IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

CONSTELLIUM ROLLED PRODUCTS RAVENSWOOD, LLC,
Petitioner,

v.

Civil Action No. 13-AA-44

WORKFORCE WEST VIRGINIA BOARD OF REVIEW; RUSSELL FRY, COMMISSIONER; WORKFORCE WEST VIRGINIA; *and* EARL B. COOPER, *et al.*,
Respondents

Appeal from an Order of the Workforce West Virginia Board of Review Labor Dispute Case No. 2012-0002

-and-

EARL B. COOPER, *et al.*,
Petitioners,

v.

Civil Action No. 13-AA-45

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

Appeal from an Order of the Workforce West Virginia Board of Review Labor Dispute Case No. 2012-0002

ORDER

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The genesis of these consolidated cases is a labor dispute which took place from August 5, 2012 to September 24, 2012 (hereinafter "the labor dispute"). The parties are the employer, Constellium Rolled Products Ravenswood, LLC, an aluminum manufacturing plant located in Ravenswood, Jackson County, West Virginia (hereinafter "Constellium Ravenswood"), and Earl B. Cooper, et al., the 690 hourly workers at Constellium Ravenswood who are represented by the United Steelworkers Local 5668 (hereinafter "Respondent-Claimants"). Constellium

Ravenswood appeals the February 22, 2013, unanimous decision of the Board of Review of Workforce West Virginia (hereinafter "Board of Review') which affirmed the three member Administrative Law Judge Tribunal (hereinafter "ALJ Tribunal") decision of December 14, 2012, finding that there was not a stoppage of work at the Constellium Ravenswood facility as a result of the labor dispute, and that the Respondents-Claimants were therefore, not disqualified from unemployment benefits pursuant to the provisions of W.Va. Code 21A-6-3(4).

Respondents-Claimants assert on appeal that: (1) they were denied the right of collective bargaining under general prevailing conditions; (2) they were required to accept wages or conditions of employment substantially less favorable than those prevailing for similar work in the locality; and (3) the ALJ Tribunal erred in quashing part of a subpoena duces tecum in which the Respondent-Claimants sought the production of communications between Constellium Ravenswood and its parent companies, namely, Apollo Global Management, Rio Tinito and FSI, a French government investment firm, all entities the Respondent-Claimants contend had control of collective bargaining.

The Board of Review declined to address the issues raised on appeal by the Respondent-Claimants, finding that the work stoppage issue was outcome determinative, and therefore, those issues were moot. The ALJ Tribunal had also determined that the work stoppage issue was outcome determinative; however, the ALJ Tribunal concluded that Respondent-Claimants had not been denied the right of collective bargaining under general prevailing conditions and were not required to accept wages or conditions of employment substantially less favorable than those prevailing for similar work in the locality

Further, the ALJ Tribunal quashed part of the subpoena duces tecum directed to Constellium Ravenswood requiring the production of communications between Constellium Ravenswood and its parent companies regarding the labor dispute.

II. STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia has held that the following standard of appellate review applies to decisions regarding unemployment compensation:

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

Syl. Pt. 3, Adkins v. Gatson, 192 W. Va. 561.E.2d 395 (1994) (emphasis added); *see, also*, W. Va. Code §-21A-7-21 ("In a judicial proceeding to review a decision of the board, the findings of fact of the board shall have like weight to that accorded to the findings of fact of a trial chancellor or judge in equity procedure."); Alcan Rolled Prod. Ravenswood, LLC v. McCarthy, 234 W. Va. 312, 765 S.E.2d 201 (2014).

