

M-0592 (Sept. 13, 2019) – Strike by drivers and warehouse workers at two of the employer’s largest plumbing and heating supply distribution facilities caused a stoppage of work within the meaning of G.L. c. 151A, § 25(b).

**Board of Review**  
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**Issue ID: M-0592**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimants appeal a decision by the Department of Unemployment Assistance (DUA) to deny unemployment benefits during the period July 30 through September 30, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

In a determination issued on October 4, 2017, the DUA concluded that the claimants were not eligible for benefits because their participation in a strike resulted in a stoppage of work pursuant to G.L. c. 151A, § 25(b). The claimants appealed and the DUA referred their appeal directly to the Board of Review, as permitted by G.L. c. 151A, § 39(d). During a full evidentiary hearing before the Board, the parties were represented by counsel. Our decision is based upon a review of the entire record, including the hearing testimony, exhibits, and the parties’ post-hearing submissions.

The issue before the Board is whether the claimants’ 2017 strike at two of the employer’s plumbing and heating supply distribution facilities caused a stoppage of work within the meaning of G.L. c. 151A, § 25(b).

### **Findings of Fact**

1. The employer is a wholesale distributor of commercial plumbing and heating supplies. Its primary customers are contractors in the construction industry. Most customers order a shipment tailored to their construction job that includes products from various manufacturers.
2. The employer sells and distributes the products through eight branch facilities located in: [City A] and [City B], Massachusetts; [City C], Rhode Island; [City D] and [City E], Connecticut; [City F], New Hampshire; [City G], Vermont; and [City H], New York.
3. Its facilities vary in size. [City A] is the largest with about 35,000 square feet of warehouse space. [City B] has about 20,000 square feet of warehouse space. In [City C], the employer has about 7,500 square feet of warehouse space. [City D]’s warehouse space is approximately 12,000 square feet. Its [City E] facility has about 10,000 square feet of warehouse space. In [City F], its warehouse is 15,000 square feet. [City G] contains 9,000 square feet, and [City H] has 18,000 square feet of warehouse space.

4. Each customer is assigned a branch location closest to its geographic location. The employer typically ships products for that customer from that branch facility.
5. The 35 claimants are members of collective bargaining units represented by the [Union Name] [Local A], all of whom worked at the employer's [City A] or [City B] facilities.<sup>1</sup> They are warehouse workers, delivery drivers, and salespeople who handle, transport, and sell the employer's plumbing and heating products.
6. [City A] is the employer's headquarters and primary warehouse and distribution center. It is also where the employer's administrative offices are located. Ninety percent of the employer's products are delivered to the larger [City A] warehouse. Inventory is then transferred to another branch, as needed.
7. In July, 2017, [City A] employed 20 unionized warehouse workers and 12 unionized truck drivers in addition to 11 managers and 24 other non-union personnel, who performed sales, accounting, and other administrative functions.
8. In [City B] in July, 2017, four warehouse workers, two salespeople, and one driver were members of the bargaining unit. Additionally, one manager and one non-union salesperson worked at this facility.
9. The [City C] employees in July, 2017 were all non-union, including two warehouse workers, three salespeople, one driver, and a manager. At the time, there were also 13 non-union employees in [City D] (four warehouse workers, four salespeople, four drivers, and a manager); seven non-union employees in [City E] (two warehouse workers, three salespeople, one driver, and a manager); six non-union employees in [City G] (two warehouse workers, two salespeople, a driver, and a manager); and [City H]'s workforce included five non-union personnel (a warehouse worker, one driver, two salespeople, and a manager). In [City F], the company employed two warehouse workers and one driver, who were members of a different union, plus four non-union salespeople and a manager.
10. In the summer of 2017, the recently unionized [City B] workers were attempting to negotiate their first collective bargaining contract. In [City A], the union members' existing collective bargaining agreement expired on July 31, 2017. The parties did not reach an agreement in their respective negotiations and on August 1, 2017, all but one of the union members at [City A] and [City B] went on strike.
11. The claimants were on strike for nine weeks, from August 1 – September 29, 2017. They returned to work on Monday, October 2, 2017.
12. The employer closed its [City B] facility for the duration of the strike. In addition to [City A], all of its other facilities (the non-striking facilities) continued to operate.

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<sup>1</sup> Only 35 bargaining unit members at [City A] and [City B] filed unemployment claims for the period at issue in this appeal.

