMPANY HAD BARGAINED IN GOOD FAITH THROUGHOUT THE NEGOTIATIONS.

Under the version of W. Va. Code § 21A-6-3(4) (2012) that was in effect at the time of the dispute, employees involved in a work stoppage incident to a labor dispute could avoid their disqualification for unemployment compensation benefits if they could show they were denied the right of collective bargaining, or were forced to accept terms and conditions of employment that were less favorable than those prevailing in the locality.

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[74] App 1231-1233.

Here, the Claimants appear to allege that Constellium Ravenswood bargained in bad faith during the negotiations and therefore no disqualification under the statute should apply. The determination of whether an employer bargained in good faith, however, is reserved to the National Labor Relations Board.[75] Although not addressed by the Board of Review or the Circuit Court, the three statutory exceptions in the former version of W. Va. Code § 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) (2012) 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 in the former statute undermined the NLRA's statutory scheme. Well-established Supreme Court precedent shows that federal law preempts W. Va. Code § 21A-6-3(4) (2012).

[75] The Court should recognize that Claimants secured unemployment compensation benefits, and those benefits were paid out many years ago. Likewise, the Union dropped its unfair labor practice charge that had alleged the Company failed to bargain in good faith many years ago. That being the case, no legal reason exists to overturn the Tribunal's decision.

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 United States Supreme Court precedent are clear that neither employers nor unions are compelled to agree to a proposal, make concessions, or come to an agreement.[76] 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 regulated bargaining behavior that Congress intentionally left unregulated.

Moreover, the second exception in the former statute involved 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 §§ 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.[77] Only the NLRB may make bargaining determinations and issue remedies pursuant to its exclusive authority under § 8 of the NLRA.

Finally, with the third exception, the former West Virginia statute looked to whether an employer has exercised its lawful right not to operate in order 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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[76] *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).

[77] *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 244 (1959) ("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 in an effort to convince their employees to accept their proposals.[78] Thus, the former West Virginia statute sought improperly to impact and balance a process – collective bargaining – that Congress has mandated must remain free from state interference.

In sum, the three statutory exceptions in the prior version of the statute formed a framework that itself was preempted by federal labor law to the extent that it allowed 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. The Union's Cross-Appeal asks this Court to intervene where it cannot.

Although it is difficult to follow their argument with precision, the Claimants appear to argue that an "unfair labor practice" under federal labor law gives rise to the "denial of the right of collective bargaining" exception to the unemployment compensation disqualification that applied under the former version of W. Va. Code § 21A-6-3(4) (2012). That is incorrect.

In *Roberts v. Gatson*,[79] this Court stated only that "by using the phrase 'denied the right of collective bargaining,' [§ 21A-6-3(4) (2012)] invited an obvious reference to federal labor law provisions concerning the duty to bargain collectively and the failure to do so."[80] But the Court was quite clear that this did not excuse a wholesale substitution of one test for the other:

> While it is true that a refusal to bargain on some issues involving wages, hours, and conditions of employment may result in an unfair labor practice, this does *not* mean that every unfair labor practice

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

[79] 182 W. Va. 764, 392 S.E.2d 204 (1990).

[80] *Id.* at 767, 392 S.E.2d at 207.

> constitutes a denial of the right of collective bargaining under [§ 21A-6-3(4) (2012)].[81]

Instead, "[u]nder our unemployment compensation statute, the test is *not* whether the employer may have committed an unfair labor practice, but whether his actions amounted to the denial of the right of collective bargaining."[82]

Thus, West Virginia law on whether there was a "denial of the right of collective bargaining" under the prior version of the statute was simply this:

> From the foregoing, we extract the following general principles that define a denial of the right of collective bargaining under [W. Va. Code § 21A-6-3(4)]. First, a refusal to engage in the collective bargaining process or to negotiate on those mandatory subjects that traditionally form the basis of the collective bargaining agreement so frustrates the process as to constitute a denial of the right. Second, a refusal to sign a written agreement which has been duly negotiated would constitute a denial, because such refusal is a negation of the bargaining process.[83]

Once the employer proves that the work stoppage disqualification exists, the burden shifts to the claimant to prove that an exception to disqualification exists.[84]

Although the "denial of collective bargaining" exception generally presented a mixed question of fact and law,[85] the decisions below in the instant case rested on factual findings relating to the nature and extent of the parties' negotiations and their respective bargaining positions; those findings are therefore entitled to substantial deference.[86] So here, to whatever extent their

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[81] 182 W. Va. at 769, 392 S.E.2d at 209 (emphasis added) (footnote omitted).

[82] 182 W. Va. at 771, 392 S.E.2d at 211 (emphasis added).

[83] 182 W. Va. at 770, 392 S.E.2d at 210 (footnote omitted).

[84] *See Copen v. Hix*, 130 W. Va. 343, 348–49, 43 S.E.2d 382, 385 (1947).

[85] *Smittle v. Gatson*, 195 W. Va. 416, 429, 465 S.E.2d 873, 886 (1995).

[86] *See id.*

appeal of the Board of Review decisions *not* addressing the issue presented the Circuit Court with an issue over which it had subject matter jurisdiction, the Claimants were bound to demonstrate that the Tribunal's decision, and the Circuit Court's decision upholding it, were clearly wrong. This they have not done.

In a single sentence in their brief, the Claimants argue that sending them a letter detailing Constellium Ravenswood's offer during negotiations somehow constitutes a denial of their right to collective bargaining:

> Constellium Ravenswood additionally acted in derogation of its duty to bargain in good faith when Mr. Lorentzen wrote directly to all union members in an attempt to get them to withdraw from the union during contract negotiations, and unilaterally communicating with the members rather than going through the collective bargaining process.[87]

The cited letter speaks for itself and plainly was not any "attempt to get [Claimants] to withdraw from the union during contract negotiations."

The remainder of the Cross-Appeal is consumed by a shotgun blast of factual allegations concerning Constellium Ravenswood's conduct during negotiations and a smattering of largely unrelated citations to case law, apparently intended to make the point that Constellium Ravenswood's lead negotiator during the labor negotiations lacked final authority to agree to a collective bargaining agreement and that the Claimants were therefore "denied the right of collective bargaining" under the previous version of § 21A-6-3(4) (2012).

First, the Claimants' "argument" is factually wrong. Constellium Ravenswood's CEO at the time, Kyle Lorentzen, and his team in West Virginia put a recommendation together early on for what Constellium Ravenswood would agree to during negotiations. Mr. Lorentzen's superiors

[87] Resp. Br. at 30 (citing App. 335-336).

agreed to that proposal and gave Lorentzen's team authorization to negotiate. Only when the union's negotiating committee refused to make any concessions at all on the healthcare cost allocation issue did Constellium Ravenswood's negotiator need to seek additional authorization.[88]

As Constellium Ravenswood's negotiator testified, he has negotiated over fifty contracts, and they all work more or less the same way: the company gives its negotiators broad latitude to negotiate, but if negotiations take an unexpected turn requiring the negotiators to go outside those limits, they would seek further authority:

> I would not necessarily say that they were outside of my parameters. It's that the conduct of the negotiations did not go as we had expected it to go, and that we had a difficult issue, medical issue, we could not get any movement from the union. So there was a lot of conversation about how to structure our package, because we had designed a package that anticipated some movement in health care, and it had certain economic aspects that would have made that a more attractive package. But when the union essentially refused to make any changes in health care, then it caused a lot of having to restrategize and tactically relook at what we were trying to do.[89]

Second, the Claimants' argument is legally wrong. They cite cases that, they say, "held that when the company's chief negotiator lacked adequate authority to bargain with the union and that economic matters had to be referred to the president of the company, then the company was not bargaining in good faith and violated 8(a)(5) and (i) of the National Labor Relations Act (NLRA)."[90] But certainly nothing in the cited cases transform every minor delay in labor

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[88] App. 1236-1238.

[89] App. 1245-1246.

[90] Resp. Br. at 33 (citing *NLRB v. A.E. Nettleton Co.*, 241 F.2d 130 (2d Cir. 1957) (finding an unfair labor practice where, unlike here, "the employer representatives lacked adequate authority to conduct the negotiations as evidenced by the fact that *all matters* had to be referred for approval, with the result that *the conferences resulted in nothing more than an exchange of thoughts*" and "the respondents entered into the negotiations without any intention of reaching an accord with the Union") (emphasis added); *Bewley Mills*, 111 N.L.R.B. 830, 831 (1955) (finding unfair labor practice where "the Respondent delayed almost 7 weeks before submitting a counterproposal to the Union; that, contrary to a promise made at the initial bargaining

negotiations into a state-law denial of the right to collective bargaining. Unless doing so constitutes an outright *refusal* to bargain, "an employer is *not* required to be represented by an individual possessing final authority to enter into agreement."[91] Thus,

> [i]t is well established that employers may not be faulted for their failure to give their bargaining representatives the final authority to enter a binding agreement on all contract proposals provided that the limitation does not act as a hindrance on the overall negotiations.[92]

Only when an employer's negotiator's complete lack of authority so frustrates the negotiating process by constituting a refusal to engage in collective bargaining or to negotiate on those

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conference, the Respondent designated as its bargaining representative an individual who had no authority to negotiate a contract, in fact had so little authority he could not give a copy of written counterproposals to the Union without receiving the advance approval of the Respondent's top officials; that, despite repeated requests therefor, the Respondent failed for about 4 months either to give its designated negotiator authority to negotiate a contract or to name another individual with such authority; that, after the negotiator was finally given the requisite authority and had negotiated a contract which was reduced to writing, the Respondent for the first time, after almost 5 months of negotiations, requested that the unit be modified and that the Union's International and the American Federation of Labor be made parties to the agreement, although neither had been certified as bargaining representative, and thereafter refused to sign the contract"); *Std. Generator Serv. Co. of Mo.*, 90 N.L.R.B. 790, 800 (1950) ("Consideration of the entire record compels the conclusion that *the failure to arrive at an agreement* was due in no small part to Respondent's failure to designate a representative with sufficient authority to act in its behalf.") (emphasis added), *enforced sub nom., Std. Generator Serv. Co. of Mo. v. NLRB*, 186 F.2d 606 (8th Cir. 1951); *Cook, J.B., Auto Machine Co.*, 84 N.L.R.B. 688, 698 (1949) (finding that failure to supply person with authority to bind employer did not satisfy good-faith bargaining requirement because "[t]he parties, after lengthy discussions over a long period of time, *came to an impasse* but it was not an impasse that eventuated in the course of bona fide collective bargaining") (emphasis added), *enforced sub nom., NLRB v. J.B. Cook Auto Machine Co.*, 184 F.2d 845 (6th Cir. 1950); *Brown & Root, Inc. (Bull Shoals, La.)*, 86 N.L.R.B. 520, 532 (1949) (finding failure to bargain in good faith when, due in part to the negotiator's lack of authority to bind employer, "an impasse was reached"), *enforced sub nom., NLRB v. Ozark Dam Constructors*, 190 F.2d 222 (8th Cir. 1951)).)

[91] *Parkview Nursing Ctr. II Corp.*, *supra* at 250 (emphasis added) (citations omitted).

[92] *Gulf States Canners, Inc.*, 224 N.L.R.B. 1566, 1576–77 (1976); see also *Jackson Sportswear Corp.*, 211 N.L.R.B. 891 (1975) ("[A]n employer [cannot] be faulted for failing to give his agent the authority to make final on-the-spot commitments on contract proposals without an opportunity to consult with his principal.").

mandatory subjects that traditionally form the basis of the collective bargaining agreement might it also constitute a denial of the right of collective bargaining.[93]

This case presents a marked, pronounced difference from the facts of the cases that the Claimants cited. Here, the Parties both gave their negotiators significant authority. Only the Union's recalcitrance to budge on the healthcare cost issue took the negotiations to a place that required both parties' negotiators to obtain additional authorization, causing petty delays of, if anything, just hours. In such a case, there has been no "unfair labor practice." Thus, to whatever extent such an "unfair labor practice" might ever lead to a state-law denial of the right of collective bargaining, the Tribunal was clearly right (and certainly not clearly wrong) to find that that was not the case here, and the Board and the Circuit Court were correct in refusing to address the issue.

Finally, the Claimants argue that "Constellium Ravenswood's unilateral change in the health and welfare section of the collective bargaining agreement requiring an untenable medical necessity clause and cost sharing deductibles, co-pays, and employee/retiree contributions which had never been in any of the prior agreements, is an additional failure to bargain in good faith."[94] But the evidence is quite clear that it was the Union, *not Constellium Ravenswood*, that took the "intransigence position" on the medical necessity clause, which the Union never even identified as a deal-breaking issue during the parties' pre-strike negotiations.[95] The Claimants also have misread *NLRB v. Katz*,[96] as standing for the proposition that a proposal to put a term in a new CBA

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[93] *See, e.g.*, *Parkview Nursing Ctr. II Corp.*, *supra* at 250 (recognizing that "an employer is not required to be represented by an individual possessing final authority to enter into agreement" but instead must not "act to inhibit the progress of the negotiations").

[94] Resp. Br. at 34.

[95] App. 1276-1277.

[96] 369 U.S. 736 (1962).

that represents a "change" from the previous CBA violates the right to collective bargaining.[97] The "unilateral change" that was made in *Katz* was not such a *proposed change from CBA to replacement CBA*, but instead an *actual change* in the working conditions unilaterally imposed on the employees *during* CBA negotiations, *i.e.*, an "action [that] plainly frustrated the statutory objective of establishing working conditions through bargaining."[98] That case does not apply here.

The Tribunal was correct in denying the Claimants' argument that they were deprived the right of collective bargaining, and the Board of Review and the Circuit Court were correct to leave that decision undisturbed.

IV. CONCLUSION

WHEREFORE, the Petitioners, Constellium Rolled Products Ravenswood, LLC, respectfully requests that this Court set aside 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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[97] Resp. Br. at 34.

[98] 369 U.S. at 744.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, I served the foregoing "Reply Brief of the Petitioner" by effectuating the deposit of a true copy in the United States mail, postage prepaid, addressed as follows:

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