Historically, the Supreme Court of Appeals has 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, and 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.[1]

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[1]See, e.g., Tabor v. Gatson, 207 W.Va. 424, 533 S.E.2d 356 (2000); Patton v. Gatson, 207 W.Va. 168, 530 S. E.2d 167 (1999); University of West Virginia Bd. of Trustees/West Virginia University v. Aglinsky, 206 W.Va. 180, 522 S.E.2d 909 (1999); Summers v. Gatson, 205 W.Va. 198, 517 S.E.2d 295 (1999); Ohio Valley Medical Center, Inc. v. Gatson, 202 W.Va. 507, 505 S.E.2d 426 (1998); Glass v. Gatson, 200 W.Va. 181, 488 S.E.2d 456 (1997); Raleigh County Bd. of Educ. v. Gatson, 196 W.Va. 137, 468 S.E.2d 923 (1996); Adkins v. Gatson, 192 W.Va. 561, 453 S.E.2d 395 (1994); Federoff v. Rutledge, 175 W.Va. 389, 332 S.E.2d 855 (1985); Belt v. Rutledge, 175 W.Va. 28, 330 S.E.2d 837 (1985); Butler v. Rutledge, 174 W.Va. 752, 329 S.E.2d 118 (1985); Mizell v. Rutledge, 174 W.Va. 639, 328 S.E.2d 514 (1985); Perfin v. Cole, 174 W.Va. 417, 327 S.E.2d 396 (1985); Lough v. Cole, 172 W Va. 730, 310 S.E.2d 491 (1983), Kisamore v. Rutledge, 166 W.Va. 675, 276 S.E.2d 821 (1981); Copen v. Hix, 130 W.Va. 343, 43 S.E.2d 382 (194

More recently, in Childress v. Muzzle, 222 W.Va. 129, 663 S.E.2d 583 (2008), the Supreme Court provided the following guidance on how the provisions of West Virginia's unemployment statute should be construed:

> "[W]hile we have held that unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof, we believe that it is also important for the Court to protect the unemployment compensation fund against claims by those not entitled to the benefits of the Act. Also, we believe that the basic policy and purpose of the Act is advanced both when benefits are denied to those for whom the Act is not intended to benefit, as well as when benefits are awarded in proper cases. Additionally, we believe that the Act was clearly designed to serve not only the interest of qualifying unemployed persons, but also the general public."

Muzzle, 222 W. Va. at 133, 663 S.E.2d at 587 (internal citations and quotations omitted).

Accordingly, this Court must give deference to the administrative agency's factual findings and review those findings under a clearly wrong standard. Further, this Court must apply a *de novo* standard of review to the agency's conclusions of law. Muscatell v. Cline, 196 W.Va. 588, at 595, 474 S.E.2d 518, at 525 (1996). By way of further guidance to this Court, the West Virginia Supreme Court has stated that, in administrative appeals:

> "[a] reviewing court must evaluate the record of the agency's proceedings to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is to be conducted pursuant to the administrative body's findings of fact regardless of whether the court would have reached a different conclusion on the same set of facts."

Donahue v. Cline, 190 W.Va. 98, at 102, 437 S.E.2d 262, at 266 (1993) (per curiam) (citing Gino's Pizza of West Hamlin v. West Virginia Human Rights Comm'n, 187 W.Va. 312, at 317, 418 S.E.2d 758, at 763 (1992)).

III. DISCUSSION

A. Findings of Fact

The ALJ Tribunal unanimously adopted twenty-nine (29) specific findings of fact which were adopted in their entirety by the Board of Review in the Order on appeal before this Court. Accordingly, the review of factual findings challenged on appeal will address the decision-making process of the ALJ Tribunal.

The record shows that, in reaching its factual findings, the ALJ Tribunal thoroughly analyzed the production, shipping, and revenue records produced by Constellium Ravenswood. The ALJ Tribunal also evaluated monthly averages of those records between January 2010 to July 2012, as proposed by Respondent-Claimants (ALJ Tribunal Order Findings ¶ 17), between March 2012 to July 2012, as proposed by Constellium Ravenswood (See ALJ Tribunal Order Findings ¶¶ 16 & 20), as well as August and September 2012 (See ALJ Tribunal Order Findings ¶¶ 15, 18 & 21) and October 2012 (See ALJ Tribunal Order Findings ¶ 23).

The ALJ Tribunal also calculated the output numbers from August and September 2011, the same two-month cycle as the strike, but from one year prior (See ALJ Tribunal Order Findings ¶¶ 21 & 25). Revenue averages for the same periods were also included in the Findings of Fact of the ALJ Tribunal Order.

Further, following a careful and thorough interpretation of the production, shipping, and revenue during the time periods, including the stretcher replacement, the ALJ Tribunal determined the following levels of production, shipping and revenue existed during the labor dispute: production of plate was 62% of normal business, production of coil was 49% of normal business, shipping of plate was 69% of normal business, shipping of coil was 77% of normal

business, and revenue was 72% of normal business. (See ALJ Tribunal Order Findings ¶¶ 22 & 26).

In adopting all of the ALJ Tribunal findings of fact by reference, the Board of Review likewise determined that during the period of the labor dispute, production of coil was 49% and production of plate was 62% of normal business production, shipping of coil was 77% and shipping of plate was 69% of normal business shipping, and revenue was 72% of normal business revenue.

Constellium Ravenswood contends that the ALJ Tribunal erred by using an approximately two and a half (2 ½) year window of time (between January 2010 to July 2012) as advanced by Respondent-Claimants, to calculate normal business instead of using only the two (2) months immediately prior to the labor dispute, when business was on an upswing, as sought by Constellium Ravenswood. Regarding this issue, this Court finds that it is not clearly wrong or unreasonable to conclude that a longer, more comprehensive time frame captures a more reliable picture of what is "normal business" and more accurately reflects the cyclical nature of Constellium Ravenswood's business.

In addition, the ALJ Tribunal averaged the output values during the time frames proposed by both parties to determine an average between the two positions. While there may be merit in choosing a different time frame for other types of comparisons, the time frames chosen by the ALJ Tribunal for comparison to the issues raised in these proceedings were reasonable, and likewise took into account the positions of both parties. Therefore, the factual determination in adopting an appropriate time frame to calculate normal business of Constellium Ravenswood by the ALJ Tribunal is given deference by this Court.

Constellium Ravenswood further takes exception with the ALJ Tribunal's calculations of output metrics during the labor dispute. While the dispute lasted from August 5, 2012 to September 24, 2012, the ALJ Tribunal calculated output numbers from August 1, 2012 to September 30, 2012, (See ALJ Tribunal Order Findings ¶ 29) because only "whole month" output metrics were available at the time of the hearing (See Resp't Br. to Board of Review pg. APP0055 of App. Vol.1).

Constellium Ravenswood contends that allowing the eleven (11) full operation days to be averaged in with the labor dispute output numbers is clearly wrong because doing so inflates the labor dispute output numbers. Constellium Ravenswood would have this Court "back out" the eleven (11) days in August and September 2012, when the plant was fully operational.

Since daily output metrics were not available at the original hearing, and are not in the record, the best this Court could do would be to calculate the output metrics for August and September of 2012, divide that figure by the number of days in the same time period to get an average daily value, and subtract eleven (11) days' worth of that value from the monthly output totals for the labor dispute period.

However, this method of calculation would still average the full production values with the labor dispute production values to determine the daily value. Essentially, while this method of calculation would likely result in a slightly more accurate view of output metrics during the labor dispute, the metrics would *still not be completely accurate as they would be inflated by averaging labor dispute values with non-labor dispute values.*

In this regard, although the calculation used by the ALJ Tribunal is not precisely accurate, it is also not clearly wrong. Indeed, any risk of inflating labor dispute numbers ever so slightly is accounted for in the ALJ Tribunal's calculation. For instance, as aforementioned, the

ALJ Tribunal actually used a more robust time frame to measure normal business of the employer plant, as opposed to simply using the production output numbers from August and September of 2011, just one year before the labor dispute. While arguably more relevant than the chosen time frames, this would, in fact, result in lower monthly averages for output metrics at full operation of the plant than those used by the ALJ Tribunal.