13. The employer did not prevent any bargaining unit employees from crossing the picket line. The non-striking [City B] union member worked at [City A] during the strike.
14. In addition to its managers and non-union sales and administrative personnel, the employer hired 12 temporary employees, including seven warehouse workers and five drivers with a Commercial Driver's License (CDL), to work at the [City A] facility for the duration of the strike.
15. When the strike ended, the employer laid off all but 19 of the bargaining unit employees at the [City A] facility due to a reduction in its business. It did not retain any of the temporary workers.
16. The employer's primary metrics for measuring its business performance are stock sales and direct sales. Stock sales are the dollar value of product delivered to customers from its inventory. Stock sales are tracked by the branch location from which they are shipped.
17. Direct sales are the dollar value of product delivered to customers directly from the manufacturers. Direct sales orders are placed by salespeople at any branch, but for accounting purposes, they are all tracked to the [City A] facility. Some manufacturers who deliver these direct sales require minimum size orders or dollar amounts in order to ship directly, and will ship by the truckload. In the ordinary course of the employer's business, direct sales can vary considerably from month to month.<sup>2</sup>
18. A secondary metric for measuring the employer's business performance is the number of units delivered. Because the price for a single unit dramatically differs based upon the type of item, (e.g., the price of a single bolt in comparison to the price of an 18-inch valve), this metric is a less important measure of its business performance than the dollar value of product delivered.

#### *Performance at the striking facilities*

19. At its [City A] facility, stock sales averaged \$741,757 per week<sup>3</sup> in the three months before the strike, May, June, and July, 2017 (also referred to as "the pre-strike period"). See Exhibit 25.<sup>4</sup> During the strike, stock sales from [City A] averaged \$253,852 per week. In the three

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<sup>2</sup> Because its direct sale levels were varied and unpredictable in the ordinary course of business, and, by the employer's own admission, the direct sales levels in August and September, 2017, were not related to the strike, we are disregarding this metric for purposes of deciding whether the strike caused a stoppage of work under G.L. c. 151A, § 25(b).

<sup>3</sup> Because the employer tracked its stock sales on a daily basis during this period, we are able to look at its performance on a weekly basis. We have calculated weekly sales figures by dividing the average monthly sales by 4.3.

<sup>4</sup> Exhibits 25 and 29 are summary exhibits presented to show sales performance. Exhibit 25 shows stock and direct sales by month, day, and year. Exhibit 29 reports the annual sales by type of invoice (cash, direct sales, stock sales, and credits for returned product). The total figures are not identical because they are generated in the ordinary course of business by two different software programs, one used in accounting (Exhibit 25) and one used in sales (Exhibit 29). The numbers vary by less than a tenth of 1%. Since the employer relies upon Exhibit 25 for its financial reports and income tax returns, we attribute more weight to this exhibit and rely upon these figures to measure the employer's performance during the strike and non-strike periods.

months after the strike, October, November, and December, 2017 (also referred to as “the post-strike period”), stock sales from [City A] averaged \$417,504 per week. Compared to the pre-strike period, average weekly stock sales in [City A] dropped 66% during the strike. Compared to the post-strike period, [City A] had 39% fewer average weekly stock sales during the strike.

20. At its [City B] facility, stock sales averaged \$111,521 per week in the three months before the strike. During the strike, stock sales from [City B] averaged \$3,283 per week. In the three months after the strike, [City B] stock sales averaged \$119,494 per week. Compared to the pre-strike period, average weekly stock sales in [City B] declined 97%. Compared to the post-strike period, [City B] had 97% fewer average weekly stock sales during the strike.
21. A year before the strike, in August, 2016, stock sales from [City A] totaled \$2,767,556.<sup>5</sup> In August, 2017, while the bargaining unit was on strike, stock sales from [City A] totaled \$1,028,019. In a year over year comparison, monthly stock sales during the August strike month in [City A] dropped 63%.
22. In September, 2016, [City A] stock sales totaled \$2,486,998. In September, 2017, [City A] stock sales totaled \$1,155,112. Compared to the year before, monthly stock sales during the September strike month in [City A] declined 54%.
23. At the [City B] facility, monthly stock sales in August, 2016, were \$474,068. In August, 2017, they were \$32,234. In a year over year comparison, monthly stock sales during the August strike month in [City B] dropped 93%.
24. At the [City B] facility in September, 2016, monthly stock sales were \$472,685. In September, 2017, stock sales in [City B] suffered a \$3,997 loss. Compared to the year before, monthly stock sales during the September strike month in [City B] declined 101%.
25. The number of units delivered from the [City A] facility in May, June, and July, 2017 averaged 2,327,969 per month.<sup>6</sup> During the strike, [City A] averaged 866,529 units delivered per month. In October, November, and December, the [City A] facility averaged 1,407,344 units delivered per month. Compared to the pre-strike period, average units delivered per month from [City A] dropped 63% during the strike. Compared to the post-strike period, the [City A] facility averaged 38% fewer units delivered per month during the strike.
26. At the [City B] facility, the number of units delivered in May, June, and July, 2017 averaged 300,051 per month. [City B] averaged 8,448 units delivered per month during the strike. In October, November, and December, 2017, the [City B] facility averaged 434,469 units delivered per month. Compared to the pre-strike period, average units delivered per month from [City B] declined 97% during the strike. Compared to the post-strike period, the [City B] facility averaged 98% fewer units delivered per month during the strike.

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<sup>5</sup> Evidence of stock sales performance in 2016 included only monthly totals. *See* Exhibit 25.

<sup>6</sup> Evidence of units delivered also included only monthly totals. *See* Exhibit 27.

27. For a year over year comparison of units delivered from the [City A] facility, the number of units averaged 2,436,185 per month in August and September, 2016. The number of units delivered from [City A] averaged 866,629 per month during the August and September, 2017, strike period. Compared to August and September a year before, average monthly units delivered during the strike from [City A] dropped 64%.
28. In [City B] during August and September, 2016, the units delivered averaged 267,777 per month. During the strike months of August and September, 2017, the units delivered from [City B] averaged 8,448 per month. Compared to August and September a year before, average monthly units delivered from [City B] during the strike declined 97%.

*Performance at non-striking facilities*

29. The employer did not keep track of the amount of stock sales or units delivered that were transferred from its [City A] or [City B] branches to the non-striking facilities during the strike. Exhibits 25 and 27 include useful data for comparison.
30. In May, June, and July, 2017, stock sales from the non-striking facilities averaged \$2,759,845 per month.<sup>7</sup> (During this same pre-strike period, the combined stock sales from the striking [City A] and [City B] facilities averaged \$3,669,095 per month.)
31. During the strike, stock sales from the non-striking facilities averaged \$3,434,055 per month. This reflects an increase of \$674,210 in average monthly stock sales from the non-striking facilities compared to the three months before the strike. (During the strike, the combined stock sales from the striking [City A] and [City B] facilities averaged \$1,105,684 per month.)
32. The number of units delivered from the non-striking facilities in May, June, and July, 2017, averaged 2,126,196 per month. (During this same period, the combined number of units delivered from the [City A] and [City B] facilities averaged 2,628,020 per month.)
33. During the strike, the units delivered from the non-striking facilities averaged 2,697,223 per month. This reflects an increase of 571,027 average monthly units delivered from the non-striking facilities compared to the three months before the strike. (During the strike, the combined number of units delivered from the striking [City A] and [City B] facilities averaged 874,977 per month.)

Ruling of the Board

In this appeal, the Board must determine the claimants' eligibility for unemployment benefits pursuant to G.L. c. 151A, § 25(b), which provides, in relevant part, as follows:

Section 25. No . . . benefits shall be paid to an individual under this chapter for—

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<sup>7</sup> Using Exhibit 25, this figure is derived by subtracting from the three-month total both the direct sales and the stock sales from [City A] and [City B] and dividing the result by three.

(b) Any week with respect to which . . . his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he was last employed . . . .

This language does not refer to the cessation of work by the individual employee or employees during the strike, but rather, to what effect, if any, the labor dispute had on the employer's operations. General Electric Co. v. Dir. of Division of Employment Security, 349 Mass. 358, 363 (1965).

Our role under G.L. c. 151A, § 25(b), is not to decide the reasons for the employees' decision to go on strike — we focus simply on the strike's impact upon the employer's operation *after* the claimants stopped working. Id.

Although the express language of G.L. c. 151A § 25(b), fails to assign the burden of proof with respect to showing stoppage of work<sup>8</sup>, the statutory intent is to allow the payment of unemployment benefits unless a stoppage of work can be shown. Consequently, this Board, relying on Massachusetts appellate precedent, has consistently held the employer must carry the weight of the evidence, as it is the party making the assertion and is the party most likely to have access to the relevant evidence. *See, e.g.*, Board of Review Decision M-62772–M-69116, (Apr. 24, 2013) *citing* Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985), *further citing* P.J. Liacos, Massachusetts Evidence 41 (5<sup>th</sup> ed. 1981) (“burden of persuasion is on the party . . . who has freer access to the evidence.”). The employer carries its evidentiary burden by proving, through substantial and credible evidence, that as a result of the strike, the work normally performed by the striking workers was disrupted to such a degree as to constitute a work stoppage within the meaning of the statute.

We further note that the term “stoppage of work” has no precise definition. It is not defined by statute but has been the subject of considerable judicial construction. The Massachusetts courts have left the term's meaning open to interpretation “in view of the diversity of factual situations which might arise in future cases.” Westinghouse Broadcasting Co. v. Dir. of Division of Employment Security, 378 Mass. 51, 55 (1979). We do know through prior court decisions, however, that, in order for a stoppage of work to exist, the employer's operations must be “substantially curtailed.” Hertz Corporation v. Acting Dir. of Division of Employment and Training, 437 Mass. 295, 297 (2002), *citing* Reed National Corp. v. Dir. of Division of Employment Security, 388 Mass. 336, 338 (1983) (Reed I). The degree of disruption, or curtailment, necessary to satisfy the statutory meaning requires a fact-specific inquiry, as “there is no percentage threshold or numerical formula.” *See* Hertz, 437 Mass. at 297. It is a matter of degree. Westinghouse, 378 Mass. at 55–56.

While the Massachusetts appellate courts have not expressly established a percentage threshold or numerical formula for measuring what constitutes a substantial curtailment of an employer's operations, we are guided by their decisions in labor disputes where the Board was able to quantify the dispute's impact on production. The Supreme Judicial Court (SJC) agreed with the Board's ruling that a drop of about 35% from normal production at a wool processing plant

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<sup>8</sup> By contrast, in labor disputes involving a lockout, G.L. c. 151A, § 25(b)(4) expressly places the burden proof on the employer to show that they meet one of the statutory exceptions to the award of unemployment benefits.

constituted a work stoppage. Adomaitis v. Director of Division of Employment Security, 334 Mass. 520, 522–524 (1956). In another decision, the court affirmed the Board’s determination that a 25% drop in production at a single plant, “without more,” did not constitute a stoppage of work as a matter of law. Reed National Corp. v. Dir. of Division of Employment Security, 393 Mass. 721, 724 (1985) (Reed II).

Based on the foregoing and consistent with this Board’s precedent, in determining whether there has been a substantial curtailment, we look first at what happened to the work normally performed by the striking employees, (*i.e.*, bargaining unit work). If the employer cannot show that bargaining unit work was substantially curtailed, then it must establish that the strike measurably and substantially disrupted the work of the non-bargaining workforce. *See* Board of Review Decision M-0336 *et al.* (Aug. 18, 2017).

In its appeal, the union urges the Board to consider the strike’s impact across all eight warehouse facilities of the company, including the non-striking facilities. G.L. c. 151A, § 25(b), however, expressly directs us to consider whether the claimants’ unemployment is due to a stoppage of work that exists because of a labor dispute *at the factory, establishment, or other premises* at which the claimants were last employed. “The statute, accordingly, impresses us as laying stress upon geographical location rather than upon a combination of widely scattered plants used for the business operation of one employer.” Ford Motor Co. v. Dir. of Division of Employment Security, 326 Mass. 757, 762 (1951). This is not to say that we are precluded from analyzing evidence pertaining to other employer premises where, as here, the claimants allege that the work from the two striking facilities were transferred to the non-striking facilities. *See Reed I*, 388 Mass. at 340 n.8 and 341. Our primary focus, however, is to determine what impact, if any, the strike had on the [City A] and [City B] facilities, where all of the claimants worked. In order to do this, we must get an understanding of the employer’s day-to-day business operations and how they utilize their work performance data to determine the performance at each facility.

As a wholesale distributor of commercial plumbing and heating supplies, the employer’s business performance is based on sales. The primary metric used measures stock sales and direct sales for each of the facilities. Stock sales are the dollar value of product delivered to customers from its inventory, and they are tracked by the warehouse facility from which they are shipped. Direct sales are the dollar value of product delivered to customers directly from the manufacturers. Direct sales orders are placed by salespeople at any branch, but for accounting purposes, they are all tracked to the [City A] facility.

A secondary metric for measuring the employer’s business performance is the number of units delivered. Because the price for a single unit dramatically differs based upon the type of item, this metric is a less important measure of its business performance than the dollar value of product delivered.

Our analysis, therefore, will begin with a focus on the stock sales and units delivered at the [City A] and [City B] facilities, where the claimants last performed their work. If the employer cannot show that bargaining unit work at these facilities was substantially curtailed, then it must establish that the strike measurably and substantially disrupted the work of the non-bargaining unit workforce.

As to the relevant period for comparing work performance data, the SJC in Reed I instructed the Board to determine substantial curtailment by comparing the employer's data during the period of the labor dispute with the same period in the previous year. 388 Mass. at 340. In Hertz, the SJC measured a normal rate of customer complaints by comparing the levels during the strike with those during the period immediately before and after the strike. 437 Mass. at 299. The evidence in the present appeal enables us to apply both formulas for comparison.

The employer shut down its [City B] branch during the strike months of August and September, 2017. Thus, it is no surprise that compared to August and September of the prior year, monthly stock sales from [City B] declined 93% and 101%, respectively. The employer, however, did try to keep up its business at the [City A] branch during the strike. It hired temporary replacement CDL drivers and warehouse workers, and it assigned the one bargaining unit member who crossed the picket line to work at [City A]. Nonetheless, in a year-over-year comparison with August and September, 2016, the [City A] facility experienced a decline of 63% in monthly stock sales during August and a 54% drop in September of 2017. All of these figures significantly exceed the 35% production drop in Adomaitis, which was held to be a work stoppage.

If we compare the strike period stock sales at these two locations to their performance in the three months immediately before and after the strike, the results are not much different. In light of the data contained in Exhibit 25, we are able to examine the employer's weekly performance. At its closed [City B] branch, average weekly stock sales during the strike declined 97% from both the pre-strike and post-strike levels. At its operating [City A] facility, performance was better. But, compared to the three-month period before the strike, [City A]'s average weekly stock sales during the nine-week strike still declined 64%. Even compared to the three-month period following the strike, when business was down from pre-strike levels, [City A] had 36% fewer average weekly stock sales during the strike.

The metric measuring performance by units delivered shows similar results. In [City B], the average monthly number of units delivered during the strike declined 97% from the levels in August and September, 2016. A year over year comparison for [City A] shows a decline of 64% in the average monthly units delivered during the strike from levels in August and September, 2016.

In comparing the units delivered during the strike to the months immediately before and after the strike, we find that [City B]'s average monthly units delivered during the strike fell 97% compared to the pre-strike period, and it averaged 98% fewer units delivered during the strike months than in the three post-strike months. In [City A], the average monthly units delivered during the strike declined 63% from the three pre-strike months, and it averaged 38% fewer units delivered than during the three post-strike months.

Thus, in performance measured by stock sales or units delivered, the employer has shown declines of 93–101% in [City B] and 36–64% in [City A] compared to the non-strike periods. Although these numbers are substantial, the record suggests that the employer might have diverted some of its [City A] and [City B] business to at least some of its non-striking facilities during the strike. The union asserts that the employer's six non-striking facilities experienced a boom in sales during the two-month strike, largely mitigating the decrease at the striking



facilities. If the net result shows that the employer lost an insubstantial amount of its regular business in the [City A] and [City B] facilities because the work had been performed at its other facilities during the strike, then the employer has not shown a stoppage of work within the meaning of G.L. c. 151A, § 25(b).

In the present case, we do not have direct evidence showing the amount of work that was transferred to the employer's non-striking facilities during the strike because the employer did not track that information as part of its ordinary course of business at the time. Nonetheless, we have endeavored to use the best available evidence (Exhibits 25 and 27) to compare pre-strike and strike period stock sales and units delivered from the striking and non-striking facilities in an effort to determine whether the employer made up for business lost at [City A] and [City B] through its other facilities.<sup>9</sup> Because there was no evidence presented to show that the transfer of work was limited to certain other warehouse facilities, for purposes of analysis, we shall assume that the total increase in business at all of the non-striking facilities came from [City A] and [City B] and not simply market forces.<sup>10, 11</sup>

To do this, we add the non-striking facilities' total increase in average monthly strike period stock sales, as compared to their pre-strike period performance (an increase of \$674,210), to the combined [City A] and [City B] average monthly strike period stock sales (\$1,105,684). The result inflates the average monthly strike period stock sales for [City A] and [City B] to \$1,779,894. This sum shows \$1,889,201 fewer average monthly stock sales than the [City A] and [City B] facilities had during the pre-strike months (\$3,669,095). Thus, even by taking a total sum of all of the sales increases from the non-striking facilities during the strike, and attributing them to the [City A] and [City B] facilities, the result still shows a 51% drop in average monthly stock sales at [City A] and [City B] compared to their pre-strike period performance.

The same calculation can be done for units delivered. We compare the total average monthly units delivered from all non-striking facilities during the strike with their pre-strike performance (an increase of 571,027), and add that amount to the combined [City A] and [City B] average monthly strike period units delivered (874,977). The result is an inflated figure of average monthly units delivered during the strike from [City A] and [City B] of 1,446,004. This increase is 1,182,016 fewer units delivered than the monthly average coming from [City A] and [City B] in the pre-strike months. Thus, if we attribute the increase in units delivered from all other facilities during the strike to work normally performed at [City A] and [City B], there was a decline of 45% at the striking facilities compared to their pre-strike performance. This means that, even if we deemed the entire increase in stock sales and units delivered by the other facilities to be bargaining unit work from [City A] and [City B] that the employer was able to

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<sup>9</sup> "If the proponent has presented the best available evidence, which is logically adequate, and is neither contradicted nor improbable, it must be considered." New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 471 (1981), *quoting* L.L. Jaffe, *Judicial Control of Administrative Action* 598, 608 (1965).

<sup>10</sup> We do this despite the evidence showing that stock sales and units delivered in nearly all of these other facilities was higher in the three months leading up to the strike compared to the prior year, which suggests that, separate and apart from the strike, business was already up at these other facilities. *See* Exhibits 25 and 27.

<sup>11</sup> *Compare* Board of Review Decision M-0064 (Sept. 23, 2014), where the evidence showed that the employer had transferred a measurable amount of bargaining unit work to a single, non-striking facility. This evidence enabled the Board to perform a "Reed analysis" by attributing that transferred amount to the striking manufacturing plant.

perform during the strike, the total amount of bargaining unit work still declined. Reductions of 51% in average monthly stock sales and 45% in average monthly units delivered demonstrate a substantial curtailment.

In its memorandum, the union further urges the Board to consider the percentage increase in stock sales at each individual non-striking location during the strike, suggesting that the increases at some of these facilities offset the percentage decreases at [City A] and [City B]. For example, the union points to an improvement in [City C]'s stock sales in August and September, 2017, of 71.9% and 99.1%, respectively, as compared to the same months in 2016. A straight comparison to a single facility like this fails to consider volume. It ignores that the [City A] and [City B] warehouses (a combined total of 55,000 square feet) account for more than three-quarters of the employer's total warehouse space and, together, averaged 25% more monthly stock sales than the other facilities combined in the months immediately before the strike. The [City C] warehouse, at 7,500 square feet, simply lacked the capacity to absorb a significant amount of the stock needed to meet the prior sales for [City A] and [City B]. We believe our analysis, which finds its basis in the Reed I decision, more accurately captures the over-all size and volume of the employer's business operations.

To further support its argument that the employer's operation was not substantially curtailed, the union points to the overall drop in stock sales across all facilities of only 9.2% in August, 9.8% in September, and a yearly increase of 7.0% in 2017 compared to the employer's performance in 2016. As stated above, we believe the statute requires us to limit our analysis to the facilities where the striking workers last performed their work. But, even if the performance across all facilities were permitted, such a year over year comparison in the circumstances of this case is misleading, given the overall status of the corporation's operations. Exhibit 25 shows that the employer's business as a whole showed mostly double-digit increases each month from January to July, 2017, as compared to the prior year, ranging from 5.6–25.5%. If anything, the sudden drop to a 9% loss during the strike emphasizes a dramatic change due to the labor dispute and, likely, the spike in business during the first seven months softened the damage to the employer's annual bottom line.

In sum, the employer has demonstrated that the August and September, 2017, strike caused a substantial curtailment of bargaining unit work at the facilities where the claimants went on strike, [City A] and [City B]. Given the evidence showing a 36–101% decline in stock sales and units delivered from the striking warehouse facilities as compared to non-strike periods, we need not decide whether disruptions to its non-bargaining unit operations were substantially curtailed.

We, therefore, conclude as a matter of law that the labor dispute caused a stoppage of work within the meaning of G.L. c. 151A, § 25(b).

The DUA's determinations denying benefits to the 35 claimants are affirmed. The claimants are denied benefits for the period July 30 through September 30, 2017.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - September 13, 2019**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano declines to sign the majority opinion.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR TO THE BOSTON MUNICIPAL COURT  
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:  
[www.mass.gov/courts/court-info/courthouses](http://www.mass.gov/courts/court-info/courthouses)

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh