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.

-and-

EARL B. COOPER, et al.,

Cross Assignee of Error

vs.

WORKFORCE WEST VIRGINIA BOARD OF REVIEW; RUSSELL FRY, COMMISSIONER, WORKFORCE WEST VIRGINIA; and CONSTELLIUM ROLLED PRODUCTS, RAVENSWOOD, LLC

Respondents.

BRIEF OF THE RESPONDENTS-CLAIMANTS, EARL B. COOPER, ET AL., TO PETITIONER CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC'S APPEAL AND LIMITED CROSS ASSIGNMENT OF ERROR BY RESPONDENT-CLAIMANTS UNDER *W.V.R.A.P.* 10(f), AND RESPONDENTS-CLAIMANTS' BRIEF IN SUPPORT OF THEIR LIMITED CROSS-APPEAL

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I. ASSIGNMENTS OF ERROR

Petitioner Constellium Rolled Products Ravenswood, LLC ("hereinafter Constellium Ravenswood") asserts that the Circuit Court erred in affirming the Board of Review's decision of no work stoppage and use of plant production methods. Respondents-Claimants, Earl B. Cooper, et al. (hereinafter "Respondents-Claimants") responds the Circuit Court and Board of Review decisions were correct.

Petitioner's also alleges that the Circuit Court and Board of Review erred in rejection that the National Labor Relations Law Act preempts state law in unemployment cases. This is not a case of first impression in West Virginia as Petitioner asserts. Respondents-Claimants will fully address this issue in its argument on Page 18 of this brief.

Respondents-Claimants have cross-appealed that they were denied due process by the Three Administrative Law Judge Labor Dispute Tribunal's[1] (hereinafter "ALJ Tribunal"), who erred in quashing sections of their subpoena duces tecum, thus preventing them from presenting evidence that Constellium Ravenswood denied Respondents-Claimants' the right of collective bargaining under general prevailing conditions, and requiring Respondents-Claimants to accept wages or conditions of employment substantially less favorable than those previously for similar work in the locality.

II. STATEMENT OF THE CASE

This is a labor dispute case for unemployment benefits under § 21A-6-3(4) of the Code of West Virginia. At the commencement of the hearing before the ALJ Tribunal, the parties stipulated that there was a labor dispute at the Constellium Ravenswood plant located in Ravenswood, Jackson County, West Virginia, between the 690 hourly workers represented by

[1] The Board of Review, under W. Va. Code 21A-7-7a, assigned this case to three Administrative Law Judges who have years of experience in contested unemployment compensation cases.

the United Steelworkers Local 5668 (hereinafter "5668"), and placed into factual issue the following: (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?; and (3) Were the employees denied the right of collective bargaining under generally prevailing conditions? (App. 0008.) [2] The dispute began on August 5, 2012, and ended on September 24, 2012, when the Respondents-Claimants returned to work.

Claimants are entitled to benefits if (1) there was no stoppage of work; (2) were required to accept wages, hours or conditions of employment less favorable than those prevailing for similar work in the locality; or (3) were denied the right of collective bargaining under generally prevailing conditions (App. 0008.)

Employer Constellium Ravenswood is appealing the June 12, 2020, Order of the Circuit Court of Kanawha County affirming the unanimous decision of the Board of Review which had affirmed the unanimous ALJ Tribunal's decision of December 14, 2012, finding that there was not a stoppage of work at the employer's facility as a result of a labor dispute, and that the Respondents-Claimants were not disqualified for benefits. (App. 0961.) Respondents-Claimants have cross-appealed that they were (1) Denied the right of collective bargaining under general prevailing conditions; (2) Required to accept wages or conditions of employment substantially less favorable than those previously for similar work in the locality; and (3) The ALJ Tribunal erred in quashing part of a subpoena directed to Constellium Ravenswood. Respondents-Claimants are entitled to benefits if they prevail on any one of these exceptions to disqualification under 21-A-6-3(4). The Board of Review found the findings by the ALJ Tribunal of no work stoppage dispositive and mooted the three questions appealed by

[2] App. is Appendix, and Supp. App. is Supplemental Appendix, and transcripts of hearings held on November 1, 2012, and November 2, 2012, before the ALJ Tribunal is designated as HTR pages of transcripts of hearings.

Respondents-Claimants. The Circuit Court did not address the two exceptions in 21A-6-3(4) or the quashing of the subpoena stating that the work stoppage issue was outcome determinative as determined by the Board.

The Circuit Court and Board of Review should have addressed the issues of the quashing of the subpoenas, the failure to bargain in good faith, that employees were required to accept terms, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality, and failure to issue the subpoena. The employer has now appealed the no work stoppage issue, so the three issues appealed by Respondents-Claimants must also now be addressed.

Respondents-Claimants, in their limited cross-appeal at the Board of Review and Circuit Court, respectfully requested that prior to the Board of Review and Circuit Court rendering a decision on the employer's appeal, that the Court address Respondents-Claimants' limited appeal of the Board of Review finding moot the Respondents-Claimants' appeal of the ALJ Tribunals' quashing parts of their subpoena duces tecum's request for communications between Constellium Ravenswood and Constellium France and Apollo Global Management, Rio Tinto, and FSI, an investment fund owned by the French government, who had control of collective bargaining. (Supp. App. 1662-1667.) Had the Circuit Court found that the ALJ Tribunal erroneously quashed Items 1, 2 and 3 of the subpoena duces tecum, then these items would have been furnished immediately to the Circuit Court so that a complete record is available for a consideration of all remaining issues of the Respondents-Claimants and Constellium Ravenswood on appeal.[3] The Circuit Court also did not address these issues as moot, but in a footnote observed:

[3] Respondents-Claimants' brief on this issue is found on brief pages 24 to 30 herein.

> "The Court notes, however, that Respondent-Claimants point to several facts that raise significant concerns which could justify the production of certain communications sought by them if a Court was necessarily reviewing whether claimants were denied collective bargaining under general prevailing conditions on the basis that a foreign national parent entity, while not participating in negotiations, controlled the employer's ability to negotiate contract terms." (App. 0973.)

III. TIMETABLE OF APPEAL

On March 20, 2013, Petitioner Constellium Ravenswood and Respondents-Claimants timely filed their appeal and cross-appeal from the Board of Review decision to the Circuit Court of Kanawha County. (App. 0140-0142.)

The Circuit Court by letter dated July 12, 2013, directed counsel to file briefs by November 1, 2013, response briefs by November 16, 2013, and final briefs by November 31, 2013, with proposed findings of fact and conclusions of law. (App. 0687.) The date of November 31, 2013, was extended by agreed order to extend final reply briefs to December 9, 2013. (App. 0455-0461.)

On November 1, 2013, Constellium Ravenswood and Respondent-Claimants filed their briefs in support of appeal to the Circuit Court, (App. 0185-0360.) (App. 0356-0403) and on November 18, 2013, filed their response briefs. (App. 0399-0435.) (App. 0436-0454.)

On December 9, 2013, Constellium Ravenswood filed its final reply brief with no proposed findings of fact or conclusions of law attached. (App. 0457-0518.)

Respondents-Claimants' on December 9, 2019, filed their final reply brief with findings of fact and conclusions of law attached. (App. 0478-0489.)

Two years later on September 24, 2015, Chris Slaughter, attorney for Constellium Ravenswood, responded to a request from Ashlee Lambert, Law Clerk to Judge Bailey, of

Thursday, September 17, 2015, to send a proposed order of findings of fact and conclusions of law. (App. 0519-0525.)

On November 20, 2017, the Circuit Clerk sent a 3-year letter to Christopher Slaughter, and on December 4, 2017, Constellium Ravenswood paid the $40.00 court costs. (Supp. App. 1673.) The Circuit Clerk sent an additional letter on December 7, 2018, Constellium Ravenswood paid an additional $20.00 court costs. (App. 0001, Line 36.)

Constellium Ravenswood, since December 9, 2013, had not pursued their appeal except when required to respond to a request from the Judge's law clerk in November 2015 to file a proposed order as directed in the Court's letter of July 12, 2013, and a letter from Kanawha County Circuit Clerk to pay mandatory fees after notification from the clerk on November 20, 2017, and December 7, 2018. (App. 0001, Item 34 and Item 36.)

The normal and accepted practice among litigators is to contact the Court to secure available dates and times for a hearing, contact opposing counsel to secure a mutually agreeable time and date, then finalize with the Court and send out the appropriate notice of hearing.

Circuit judges in West Virginia are inundated with criminal, juvenile, abuse and neglect, domestic relations, mental hygiene, and guardianship and conservatorship proceedings, all of which have priority status on the docket. Litigants in the other general, civil cases are charged with the duty to pursue their cases with reasonable diligence with the Court.

Constellium Ravenswood made no effort for almost seven years to contact the Court or opposing counsel to move forward with this appeal. This is the classic example of the litigant being dilatory resulting in the defense of latches.

IV. STATEMENT OF THE CASE AS TO NO WORK STOPPAGE

The ALJ Tribunal unanimously made twenty-nine (29) specific findings of fact which clearly supported its conclusions of law that there was not a stoppage of work at the Constellium Ravenswood operation within the meaning of the Chapter 21A-6-3(4) West Virginia Unemployment Statute and found Respondents-Claimants were not disqualified for benefits. (App. 0004-0015.)

Constellium Ravenswood, located in Jackson County, is a subsidiary of the French company, Constellium France. Constellium France is owned by Apollo Global Management ("Apollo") 51%, Rio Tinto Alcan, a British mining company 40%, and FSI 10%, an investment fund owned by the French Government. Kyle Lorentzen is the Chief Operating Officer ("CEO") of Constellium Ravenswood, and his office is in Ravenswood, West Virginia. Lorentzen reports to Christophe Villemin, President of Constellium Global ATI, a division of Constellium France, whose office is in Paris, France, and controlled Constellium Ravenswood contract negotiations. (App. 1231-1242, HTR 219-230.) Jerry Carter is Constellium's Ravenswood's Vice President of Human Resources, and he served as its chief negotiator in the labor negotiations at issue in this case (App. 1244-1254, HTR 233). Constellium Ravenswood is a manufacturing plant which produces aluminum products, including plate and coil, which is the normal business activity of Constellium Ravenswood. (App. 0004-0014 - ALJ Tribunal Order Findings ¶¶ 1 & 14.) [Emphasis added.]

The ALJ Tribunal also found that the 2010-2012 contract did not contain a medical necessity clause, yet Constellium Ravenswood through its third-party administrator, unilaterally implemented a medical necessity criterion. (App. 0007 - ALJ Tribunal Order Findings ¶¶ 6 &7.) This unilateral implementation by Constellium Ravenswood resulted in grievances

resolved in the employees' favor. (App. 0007-0008 - ALJ Tribunal Order Findings ¶ 7.) "The employer created and perpetuated the medical necessity issue and controversy which prevented an agreement or resolution of other economic issues." (App. 0004-0014 - ALJ Tribunal Order Findings ¶¶ 7 and 10 .)

The ALJ Tribunal thoroughly analyzed the production and shipping of plate and coil produced by the employer from March 2012 to September 2012, and evaluated monthly averages between January 2010 to July 2012, as set forth by claimants in August 2012, September 2012, and October 2012 (App. 0006-0007 - ALJ Tribunal Order Findings ¶¶ 15-23). Revenue averages for the same periods were set forth in App. 0006-0007 - ALJ Tribunal Order Findings ¶ 25.[4] The ALJ Tribunal carefully and thoroughly interpreted the revenue, production and shipping records during all periods, including the stretcher replacement, and found that during the labor dispute as set forth in App. 0007 as follows:

Production of plate was 62% of normal business	(ALJ Tribunal Order Findings ¶ 22)
Production of coil was 49% of normal business	(ALJ Tribunal Order Findings ¶ 22)
Shipping of plate was 69% of normal business	(ALJ Tribunal Order Findings ¶ 22)
Shipping of coil was 77% of normal business	(ALJ Tribunal Order Findings ¶ 22)
Revenue was 72% of normal business	(ALJ Tribunal Order Findings ¶ 26)

As a result of these findings of fact , the ALJ Tribunal found no stoppage of work of the company's normal business activities at its facility as a result of the labor dispute. Consequently, claimants were not disqualified. (App. 0007 - ALJ Tribunal Order Findings ¶¶ 22, 26 & 28.) The Board of Review, on appeal, affirmed the findings of fact of the Tribunal stating:

> "...having reviewed all documents, testimony, and the labor tribunal's written decision in this matter, finds the Administrative Law Judge Tribunal has made a proper ruling and adopts the findings of the Administrative Law Judge Tribunal, by reference in its entirety, as regarding the work stoppage issue. The Board of

[4] App. 1460-1482 - All production, shipping and revenue records are official records of the employer.

> Review finds that there was not a substantial or significant stoppage of work at the employer business operation. [Emphasis added.]
>
> Since the work stoppage issue was outcome determinative, the Board of Review did not address the three exceptions expressed in WV Code Chapter §21A-6-3(4), specifically exception *(1) if the employees are required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality; exception (2) if employees are denied the right of collective bargaining under generally prevailing conditions; and exception (3) if an employer shuts down his or her plant or operation or dismisses his or her employees in order to force wage reduction, changes in hours or working conditions.* [5]
>
> The Board of Review, having reviewed all testimony, submitted documents and the labor dispute tribunal's decision in the matter, considers moot the claimant's request to enforce and compel compliance with the subpoenas, in that the claimants prevailed.
>
> Further, the Board of Review denies the employer's motion that federal law pre-empts state law. The Board of Review finds that the employer's motion is without merit; the federal law cited does not preempt state law in this matter." (Board of Review Order - App. 0125-0127.)

West Virginia has specifically defined the term substantial curtailment in Cumberland & Allegheny Gas Co. v. Hatcher, 147 W.Va. 630, 130 S.E.2d 115 (1963), Lee-Norse v Rutledge, 170 W.Va. 162 (1982), and Verizon Srvs. Corp. v. Bd. of Review, 240 W.Va. 355 (2018), and will be fully discussed supra in this brief at pp. 9-18.

V. STATEMENT REGARDING ORAL ARGUMENT

The case does not involve an issue of first impression regarding preemption of the National Labor Relations Act regarding unemployment benefits under West Virginia law. Respondents-Claimants say to the Court that it may involve an issue of public importance since it involves 690 West Virginia industrial workers.

[5] The italicized parts of the Board of Review's Order are those appealed by the Respondents-Claimants.

VI. ARGUMENT ON STOPPAGE OF WORK AND BOARD OF REVIEW'S USE OF PLANT PRODUCTION METHODOLOGY

The well-defined case law in West Virginia for employees to receive unemployment compensation benefits in labor dispute cases under the statutory exceptions of 21A-6-3(4) is set forth as follows in the Smittle v. Gatson, 195 W.Va. 416, Syl. 2 (1995):

> "'Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof.' Syllabus, Mercer County Bd. of Education v. Gatson, 186 W.Va. 251, 412 S.E.2d 249 (1991)."

In accord with Syllabus 2, Davis v. Gatson, 195 W.Va. 143 (1995). Also see Adkins v. Gatson, 192 W.Va. at 564 (1994), Davenport v. Gatson, 192 W.Va. 117 (1994), and Lee-Norse v. Rutledge, 170 W.Va. 162, Syl. 7 (1982).

This Court in Smittle went on to opine:

> "Our liberal construction reflects the purpose of our State's unemployment compensation laws, which as stated in *W. Va. Code*, 21A-1-1 [1978] 'is to provide reasonable and effective means for the promotion of social and economic security by reducing as far as practicable the hazards of unemployment[,]' so as to:
>
> > (1) Provide a measure of security to the families of unemployed persons.
> >
> > (2) Guard against the menace to health, morals and welfare arising from unemployment.
> >
> > (3) Maintain as great purchasing power as possible, with a view to sustaining the economic system during periods of economic depression.
> >
> > (4) Stimulate stability of employment as a requisite of social and economic security.
> >
> > (5) Allay and prevent the debilitating consequences of poor relief assistance.

> "*See Davis v. Gatson, supra*, ___ W. Va. at ___, ___ S.E.2d at ___, Slip op. at 17; *Gibson v. Rutledge*, 171 W. Va. 164, 167-68, 298 S.E.2d 137, 141 (1982); *Lee-Norse Co. v. Rutledge*, 170 W. Va. at 166, 291 S.E.2d at 481. *See also Hill v. Board of Review*, 166 W. Va. 648, 651, 276 S.E.2d 805, 807 (1981).
>
> "Because of this liberal construction, the disqualification provisions of the unemployment statutes must be narrowly construed. *Peery v. Rutledge*, 177 W. Va. 548, 551, 355 S.E.2d 41, 45 (1987); *Gordon v. Rutledge*, 175 W. Va. at 685, 337 S.E.2d at 922; *Bennett v. Hix*, 139 W. Va. 75, 84, 79 S.E.2d 114, 119 (1953).
>
> "It is well-settled in this jurisdiction that the Board of Review's findings of fact will only be set aside if they are clearly wrong." Smittle at 422-423. [Emphasis added.]"

In Lee-Norse v. Rutledge, 170 W.Va. at 166, this Court held "the primary purpose of the unemployment compensation law is not to regulate or control the relationship of employer and employee, but to provide reasonable effective means for the promotion of social and economic security by reducing as far as practical the hazards of unemployment," citing Homer Laughlin China v. Hix, 128 W.Va. 613 (1946).

In Cumberland & Allegheny v. Hatcher, the Court affirmed in Verizon Srvs. Corp. v. Bd. of Review, 240 W.Va. 355 (2018), stoppage was defined in Syllabus 2 as:

> "2. UNEMPLOYMENT COMPENSATION—
>
> The term "stoppage of work", within the meaning of the unemployment compensation statutes of this state refers to the employer's operations rather than to a mere cessation of employment by claimants of benefits under the provisions of such statutes; and, 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."

The term 'stoppage of work', within the meaning of the unemployment compensation statute of West Virginia § 21A-6-3(4), with an almost unanimous agreement

among the other 50 states, refers to the stoppage of the employer's operations rather than to a mere cessation of employment by claimants under the provisions of each state's statute. In West Virginia, for employees to 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. Cumberland & Allegheny, Id. [Emphasis added.]

The meaning of or definition of stoppage of work in West Virginia is well defined in Cumberland where the Court held no work stoppage when the employer estimated an 80% curtailment in the overall activities or operations of the company during the dispute, where revenue was stable and no showing of an accumulated backlog of work or services to require employment of additional personnel, or to require overtime of regular employees (striking employees) after normal operations resumed. [Emphasis added.] Cumberland at 639. Cumberland holds that substantial curtailment of normal operations would be in the 75-80% range as seen in Homer Laughlin China v. Hix, 128 W.Va. 613 (1946). [Emphasis added.] Revenue, shipping and production which are the normal operations at Constellium Ravenswood were not substantially curtailed under the controlling rule of the West Virginia Supreme Court in Cumberland as found by the ALJ Tribunal and affirmed by the Board of Review and the Circuit Court. On this issue standing alone, the Respondents-Claimants are entitled to benefits.

The legal conclusion opinions expressed by the ALJ Tribunal, Board of Review and the Circuit Court are in complete accord with black letter West Virginia jurisprudence of Cumberland, Id., and Verizon Srvs. Corp. v. Bd. of Review, Id.

In Lee-Norse v Rutledge, 170 W.Va. 162 (1982), the Supreme Court of Appeals held "the State should be neutral in labor disputes, and it should not encourage resort to aggressive

measures in derogation of peaceful negotiation at the bargaining tables." Id. at 168. As the Tribunal found, and affirmed by the Circuit Court and Board of Review:

> "...the legislature enacting a statute which provides for the claimants' receipt of unemployment compensation benefits due to no stoppage of work at the employer facility resulting from the labor dispute. 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. If the employer plant work stops during the strike, there is no employer revenue, the employer customers are being serviced by competitors; so the employer has a similar incentive to bargain with the striking union workers. If the employer plant operation continues, then the employer cash revenue permits debt satisfaction and employer customers continue to receive products from the employer; therefore, the employer lacks an urgent incentive to bargain with the strikers. So, if the employer plant continues to produce products and generate revenue during a strike, then the employer may be in a better financial cash flow position to negotiate a more favorable employment contract. Generally, the state should be neutral in labor disputes. Lee-Norse v Rutledge, 291 S.E.2d 477, (WV 1982). 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; 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." (ALJ Tribunal Order Conclusions of Law and Discussion pp. 5-6.) [Emphasis added.] (App. 0008-0009.)

Chapter 21A-7-21, West Virginia Code provides:

> In a judicial proceeding to review a decision of the board, the findings of fact of the board (Board of Review) shall have like weight to that accorded to the findings of fact of a trial chancellor or judge in equity procedure. [Emphasis added.]

The Supreme Court of Appeals' decisions have consistently held that findings of fact by the Board of Review of the West Virginia Department of Employment Security in an unemployment compensation case are entitled to substantial deference, should not be set aside unless such findings are clearly wrong; however, the plainly wrong doctrine does not apply to conclusions of law by the Board of Review. Syl. 1, Childress v. Muzzle, 222 W.Va. 129 (2008),

Syl. 1, Raleigh County Bd. of Educ. v. Gatson, 196 W.Va. 137 (1996); Syl. 3, Adkins v. Gatson, 192 W.Va. 561 (1994); Syl. 1, Belt v. Rutledge, 175 W.Va. 28 (1985); Syl. 1, Butler v. Rutledge, 174 W.Va. 752 (1985); Syl. 1, Kisamore v. Rutledge, 166 W.Va. 675 (1981). *Per curium* cases Tabor v. Gatson, 207 W.Va. 424 (2000); Patton v. Gatson, 207 W.Va. 168 (1999); Summers v. Gatson, 205 W.Va. 198 (1999); Ohio Valley Medical Center, Inc. v. Gatson, 202 W.Va. 507 (1998). [Emphasis added.]

Under the regulations of the Board of Review in effect at the time of the hearing, the burden is on the employer to show that there was a stoppage of work. (CSR § 84-1-6.7.6).[6] Constellium Ravenswood failed to show a stoppage and, in its Briefs here and before the Board of Review and Circuit Court, engaged in statistical hyperbole with its own monthly production and revenue records in a veiled attempt to reduce its actual manufacturing average and monies received. The use of "would have" and "actually" in its Brief here is an attempt to distract or distort the correct actual findings by the ALJ Tribunal and the Board of Review. (Constellium Brief here pp. 26-28, and Appellate Brief to Board of Review 12/26/12, App. 0040-0043.)[7] Even if the ALJ Tribunal had accepted the averages which Constellium Ravenswood set forth in its Brief, the "would have" hyperbole averaging figures used by Constellium Ravenswood still falls far short of 75-80% curtailment of normal product as required by the rule of Cumberland. The West Virginia Supreme Court of Appeals has and specifically and consistently rejected the existence of possibilities or probabilities theories in unemployment cases holding "to indulge in speculation and to create a presumption thereon in contravention of the principle that the Unemployment Compensation Law is to be liberally construed." Hill v. Board of Review, et al.,

[6] CSR § 84-1-6.7.6 General hearing procedures and policies placed the initial burden of going forward in labor dispute - or work stoppages - on the employer. CSR was in effect from March 1, 1999, until 2017 when § 21A-6-3(4) was amended.

[7] The December 26, 2012, Brief of Constellium Ravenswood to the Board of Review in support of its appeal of the Decision of the Labor Dispute Tribunal is designated as "Constellium Appeal Brief."

166 W.Va. 648 at 659 (1981), citing Cumberland & Allegheny Gas Co. v. Hatcher, 147 W.Va. 630, 130 S.E.2d 115 (1963); and Bennett v. Hix, 139 W.Va. 75, 79 S.E.2d 114 (1953).

Businesses are not run on a monthly basis, but on a yearly basis and with yearly quarterly filings with the Securities and Exchange Commission[8] with comparisons to prior year performance. The production, shipping and revenue records of 2010-2012 placed into evidence here are those of the company, not the Respondent-Claimants. The company states in its Brief before the Board "...there was no evidence that the 'cycles' that Ravenswood facility's products are subject to are annual or seasonal ones," but then acknowledges that it is subject to business cycles, and acknowledges business has ups and downs. (Constellium Appeal Brief to Board of Review 12/26/12, p. 28, App. 0053.) The ALJ Tribunal fully, fairly and accurately evaluated Constellium Ravenswood's records to determine under West Virginia law there was not substantial curtailment of the employer's normal operations of production, shipping, or income. As previously stated, normal business operations are not measured over a one or two month period, but over yearly production and revenue periods. The West Virginia rule in Cumberland & Allegheny Gas Co. v. Hatcher at 640 holds substantial curtailment of the normal operations of an employer would be in the 75-80% range as seen in Homer Laughlin China v. Hix, Id., and Cumberland. [Emphasis added.]

Additionally, there was no testimony by Constellium Ravenswood showing any accumulated backlog of work or service in the production or shipping or maintenance services categories sufficient in volume or nature to require overtime employment on the part of the regular employees after normal operations were renewed as required under Cumberland. Id. at 639.

[8] Public companies in the United States are required to file quarterly and annual financial reports to the Securities and Exchange Commission and furnish complete annual financial reports to stockholders. Securities Exchange Act 15 U.S.C. §§ 13 and 15, 17 CFR 240.

Contrary to Constellium Ravenswood's position that cases since the post-1950s have rejected the ALJ Tribunal's output-only methodology, this certainly is not the law in West Virginia since Cumberland & Allegheny Gas Co. v. Hatcher was decided in 1963, and again affirmed in Lee-Norse Company v. Rutledge, 170 W.Va. 162 (1982), and Verizon Srvs. Corp. v. Bd. of Review, 240 W.Va. 355 (2018). Many of the other states use the exact or similar same language used by the West Virginia Supreme Court of Appeals, "substantial curtailment of the employer's normal operations or production."[9]

In Constellium Ravenswood's argument here and before the Circuit Court and Board of Review, it cited cases from Illinois, Missouri, and Massachusetts which are clearly distinguishable from Cumberland, and each are fully addressed here.

Travis v. Grabiec, 52 Ill.2d 175, 180 (1972), is fully distinguished from the situation at Constellium Ravenswood. The Illinois case of Travis involved a group of thirteen different unions in multiple departments where construction work was halted and transportation of product by truck and barge practically terminated. Travis at 180-181. However, Travis acknowledges, which Constellium Ravenswood has omitted from its brief, the following:

> "'...that a Substantial curtailment is sufficient to disqualify claimants. Less unanimity exists, of course, as to the meaning of

[9] Willard A. Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J. URB L. 319 (1967), at p 327 and FN 30.

Constellium Ravenswood, in this brief and 12/26/12 Board of Review Appeal Brief writer and the Respondents-Claimants' Brief have referred to Law Review articles written by Milton I. Shadur, Unemployment Benefits and the 'Labor Dispute' Disqualification, (1949-1950)17 U.CHI.L.Rev. 294 (1949), and Willard A. Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J. URB L. 319 (1967). These articles, one written in 1949 and the other in 1967, reviewed the statutes and case law of many, but not all of the states. These articles have not been updated by the authors since date of publication. Constellium Ravenswood's Brief has picked and chosen from case cites or statutes different from West Virginia, and fails to refer to those statutes and case law of West Virginia and similar states. Respondents-Claimants' Brief calls to the Court's attention those references in the articles consistent with the West Virginia rule of law at issue here. Law Review Articles are not primary legal authorities, but are attempts by legal writers to review a legal subject which can be a general decision of law in a specific subject area, a survey of law in one jurisdiction, or a more specific analysis of one important case, and usually written from a single perspective.

> "substantial." Although most decisions follow the general practice of examining decreased production, business revenue, service, number of employees, payroll, or man-hours, seemingly inconsistent results are bound to ensue from the great variety of fact situations presented. As long as the bases for decision are correct, however, an occasional aberration is small cause for alarm.'"[10] Travis at 180. [Emphasis added.]

The Missouri case of Laclede Gas Co. v. Labor & Indus. Relations Comm'n of Mo, 657 S.W.2d 644 (Mo. Ct. App. 1983), is also different and distinguishable. The company had 22 different departments where operation of the various departments was curtailed between 10-100% with an average curtailment of 75.4 at the beginning of the strike and 69.6% at the end, and was controlled by the Missouri statute which defined stoppage of work as a substantial diminution of activities, production and services. Id. at 647-648. The percentage figures in Laclede "were arrived at by 'approximation' and were based on various measurements of 'normal' activity... in past years." Id. at 648. Constellium Ravenswood's Brief faults our ALJ Tribunal using past year and monthly actual figures, yet cites the Missouri case in support of its position. An interesting paradox of consistency or inconsistency in Constellium Ravenswood's position on how to arrive at monthly averages.

In Boguszewski v. Comm'r of Dept. of Emp. & Training, 410 Mass. 337, 572 N.E.2d 554, (Mass. 1991), the Massachusetts Court found that while production of electricity, energy services and processing of payments remained at normal levels during the dispute, maintenance, inspection, testing, installation or replacement, clerical and administrative functions were either not performed or were performed at levels between 3% to 50% of normal, and found a substantial curtailment under Massachusetts's law.

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[10] Quoting verbatim from Travis v. Grabiec, 52 Ill.2d 175, 180 (1972), which quotes verbatim from Shadur, Unemployment Benefits and the 'Labor Dispute' Disqualification (1949-1950), 17 U.Chi.L.Rev. 294, 310-312.

Constellium Ravenswood failed to cite the 2002 Massachusetts case of Hertz Corporation v. Acting Director of the Div. of Employment and Training, 437 Mass. 295 (2002), where the Supreme Judicial Court of Massachusetts reached the opposite result from Boguszewski. The Court, upholding the decision of the deputy and full evidentiary hearing before the Board of Review, found no work stoppage and rewarded unemployment benefits stating "'The board's decision was well-reasoned and contained detailed findings, and determined a question which is "primarily a question of fact for the board."...'" Id. at 300. [Emphasis added.]

As required under in CSR § 84-1-6.7.6 and Cumberland, Constellium Ravenswood having the burden of proof has failed to present testimony "...that there was no substantial showing of unfulfilled demands or unfulfilled requirements in such categories..." and there "...was no showing of an accumulated backlog of work or services 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." Cumberland at 639.[11] [Emphasis added.]

The Board of Review adopted the ALJ Tribunal finding of fact that during the period of the labor dispute revenues were 72% of normal business, production for coil was 49%, and plate 62% of normal business production, and shipping was 77% coil and 69% plate of normal business shipping and revenues were 72% compared to normal business activity. (App. 0125-0126 - ALJ Tribunal Order p. 7.) Based upon these findings of fact, the Board of Review found the ALJ Tribunal correctly found under Cumberland that there was not a substantial curtailment of business activity at Constellium's facility during the strike, and correctly found there was not a stoppage of work at Constellium Ravenswood's facility as a result of the labor dispute, and,

[11] The West Virginia Supreme Court of Appeals in Cumberland & Allegheny Gas Co. v. Hatcher, did an exhaustive review of the stoppage of work law of twelve other states, including Missouri and Illinois before issuing its ruling.

therefore, the claimants were not disqualified from receiving benefits. The Circuit Court's decision in upholding the Board of Review affirming the fact finding of the ALJ Tribunal is fully supported by this Court's decisions in Cumberland and Lee-Norse, and are entitled to the same weight as those of a trial chancellor and are to be set aside only when clearly wrong. Copen v. Hix, 130 W.Va. 343 (1947), and Adkins v. Gatson, 192 W.Va. 561 (1994).

The thorough and well-reasoned detailed findings and conclusions of law of the three ALJ Tribunal assigned by the Board of Review finding no stoppage of work and no disqualification, and fully adopted and affirmed by the Board of Review and the Circuit Court are correct under West Virginia law as set forth in Cumberland, Homer Laughlin, and Lee-Norse, and the Respondents-Claimants respectfully request the Order of the Circuit Court of Kanawha County be affirmed.

VII. FEDERAL PREEMPTION ISSUE

Constellium Ravenswood begins its argument on the preemption issue stating "Even if it were correct under a matter of law," [the Circuit Court's findings affirming the Board of Review] and then never discusses the holdings of Roberts v. Gatson, 182 W.Va. 764, on the federal preemption issue of New York Telephone Co. v. New York State Dept. of Labor, 440 US 519 (1979). (Constellium Appeal Brief p. 32.) There is no federal preemption for payment of unemployment compensation benefits to persons while they are out of work while on strike. The question presented in New York Telephone Co. v. New York State Dept. of Labor, Id., is whether the National Labor Relations Act, as amended, implicitly prohibits the State of New York from paying unemployment compensation to strikers. Mr. Justice Stevens, joined by Mr. Justice White and Mr. Justice Rehnquist, concluded that Congress, in enacting the National

Labor Relations Act and Social Security Act, [12] did not preempt a State's power to pay unemployment compensation to strikers, stating:

> "The voluminous history of the Social Security Act made it abundantly clear that Congress intended the several States to have broad freedom in setting up the types of unemployment compensation that they wish. We further noted that when wished to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the States' freedom to legislate in this area." [Footnote omitted.] Id. at 538.

The U.S. Supreme Court in New York Telephone Co. affirmed its prior rulings in Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 97 S.Ct. 1898, 52 L.Ed.2d 513; Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279; Batterton v. Francis, 432 U.S. 416, 97 S.Ct. 2399, 53 L.Ed.2d 448. Id. at 539. Also see Watkins v. Cantrell, 736 F.2d. 933 (4 C.A.Va. 1984), all holding that states are not preempted by federal law to regulating qualifications for unemployment benefits.

Justice McHugh, speaking for a unanimous West Virginia Supreme Court of Appeals in Roberts v. Gatson, 182 W.Va. 764 at 769, addresses the New York Telephone Company case holding:

> "This case (New York Telephone) holds that a state is not precluded by the doctrine of federal labor law pre-emption from authorizing the payment of unemployment compensation benefits to persons while they are out of work on strike." [Emphasis added.]

Additionally, Constellium Ravenswood cites Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Emp. Relations Comm'n, 427 U.S. 132 (1976), NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938), San Diego Bldg. Trades v. Garmon, 359 U.S.

[12] The federal-state unemployment insurance system was established under the Social Security Act of 1935.

236 (1959),[13] Wisc. Dep't of Indus., Labor & Human Relations v. Gould Inc, 475 U.S. 282 (1986), and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). These cases deal with preemption of states' unfair labor practices under the National Labor Relations Act, and not with a state's right to authorize unemployment compensation benefits to persons while on strike, as held in Roberts v. Gatson, 182 W.Va. 764 (1990), and New York Telephone Co. v. New York State Dept. of Labor, 440 US 519 (1979).

CONCLUSIONS OF NO WORK STOPPAGE ISSUE AND PREEMPTION ISSUE

The employer, Constellium Ravenswood, has not met its burden under CSR 84-1-6.7.6. and the holdings of Cumberland and Homer Laughlin that there was a substantial work stoppage. Applying the firmly established West Virginia case law that unemployment statutes are remedial in nature and should be liberally construed, coupled with Chapter 21A-7-21 and holdings of the Supreme Court of Appeals that findings of fact by the Board of Review are entitled to substantial deference and should not be set aside unless clearly wrong, Respondents-Claimants respectfully request that the Order of the Circuit Court of Kanawha County affirming the Board of Review Order of February 22, 2012, be affirmed finding that there was no substantial stoppage of work and the Respondents-Claimants were not disqualified.

VII. RESPONDENTS-CLAIMANTS' BRIEF IN SUPPORT OF THEIR LIMITED CROSS ASSIGNMENT OF ERROR

If the Court affirms the Order of the Circuit Court of Kanawha County which affirmed the Board of Review's finding of no work stoppage and the Respondent-Claimants were eligible for unemployment compensation benefits, then as the Circuit Court and Board of Review found

[13] Constellium Ravenswood's Appeal Brief, on Page 50, Footnote 177, cites San Diego Bldg. Trades v. Garmon, 359 U.S. 236, 247 (159), with the quote "'The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" Constellium Ravenswood failed to inform the Board that the compensation referred to in San Diego Bldg. Trades is not unemployment compensation, but damages for a tort action under state law where the company sued the union for peaceful union activity.

this to be outcome-determinative, then this Court need not address the Respondent Claimants cross appeal set forth below.

A. STATEMENT OF CASE OF DENIAL OF DUE PROCESS

Respondents-Claimants filed a limited counter-appeal that the ALJ Tribunal letter ruling of October 2, 2012, erred in granting, in part, the employer's Motion to Quash Respondents-Claimants' Subpoenas Duces Tecum Request Nos. 1, 2 and 3 requesting the employer produce the following:

> 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 Global Management, LLC, or any of its affiliates, including Appollo Investment Fund VII, LP, Rio Tinto, Funds Strategique d'Investment FSI, 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. (App. 0373-0374.)

The ALJ Tribunal, by letter dated October 2, 2012, granted the employer's Motion to Quash stating that 1, 2 and 3 are vague, general and unnecessarily cumbersome. (Supp. App. 1664.) The records Respondents-Claimants are requesting are relevant and directly address the

issue that the employer is not negotiating in good faith as is required by the National Labor Relations Act. It is the Respondents-Claimants' position that the employer of the Respondents-Claimants, Constellium Ravenswood's collective bargaining is being controlled and directed by one or more of the third parties listed in the subpoenas, which is a violation of the National Labor Relations Act. In Roberts v. Gatson, 182 W.Va. 764, the West Virginia Supreme Court of Appeals, in ruling on exceptions to unemployment benefits under 21A-6-3(4), held:

> "Our act, by using the phrase 'denied the right of collective bargaining,' invites an obvious reference to federal labor law provisions concerning the duty to bargain collectively and the failure to do so." Roberts at 767.

The information requested is very specific. The request does not fall within any attorney-client privilege since it regards communications between Constellium and non-attorney parties or its own internal employees with employees of different companies in a foreign country. Also, the undersigned attorney for Respondent-Claimants signed a confidentiality agreement in this case as to any information received regarding trade or business information. (App. 1026-1027, HTR 14-16.)

Negotiators for Constellium Ravenswood were Kyle Lorentzen, CEO of Constellium Ravenswood, Jerry Carter, Vice President of Human Resources, Marty Lucki, Tim Domico, Luke Staskal, Anna Hearn, and Joe Santucci, attorney. Mr. Lorentzen only attended the initial session on May 20, 2012. Mr. Carter became the lead negotiator for Constellium Ravenswood. Present for 5668 was Randy Moore, Subdistrict Director for USWA of West Virginia, Jason Miller, 5668 President, Nathan Nelson, President of 5668 Constellium Ravenswood, Kevin Gaul, Chairman Grievance Committee, David Martin, and Ed Barnette, Bargaining Committee Representatives.

The hearing record discloses that Kyle Lorentzen reported to and was controlled by Christopher Villemin, President of Constellium Global ATI, a division of Constellium France, whose office is in Paris, France, who controlled Constellium Ravenswood. Mr. Lorentzen kept his boss, Christophe Villemin, informed of the negotiations and exchanged emails with his boss and had notes of telephone conversations with him on the contract issues which would show, along with other conversations, that Constellium N.V. was in fact controlling the negotiations. (App. 1231-1248, HTR 219-230.)

Mr. Lorentzen testified that prior to negotiations, the Board of Directors of Constellium Paris, which was made up of five members appointed by Apollo, two from Rio Tinto, and one from French Investment, established the economic parameters for the new collective bargaining agreement and, that to go outside of these parameters, he had to get approval from Paris on several occasions. (App. 1231-1242, HTR 223-230.)

Kyle Lorentzen, the CEO of Constellium Ravenswood, was not present during the final twenty-six bargaining sessions (App. 1190, HTR 178). Jerry Carter, the head negotiator, did not have authority to make decisions on economic matters, but had to receive authority from companies in Paris, France, through Kyle Lorentzen, who never reappeared at any bargaining session after the May 30th meeting. (App. 1187-1189, Moore testimony.) Mr. Moore testified that "[He] did not feel that the person the company had at the table was calling the shots or had authority to call the shots," and that long delays in bargaining was because the company was waiting to get approval from Paris on economic issues. (App. 1187-1189, HTR 206-207.) Jerry Carter testified that on economic issues, he had to get approval from CEO Lorentzen, who, in turn, had to get approval from Paris where the "big boss" was. CEO Lorentzen testified that he

controlled Carter on economic issues, and that he had to contact Paris to get approval for economic issues. (App. 1231-142, HTR 224-235.)

Constellium Ravenswood in its response brief attempts to downplay the role of Constellium N.V. in contract negotiations by stating that Constellium Ravenswood was permitted to consult with higher management in Paris. The claimants are alleging that Constellium was not bargaining in good faith since Constellium N.V. Paris was in fact controlling the entire negotiations, which is a failure to bargain in good faith denying claimants the right to collective bargaining since Constellium N.V., a nonparty to the collective bargaining treatment, was not at the bargaining table.

B. DENIAL OF PROCEDURAL DUE PROCESS

The denial of Respondent-Claimants' subpoena and subpoena duces tecum violates the claimants' property interest under due process protections under the fourteenth amendment of the U.S. Constitution and the Article 3, Section 10 of the West Virginia Constitution denies them the opportunity for a full and fair hearing before the tribunal on the issues: were the employees required to accept wages, hours or conditions of employment less favorable than those prevailing for similar work in the locality?; and were the employees denied the right of collective bargaining under generally prevailing conditions?

Federal law mandates that state unemployment programs provide the claimants an opportunity before an impartial tribunal to present his own evidence and arguments orally and confront and examine any adverse witnesses.

Any judicial analysis of a state hearing procedure in an employment case must be conducted with a fundamental recognition under the fourteenth, U.S. Const. amend XIV, which is the cornerstone of due process. The procedural cornerstone for a fair hearing for

unemployment benefits under 42 U.S.C. 503 (a)(3) has been interpreted to impose requirements which are the same as constitutional procedural due process.

42 U.S.C. 503 (a)(3) provides:

> "(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act [26 U.S.C. 3301 et seq.], includes provision for—
>
> (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied."

In the unemployment case of Cuellar v. Texas Employment Com., 825 F.2d 930 (5CCA 1987), where the claimant was denied subpoenas foreclosing the opportunity to present evidence, the Court held:

> "The dictates for procedural due process provided by administrative hearings in regard to deprivations of property are succinctly stated in the Supreme Court's recent pronouncement in Brock v. Roadway Express, Inc., 481 U.S. 252, 107 S. Ct. 1740, 1746-47, 95 L. Ed. 2d 239 (1987)...

The Court in Cellular went on to hold:

> "'...Though the required procedures may vary according to the interests at stake in particular contexts, Boddie v. Connecticut, 401 U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971), "the fundamental requirement of due process is the opportunity to be heard "'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965); see also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 656, 94 L. Ed. 865 (1950). Depending on the circumstances, and the interests at stake, a fairly extensive evidentiary hearing may be constitutionally required before a legitimate claim of entitlement may be terminated. Id. at 934... [Emphasis added.]
>
> "Depending on the circumstances, and the interest at stake, a fairly extensive evidentiary hearing may be constitutionally required

> before legitimate claim of entitlement may be determined." See Goldberg v. Kelley, 397 U.S. 254, 266-271.
>
> "There can be no doubt that unemployment benefits are a species of property protected by the fifth and fourteenth amendment due process clauses, regardless of whether the claimant wishes to establish or retain benefits. See Sherbert v. Verner, 374 U.S. 398, 405, 83 S. Ct. 1790, 1794-95, 10 L. Ed. 2d 965 (1963); California Dept. of Human Resources Development v. Java, 402 U.S. 121, 123-24, 91 S. Ct. 1347, 1352, 28 L. Ed. 2d 666 (1971); Graves v. Meystrik, 425 F. Supp. 40 (E.D.Mo.1977) (3 judge court), aff'd without opinion, 431 U.S. 910, 97 S. Ct. 2164, 53 L. Ed. 2d 220 (1977)..." Cuellar at 935. [Emphasis added.]

In Goldberg v. Kelley, 397 U.S. 254 (1970), the Supreme Court held that a state hearing for welfare benefits under 42 U.S. Code in an administrative hearing there must be:

> '...a hearing at a meaningful time and in a meaningful manner 'require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.' 397 U.S. at 267-68, 90 S. Ct. at 1020 (emphasis added)." Cuellar at 935.

Also see Camacho v. Bowling, 562 F. Supp. 1012 at 1020 (N.D. Illinois 1983), where the District Court remanded a denial of unemployment compensation benefits to the Illinois state agency to hold additional hearings holding: "'Section 303(a)(3) of the Social Security Act[14] affords an identical protection, requiring "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.' [Emphasis added.] 42 U.S.C. § 503(a)(3). Whether the statutory 'fair hearing' requirement has been met is tested by the same standards as constitutional procedural due process. Citing Ross v. Horn, 598 F.2d 1312, 1318 n. 4 (3d Cir.1979), cert. denied, 448 U.S. 906, 100 S. Ct. 3048, 65 L. Ed. 2d 1136 (1980). Cf. Wilkinson v. Abrams, 627 F.2d 650, 653 (3d Cir.1980); Carmona v.

[14] Title III of the Social Security Act, 42 U.S. Code §§ 501, etc., established the unemployment compensation programs. The reference to Section 303(a)(3) is misprinted and should be 503(a)(3).

Sheffield, 475 F.2d 738, 739 (9th Cir.1973). Thus, if the court finds that the appeals process violates procedural due process, it follows that the appeals process also violates Section 303(a)(3).'"

> "The due process requirement of notice, in the administrative context, 'requires that interested parties be given a reasonable opportunity to know the claims of adverse parties and an opportunity to meet them. North Alabama Express, Inc. v. United States, 585 F.2d 783, 786 (5th Cir.1978), citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143, 60 S. Ct. 437, 442, 84 L. Ed. 656 (1940); Morgan v. United States, 304 U.S. 1, 18, 58 S. Ct. 773, 776, 82 L. Ed. 1129, 58 S. Ct. 999 (1938); Intercontinenal Industries, Inc. v. American Stock Exchange, 452 F.2d 935, 941 (5th Cir.1971), cert. denied, 409 U.S. 842, 93 S. Ct. 41, 34 L. Ed. 2d 81 (1972)...'"

A strong bias exists towards admissibility of the documents requested under West Virginia Rules of Evidence 401, 402 and 403, and under this approach, in the absence of some particular exclusionary provisions of the Constitution, statute or rule, trial judges should admit all evidence relevant under Rule 401 if its probative value is not substantially outweighed by the dangers and other considerations spelled out in 403. (1-4(A), pp. 12, Cleckley, *Handbook on Evidence for West Lawyers*, 3rd Ed.)

Administrative agency should receive, under the applicable rules of admissibility, all available material evidence, which would include circumstantial as well as direct evidence, and can consider hearsay, and may use both presumptions and proof of facts to resolve an issue before it. 1A Michie's Jur Administrative Law, § 12, at pp. 338-339.

In W. Va. University Board of Trustees v. Fox, 197 W.Va. 91 (1996), this Court noted that the West Virginia Rules of Evidence are typically given their full effect in administrative proceedings, yet acknowledged that under The Administrative Procedures Act 29A-5-2, also provides that '"[w]hen necessary to ascertain facts not reasonably susceptible of proof under

those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs . . . ."' Id. at 94, FN3.

While WorkForce West Virginia and the Board of Review are not governed by the West Virginia State Administrative Procedures Act, § 29A-5-2, *et seq.*, which states "...The rules of evidence as applied in civil cases in the circuit courts of this state shall be followed...." WorkForce West Virginia and the Board of Review have promulgated regulations under § 21A-7-13, *et seq.*, and have not changed, negated or modified the statutory provision that the West Virginia Rules of Evidence do not apply in its administrative hearings, and, in fact, have enlarged admissibility as allowed under West Virginia Code § 21A-7-13 by its promulgated rule CSR § 84-1-6.3 which states as follows:

> § 21A-7-13. Board to establish regulations for procedure.
>
> The board shall establish, and may from time to time modify and amend, rules and regulations for:
>
> > "... (4) Determining the rights of the parties; and the rules need not conform to the common-law or statutory rules of evidence and procedure and may provide for the determination of questions of fact according to the predominance of the evidence."
>
> CSR 84-1-6.3 "Rules of Evidence and Procedure – In the conduct of the hearings, neither the Board of Review nor its subordinate tribunals shall be bound by the usual common law or statutory rules of evidence or by the formal rules of procedure, except as provided for by these rules."

In Freed v. Unemployment Comp. Review Comm'n, 94 N.E.3d 51(Ohio 2017), citing Boddie v. Connecticut, 401 U.S. 371, the claimant in an unemployment hearing had requested a subpoena duces tecum requesting detailed information which the company did not provide. The Ohio court held the failure by the company to provide the material denied the claimant due

process under the fourteenth amendment of the U.S. Constitution. A party must be allowed to present evidence that provides insight on the subject matter in dispute. The key factor is whether the claimants have the opportunity to present facts that show they are entitled to benefits under all issues in dispute.

In Hicks v. Ky. Unemployment Ins. Comm'n, 390 S.W.3d 167, the Court held, "'Due process requires, at a minimum, that persons forced to settle their claims of right and duty through the judicial process be given a meaningful opportunity to be heard.' Utility Regulatory Comm'n v. Kentucky Water Service Co., Inc., 642 S.W.2d 591, 593 (Ky. App. 1982) (citing Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). 'An administrative agency is prohibited from acting in an arbitrary manner by § 2 of the Kentucky Constitution.' Bunch v. Personnel Bd., Commonwealth of Kentucky, 719 S.W.2d 8, 10 (Ky. App. 1986) (citing Pritchett v. Marshall, 375 S.W.2d 253 (Ky. 1964)). Here, Hicks was denied a subpoena and a continuance. This was an arbitrary denial of due process. Hicks should have been granted his subpoena, or at least given a continuance in order to try to obtain another subpoena. Hicks was denied his meaningful opportunity to be heard because he was prohibited from collecting evidence to be used during his hearing." [Emphasis added.]

The quashing of the subpoena and subpoena duces tecum by the hearing Tribunal and the non-decision of the Circuit Court and Board of Review in denying the claimants' appeal of this matter, the claimants are being denied the opportunity to introduce evidence that Constellium N.V., a non-party to the collective bargaining agreement, was interfering and controlling to negotiations of the CBA which is a violation of W. Va. Code § 21A-6-4. The claimants are being denied procedural due process of a property right to a fair hearing and to confront the actions of an adverse nonparty. It is abundantly clear that in administrative hearings for

unemployment benefits that all relevant evidence should be admitted and considered by the ALJ Tribunals and the Board of Review to determine the rights of the parties.

C. ARGUMENT THAT CONSTELLIUM RAVENSWOOD DID NOT BARGAIN IN GOOD FAITH

The West Virginia Statute, Chapter 21A-6-3(4) governing removal of the disqualification when an employer fails to bargain in good faith states in part "...No disqualification under this subdivision is imposed... if employees are denied the right of collective bargaining under generally prevailing conditions..."[15]

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. (Carter testimony, App. 335-336.)

In Roberts v. Gatson, 182 W.Va. 764, 768, the Supreme Court of Appeals held:

> "...we believe it is appropriate for this Court to look to the NLRA for guidance in interpreting the phrase 'denied the right of collective bargaining' contained in W.Va. Code, 21A-6-3(4). Under Section 8(d) of the NLRA, 29 U.S.C. § 158(d), 'to bargain collectively' is defined as follows:
>
> > "'For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if

[15] Shadur, Unemployment Benefits and the 'Labor Dispute' Disqualification (1949-1950), 17 U.Chi.L.Rev. 294, 310-312 at 306, opines that this section of the West Virginia Statute "has added a significant contribution based on the notion of the unreasonableness" of the employer which results in the removal of the disqualification provision.

> requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession[.]'" Roberts at 768.

This Court in Roberts, went on to hold:

> "Under the federal labor law, there have evolved what are termed per se violations of the duty to bargain collectively in good faith. This type of violation is considered so egregious that the offending party will rarely, if ever, be permitted to escape an unfair labor practice charge by attempting to excuse or justify its conduct. The United States Supreme Court, in N.L.R.B. v. Katz, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230, 236 (1962), identified two such violations and indicated that the question of good faith was not relevant:...We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." (Emphasis in original; footnotes omitted). Roberts at 769.
>
> ..."Katz also identifies the refusal to bargain over any mandatory subject of collective bargaining as a per se violation of the act:
>
> > "'A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.' 369 U.S. at 743, 8 L.Ed.2d at 236, 82 S.Ct. at 1111. (Emphasis in original)." Roberts at 770.

In addition to the aforesaid conduct, the U.S. Supreme Court has recognized that "Under § 8(a)(5) of the National Labor Relations Act, there is a duty to disclose relevant information necessary to accomplish collective bargaining." Roberts at 770.

With Kyle Lorentzen, CEO of Constellium, absent after the opening session of the negotiations on May 30, 2012, the remaining 25 sessions were attended by Jerry Carter, Hana Hern, Luke Staskal, Marty Lucki, Tim Domico, and Joe Satucci, with 24 tentative agreements

reached on July 21, 2012, on non-economic issues. The company refused to bargain on economic issues until July 9, 2012, and that the economic issues were contingent upon acceptance by the union of the company's economic package. Respondent-Claimants' evidence established that neither Kyle Lorentzen nor Jerry Carter who served as the company's lead negotiators, nor any of the other negotiators, had the final authority to bind the company on economic issues and that Mr. Carter would merely transmit union economic proposals to Mr. Lorentzen who, in turn, would have to relay the proposals to Constellium Paris for acceptance or rejection. (App. 1232-1238, Lorentzen testimony, HTR 224-229; Carter testimony, App. 1243-1247, HTR 233-234.) The failure to have a person without authority at negotiations to enter into a binding agreement is indispensable under the National Labor Relations Act, is a failure to bargain in good faith, and an unfair labor practice under the National Labor Relations Act.

The National Labor Relations Board in Standard Generator Service Company v. United Automobile Workers of America, Case No. 90 N.L.R.B. 131, enforced 186 F.2d 606 (C.A.8 1951), held that a company's failure to invest sufficient authority in its negotiation was an unfair labor practice under 8(a)(5) of the National Labor Relations Act. Also see J.B. Cook Auto Machine Co. Inc. and International Association of Machinists, 84 N.L.R.B. 698, enforced 6th Cir. 184 F.2d 845. In Brown and Root, et al. v. Fort Smith, Little Rock and Springfield Joint Council AFL-CIO, 80 N.L.R.B. No. 72, the Board affirmed the Trial Examiner that the employer under 8(a)(1) of the National Labor Relations Act had not negotiated in good faith when its appointed negotiator could meet and discuss with the union provided he did not depart in any substantial particulars from the employer's proposal, and had no authority to make or accept any counter proposal binding on the employer. This failure to invest its appointed negotiator with any authority to negotiate is a failure to bargain in good faith. Also see V-O Milling Co. and

Flour, Feed and Cereal Workers Federal Union Local 21830 AFL, 43 N.L.R.B. No. 59; J. B. Cook Auto Machine Co. Inc., and International Association of Machinists, 84 N.L.R.B. No. 84.

In National Labor Relations Board v. A. E. Nettleton Co., et al., 241 F.2d 130 (C.A.2 1957), the Court 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). The Court also found that attempting to influence union members to give up membership during negotiations was a violation of the NLRA. Id. at 134.

In Bewley Mills and General Drivers, Warehousemen & Helpers of America Local 968, NLRB Case No. 39-CA-389, the National Labor Relations Board held that where the company's designated representative had no authority and had to receive advanced approval of company's top officials violated § 8(1)(5) and (i) of the National Labor Relations Act.

The record discloses that Kyle Lorentzen reported to and was controlled by Christopher Villemin, President of Constellium Global ATI, a division of Constellium France, whose office is in Paris, France who controlled Constellium Ravenswood (App. 222-223), and that he exchanged emails with his boss, Christophe Villemin and had notes of telephone conversations with Mr. Villemin on the contract issues. (App. 223-225.)

The specific instances of unfair labor practices committed by Constellium Ravenswood begin with the failure to have a person at the negotiation table with authority to bargain, in and of itself, is a failure to bargain in good faith, and for foreign companies RIO Tinto, Apollo Management, French Investment Fund, and Constellium of Paris to have controlled Constellium Ravenswood's, a West Virginia company, negotiations, is an absolute failure to bargain in good

faith when the controlling individual is an employee of a foreign company located in Paris, France.

Constellium Ravenswood and its predecessor, Alcan, entered into a collective bargaining agreement with 5668 in July 2010, to expire on July 15, 2012, which did not contain a medical necessity clause and had first dollar medical coverage with no contributions by employees or retirees.

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. Under the rule set forth by the U. S. Supreme Court in N.L.R.B. v. Katz, 369 U.S. 736 (1962), and adopted by our Supreme Court of Appeals in Roberts v. Gatson, 182 W.Va. 764, an employer's unilateral change in conditions of employment under negotiation is a violation of the duty to bargain in good faith. Roberts at 769. Also see NLRB v. American Nat. Ins. Co., 343 U.S. 395 (1952), where the United States Supreme Court upheld National Labor Relations Board (NLRB) and Fifth Circuit findings that unilateral action in changing working conditions during bargaining is a failure to bargain in good faith and a violation of 8(d) NLRA. Mr. Moore testified that the August 4 offer was the worst to come across the table. It went backwards.[16] (App. 204.) In Roberts, the Supreme Court of Appeals found that the company's last offer before the work stoppage is the starting point and "the determination of when an employer is trying 'to force wage reduction' or other changes in benefits under W.Va. Code 21-6-3(4) [1990], is made by comparing the employer's proposed change(s) to the status quo as shown by the expiring contract. If the

[16] Bewley Mills, NLRB Case No. 39-CA-389, supra, held that when the company approaches the bargaining table not with an open mind that it is not bargaining in good faith.

employer's proposed change(s) would result in detrimental terms for the employee, then the employer is considered to be seeking 'to force wage reduction, changes in hours or working conditions.'" Syllabus 6, Smittle v. Gatson, 195 W.Va. 416, (1995).

Constellium Ravenswood also acted in derogation of its duty to bargain in good faith when Mr. Lorentzen wrote on August 2, 2012, to all union members in an attempt to get them to withdraw from the union during contract negotiations. (App. 335-336; Hearing Tr. Employer's Exhibit 18.)

The intransigence position of Constellium Paris in requiring Constellium Ravenswood to unilaterally adopt the medical necessity clause is an unconscionable act to force on employees, retirees, and their families huge medical deductions and copays which never existed before, is without question a change in the status quo in benefits resulting in detrimental terms which would result in significant health and economic losses to the claimants, retirees, and their families. This is an unfair labor practice under W.Va. Code 21-6-3(4), as held by Smittle v. Gatson, Id.

D. CONCLUSION AS TO FAILURE TO BARGAIN IN GOOD FAITH

Neither the ALJ Tribunal nor the Board of Review made any findings of facts on these issues. The Board of Review, from these facts had they addressed these issues, should have found Constellium Ravenswood failed to bargain in good faith and was trying to force changes in benefits from the expiring contract which would result in detrimental economic losses for the employees, retirees, and their families, and that the Respondents-Claimants were not disqualified.

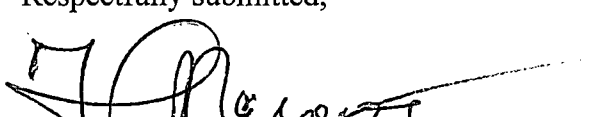
WHEREFORE, Respondents-Claimants request this Court to find that the employees were denied due process and were prevented from fully pursuing their positions and to accept

wages, hours or conditions of employment less favorable than those prevailing for similar work in the locality, and the employees were denied the right of collective bargaining under generally prevailing conditions and are not disqualified, and respectfully request the Court remand the issues of the denial of due process to the Tribunal requiring subpoenas be issued and a full hearing held on these questions of law and facts.

FINAL CONCLUSION

For the reasons specifically stated in the Board of Review's Finding of Facts and Conclusions of Law and Discussion, and in accordance with the law of the State of West Virginia as set forth in Cumberland & Allegheny Gas Co. v. Hatcher and Roberts v. Gatson, the claimants respectfully request that the Court affirm the Order of the Circuit Court which affirms the Board of Review decision of February 28, 2013, affirming the ALJ Tribunal's Decision of December 14, 2012, finding that there was not a substantial work stoppage at Constellium Ravenswood and award the Respondent-Claimants benefits, and Respondents-Claimants further request that the Court find that the claimants were denied due process in their positions to show they were denied the right of collective bargaining under general prevailing conditions and were required to accept conditions of employment substantially less favorable than those for similar work in the locality and not disqualified for benefits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Thomas P. Maroney, counsel for Respondents-Claimants Earl B. Cooper, et al., do hereby certify that I served a true and accurate copy of **BRIEF OF THE RESPONDENTS-CLAIMANTS, EARL B. COOPER, ET AL., TO PETITIONER CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC'S APPEAL AND LIMITED CROSS ASSIGNMENT OF ERROR BY RESPONDENT-CLAIMANTS UNDER *W.V.R.A.P.* 10(f), AND RESPONDENTS-CLAIMANTS' BRIEF IN SUPPORT OF THEIR LIMITED CROSS-APPEAL** upon the following parties of record, via U.S. First Class Mail, postage pre-paid, on this 23rd day of November 2020.

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