Further, as more fully discussed below, there is not a bright-line percentage that triggers substantial curtailment. The percentage calculations are approximations meant to be a point of reference to provide perspective on the impact of the labor dispute. Because the calculations in question accomplish this purpose, they will not be disturbed by this Court.

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

The ALJ Tribunal chose relevant, tangible, metrics to give points of comparison for the impact of an hourly worker labor dispute at a production company. Moreover, as more fully discussed in the following section, there is nothing in the record to show that the accumulated backlog of work or services of the salaried employees were of such volume or were of such a nature as to require the employment of additional personnel or to require overtime employment on the part of the salaried employees after normal operations were resumed.

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

However, the ALJ Tribunal, having heard all the testimony and reviewed all the evidence as it was presented, was in a much better position to determine what metrics and calculations would give the best approximation of the impact of the labor dispute on a business like Constellium Ravenswood. It is not this Court's role to substitute new judgment for the fact finding below unless clearly warranted under the law. Indeed, this Court finds there is no need to disturb the factual determinations of the administrative tribunals as they are not clearly wrong.

In sum, upon a thorough review of the record as a whole, the evidence supports the factual findings of the Board of Review.

B. Conclusions of Law

1. Issue of Work Stoppage

As previously noted, this Court reviews *de novo* the lower tribunals' application of the facts to the prevailing law. Under West Virginia law, claimants are disqualified for unemployment compensation if the underlying labor dispute causes a stoppage of work. West Virginia Code § 21A-6-3 provides, in pertinent part:

Upon a determination of the facts by the commissioner, an individual is disqualified from benefits: . . .

> 4) For a week in which his or her total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he or she was last employed[.]

W. Va. Code § 21A-6-3(4).

The term 'stoppage of work' relates to the employer's plant operations rather than to the employees' labor. Cumberland & Allegheny Gas Co. v. Hatcher, 147 W.Va. 630, at 638, 130 S.E.2d 115,120 (1963), overruled on other grounds by Lee-Norse Co. v. Rutledge, 170 W. Va. 162, 291 S.E.2d 477 (1982). That question, in turn, has been held by courts to hinge on whether there was a "substantial curtailment" of the employer's normal operations. Id. at Syl. Pt. 2.

It is undisputed that there was *at least some* disruption in Constellium Ravenswood's business as a result of the labor dispute. However, the more challenging determination is the amount of disruption in normal business which constitutes a substantial curtailment. There is no bright-line percentage established by statutory or case law. Rather, a reviewing court must look to the guidance of controlling precedent to determine whether there has been substantial curtailment of normal business based upon the unique facts of a given case.

In Allegheny Gas Co. 147 W. Va. 630 at 639, 130 S.E.2d at 121, the Court held that no substantial curtailment of the normal operations of a gas company had occurred where 80% of the workforce was unable to work due to an ongoing labor dispute, during which time the remaining 20% were completely unable to perform many of the normal functions of the company including: periodic meter changes, routine service orders, domestic meter reading, constructing new line extensions, renewal of old lines or installing new service lines, meter tests, maintenance and building work, and engineering and design work. However, because the gas company was able to fulfill its vital business purpose of providing continuous gas to customers during the labor dispute, the court found that there was no substantial curtailment. Id. at 635, 130 S.E.2d at 122.

Constellium Ravenwood makes the argument that substantial curtailment occurred because salaried employees were unable to fulfill their regular duties, such as administration,

maintenance, engineering, and training, among other things, due to time spent performing the duties of the hourly workers during the labor dispute. Indeed, the record below clearly indicates that salaried employees of Constellium Ravenswood were not able to devote adequate time to their normal duties while they were covering the duties of the hourly employees during the labor dispute (See ALJ Tribunal Order Findings PP12 & 24).

However, the record does not establish that the shift in the salaried employees' duties resulted in a substantial curtailment of normal operations under the reasoning cited in Allegheny Gas Co. To the contrary, the record confirms that the Constellium Ravenswood plant was still able to fulfill its vital business purpose of producing, shipping and earning revenue from aluminum products at levels comparable to the levels prior to the period of the labor dispute.

An additional but related consideration in determining whether or not there was a substantial curtailment of normal operations is whether there was a 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." Allegheny Gas Co., 147 W. Va. at 639, 130 S.E.2d at 121 (1963).

While there was testimony in the proceedings below that there was a back log in reviews and corporate reports as a result of the salaried employees performing other tasks during the labor dispute, the record does not indicate a backlog requiring additional employees or any overtime on the part of regular employees once normal operations were resumed.

In sum, while there was unquestionably administrative "catch-up" work to be done when normal operations resumed, the record does not support a conclusion that it was in such

categories or of such a volume that the normal operations of Constellium Ravenswood were substantially curtailed.

Accordingly, this Court agrees with the Board of Review in determining that there was not a stoppage of work within the meaning of the law of West Virginia, and the Respondent-Claimants are therefore, not disqualified for unemployment compensation benefits during the labor dispute.

2. Issue of Federal Preemption

Constellium Ravenswood asserts a federal preemption issue, but no such issue exists regarding payment of state unemployment compensation benefits to persons while they are out of work during a labor dispute. An issue addressed by the United States Supreme Court in New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) was whether the National Labor Relations Act, as amended, implicitly prohibited the State of New York from paying unemployment compensation to striking workers. Justice Stevens concluded that:

> The voluminous history of the Social Security Act[2] 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 Congress 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.

Id. at 537-538.

The Supreme Court of Appeals of West Virginia noted, in Roberts v. Gatson, 182 W. Va. 764, 392 S.E.2d 204 (1990) that New York Telephone Co. "holds that a state is not precluded by

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

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."

Roberts 182 W.Va. 764, at 769, 392 S.E.2d 204, at 209 (See Footnote 5).

Accordingly, this Court finds that federal law does not preempt the granting of state unemployment compensation benefits to workers during a labor dispute.

3. Remaining Issues on Appeal

The Respondent-Claimants appeal the Board of Review's decision not to address whether Respondent-Claimants were denied the right of collective bargaining under generally prevailing conditions and whether the Respondent-Claimants were required to accept terms, hours or conditions of employment allegedly less favorable than those prevailing for similar work in the locality, as the work stoppage issue was found to be outcome determinative (App. Vol. 1, pp. APP0009, APP0164).

Further, the Respondent-Claimants take issue with the decision of the ALJ Tribunal to quash part of a subpoena directed to Constellium Ravenswood to produce certain communications between Constellium Ravenswood and its parent entities regarding the labor dispute.

With regard to those remaining issues, this Court agrees with the Board of Review in finding that the stoppage of work issue is outcome determinative such that the issues appealed by Respondent-Claimants are technically moot.[3] Likewise, this Court, in affirming the Order of the Board of Review, finds the remaining issues to be moot and thus will not address them.

[3] 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 (Claimants' Resp. to Resp't Br in Supp. Of Appeal and Claimants' Counter-Appeal pp. 12, 13; App.vol.I pg. APP0105, APP0106) 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.

RULING

Based on the foregoing, it is hereby **ORDERED** that the Board of Review Order of February 22, 2013, affirming the Administrative Law Judge Tribunal findings that there was not a stoppage of work at Constellium Ravenswood, and that the Respondent-Claimants are not disqualified from benefits, is affirmed.

Further, the Court **ORDERS** that these consolidated administrative appeals are hereby **DISMISSED** and **STRICKEN** from the active docket of this Court.

ENTERED this 12th day of June, 2020.

Jennifer F. Bailey, Judge
Kanawha County Circuit Court

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 15
DAY OF June 2020
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA